[2024] **JMSC Civ. 136**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. SU2022CV04003

BETWEEN	**SILVERA ADJUDAH**	**CLAIMANT**
AND	**ATTORNEY GENERAL**	**1ST DEFENDANT**
AND	**MINISTRY OF NATIONAL SECURITY**	**2ND DEFENDANT**
AND	**DR. JUDITH MOWATT**	**3RD DEFENDANT**

IN CHAMBERS

Claimant in person

Romario Miller and Dimitri Mitchell instructed by the Director of State Proceedings for the 1st and 2nd Defendants

Heard: October 29, 2024 and November 28, 2024

Civil Procedure - CPR 26.3(1) (b) and (c) - Application to strike out statement of case - Whether claim discloses a reasonable ground for bringing a claim in negligence or a claim for discrimination on the basis of age-Whether claim is an abuse of process

Application for Default Judgment - Part 12 CPR

Service of court documents other than a claim form by email

Master L. Jackson (Ag)

INTRODUCTION AND BACKGROUND

[1] In 2015 (the month is not stated in the pleadings), Mr. Adjudah applied for the position of Administrative Manager at the Institute of Legal and Forensic Medicine that was advertised in the Gleaner. He was not shortlisted for the position, and as such, feels slighted and discriminated against. He filed a claim form and particulars of claim suing the 3rd defendant as a servant of the 1st and 2nd defendants for breach of duty for failing to give reasons (which he requested in writing), as to why he was not shortlisted for the position. He further pleaded in his particulars of claim that the position was given to someone younger than he, and as such he was discriminated against because of his age.

[2] The claim form and particulars of claim were served on the 1st and 2nd defendants on December 20, 2022. An acknowledgement of service was filed on January 5, 2023, by the 1st defendant acknowledging service on behalf of the 1st and 2nd defendants. As required by the Civil Procedure Rules (CPR), a defence was to be filed by the defendants, within 42 days of service of the claim form and particulars of claim, however, the 1st and 2nd defendants failed to file their defence.

[3] Mr. Adjudah filed an affidavit of service that addresses attempted service on the 3rd defendant and although he contends that there is a difference between non-service and a party refusing to accept service, for the purposes of the CPR, service was not effected on the 3rd defendant.

[4] Paragraph 5 of the affidavit filed by Mr. Adjudah states that he left a message with Dr. Mowatt's receptionist, Ms Melissa Palmer, requesting that Dr. Mowatt get in touch with him so that she could be served with the claim form herein. He states further that to date she has not done so. He says further "that I see as a clear indication that the defendant is not willing to be served with the Court documents".

[5] By virtue of rule 5.1, the requirement for personal service only applies to service of a Claim Form. Rule 5.1 states that the general rule is that a Claim Form must be served personally on each defendant. Pursuant to rule 5.13 and 5.14, by application to the court, an applicant can request that personal service of the claim form and prescribed documents (or any other documents) is dispensed with and that the court grant an order permitting service on the defendant by way of an alternate or specified method of service.

[6] Since Mr. Adjudah has not established service on the 3rd defendant as required by rule 5.1 nor did he obtain an order pursuant to rules 5.13 or 5.14, I find that the 3rd defendant was not served with the claim form and particulars of claim and his distinction on non-service versus refusal of service is unwarranted.

[7] The 1st and 2nd defendants on January 20, 2023, filed an application for an extension of time to file a defence which was supported by the affidavit of Mr. Gabbadon. On February 15, 2023, Mr. Adjudah filed a notice of application that default judgment be entered against all the defendants in default of defence.

[8] On September 15, 2023, the 1st and 2nd defendants amended their application to include an order striking out the claim against them and in the alternative for an extension of time to file a defence to the claim.

[9] Thus, there are two applications before the Court for determination; firstly, the amended application filed by the 1st and 2nd defendants to strike out the claimant's claim and in the alternative for an extension of time to file a defence. Secondly, the application by the claimant to enter judgment against the defendants for failing to file a defence.

