

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

Claim No. CV 439 of 2019

BETWEEN:

MARTIN WARRINGTON

CLAIMANT

AND

UNIVERSITY OF THE WEST INDIES

DEFENDANT

Before The Honourable Justice Cecil N. McCarthy, Judge of the High Court

Date of Decision: 2021 March 29

Appearances:

Mr. Tariq Khan and Ms. Shayne Williams for the Claimant

**Mr. Roger Forde QC in association with Mr. Jason Wilkinson of Carrington
& Sealy for the Defendant**

DECISION

INTRODUCTION

- [1] On the 1st day of November 2019, the claimant/applicant (herein referred to as “the claimant”) filed a without notice application for interim injunctive relief. The claimant is seeking an interim injunction against the University of the West Indies, the respondent/defendant herein, permitting him to remain in the post of Manager, Properties & Facilities, along with full benefits including the salary attached to the said post pending trial of the substantive action.
- [2] The application was heard by the Court on 19 November 2019, and it was ordered that the documents filed on 1 November 2019, be served on the respondent/defendant (herein called “the defendant”) and that the matter be heard inter parties on 25 November 2019.
- [3] On the 22 November 2019, the substantive action was filed by the claimant. That action essentially claimed damages for several breaches of the contract of employment between the claimant and the defendant, including wrongful termination of the contract of employment.
- [4] The application for injunctive relief pending the trial of the substantive claim seeks injunctive relief to the effect that the defendant be restrained:

- “1. *from giving effect to its breach of contract of employment with the Claimant/Applicant from the post of Manager, Properties & Facilities of the Defendant/Respondent by way of its purported redundancy;*
2. *from treating the Claimant/Applicant as other than continuing to be employed by the Defendant/Respondent unless and until the Defendant/ Respondent addresses its continuing breaches of its contract of employment with the Claimant/Applicant;*
3. *from dismissing or purporting to dismiss the Claimant from his post as Manager, Properties and Facilities of the Defendant/Respondent by way of its purported redundancy.*
4. *The Claimant/Applicant seeks a further Order that the Defendant/Respondent do preserve the status quo which includes but is not limited to the payment of his monthly salary as it falls due together with all the allowances and or emoluments to which he is entitled.”*

Factual Background

[5] Under successive contracts of employment the claimant has been employed continuously by the defendant for over 15 years. By letter of appointment dated 23 March 2004, the claimant was first appointed to the post of

Manager, Properties and Facilities at the Cave Hill Campus with effect from 1st May 2004. The said letter of appointment sets out the terms and conditions of his employment, and, among other things, expressly provides that the employment was subject to the Charter, Statutes, Ordinances, Rules and Regulations of the defendant.

- [6] The claimant's appointment was extended by letters of 11 July 2007, and 29 January 2010, respectively.
- [7] By letter dated 7 December 2012, the claimant was appointed to the post of Manager, Properties and Facilities at the Cave Hill Campus with indefinite tenure but otherwise subject to the same terms and conditions as contained in the letter of appointment dated 23 March 2004. The letter expressly stated that the appointment was terminable by six (6) months' notice in writing on either side, or six (6) months' pay in lieu of notice.
- [8] In or about the month of January 2019, the defendant alleged that it embarked upon a process of reorganising some of its functional areas with a view to creating greater levels of efficiency and effectiveness. This process culminated in the reorganisation of the Office, Planning and Projects and its integration with the Maintenance Department thereby creating one unit called the Office of Institutional Planning and Infrastructural Services.

- [9] As a result of the abovementioned reorganisation, the defendant expected a diminution in the requirements for services performed by the claimant in his post of Manager, Properties and Facilities (Head of the Maintenance Department).
- [10] By letter dated 11 September 2019, the defendant wrote to the claimant and gave him notice that his contract of employment would be terminated with effect from 12 September 2019, for reasons of redundancy, and enclosed therewith a cheque in the sum of \$121,412.98. The said amount included payments calculated in accordance with the Severance Payment Act Cap. 355A of the Laws of Barbados, as well as six months' pay in lieu of notice.
- [11] The claimant acknowledged receipt of the letter of termination but refused to accept the cheque and other enclosures in the said letter.
- [12] Since 11 September 2019, the defendant says that the claimant has not provided any services to the defendant and has not been paid a salary from the date of termination of his employment, namely 12 September 2019.
- [13] By letter dated 13 September 2019, the claimant, acting through his attorney-at-law. Mr. Tariq Khan, challenged the termination of his employment.

