

**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE**

**HIGH COURT**

**CIVIL DIVISION**

**Civil Suit No: 1152 of 2014**

**BETWEEN**

**JULIETTE PAULETTE STRAKER**

**CLAIMANT**

**AND**

**SHELL WESTERN SUPPLY AND  
TRADING LIMITED**

**DEFENDANT**

*Before The Honourable Madam Justice Pamela Beckles, Judge of the  
High Court*

**Date of Decision: 2020: June 16**

**Appearances:**

**Ms. Diana R. Douglin, of George Walton Payne & Co.,  
Attorney-at-Law for the Claimant**

**Mr. R. Omari Drakes, of Clarke Gittens Farmer, Attorney-at-Law for  
the Defendant**

**DECISION**

**INTRODUCTION**

[1] This is an application by Shell Western Supply and Trading Limited (the Defendant) to strike out the Claimant's Statement of Claim pursuant to Rule 26.3(3)(a) of the Civil Procedure Rules 2008 ('the CPR').

- [2] The sole ground of the application for striking out the Claimant's action is that the issue before the court has already been decided by the Severance Payments Tribunal ('the Tribunal') in Claim 508/335112. It is the Defendant's position that the claim should be struck out because it is vexatious and an abuse of the court's process since the tribunal found that the Claimant was made redundant and was not dismissed pursuant to the employment contract as alleged by the Defendant Company.
- [3] In the affidavit accompanying the application, Counsel for the Defendant submitted that having reviewed the legal authorities it is his belief that where a tribunal or court of law has made a final determination on an issue, the parties are bound by the decision in a subsequent proceedings between themselves whether in a tribunal or a court of law.
- [4] This application for striking out is being strenuously opposed by the Claimant who submit that there is no issue estoppel and therefore the Claimant is not estopped for making her current claim for wrongful dismissal.

### **THE BACKGROUND**

- [5] The Claimant is a former employee of the Defendant Company. The Defendant is an international business company incorporated under the provisions of the Companies Act, Cap. 308 of the Laws of Barbados, with its registered office situate at Mahogany Court, Wildey Business Park, Wildey, St. Michael in this Island.

- [6] The Claimant entered into an agreement with Shell Antilles and Guianas Limited, an affiliate of the Defendant Company on November 5<sup>th</sup>, 1991 where the Claimant agreed to be employed as a Marketing Economics Analyst by the Defendant.
- [7] In or around 2005 there was restructuring at the Shell Antilles and Guianas Limited and some of its business was sold to SOL. One of the businesses not sold to SOL was the Shell Aviation Services, a company established by Shell to manage its aviation business in Barbados. The Claimant applied for a job and went to work with Shell Aviation Services in the capacity of Finance Analyst.
- [8] While working there for approximately two years, Shell Aviation Services was sold to SOL.
- [9] On or about the 8<sup>th</sup> March, 2007 the Claimant and the Defendant entered into an employment agreement where the Claimant worked with the Defendant as a Risk Analyst.
- [10] There was embedded in that employment agreement a similar term to that contained in the agreement entered into on November 5<sup>th</sup>, 1991 between the Claimant and Shell Antilles and Guianas Limited.
- [11] It was an express term of the agreement that subsequent to the confirmation of the Claimant's appointment to her position, either party to the agreement will require one month's notice in writing to terminate the agreement or in the alternative, either party may, in lieu of such notice, pay to the other the equivalent of one month's salary and upon payment the contract would terminate forthwith.

- [12] Clause 9 of the agreement also stated that the other terms and conditions of the Claimant's employment contract were set out in the Human Resources Policies and Procedures Manual and Code of Conduct which would be updated from time to time.
- [13] The Human Resources Policies and Procedures Manual sets out policies on the terms and conditions of employment, employee relations, tele-communications, health and safety, security, remuneration and benefits, leave, disciplinary and grievance policies and procedures, training and education and development and travel.
- [14] In addition to a monthly salary, the Claimant received other emoluments such as entertainment, travel, telephone and club membership allowances. She was also enrolled in the Defendant's medical and pension plans.
- [15] Between the years 2007 – 2011, the Claimant received handsome bonuses, however, the relationship between the parties broke down and by letter dated October 5<sup>th</sup>, 2011, the Defendant terminated the Claimant's contract pursuant to the express provisions of the contract, namely Clause 1 of the Human Resources Policies and Procedures Manual. This occurred one day prior to restructuring and/or reorganization within the Defendant Company.
- [16] The Defendant paid the Claimant BDS \$20,206.96 which was equivalent to three months salary along with holiday pay (net of NIS and Income Tax). The Claimant however thought this to be an inadequate sum in relation to damages for pay in lieu of notice.