SUBMISSIONS

[10] The Court made orders for the parties to file and serve written submissions, but neither parties complied with this order. The parties were allowed to make oral submissions at the hearing. Those submissions will be briefly outlined here.

[11] Mr. Mitchell commenced his submissions by indicating that the claimant's statement of case ought to be struck out because he has no reasonable grounds for bringing the claim, the claim he argued is frivolous and vexatious and is also an abuse of process. He prayed in aid rule 26.3(1) (b) and (c) of the CPR.

[12] He argued further that the claimant has sought to ground a claim in the tort of negligence, but his pleadings do not support this cause of action as the law does not impose a duty of care on a potential employer to provide reasons to an applicant who is not shortlisted for a post for which he has applied.

[13] He also relied on the principles enunciated in the various authorities on the elements of the tort of negligence, such as **Donoghue v Stevenson** [1932] A.C. 562 and **Caparo Industries Plc v Dicken** (1990) 2 AC 605 page 617 viz a vie the claimant's pleadings. He further submitted that there is no proximity between the Claimant and the 3rd defendant and it is therefore unreasonable to impose a duty in these circumstances.

[14] He further noted that the claimant has pleaded emotional distress as a result of the breach he alleges occurred, but there is no medical evidence to support this claim. As such there are no reasonable grounds to bring such a claim.

[15] Relying on **Anthony Tharpe and Successors in the interest of Business Ventures Solutions INC & Anor v Alexis Robinson &others** [2022] JMSC Civ 66 paragraph 88, he encouraged the court to examine the pleadings as was done in that case and to find that the claimant has no reasonable grounds for bringing this claim.

[16] In relation to the claim for damages for age discrimination, counsel for the 1st and 2nd defendants stated that having examined the pleadings this claim is unfounded and in any event, such a claim lays elsewhere and not by way of claim form and particulars of claim.

[17] Mr. Adjudah objected to the defendants' application on the basis that he was never served with the application and that he has raised and maintained this objection

for some time. He contends that service by email is improper and that the defendants have breached CPR rule 11.1(a) and (b) in serving their application contrary to the orders of the Court. He further stated that he sent an email to the defendant on June 4, 2024, to the effect that no emails were to be sent to him, as his email was hacked and he was therefore not accepting service by email.

[18] In addressing the substantive aspect of the application, the claimant stated that he has reasonable grounds for bringing the claim. He stated that he sent a letter which is exhibited to the particulars of claim requesting that the 3rd defendant state their reasons for failing to shortlist him for the position for which he applied. The 3rd defendant he argued is obligated to respond to this request and provide reasons. In failing to respond to his request, Dr. Mowatt breached her duty to him.

[19] He also noted that the defendants' counsel has failed to establish that his pleadings are faulty. In addition to not receiving a response from Dr. Mowatt, his investigations revealed that a younger person was hired to fill the post for which he had applied.

[20] Since he is more qualified for the position as he has all the experience and the necessary qualifications for the job and was not shortlisted for the post it must have been his age or something untoward on Dr. Mowatt's part which resulted in him not being shortlisted for the post. Mr. Adjudah stated that he requested information from the defendants on the due diligence they said they had conducted on him and he has not received same. He concluded that the defendants must be hiding something in this regard.

[21] He concluded his submissions by urging the Court not to entertain the defendants' application as it was wrongly before the Court and also because they have failed to establish that he has no grounds for bringing his claim.

[22] In relation to his application to enter default judgment against the defendants he submitted that the default judgment should be entered as the defendants have failed to file a defence within the time prescribed by the CPR. He says their

"national application" which is filed in every case for an extension of time to file a defence ought to be rejected.

[23] In response, Mr. Mitchell argued that the application to enter default against the 1st and 2nd defendants could not be entered without the Court first considering the defendants' application for an extension of time to file a defence which is their alternative application which was included in their amended application.

[24] He stated that the application to extend the time to file a defence was filed within a reasonable time, that is on January 20, 2023, having been served with the claim form and particulars of claim December 20, 2022.

