



[2025] JMSC Civ 35

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. SU 2019 CV 03289

**BETWEEN HUPERT GAYLE CLAIMANT/
RESPONDENT**

**AND THE TRANSPORT AUTHORITY DEFENDANT/
APPLICANT**

IN CHAMBERS

**Mrs Marva Hanson-Burnett instructed by Hanson Burnett Law for the
Claimant/Respondent**

**Mr Harrington McDermott instructed by McDermott Reynolds McDermott for the
Defendant/Applicant**

Heard: 31 October 2024 and 4 April 2025

**Civil Procedure – Application to strike out claimant’s statement of case – Claim
for wrongful dismissal – Whether the claimant’s statement of case discloses any
reasonable grounds for bringing the claim – The distinction between a claim for
wrongful dismissal and one for unjustifiable dismissal – Whether the claimant’s
statement of case ought properly to be struck out – Sections 11 and 11B, The
Labour Relations and Industrial Disputes Act – Rules 9.6 and 26, Civil Procedure
Rules, 2002, as amended**

A. NEMBHARD J**INTRODUCTION**

[1] For approximately sixteen (16) years, the Claimant, Mr Hupert Gayle, was employed to the Defendant, The Transport Authority (“the Authority”), as a Route Inspector. In or around July 2017, the Disciplinary Tribunal of the Authority found Mr Gayle guilty of an offence and recommended that his services be terminated. Acting on that recommendation, the Authority dismissed Mr Gayle. Mr Gayle contends that his dismissal was wrongful and consequently, he initiated the instant Claim by virtue of which he seeks the following Orders: -

- i. A Declaration that his purported dismissal is wrongful, null and void.
- ii. That he be paid his salary and other benefits that would have fallen due from the date of his dismissal to the date of judgment.
- iii. That he be paid the costs of this action.

[2] For its part, the Authority raises important questions in relation to the propriety of the forum which Mr Gayle has selected for the adjudication of his complaint in this regard. Additionally, the Authority raises questions in relation to the legal bases on which the instant Claim was initiated against it. The Authority contends specifically that Mr Gayle has failed to identify the term(s) of the contract of employment which he alleges that it breached by its dismissal of him. The Authority further contends that the instant Claim largely concerns allegations that the Authority acted unfairly/unjustifiably in its dismissal of Mr Gayle. These allegations, the Authority maintains, fall properly within the remit of the Industrial Disputes Tribunal (“the IDT”), pursuant to the Labour Relations and Industrial Disputes Act (“the LRIDA”). It is against this background that the Authority seeks to have the Claimant/Respondent’s Statement of Case struck out.

[3] The application to strike out the Claimant's Statement of Case is contained in a Notice of Application for Court Orders, which was filed on 24 October 2019. By virtue of that application the Authority seeks the following Orders: -

1. That the Claimant's Claim against the Defendant be struck out in its entirety.
2. That judgment be entered against the Claimant in favour of the Defendant.
3. Alternatively, that the portions of the Claimant's Statement of Case seeking a Declaration that the Claimant's dismissal was unlawful, be struck out.
4. That the portions of the Claimant's Statement of Case seeking the payment of salary and other benefits from the date of the Claimant's dismissal to the date of judgment, be struck out.
5. That the portions of the Claimant's Statement of Case seeking a Declaration that the Claimant's dismissal was wrongful, be struck out.
6. A Declaration that this Honourable Court has no jurisdiction to try the Claim herein.
7. Costs.
8. Such further or other relief as this Honourable Court deems fit.

[4] The application is made on the following bases: -

- i. That the Claimant's Claim is one which seeks to challenge the unfairness of his dismissal. The Supreme Court has no jurisdiction over matters of unfair dismissal. The Labour Relations and Industrial Disputes Act ("LRIDA"), deals with claims arising from an unfair dismissal and such matters are adjudicated over by the Industrial

Disputes Tribunal. Similarly, the payment of salary and benefits due to an employee who was unfairly dismissed falls within the remit of the Industrial Disputes Tribunal and not the Supreme Court. The Claimant's Statement of Case therefore discloses no reasonable grounds for bringing a claim to challenge the unfairness of his dismissal and the Supreme Court has no jurisdiction to try the Claim.

- ii. That the Claim herein is an attempt to circumvent the process set out under the LRIDA for bringing claims before the Industrial Disputes Tribunal. The Claimant's Claim is therefore an abuse of the process of the Court.
- iii. That the Claimant's Statement of Case makes no allegation of breach of contract on the part of the Defendant. The Claimant's Statement of Case therefore discloses no reasonable grounds for bringing a claim in wrongful dismissal.
- iv. That pursuant to rule 26.3(1)(b), the Court can strike out a statement of case or part thereof if it appears to the Court that the statement of case or 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.
- v. That pursuant to rule 26.3(1)(c), the Court can strike out a statement of case or part thereof if it appears to the Court that the statement of case or part to be struck out discloses no reasonable grounds for bringing the claim.
- vi. That pursuant to rule 9.6, the Court has the power to make a Declaration that it has no jurisdiction to try a claim.