- [17] As a result, on May 22<sup>nd</sup>, 2012 the Claimant brought a claim for severance against the Defendant with the Tribunal pursuant to **section 3** of the Severance Payment Act, Cap. 355A. In a decision dated December 2013, after hearing evidence from both parties, the Tribunal found that the Claimant's dismissal was part and parcel of the Defendant company reorganization and that the Claimant was dismissed as a direct result of redundancy which started before the 5<sup>th</sup> October, 2011 and continued thereafter. The Claimant was awarded severance payment. The Tribunal's decision has not been the subject of any appeal.
- [18] On July 23<sup>rd</sup>, 2014, the Claimant brought an action for wrongful dismissal against the Defendant where she sought a declaration that Clause 1 of the agreement made on March 8<sup>th</sup>, 2007 between the Claimant and the Defendant be rescinded/set aside as being unconscionable and/or exerted in circumstances with an inequality of bargaining power; damages for wrongful dismissal; the sums of USD \$9,661.49 and BDS \$51,575.06; aggravated damages; interest; costs and further or other relief.
- [19] In the Claimant's Statement of Claim she expressed the view that Clause 1 of the Employment Agreement was unconscionable and/or exerted in circumstances with an inequality in bargaining power. In her particulars of claim, she noted that she was in no position to negotiate terms and there was no negotiation of terms; she signed a standard form agreement; was provided with far less than what her legal rights would have been in the absence of the agreement; was

- provided with no opportunity to seek independent legal advice and at the time of her dismissal she was employed by the Defendant and its predecessor in title in excess of 20 years.
- [20] The Claimant was also of the view that the Human Resources Policies and Procedures were terms of her employment contract and she based this on the fact that amongst other things the manual set out specific procedures to be followed in cases of disciplinary action, the policy was in force for the entire period the Claimant was employed and the Defendant had during the course of the Claimant's employment prior and subsequent to 2007 followed the Human Resources Policies and Procedures Manual.
- [21] The Defendant, on July 28<sup>th</sup>, 2014 filed an Acknowledgement of Service of Claim Form indicating an intention to defend the action for wrongful dismissal. The affidavit of service was filed on July 29<sup>th</sup>, 2014 and the Defendant filed a Defence on October 7<sup>th</sup>, 2014.
- [22] The matter came on for case management on May 8<sup>th</sup>, 2015 and an order was made for standard disclosure, inspection of documents, witness statements to be filed and the parties were ordered to file an agreed statement of facts and issues before October 1<sup>st</sup>, 2015.
- [23] The above documents were subsequently filed as ordered and on February 1<sup>st</sup>, 2016, the Defendant applied to have the Claimant's Statement of Claim struck out as an abuse of process; all further proceedings in the action stayed and for costs of the application occasioned by such striking out be the Defendant's costs.

**DEFENDANT'S SUBMISIONS**

- [24] The Defendant's case is that by virtue of the doctrine of 'res judicata', the Claimant is estopped from bringing an action for wrongful dismissal against the Defendant on the ground that the Severance Payment Tribunal had already determined the issue.
- [25] Counsel for the Defendant submitted that where a judicial or other tribunal pronounces a decision over a particular matter, the parties bound by the decision cannot reopen that same matter, save on appeal.
- [26] He pointed out that the doctrine of res judicata embodies the concept of issue estoppel, a term used to describe a defence which may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided.
- [27] He argued that the Claimant's claim in this action is on the same basis as the claim brought in the Severance Tribunal against the Defendant, that is, on what basis was the Claimant dismissed and further that since the Tribunal determined that issue, it prevents the Claimant from bringing the instant action to which the same issue applies, as this is a different cause of action but with the same issue to be determined.
- [28] Counsel noted that the Tribunal determined that the Claimant was dismissed as a result of redundancy and queried whether a dismissal can be wrongful if it is based on a statutorily recognized reason.
- [29] He further argued that for the Claimant to file a different cause of action to which the same issue is relevant, is contrary to the good administration of justice in the interests of the public and the parties, as it is creating abusive and duplicative litigation.

[30] Counsel relied on the cases of Hoyte v. The Transport Board BB 2002 HC 25 and Agard v. Caribbean Data Services Limited 358 BB 2003 CA 15, contending that the Claimant was made redundant and therefore as a result of the said redundancy there is a legal bar preventing her from claiming that she was wrongfully dismissed.