[25] In explaining the 1st and 2nd defendant's delay in filing a defence he relied on Western **Regional Health Authority v Rashaka Brooks Jnr (a minor) by. Rashaka Brooks Senior (his father and next friend)** [2013] JMCA Civ 16. He submitted that the Attorney General is sued in a representative capacity and does not have first-hand knowledge of the claim and needs to obtain instructions from the 2nd defendant as to whether the 3rd defendant is a servant and agent of the 1st and 2nd defendants.

[26] Investigations are also ongoing and the Director of State Proceedings is yet to receive instructions which enables her to respond to the claim. He also stated that given the claimants allegations in his statement of case, these investigations are necessary to determine whether there was any merit or substance in the allegations made by the claimant in his statement of case.

LAW

[27] The Court's power to strike out a party's statement of case is a power which ought to be exercised sparingly and only in exceptional cases, (see **Lawrence v Lord Norreys** (1890) 15 App Case 210). This principle has been endorsed in a number of authorities by the Court of Appeal and the Supreme Court of Jamaica. (see for example **S & T Distributors Limited and S and T Limited v CIBC Jamaica Limited and Royal & Sun Alliance** SCCA 112/04 delivered 31st July 2007) where

Harris J.A stated that striking out is a severe measure which is to be exercised with extreme caution. The court is obliged to take into consideration the probable implication of striking out and balance them carefully against the principles as prescribed by the cause of action which is sought to be struck out. She went further and stated that judicial authorities show that this power should only be exercised in plainly obvious cases.

[28] Rule 26.3 (1) of the CPR outlines this power to strike out and states:

> *"(1) In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court-*
> *(a) that there has been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceedings;*
> *(b) 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;*
> *(c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim;"*

[29] Rule 26.3(1) (b), of the CPR does not specifically define what is meant by an "abuse" of the court's process or a claim that is likely to obstruct the just disposal of the proceedings. Therefore, it is for the Court to determine what constitutes either, based on the particular facts of each case.

[30] In **Attorney General v Barker** [2000] EWHC 453 (Admin) the court explained abuse of process and said that;

> *"the hallmark of a vexatious proceeding is in my judgment that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceeding may be, its effect is to subject the Defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the Claimant; and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in*

a way which is significantly different from the ordinary and proper use of the court process."

[31] In **West Indies Petroleum Limited v Wilkinson and Levy** [2023] JMCA Civ 2 G Fraser JA (Ag), in examining the term "abuse of process", stated that "*the circumstances in which the court may strike out a statement of case on the ground that it amounts to an abuse of the process of the court are varied. There can be no limited or fixed categories of the kinds of circumstances in which the court has a duty to exercise this salutary power since the category of cases in which it may arise is not closed*".

[32] Some of the instances in which the court has deemed a claim to be an abuse of process include but are not limited to;

(a) Starting a claim with no intention of pursuing it (see **Grovit v Doctor [1997] 1 WLR 640;**

(b) Issuing a claim where the description of the claimant does not disclose any entitlement to sue (see **Arnold Berg Export Import v Ramsanahie (1988) High Court, Trinidad and Tobago No 2010 of 1987 (unreported);**

(c) Litigating issues which have been investigated and decided in a prior case **(see Johnson v Gore Wood and Perkins v Devoran Joinery Company Ltd [2006] EWHC 582**);

(d) Inordinate and inexcusable delay **(see Grovit v Doctor and others [1997] 1 WLR 640 and Habib Bank Ltd v Jaffer (Gulzar Haider) [2000] CPLR 438, CA);**

(e) Issuing a claim that is vexatious, scurrilous or obviously ill-founded **(see Koch v Chew (1997/98) 1OFLR 537;**

(f) Re-litigation of issues already settled by a compromise, which was the point of dispute in **Clarence Ricketts v Tropigas SA Ltd and others**

(unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 109/1999, judgment delivered 31 July 2000.