BACKGROUND

The factual matrix

- [5] The Claimant, Mr Hupert Gayle, was employed to the Defendant, The Transport Authority. For approximately sixteen (16) years, Mr Gayle worked as a Route Inspector, having started in or around August 2001.¹ Mr Gayle's written Contract of Employment expressly provides for the termination of his employment as follows: -

"TERMINATION OF EMPLOYMENT:

Termination of your employment, after confirmation, is subject to:

1. One (1) month's notice in writing on either side. The notice is exclusive of vacation leave."

- [6] Mr Gayle alleges that in or around October 2004, he was warned by a Senior Inspector that he had committed the offence of failing to comply with reasonable instructions given to him by a Supervisory Officer. Mr Gayle maintains that though he was warned that warning does not amount to his guilt.²

- [7] Over a decade later, in or around July 2017, Mr Gayle was the subject of a disciplinary hearing concerning allegations of breaches of the Authority's Offences and Disciplinary Codes. At the conclusion of this hearing, the Disciplinary Tribunal of the Authority found Mr Gayle guilty of insubordination. By way of a letter from the Authority dated 11 July 2017 and concerning the outcome of the disciplinary hearing, Mr Gayle was advised of the following: -

"d. Count 4: Item 47 - Insubordination: wilfully disrespectful and/or disobedient or rebellious or fail to comply with a reasonable instruction(s); being rude and disrespectful to supervising officer, or behaving in a

¹ See – Paragraphs 2 and 10 of the Affidavit of Hupert Gayle, which was filed on 15 August 2019. See also, Exhibit "A1", which contains a copy of the Contract of Employment bearing the signature of Mr Hupert Gayle and Mrs Zonia Foster-Maynard, the Manager of the Human Resource and Administration Division of The Transport Authority.

² See – Paragraph 5 of the Affidavit of Hupert Gayle, which was filed on 15 August 2019

rebellious manner, thus causing a breakdown in relationships or frustrating the work process; or refusing to performed [sic] assumed work functions which warrants dismissal for a second offence. Based on the evidence proffered, the Tribunal found you guilty of this offence and recommended dismissal as this is your second offence.

In line with the foregoing, the Transport Authority will be upholding the decision of the Tribunal for the charges outlined in Count 2 and Count 4. In addition to the written warning for Count 2, based on the ascribed penalty for Count 4, your services will be terminated effective Wednesday, July 12, 2017.

...

In accordance with the Transport Authority Grievance Procedures and Disciplinary Code, appeals can be made in writing to the Managing Director within seven (7) days upon receipt of this letter. The grounds for appeal must be clearly stated.”

- [8] Mr Gayle was dismissed on 12 July 2017.³ Mr Gayle appealed this decision, and the Appeal Committee of the Authority upheld the dismissal.⁴ Aggrieved by that decision, Mr Gayle initiated the instant Claim.

The position advanced by the Claimant/Respondent

- [9] Mr Gayle asserts that he was unlawfully or wrongfully dismissed by the Authority. He contends that paragraph 4.4.3 of the Transport Authority Grievance Procedure and Disciplinary Codes permits the dismissal of an employee if there were a prior offence within a year of the decision to dismiss an employee. Mr Gayle further asserts that the Authority had no authority to dismiss him and that

³ See – Exhibit “HG1”, which contains a copy of the letter dated 11 July 2017 and addressed to Mr Hupert Gayle, bearing the signature of Mr Audley Carter, the General Manager of Operations of The Transport Authority. See also, paragraph 3 of the Affidavit of Hupert Gayle, which was filed on 15 August 2019.

⁴ See – Exhibit “HG3”, which contains a copy of the letter dated 3 May 2019, addressed to Mr Hupert Gayle, bearing the signature of Mr Cecil Morgan, Managing Director of The Transport Authority. See also, paragraph 7 of the Affidavit of Hupert Gayle, which was filed on 15 August 2019. In this letter, it is stated: “...Therefore, this letter serves to confirm the termination of your service with the Authority with effect from July 12, 2017.”

his dismissal was a nullity.⁵ Mr Gayle maintains that he ought to have been reinstated in his job and paid all benefits which he maintains he was denied since 2017.⁶

[10] Mr Gayle initiated the instant Claim by way of a Fixed Date Claim Form, along with an accompanying Affidavit, each of which was filed on 15 August 2019. By way of the Fixed Date Claim Form, Mr Gayle seeks the following: -

- i. A Declaration that his purported dismissal is wrongful, null and void.
- ii. That he be paid his salary and other benefits that would have fallen due from the date of his dismissal to the date of judgment.
- iii. That he be paid the costs of this action.