### **CLAIMANT'S SUBMISSIONS**

[31] Counsel for the Claimant in her written submissions did not agree with the Defendant's submission that the requirements for issue estoppel have been met. It is her case that the same question has not been decided as is required by the doctrine of issue estoppel.

[32] It is her position that the issues of whether the Claimant was wrongfully dismissed and whether she is entitled to damages as a result of that wrongful dismissal are issues yet to be determined.

[33] Counsel submitted that the issue before the tribunal was whether the Claimant was entitled to a severance payment based on her statutory entitlement but in this case it includes damages for wrongful dismissal, which is an implied term of the contract of employment and which requires reasonable notice of termination and damages for failure to give adequate notice.

[34] She relied on the Canadian case of Tarr v. Kipling Motor Inn, Prairie Oasis Ltd; 1996 CanLII 7181 (SK QB) to show that regulatory regimes may overlap. In this case the court noted that where a person pursues a claim for payment in lieu of notice under the relevant statutory regime, he or she could still bring an action for wrongful dismissal as the claims are not one and the same pursuant to the Act in

- question. The court also held that a claim for statutory payment in lieu of notice does not encompass other heads of damage, which may be available in an action for damages for wrongful dismissal, such as loss of benefits.
- [35] In Tarr the court used the case of Fayant v. Campbell Maple Village Ltd. [1994] 3.W.W.R 171 (Alta Q.B.) to show the interplay between statute and common law. In Fayant, the court identified three possible scenarios that could arise with respect to the interplay – the plaintiff (1) ab initio utilizes the courts; (2) utilizes the Employment Standards Board only; (3) ab initio utilizes the provisions of the Employment Standards Board, is unsuccessful, then initiated legal proceedings. However the court in Tarr then identified another potential interplay between the two regimes, this is, the plaintiff successfully advances a claim under the Act whereby it is awarded pay in lieu of notice pursuant to the requirements of the Act and then pursues a claim for wrongful dismissal.
- [36] Counsel further submitted that the two regimes are separate and whether the Claimant was wrongfully dismissed is not a determination that can be made within the statutory jurisdiction of the Tribunal.
- [37] Relying on the dicta in Tarr, Counsel submitted that a claim for statutory severance pay under the Severance Payments Act does not encompass other heads of damage such as damages for losses flowing from the wrongful dismissal and loss of benefits.
- [38] It is her position that the Claimant’s claim encompasses among other things loss of reputation, earnings, pension benefits, medical benefits,

entertainment allowance, travel allowance, telephone allowance, club membership allowance, bonus entitlement and USD \$9,661.49 being 25% of withholding tax paid to the Commissioner of Inland Revenue on transfer from her Shell Caribbean Retirement Fund.

[39] She further contends that the above are still live issues based on the factual circumstances of the Claimant's dismissal and that they could not have been determined before the Severance Payment Tribunal and furthermore, the Tribunal made no inquiry as to what notice requirements would be reasonable under the circumstances, what other benefits the employee might have lost, or whether the case warranted any other damages.

[40] Counsel for the Claimant maintains that the Claimant is not prohibited from pursuing a claim for wrongful damages having successfully obtained a severance payment under the Act.

[41] Moreover she argued that the Severance Payment Act acknowledges that there may be other rights or claims to other payments due to an employee and the right to such payments is not a bar to severance proceedings.

### **ISSUE(S)**

[42] The issues which have to be determined by this court are:

- (1) Whether the issue to be determined before the court was previously adjudicated by the Severance Payment Tribunal
- (2) If so, should the Claimant be estopped from proceeding with the current application and the action be struck out as an abuse of the court's process.

## LAW AND ANALYSIS

### [43] **Res judicata and Issue Estoppel**

According to the court in *Sooknanan v. The Medical Council of Guyana [2014] CCJ 8 (AJ)* ‘res judicata’ is "an ancient legal principle going back to the Roman and Canon Law (if not to the Greek Law and the Old Testament) that a matter which has been decided by a competent tribunal cannot be relitigated when certain conditions have been met. Only then can it be said that the matter is res judicata (pro veritate accipitur).”

Similarly in *Henderson v. Henderson (1843) 3 Hare 100*, **Wigham V.C.** explained the ‘res judicata’ principle in the following terms:

“...Where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matters which might have been brought forward as part of the subject in context, but which was not brought forward, only because they have from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.”