[14] Since the termination of the contract of employment is being challenged it is useful to set out the terms of the claimant's most recent employment contract. The letter of appointment reads:

“Dear Mr. Warrington:

*I am directed by Council to offer you an extension of your contract as **Manager, Properties & Facilities**, The University of the West Indies, Cave Hill Campus, Barbados on indefinite tenure with effect from **August 1, 2012**.*

2. *The appointment is nevertheless terminable by six (6) months' notice in writing on either side given effect, not earlier than March 31 in any academic year; **or six (6) months' salary in lieu of notice**. The retiring age is sixty-five (65) years.
[emphasis supplied]*
3. *The appointment is full-time and no outside employment may be undertaken without the written consent of the University of the West Indies. Your duties will be arranged by the Campus Registrar, or other person designated by her.*
4. *You will be paid a housing allowance of 20% of your basic salary.*
5. *Your incremental date will remain August 1.*
6. *All other terms and conditions of employment as contained in your letter of appointment dated March 23, 2004 remain the same.*

As evidence of your acceptance of this offer, kindly sign and return the enclosed copy of this letter.”

The Affidavits

- [15] On 1st November 2019, the claimant filed an affidavit in support of his application.
- [16] In that affidavit the claimant, among other things, deposed to the facts outlined in the preceding factual background.
- [17] In the affidavit the claimant deposed that he was not forewarned nor consulted with respect to his “purported redundancy”. Furthermore, he asserted that the “attempt” to make him redundant was in breach of Ordinance 8 referred to in his application.
- [18] Essentially, the claimant’s affidavit alleges that the defendant has breached his contract of employment by seeking to make him redundant. He contends that he is still an employee of the defendant and he has made the application to the Court because damages are not an adequate remedy.
- [19] On the 22nd November 2019, Mr. Kenneth Walters, the Campus Registrar, (“the Registrar”), swore and filed an affidavit on behalf of the defendant in response to the claimant’s application and affidavit.
- [20] The facts set out in the factual background were not disputed by the defendant, but the defendant through the Registrar, deposed that the claimant’s contract of employment was terminated effective 12 September

2019 by reasons of redundancy and in accordance with clause 2 of the claimant's contract of employment.

[21] The Registrar deposed that the claimant was given a letter of termination on 11th September 2019, along with a cheque for severance and other termination payments. The letter was accepted, but the cheque was refused by the claimant.

[22] By letter of 13 September 2019, the claimant, through his attorney-at-law herein, challenged the termination of the claimant's employment. The Registrar admits that the parties embarked on a period of negotiation but says the defendant never resiled from its position that the claimant was dismissed by reason of redundancy.

The Claimant's Submissions

[23] Counsel for the claimant, Mr. Tariq Khan, submits that even though the court will usually only award an employee damages for breaches of a contract of employment there are exceptional circumstances in which the court may restrain an employer from terminating an employee's contract.

[24] Mr. Khan relies on a statement appearing in the 12th Edition of Injunctions by David Bean et al at paragraphs 4-10. That statement reads:

“Two exceptions to the general rule have been developed. The first is where the employer retains confidence in the employee’s integrity and ability, an injunction may then be granted if it is clear that it would be just to do so. (Hill v Parsons [1972]ch. 305; Powell v Brent LBC [1988] ICR 176)(“Powell”)

[25] Counsel submits that as long as there is mutual trust and confidence between the employer and employee an interim injunction should be granted restraining the employer from terminating the employee. Counsel argues that despite what has occurred between the claimant and the defendant there has been no demonstrable loss of trust or confidence by the defendant in the claimant.

[26] Quite noticeably the affidavit filed herein by the claimant does not expressly or implicitly demonstrate or assert that there has been the maintenance of trust and confidence between the claimant and the defendant.

[27] Paragraphs 16 and 17 of the affidavit are typical of a significant portion of the said affidavit. They state:

“16. This matter must therefore, I pray to this Honourable Court, be treated with the urgency it deserves. By attempting to make me redundant, the Defendant/Respondent sought to “disappear” me from its environs. It engages in subterfuge and that is the only term which I considered to be appropriate because I was simply declared redundant on September the 11th and told to go. My issue has to be in what version of events can that be acceptable? Because it isn’t.