[33] In relation to striking out a claim on the basis of it being an abuse of process the learned authors of **Halsbury's Law of England Civil Procedure (Volume 11 2020)** state that this power will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the claimant might not, or probably would not, succeed, but that he could not possibly succeed on the basis of the pleadings and the facts of the case. For example, it is an abuse of process to proceed by way of an ordinary claim where the proper procedure would be an application for judicial review. See **O'Reilly v Mackman** [1983] 2 AC 237, [1982] 3 All ER 1124, HL a decision of Lord Diplock paragraph 53 where he held that it would *be "contrary to public policy" and "an abuse of the process of the court" for a person seeking to establish that a decision of a public authority infringed his public law to proceed by way of ordinary action".*

[34] This principle was also endorsed in our region by the Bahamian Supreme Court in **Glenard Evans v Airport Authority** 2022/CLE/gen/01521 (23 November 2023). The short facts of that case are that the claimant was allegedly terminated from his employment with an airline until he received his badges/credentials from the defendant. He allegedly applied for a job with another airline and was informed by employees/servants/agents of the defendant before applying that he would be re-issued his badges/credentials. However, the claimant complained that the defendant delayed in responding to his application and only granted him limited access, without reasons and without an opportunity to be heard, which caused the airline to which he applied for a job to rescind its offer of employment. The claimant averred that the actions of the defendant were "malicious and/or reckless and/or negligent" and sought damages, interest and costs. The defendant sought to strike out the claimant's originating summons and statement of claim on the basis that the action was an abuse of process because the claimant chose to proceed by

ordinary action instead of judicial review and had brought another identical action against the defendant and on the basis that the claimant had no reasonable grounds for bringing the claim. The Court held that, as a general rule, it would be an abuse of process, which may be addressed under the inherent jurisdiction, for a claimant to avoid the judicial review procedure and the built-in safeguards therein and go by way of an ordinary procedure to vindicate a public law right or to challenge a public law act or decision the "exclusivity principle"). **(Taken from the Bahamas Supreme Court CPR 2022 Practice Guide 2024)**[1]

[35] Rule 26.3 (1) (c), speaks to the court's power to strike out a claim where there are no reasonable grounds for bringing or defending the claim. Similarly, this rule provides little guidance as to how it is to be interpreted and implemented.

[36] Guidance on the circumstances in which this rule can be applied can also be gleaned from the learned authors of **Halsbury's Law of England** Defamation Volume 32 (2023) who stated that a pleading may be struck out under this ground for example, where the court may conclude that particulars of claim set out no facts indicating what the claim is about, or are incoherent and make no sense, or contain a coherent set of facts but those facts, even if true, do not disclose any legally recognizable claim against the defendant.

[37] The Court of Appeal in **Sebol Ltd & Anor v Ken Tomlinson & Anor** Supreme Court Civil Appeal 115/2007 agreed with Sykes J (as he then was), in his interpretation and application of Rule 26.3 (1) (c) when he said;

> *"Let us look at what rule 26.3 (1) (c) actually says. The rule does not speak of a reasonable claim. It speaks of reasonable grounds for bringing the claim. It would seem to me that simply as a matter of syntax the instances in which a claim can be struck out against a Defendant are wider than under*

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[1]Accessible here chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://courts.bs/wp-content/uploads/2024/02/Updated-CPR-GUIDE-2024-w-PRACTICE-DIRECTION-1.pdf

the old rules. The rule contemplates that the claim itself may be reasonable, that is to say, it is not frivolous, unknown to law or vexatious, but the grounds for bringing it may not be reasonable. Clearly the greater includes the lesser. Thus if the claim pleaded is unknown to law then obviously there can be no reasonable grounds for bringing the claim. It does not necessarily follow, however, that merely because the claim is known to law the grounds for bringing it are reasonable. The rule focuses on the grounds for bringing the claim and not on just whether the pleadings disclose are reasonable cause of action."