[44] The doctrine of res judicata effectively seeks to prevent an abuse of the court’s process by duplicity of proceedings and one of the ways in

which duplicity may be prevented is by virtue of the doctrine of issue estoppel.

[45] Issue estoppel seeks to prevent the relitigation of the same issue in separate matters with a different cause of action.

[46] In the case of *Arnold v. National Westminster Bank plc [1991] 2 AC* **CA Lord Keith** defined the two forms of estoppel covered by the concept of res judicata as:

“...Cause of action estoppel arises where the cause of action in the latter proceedings is identical to that in the earlier proceedings, the later having been between the same parties or their privies and having involved the same subject matter. In such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment. The discovery of new factual matter which could not have been found out by reasonable diligence for use in the earlier proceedings does not, according to the law of England, permit the latter to be re-opened.”

Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seek to re-open that issue.”

[47] On the question of issue estoppel Halsbury Law of England, Fourth edition reissue Vol. 11 states at paragraph 977:

“...A party is precluded from contending the contrary of any precise point which, having once been distinctly put in issue has been solemnly and with certainty determined against him. Even if the objects of the first and second actions are different, the finding on a matter, which came directly (not collaterally or incidentally) in issue in the first action, provided it is embodied in a judicial decision that is final, is conclusive in a second action between the same parties and their privies. This principle applies

whether the point involved in the earlier decision, and as to which the parties are estopped, is one of fact or one of law, or of mixed fact and law. The conditions for the application of the doctrine have been stated as being that:

- (1) the same question was decided in both proceedings;
- (2) the judicial decision said to create the estoppel was final; and
- (3) the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

The scope of the doctrine depends on whether a court takes a narrow or wide view of the extent of the issue to be determined in the earlier case.

Where a cause of action is held not to fall within the scope of issue estoppel, it may none the less be struck out as vexatious or frivolous; to relitigate a question which in substance has already been determined is an abuse of process...Decisions of an industrious tribunal can in principle give rise to an issue estoppel where the later court cannot identify a clear finding in the earlier proceedings in the relevant issue.”

[48] The case of *Greenhalgh v. Mallard* [1947] 2 All ER 255 is also instructive – there **Somerwell LJ** stated that ‘res judicata’ by way of ‘issue estoppel’ may cover –

“...issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.”

[49] In determining whether or not the issue raised in the current matter was dealt with previously in another forum and if so, whether it would

be an abuse of the court's process to relitigate the same issue, it now becomes necessary to examine the decision of the Severance Payment Tribunal.

[50] In the claim before the Tribunal, the Claimant claimed for severance on the basis that she was made redundant and not dismissed 'pursuant to the terms of her contracts' as stated by the Defendant Company. The issue therefore for the Tribunal was whether the Claimant was dismissed for the reason stated by the Defendant Company or any other reason or redundancy.

[51] At page two of the decision delivered in December 2013 by the Severance Payment Tribunal No. 508/335112, the Tribunal recited the Claimant's ground for the application for severance as follows:

"I am applying for severance on the grounds that my role was made redundant for two reasons:

- (1) A replacement Risk Analyst has not been resourced;
- (2) The role has changed significantly – some tasks done locally under a new role and other tasks outside of Barbados."

"...in summary, I believe that I am entitled to severance because the role of Risk Analyst has effectively been made redundant as a new Risk Analysis has not been employed, and the role has changed significantly with some of the tasks being incorporated into a new role of Finance Advisor and the other tasks being performed outside of Barbados."

[52] **Section 3 (3)(a)** of the Severance Payment Act provides –

"For the purposes of the Act, an employee who is dismissed shall be deemed

- (a) to be dismissed because of redundancy if his dismissal is wholly or mainly attributable to
  - (i) the fact that his employer has ceased or intends to cease to carry on the business for the purposes of which the employee was employed by him or has ceased, or intends to cease, to carry on that business in the place where the employee was so employed; or
  - (ii) the fact that the requirements of that business for employees to carry out work of a particular kind in the place where he was so employed, has ceased or diminished or expected to cease or diminish...”

[53] After considering the evidence presented pursuant to the above section, the matter was determined in the Claimant’s favour and the Tribunal found that the Claimant’s dismissal was ‘part and parcel’ of the reorganization which was in the works and that she was therefore dismissed for redundancy as a direct result of the re-organization, which started before October 5, 2011 and continued hereafter.