17. *I have set out the reasons why this is not a redundancy but yet another breach of my contract of employment and must be so treated. It is in those circumstances that I seek a preservation of the status quo while I deal with the multiple breaches of the terms of my contract of employment. I am asking this Honourable Court to protect me from the undoubted power and might of the Defendant/Respondent. All of its acts toward me are consistent with the agonies I endured when I fought to be paid what is due me, that is, The Entertainment Allowance. It took me 11 years to obtain justice and then that justice was poisoned by its failure to compensate me for a tax liability caused by its breach.”*

[28] Mr. Khan also submits that the letter of 11th September 2019, constitutes a repudiation of the contract of employment by the defendant, which the claimant has not accepted. Mr. Khan contends that the claimant continues to be employed by the defendant.

[29] In support of his application for an interim injunction Mr. Khan relied principally on the **Powell v Brent LBC [1998] 1.C.R 176** and **Burke v Independent Colleges [2010] IEHC 412**.

The Defendant’s Submissions

[30] Counsel for the defendant, Mr. Roger Forde QC submitted that under Section 44 of the Supreme Court of Judicature Act Chapter 117 of the Laws

of Barbados, the Court is authorised to grant mandatory and other injunctions.

[31] Mr. Forde contends that to obtain the grant of an injunction the claimant must establish:

- (1) that there is a serious issue to be tried; and
- (2) the balance of justice favours the grant of the injunction.

[32] Mr. Forde submits that the two cases cited by Mr. Khan are distinguishable from the instant case.

[33] First, he points out that the case at bar is one in which there has been a notice of dismissal giving a date on which the termination takes effect. There is therefore no performance left open to the claimant. Secondly, he submits that both **Powell** and **Burke** are cases of constructive dismissal and different principles will apply.

[34] In respect of **Powell**, Mr. Forde says that Ms. Powell worked for a month or so in the position of Principal Benefits Officer and was never dismissed from her employment. The employer sought to demote her to the position of Senior Benefits Officer and prior to resuming work in that position she instituted legal proceedings contending that a constructive dismissal was imminent, and she required an injunction to prevent the said dismissal.

Unlike the instant case she received no letter which purported to terminate her employment at a particular date.

[35] Mr. Forde contends that the issue in **Powell** was whether the decision to demote Ms. Powell was a repudiation of the contract of employment, and, therefore, it required acceptance.

[36] Mr. Forde also submits that Powell is not an authority for the proposition that a notice of dismissal which specifies the date of termination of the contract is a repudiation of the contract.

[37] Like the claimant in **Burke**, Ms. Powell received no formal letter of dismissal.

[38] Mr. Forde relies as well on **Riordan v War Office [1959] 3 All ER 552** which supports the proposition that a party can bring the contract of employment to an end by a notice terminating it unilaterally.

The Issues

[39] The issue that I must determine is whether the claimant is entitled to the interim injunctive relief which he seeks.

The Law

[40] The Court is empowered by section 44(b) of the Supreme Court of Judicature Act Chapter 117 to grant mandatory and other injunctions.

[41] For the claimant to obtain the grant of an injunction he must establish that:

1. there is a serious issue to be tried, and
2. the balance of justice favours the grant of an injunction.

[42] These guiding principles have been enunciated in **Toojays Limited v Westhaven Limited [2012] 2 LRC 65**, in which the Court of Appeal gave its interpretation of Lord Diplock's seminal judgment in **American Cyanamid v Ethicon [1975] 1 ALL ER 504**.

Serious Issue to be Tried

[43] Recently, in **Worrell v Minister of Finance Civil Appeal No: 8 of 2017**, **Burgess** JA (as he then was) delivering the judgment in that case, described the test in these words, at paragraph 42, thereof:

“That test is a two limbed test. The first limb involves an enquiry as to whether the party seeking an interlocutory injunction has shown that there is a serious issue, in the sense of not being frivolous or vexatious, to be tried. Once it is established, as it were, that the party has crossed this threshold, the court can then address the second limb which involves a question of whether the balance of justice lies in favour of granting or refusing the interlocutory relief sought.”

[44] The affidavits filed by the respective parties present two competing versions of the facts. The claimant contends that he is still employed by the defendant, and that the letter of 11 September 2019 is a threatened

repudiation of contract which he does not accept. The defendant, on the other hand, says that it has terminated the claimant's contract in accordance with its provisions. The issues raised by the claimant cannot be said to be frivolous or vexatious.