[38] The Court in **Glenard Evans v Airport Authority** stated that CPR 26.3 (1) is not merely a rule on technicality but it goes to furthering the overriding objective in an appropriate case. If, on review of a statement of case, it is clear that it is groundless, then it would be a waste of time and resources to allow the matter to proceed to trial and for the parties to incur further costs. Dealing with a matter expeditiously and fairly includes acceding to a party's application to a pre-empt trial where a statement of case is defective or does not disclose a reasonable ground for bringing or defending a claim.

[39] Part 12 of the CPR governs default judgments. Of relevance are the conditions to be satisfied relating to obtaining judgments for failure to defend as outlined in rule 12.5. That rule states:

The registry must enter judgment at the request of the Claimant against a Defendant for failure to defend if –

(a) the Claimant proves service of the Claim form and particulars of Claim on that Defendant; or

(b) an acknowledgement of service has been filed by the Defendant against whom judgment is sought; and

(c) the period for filing a Defence and any extension agreed by the parties or ordered by the court has expired;

(d) that Defendant has not –

(i) filed a Defence within time to the Claim or any part of it (or such Defence has been struck out or is deemed to have been struck out under Rule 22.2(6));

(ii) where the only Claim is for a specified sum of money, filed or served on the Claimant an admission of liability to pay all of the money claimed, together with a request for time to pay it; or

(iii) satisfied the Claim on which the Claimant seeks judgment; and

(e) there is no pending application for an extension of time to file the Defence (emphasis mine)

ANALYSIS

The Claimant's Objections to the 1st and 2nd Defendants' Application on the issue of service

[40] Before going into the substance of the application, I must first address Mr. Adjudah's contentions that he was never served with the 1st and 2nd defendants' application, that the service was in breach of rule 11.11 and that in any event service by email is a breach of the rules.

[41] Mr. Adjudah contends that he is unable to feel the seal of the documents filed to see if they are authentic if they are scanned and emailed to him and that service by email is contrary to the CPR. He also went on to indicate that his email address was compromised and that he sent an email on June 4, 2024, to the defendants and other persons to stop using the email as it was hacked. He filed a further affidavit on October 23, 2024, exhibiting this email.

[42] The Court of Appeal in **Jackson v McFarlane** [2024] JMCA Civ 18 stated that *"it is common ground that there is no practice direction as contemplated by rule 6.2(d) of the CPR, permitting service of documents other than a claim form by electronic means such as an email. The approval of that method by the court, also contemplated by that rule was therefore required. As the hallmark of valid alternative service under the CPR is that a method other than personal service is*

used because it is thought it will or it likely will bring the contents of the documents to the attention of the party to be served. Only likelihood is necessary. There was, therefore, no requirement that there must be confirmation of actual receipt of the information by the party to be served, before the learned judge could properly place her stamp of approval on the method utilized. The unchallenged evidence that the email address to which the notice of adjourned hearing and accompanying documents was sent is the email address of the appellant, and that he had received documents from the respondent's counsel at that email address before, made that approval eminently reasonable. His evidence that he searched his email and did not find it, does not in any way invalidate the approval granted by the learned judge."

[43] In the circumstances, I find that the claimant's contention in the instant matter, that service by email is invalid and contrary to the CPR is unfounded.

[44] Relative to Mr. Adjudah's objection that he needed to feel the seal to see if it is authentic, the court has already ruled on this issue and I will borrow the words of Barnaby J in **Adjudah v Ministry of Justice and Anor** [2024] JMSC Civ 61 where she said that; ***"The object of service of a notice of application is not to enable the person served to see and feel any court seal affixed to the notice but is to advise the party of the existence and contents of the application, and the date and time fixed for its hearing. There is no evidence of Mr. Adjudah labouring under any disability which prevented him seeing the contents of the copy of the Notice of Application served on him via electronic mail, and of email correspondence from the Court's Registry which informed him of the hearing date of the Defendants' Application"*** (emphasis mine)

[45] His final contention regarding service by email, is that his email was compromised and thus precluded him from obtaining emails. The first order of the Court in relation to service by email was made on December 20, 2023. On February 20, 2024, the Court again ordered that service should be effected by email. The

affidavit of service by the 1st and 2nd defendants shows service to the email address placed on the claim form by the claimant occurring on March 6, 2024.