[54] The issue before the Tribunal was whether the Claimant was dismissed pursuant to her contract or for some other reason such as redundancy. The issue in the substantive application before this court

is whether the Claimant was wrongfully dismissed from the Defendant Company or pursuant to contract.

### **Striking Out**

[55] In addition to its inherent jurisdiction to strike out a statement of claim, the court also has power to strike out a statement of case or part thereof from the Civil Procedure Act.

[56] By **CPR 26.3(3)**:

“the court may strike out a statement of case or part of a statement of case if it appears to the court that –

- (a) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings.”

[57] In addressing the court’s power under **CPR Rule 3.4(2)(b)** which is similar to our **Rule 26.3(3)**, **Lord Diplock** in *Hunter v. Chief Constable of the West Midlands Police* [1982] AC 529 at page 536 noted that the power contained in that rule is one

“...which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people.”

[58] The principles that are involved in an application to strike out a claim on the basis that it is an abuse of the court’s process were summarized in *Johnson v. Gore Wood & Co. (a firm)* [2002] 2 AC 149 by **Lord Bingham** of Cornhill. He stated the following:

“There is an underlying public interest...that there should be finality in litigation and that a party should not be vexed twice in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in latter proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the abuse or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty but where these elements are present the latter proceedings will be much more obviously abusive, and what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter would have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of all the facts of the case, focusing attention on the critical question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not.... It is my view preferable to ask whether in all the circumstances a party’s conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice.”

[59] The court’s jurisdiction to strike out a statement of case should be used sparingly, especially where the ground for striking out is that the

claim is an abuse of the court's process. The court should act cautiously because the exercise of this jurisdiction denies a party of his right to a trial and of his ability to strengthen his case through the process of disclosure and other procedures such as requests for information. See Citco Global Custody NV v. Y2K Finance HCVAP 2008/022.

[60] Striking out applications as an abuse of the court's process should also be assessed with the overriding objective in mind considering whether re-litigation outweighs the need to allot the court's limited resources to other cases – see Securum Finance Ltd. v. Ashton [2001] ch. 2.

[61] This need to consider the overriding objective in such an action was further emphasized in the Jamaican case of Claudette Edwards v. Quest Security Services Limited et al HCV 1124 of 2005 where **Sykes J** explained:

“[10] The decision has to be made in light of the overriding objective. The court is required to deal with cases justly. A number of factors to be considered are listed in Rule 1.1(2) of the Civil Procedure Rules (“CPR”). The rule, however, is not exhaustive. The CPR has taken the position that the administration of civil justice is multifaceted and in making any decision the court must decide against the backdrop of the various dimensions that are brought to bear on the administration of law. This explains why Rule 1.1(2) list considerations as (i) the amount of money involved. (ii) the allocation of an appropriate share of the court's resources to the particular case; (iii) the necessity to see that other litigants are not deprived of their share of the court's resources; (iv) the complexity of the case and (v) the expeditious hearing of cases.

[11] Rule 1.1(2) expressly states that dealing with cases justly includes the factors listed above. The rule therefore recognizes that other conditions are important...”

[62] In examining the overriding objective in the UK’s CPR which is similar to Barbados’ **Lord Wolf** in *Biguzzi v. Rank Leisure Plc [1999]* *1WLR 1926* said:

“The fact that a judge has that power does not mean that in applying the overriding objectives the initial approach will be to strike out the statement of case. The advantage of the CPR over the previous rules is that the court’s powers are much broader than they were. In many cases there will be alternatives, which enable a case to be dealt with justly without the draconian step of striking the case out.”

[63] As previously stated one of the ways in which the court’s process may be abused is by repeated litigation and in the case of *Andrew Lovell v. The Attorney General* (unreported) **Scott J (ag.)** noted the following:

[51] The court has inherent jurisdiction to prevent an abuse of its process by repeated litigation. It is an important and powerful weapon in the court’s armoury in response to repeated litigation. The court’s residual power to strike out for abuse of its process is an extraordinary remedy. The court is not bound by some of the constraint and strictures of the res judicata doctrine. The court’s power to bar or strike out a claim for abuse of process is in addition to, and wider than the power to bar a claim based on res judicata. Thus, the court may yet strike out an action for abuse of the court’s process where the case for res judicata is not established. The court can use its power to strike out for an abuse of the process of the court which would be manifestly unfair to a party, or the action involves unjust harassment or oppression, or the relitigation would likely bring the administration of justice into disrepute. The circumstances where the court may strike out an action as an abuse of process of the court are varied, but include

while the subsequent proceedings amount to a duplication of proceedings of a collateral attack on an earlier decision.”