[45] The claimant is seeking an order that the employer keep him in employment, as well as damages for breach of contract. Even though it is only in exceptional cases that a court will order an employer to reinstate an employee in a contract of employment or restrain an employer from dismissing an employee, I am of the view that the claimant has met the threshold required to establish a serious issue to be tried.

The Balance of Justice

[46] It is the trite law that the hearing of an interlocutory injunction is not a trial on the merits.

[47] There is no oral testimony and no cross-examination of prospective witnesses.

[48] The essential function of the interlocutory injunction is to preserve the status quo pending determination of the substantive matter.

[49] The balance of justice will often depend on the area of law.

- [50] I am mindful that the claimant has chosen to ground his claim in the common law of employment.
- [51] In this area of the law it is very rare for a court to restrain an employer from dismissing an employee or order an employer to reinstate a dismissed employee.
- [52] In Barbados, the Employment Rights Act has been enacted to provide remedies for unfair dismissal. One of those remedies is reinstatement.
- [53] The usual remedy for a breach of the employment contract is damages. Damages are easily calculated and in most cases can be assessed with certainty. In the instant case, the calculation of damages is made easier by the fact that there is a termination clause which provides for the termination of the contract on six months' notice, or on payment of six months' pay in lieu of notice.
- [54] In this regard, it appears to me that clause 2 of the contract referred to at paragraph 14 of this judgment is intended to confer a power on the defendant to bring the claimant's contract of employment to end at anytime.
- [55] Our Court of Appeal has had cause to interpret a similar provision in **Caribbean Commercial Bank Limited v Daniel (Magisterial Appeal No. 8 of 1997)**.

[56] In that case the provision in a contract between the appellant bank (“CCB”) and the respondent employee permitted dismissal on two months’ notice in writing or two months’ additional salary in lieu of notice, and it also contained provisions for termination for misconduct. The contract provided in part:

“I further understand that the Bank may, at its sole discretion, within the terms of the law discontinue my employment by either.

(1) Giving 2 months notice in writing or

(2) By the payment of salary from the last pay day to the end of the calendar month in which the Bank ceases to employ me, plus 2 additional month’s salary in lieu of notice.

The Bank may terminate the contract without notice or payment in lieu of notice in the event of serious misconduct or persistent unpunctuality, neglect of duty, or breach of any rules or regulations made by the Bank. I hereby make application to join the Bank’s Group Health and Accident Plan Insurance and hereby authorise the Bank to make the required deductions from my salary.”

[57] Based in part on an error which resulted in the employee approving interest for a client in excess of \$38,000.00 instead of \$1,384.66 a memorandum was sent to the employee warning the employee that the memorandum would be in effect for 3 months. The memorandum read in part:

“This written warning will be in effect for a period of three months during which time you will be expected to establish and maintain a satisfactory work performance record. If your work performance is unsatisfactory at any time this period, I will have no alternative but to place you on final written warning.

You are being urged to take whatever corrective steps necessary to improve your performance.”

[58] Within three months of the warning, the CCB informed the employee that her services would no longer be required and in the letter of termination her entitlements were calculated and she was paid those entitlements, along with two months’ salary in lieu of notice.

[59] The employee was awarded damages for wrongful dismissal by the Magistrate on the footing that the dismissal was because of incompetence and CCB should have given the employee a reasonable time to improve after the warning and having put the employee on a final warning. CCB was estopped from taking any action under the agreement to terminate her employment unless it had first given her a final written warning.

[60] On appeal, the Court of Appeal held that there was no wrongful dismissal and it quoted the classic analysis of the term payment ‘in lieu of notice’ as provided by **Lord Browne-Wilkinson in Delaney and Staples** 1992 1 ALL ER 944, at 997, 998. The statement reads:

“The phrase payment in lieu of notice is not a term of art. It is commonly used to describe many types of payment the legal analysis of which differs. Without attempting to give an exhaustive list, the following are the principal categories (1) An employer gives proper notice of termination to his employee, tells the employee that he not work until the termination date and give him the wages attributable to the notice period in a lump sum. In this case (commonly called “garden leave”) there is no breach of contract of the employer. The employment continues while the expiry of the notice: the lump sum payment is simply advance or wages. (2) The contract of employment provides expressly that the employment may be terminated either by notice or payment of a sum in lieu of notice, summarily. In such a case if the employer summarily dismisses the employee he is not in breach of contract provided he makes the payment in lieu. But the payment in lieu is not payment of wages in the ordinary sense since it is not a payment for work to be done under the contract of employment. (3) At the end of the employment, the employer and the employee agree that that the employment is to terminate forthwith on payment of a sum in lieu of notice. Again the employer is not in breach of contract by dismissing summarily and the payment in lieu is not strictly wages since it is not remuneration for work done during the continuance of the employment. (4) Without the agreement of the employee, the employer summarily dismisses the employer and tenders payment in lieu of proper notice. This is by far the most common type of payment in lieu and the present case falls into this category. The employer is in breach of contract by dismissing the employee without proper notice. However, the summary dismissal is effective to put an end to the employment

relationship, whether or not it unilaterally discharges the contract of employment. Since the employment relationship has ended no further services are to be rendered by the employee under the contract. It follows that the payment in lieu is not a payment of wages in the ordinary sense, since it is not a payment for work done under the contract of employment.

*The nature of a payment in lieu of falling within the fourth category has been analysed as a payment by the employer on account of the employee's claim for damages in breach of contract. In *Gothard v. Mirror Group Newspapers Ltd* [1989] 1 CR. 729 at 733 Lord Donaldson M.R. stated the position to be as he had stated in *Dixon v. Stenor Ltd* [1973] 1 CR. 157 at 158"*

- [61] One of the factors in considering the balance of justice is whether the claimant can be compensated in damages for the injury he has suffered.
- [62] In his judgment in **Toojays, Burgess JA** emphasized that “the principle that adequacy of damages is to be considered as a significant factor in assessing where the balance of convenience lies.”
- [63] Recently in **Worrell**, *supra*, a case in which there was a similar six months' notice provision in the contract of employment, the Court of Appeal held that where the loss likely to be suffered by the claimant between the date of the application and the date of trial can be compensated in damages and the defendant is able to pay the same no injunction should be granted. In that

case the Court of Appeal affirmed the assessment of Worrell J that the claimant would be adequately compensated in damages.

[64] Mr. Khan has sought to claim relief in the form of injury to reputation and other injury flowing from the manner of the dismissal.

[65] But so far as I am aware, for over a century now, commencing with **Addis v Gramophone Company Limited 1909 AC 488**, at common law the court has disallowed that kind of relief for breach of a contract of employment.

[66] In this regard, I recommend the case of **Edwards v Chesterfield Royal Hospital NHS Foundation Trust [2011] UKSC** cited by Mr. Forde QC. Additionally, the Jamaican Court of Appeal in a judgment delivered by **Brooks JA** has recently reviewed this area of the law (see **Edward Gabbidon v Sagicor Bank Jamaica Limited, Civil Appeal No: 95 of 2010, date of decision, 3 April 2020**).

[67] I also wish to refer to paragraphs **142** and **143** of the judgment of the court in **Edward Gabbidon** which reads:

*“[142] An examination of the law in relation to the termination of the contract of employment has demonstrated that, despite its antiquity, the **Addis** principle that damages were awarded for breach of contract and not for the manner of the breach, remains the law in this country. It has been happily supplemented*

by the introduction of the implied principle of mutual trust and confidence into the contract of employment.

[143] That implied term, however, has its limitations. Firstly, it cannot trump an express term of contract that allows either party to terminate the contract upon notice or that allows the employer to make a payment in lieu of notice. Secondly, in the absence of an express term, stipulating the means by which the contract may be terminated, the implied term does not apply if the breach of it is what leads to the dismissal.”

[68] On the point that the implied term of mutual trust and confidence cannot override an express term permitting either party to terminate on notice or permitting the employer to make a payment in lieu of notice: see **Reda v Flag Ltd [2002] UKPC 38**.

DISPOSAL

[69] The calculation of the damages in cases of termination of employment contracts has been based on notice and the provisions of the contract. In this case, there is specific provision for termination on six months’ notice or six months’ pay in lieu of notice.

[70] The employee is also entitled to severance payment and any other payments that are provided by statute.

[71] Having determined that damages would be an appropriate remedy, the claimant's application for injunctive relief is dismissed.

[72] The claimant must pay the costs of the defendant to be agreed or assessed.

Cecil N. McCarthy
Judge of the High Court