[46] Interestingly, the claimant's affidavit of October 23, 2024, which takes issue with the 1st and 2nd defendants effecting service of their applications on him by email was filed long after the Court authorized service of the 1st and 2nd defendants' documents on him by email. Further, Mr. Adjudah's email to the Attorney General's Chambers and two other persons indicating that he is no longer accepting emails for professional or business matter is dated **June 4, 2024** also after the court authorized service by email.

[47] This email states that he can send emails but somehow cannot receive them. He went on further to say that he is not setting up any other emails as every time he does so he is hacked.

[48] Mr. Adjudah gave no evidence and there is nothing on the file to indicate that he brought this issue to the attention of the Court when the orders for service by email were initially made, nor did he secure an order varying the order of the court authorizing service of the 1st and 2nd defendants' documents on him by email. This was the only way Mr. Adjudah could refuse or object to service from the 1st and 2nd defendants by email.

[49] Moreover, Mr. Adjudah's main contention when the issue of service by email was raised in previous hearings is not that his email was compromised, but that service by email is not in keeping with the CPR and that no Judge can "override the CPR".

[50] As it concerns breach of rule 11.11, the rule states that the application is to be served 7 days before the hearing date. The application was adjourned on a number of occasions for lack of service. The affidavit of service shows that the claimant was served by email on March 6, 2024, which was way in advance of the date the matter was before this Court October 29, 2024.

[51] For these reasons the claimant's objections to service on him by email are unfounded and I find that service of the 1st and 2nd defendants' application and amended application were properly served on the claimant.

The 1st and 2nd Defendants' Application to Strike out the Claimant's Claim

[52] I will now move to the 1st and 2nd defendants' application. The 1st and 2nd defendants only filed one affidavit in support of this application. This affidavit only addressed the application for an extension of time to file and serve a defence.

[53] There was therefore no evidence before the court in relation to the application to strike out the claimant's case. However, the arguments raised by counsel for the 1st and 2nd defendants on the amended application are really legal issues which would not necessarily require an affidavit to be filed.

[54] A similar view was taken by Barnaby J in **Adjudah v Ministry of Justice and Anor** [2024] JMSC Civ 61 where the defendants were not allowed an adjournment to serve the claimant an affidavit it sought to rely on for the application and thus there was no affidavit evidence before the Court in support of the application to strike out the claim.

[55] Barnaby J, concluded that "*while the grounds for striking out may be established on evidence to which an affidavit would go in aid, it is well settled that these grounds for striking out may be established on an examination of the pleadings, and as a matter of law".*

[56] In addition, part 11 of the rules allows for applications to be made orally or in writing. Rule 11.9 states that the applicant need not give evidence in support of an application unless required by a rule, practice direction or court order. Moreover, in these types of applications to strike out pursuant to rule 26.3(1) (b) (c), the court is generally only concerned with whether or not the statement of case (pleadings) discloses no reasonable grounds for bringing or defending the claim or is an abuse of process. See **Sebol Ltd & Anor v Ken Tomlinson & Anor** Supreme Court Civil Appeal 115/2007.

[57] Mr. Adjudah's claim centres on two assertions. Firstly, his claim is grounded in the tort of negligence and that the 3rd defendant owed him a duty of care which she breached when she failed to provide him with the reason(s) why he was not shortlisted for the position of Administrative Manager for which he had applied.

[58] His further submission was that despite the fact that he had the necessary qualifications and experience, the position was given to a younger person and thus he was discriminated against on the basis of his age since he is in his 50s.

[59] The claimant's particulars of claim merely states that in his letter dated December 21, 2016, to the 2nd defendant, he requested information on their due diligence findings which caused him not to be able to compete for or be shortlisted for the position of Administrative Manager at the Institute of Forensic Science and Legal Medicine.

[60] He states further that to date he has still not been provided with a response from the 2nd defendant despite having had all the qualifications and experience for the job.