[64] The Claimant relied on the Canadian case of Tarr v. Kipling Motor Inn, Prairie Oasis Ltd. 1996 CanLii 7181 (SK QB) in support of her contention that she is not estopped from bringing the instant claim based on the doctrine of issue estoppel. However in that case the court found that there was no cause for dismissal whereas in the present case, the Claimant’s cause of dismissal was redundancy – therefore that case can be distinguished from the present one. According to the Court of Appeal, there were two different issues being addressed namely (1) in the first claim under the above stated statute, the issue was whether the respondents were entitled to pay in lieu of notice as required by Section 43 of that Act and (2) in the Queen’s Bench Division the court had to determine whether the respondents were wrongfully dismissed pursuant to the employment contracts in that they were dismissed without notice and without just cause. The court found that a claim for damages for wrongful dismissal was not the same as the claim for pay in lieu of notice pursuant to the Act.

[65] Counsel for the Defendant relied on the cases of Agard v. Caribbean Data Services Limited 358 Magisterial Appeal No. 12 of 2000 and Hoyte v. The Transport Board BB 2002 HC 25 in support of his submission that an action for wrongful dismissal should not be entertained where there is a genuine and clear case of redundancy. He

noted that those cases established a legal bar, which prevents a person made redundant from bringing an action for wrongful dismissal.

### **CONCLUSION**

- [66] The court finds that the same issue or the reason for the Claimant's termination of service lies at the heart of both the proceedings in the Employment Tribunal and the High Court action, although the latter includes additional claims.
- [67] There is no denial that the Claimant could bring an action for wrongful dismissal as **section 13** of the Severance Payment Act clearly provides that a payment under the Severance Payment Tribunal does not preclude an employee from claiming damages for wrongful dismissal. However where the issue that was determined before the Tribunal will be the issue to be determined before the court by the same parties, then the court has to decide whether the matter should be struck out as an abuse of the court's process to avoid relitigation of the same issue.
- [68] It is the opinion of the court that the Claimant should have brought an action for wrongful dismissal where all of her claims could have been adjudicated – she did not and the court now has to consider whether she has shown exceptional circumstances as discussed in *Arnold's* case (supra) and therefore should be allowed to pursue this claim for wrongful dismissal at this stage.
- [69] Having applied the facts to the law, I do not find that this is a case of res judicata in the strict sense, because the cause of action is not the same in both proceedings. I do find however that the doctrine of

‘issue estoppel’ is applicable in that the question or fact as to the reason for the Claimant’s dismissal was distinctly put in issue and distinctly determined by the Tribunal who had competent jurisdiction to hear the matter. The Claimant’s reason for dismissal formed a necessary ingredient in her claim for redundancy and now the Claimant is seeking to reopen that same issue in those proceedings with the same parties, albeit involving a different cause of action to which the same issue is relevant. As stated before the Tribunal concluded that the reason for the Claimant’s dismissal was redundancy due to restructuring. It did not find that the Claimant was terminated pursuant to contract as was stated by the Defendant Company. This demonstrates that the issue to be determined was the reason for her dismissal and this is the same issue that the court is now being asked to consider. The decision of the Tribunal was final and that decision has not been appealed by either the Claimant or the Defendant Company. Furthermore on reviewing the pleadings in the current application, I do not find any exceptional circumstances which would merit a re-hearing of this matter.

[70] The court has asked itself this question – since the Tribunal found that the reason for dismissal was redundancy and this has not been challenged, how now can the Claimant be asking the court to determine that she was wrongfully dismissed.

[71] Bearing in mind that the court is always mindful of the overriding objectives to deal with matters justly, the court therefore has to perform a balancing act, that is, balancing the Claimant’s right to

bring this action against the Defendant's right not to vexed twice in the same matter as well as to consider the use of the court's resources.

- [72] The court finds that the underlying issue to be determined in both applications was based on what was the reason for the Claimant's dismissal. The Tribunal having made its determination, if the Claimant is allowed to continue with the application, the court runs the risks of adjudicating on an issue that the Tribunal decided and also the risk of ending up with inconsistent decisions.

### **DISPOSAL**

- [73] In the circumstances the Claimant's case is struck out as an abuse of the court's process.
- [74] The Claimant to pay the Defendant's costs to be assessed if not agreed.

**PAMELA A. BECKLES**  
Judge of the High Court