[61] Under the head damages, he avers that there is a breach of duty of care by the 3rd defendant who acted in total dereliction of her duties and with gross negligence in failing to provide him with the reasons why he was not shortlisted for the job.

[62] Rule 8.7 of the CPR sets out what is to be contained in the claim form and rule 8.9 outlines the claimant's duty to set out his/her case. The onus is on a claimant to set out all the facts upon which he intends to rely on to prove his case. The purpose of the rule is to ensure that the claimant pleads the factual matrix of the case in the statement of claim so as to make the defendant aware of what he is to defend himself against.

[63] Although Mr. Adjudah has alleged that the 3rd defendant owed him a duty to provide the reasons why he was not shortlisted for the post of Administrative Manager at the Forensic Laboratory, he has not pleaded how this duty arises.

Furthermore, there is nothing in his pleadings which speaks to a duty of care which is the hallmark to establish a claim in Negligence.

[64] There are two ways that the duty of care arises as a legal concept; that is by virtue of the common law or by statute. As it stands, there is no legislation in Jamaica that imposes a duty or a duty of care on a potential employer to provide an individual who applies for employment within an organization with the reason(s) why the applicant was not shortlisted for the position for which he applied.

[65] At common law, there is no particular set of circumstances in which the court will find that a duty of care arises. However, the court has emphasized that a relationship or nexus must exist before the court will impose that duty. In the landmark case of **Caparo Industries plc v Dickman** [1990] 2 AC 605, [1990] 1 All ER 568, HL, Lord Bridge considered the long history of negligence and stated at 573:

> *"what emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other. But it is implicit in the passages referred to that the concepts of proximity and fairness embodied in these additional ingredients are not susceptible of any such precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope."*

[66] An example of where a duty of care has long been held to exist is between various road users. It is foreseeable that harm will result if cars are driven carelessly. There

is the requisite degree of 'proximity', in this case, physical proximity to other drivers. It is fair and reasonable that there should be a duty, and this is also underpinned by mandatory insurance for car drivers. Another area in which it has long been recognised that there is a duty of care is in the context of employment. See **Tolley's Employment Law Service Issue 175 October 2024**.

[67] I agree with the submissions by counsel for the 1st and 2nd defendants on this point. There can be no duty of care in the circumstances as asserted by Mr. Adjudah. He is merely an applicant seeking to be shortlisted to be interviewed for a position. There is no contact or engagement at that level by the potential employer that would reasonably lead to an expectation for reasons to be provided to Mr. Adjudah. I am unable to see any proximity between the parties for one to say a duty of care exists. Additionally, he has not pointed to any specific harm that has occurred as a result of him not being able to secure the reasons he requested nor is there any foreseeability of any such harm occurring. Thus, from the pleadings, there would be no reasonable ground for bringing such a claim.

[68] I also wish to point out that there is no general common law duty to provide reasons, but, such duty may arise for certain instances or if stipulated by statute[2]. If, however, Mr. Adjudah believes that the decision making process was unfair, illegal or irrational, with respect to the shortlisting of candidates to be interviewed, then this would be for another forum which is not initiated by way of claim form and particulars of claim. In any event, his pleadings have not shown that the process for shortlisting candidates and the failure to provide him with reasons was unfairly conducted and ought to be reviewed.

[69] The second assertion by Mr. Adjudah is that of age discrimination. Whilst the Court agrees that generally speaking, discrimination is a reasonable ground for bringing

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[2] The general rule is that it is not a requirement of natural justice that reasons be given for a decision (R v Secretary of State for the Home Department, ex p Doody [1994] 1 AC 531, [1993] 3 All ER 92, HL). But there are exceptional cases, where reasons should be given (R v Secretary of State for the Home Department, ex p Fayed [1997] 1 All ER 228, [1998] 1 WLR 763, CA; Phipps v General Medical Council [2006] EWCA Civ 397, [2006] Lloyd's Rep Med 345, CA).

a claim, the pleadings of the claimant must outline facts and particularize the basis on which the claimant asserts he was discriminated against because of his age. Mr. Adjudah's pleadings as to why he says he was discriminated based on his age are vague and lack details. It is riddled with speculation as to why he says he was discriminated against, which is contrary to a claimant's duty to state his/her case. He says that his investigations reveal that someone younger obtained the job and it is on this basis that he is alleging discrimination, as he says he is in his 50s. This information is woefully insufficient to ground such a claim, particularly because he is unable to speak to the qualifications and experience that the selected candidate had which led him to be selected to fill the post of Administrative Manager at the Forensic Lab.

[70] Furthermore, in Jamaica, claims of freedom from discrimination are grounded either in the Constitution under the Charter of Fundamental Rights and Freedoms or legislation (for example Disabilities Act). In order to ground a claim under the Charter of Fundamental Rights and Freedoms, it would be incumbent on the claimant to establish that the discrimination he alleges (that is age,) falls within any of the fundamental rights and freedoms outlined therein. This is important in light of the fact that age discrimination is not a specific or carved out right and freedom protected under the Jamaican Constitution. The protected grounds are race, sex, place of origin, social class, colour, religion and political opinions. In addition, claims of discrimination under the Constitution are initiated by virtue of section 19 of the Constitution which is not by claim form and particulars of claim.

[71] With respect to legislation, there are no legislative provisions that address age discrimination in Jamaica. The most recent statute enacted on discrimination is the Disabilities Act which has its own regime to address discrimination which is limited only to disabilities. This regime is through the Disabilities Rights Tribunal which is the body that settles complaints concerning discrimination and other breaches of the Disabilities Act. Therefore, Mr. Adjudah would have to demonstrate that there is a disability linked with his age to trigger a claim under this legislation. If this

applies, he would have to first engage the mechanisms established under that Act by filing a claim before the Disabilities Rights Tribunal.

[72] In light of the foregoing, Mr. Adjudah's claim ought to be struck out on the following basis;

a. There is no reasonable ground for bringing the claim as there is no duty of care at common law or by statute, or otherwise, owed to him by the defendants in the circumstances as pleaded in his statement of case. Even if the claim pleaded is known to law, where there are obviously no reasonable grounds for bringing the claim, the claim ought to be struck out. **See Sebol Ltd & Anor v Ken Tomlinson & Anor.**

b. Although there is no general common law duty to give reasons, if, the decision-making process is unfair, illegal or irrational, as it relates to the shortlisting of candidates for the job Mr. Adjudah applied for, the proper forum to challenge this would not be by claim form and particulars of claim. See **O'Reilly v Mackman** [1983] 2 AC 237, [1982] 3 All ER 1124, HL decision of Lord Diplock at paragraph 53 where he held that it would *be "contrary to public policy" and "an abuse of the process of the court" for a person seeking to establish that a decision of a public authority infringed his public law to proceed by way of ordinary action.*

c. His claim is vague and lacks sufficiency as it concerns his assertions that he was discriminated against on the basis of his age. He has failed to plead any factual argument to support his contention. Moreover, claims for discrimination are not initiated by way of claim form and particulars of claim; doing so would also amount to an abuse of process. See **Glenard Evans v Airport Authority** 2022/CLE/gen/01521 (23 November 2023).

[73] Having so found, there is no need to consider the 1st and 2nd defendants' alternative request for an extension of time to file defence.

[74] Finally, having also determined that the claimant's statement of case should be struck out as per the 1st and 2nd defendants' application, it stands to reason that there is no need to determine whether or not judgment in default ought to be entered against the 1st and 2nd defendants.

ORDERS

(1) The statement of case of the claimant is struck out as disclosing no reasonable grounds for bringing the claim and as an abuse of the process of the court.

(2) Costs to the 1st and 2nd defendants/applicants to be agreed or taxed.

(3) Counsel for the 1st and 2nd defendants/applicants to prepare file and serve order.

Luciana Jackson
Master in Chambers (Ag)