The position advanced by the Defendant/Applicant

[11] The Authority contends that Mr Gayle has not identified the allegations of breach of contract to sustain a claim of unlawful/wrongful dismissal against it. The Authority asserts that it is the LRIDA which governs claims arising from an unfair dismissal and that these claims are statutorily within the remit of the IDT. The Authority further asserts that the filing of the instant Claim is tantamount to an attempt to circumvent the process set out under the LRIDA for bringing claims before the IDT.

THE ISSUES

[12] The application raises the following salient issues for the Court's determination: -

⁵ See – Fixed Date Claim Form, which was filed on 15 August 2019. Mr Gayle's case is that the finding of The Transport Authority's Disciplinary Tribunal and the Appeal Tribunal was unlawful, null and void for the reasons that the offence in respect of which the Claimant was dismissed only attracts the penalty of dismissal if there was a prior similar offence and further that there was properly no such prior offence but even if there was one, it had been committed fourteen years earlier and such an offence could not be taken into account after one year.

⁶ See – paragraph 9 of the Affidavit of Hupert Gayle, which was filed on 15 August 2019.

- i. Whether the Claimant's Claim ought properly to be struck out in its entirety.
- ii. Alternatively, whether the impugned portions of the Claimant's Statement of Case ought properly to be struck out.

[13] In seeking to resolve these issues, the following sub-issues must also be determined: -

- a. Whether the Supreme Court of Judicature of Jamaica has the jurisdiction to try the instant Claim.
- b. Whether the Claimant's Statement of Case discloses any reasonable ground(s) for bringing the Claim.

THE LAW

The law concerning wrongful dismissal

[14] The Halsbury's Laws of England⁷ defines the term 'wrongful dismissal' as follows: -

"A wrongful dismissal is a dismissal in breach of the relevant provision in the contract of employment relating to the expiration of the term for which the employee is engaged. To entitle the employee to sue for damages, two conditions must normally be fulfilled, namely:

- (1) the employee must have been engaged for a fixed period, or for a period terminable by notice, and dismissed either before the expiration of that fixed period or without the requisite notice, as the case may be; and*
- (2) his dismissal must have been without sufficient cause to permit his employer to dismiss him summarily.*

⁷ Employment (Volume 39 (2021), paragraph 832

The common law claim for wrongful dismissal must be considered entirely separately from the statutory claim for unfair dismissal. The existence of the latter does not, however, abrogate the common law claim, which may still be particularly appropriate in two cases:

- (a) where the employee is not entitled to bring a claim for unfair dismissal.*
- (b) where the damages for wrongful dismissal are likely to exceed the statutory maximum placed on compensation for unfair dismissal (as, for example, in the case of a well-remunerated employee on long notice or a fixed-term contract)."*

[15] In the Canadian authority of **Wallace v United Grain Growers Ltd**,⁸ McLachlin J opined as follows: -

"The action for wrongful dismissal is based on an implied obligation in the employment contract to give reasonable notice of an intention to terminate the relationship (or pay in lieu thereof) in the absence of just cause for dismissal...A 'wrongful dismissal' action is not concerned with the wrongness or rightness of the dismissal itself. Far from making dismissal a wrong, the law entitles both employer and employee to terminate the employment relationship without cause. A wrong arises only if the employer breaches the contract by failing to give the dismissed employee reasonable notice of termination. The remedy for this breach of contract is an award of damages based on the period of notice which should have been given."

[16] Wrongful dismissal is wholly distinguishable from unfair or unjustifiable dismissal, a matter which is statutorily outside of the remit of the powers of the court. The court has no jurisdiction to try unfair or unjustifiable dismissal claims. There is a clear distinction between wrongful/unlawful dismissal and unfair/unjustifiable dismissal. The learned authors Corthésy and Harris-Roper in their text,

⁸ (1997) 152 DLR (4th) 1, 39

Commonwealth Caribbean Employment and Labour Law,⁹ distinguish between wrongful dismissal and unfair dismissal¹⁰ in the following way: -

“In light of the foregoing discourse, it is necessary to clarify that wrongful/unlawful dismissal and unfair/unjustifiable dismissal are not of the same genus. The latter is entirely a creature of statute, while the former is strictly a common law claim.

...

Thus, one of the most critical distinguishing features of the two concepts is that ‘...unfair dismissal involves an enquiry into the overall merits of the dismissal (substance and procedure) whereas the common law action for wrongful dismissal essentially...looks typically at the form of the dismissal’. Therefore, a person can be both terminated wrongfully and unfairly dismissed on the same set of facts and can, in principle, claim redress for both wrongs; the two are not mutually exclusive.”

[17] Brooks JA (as he then was) in the authority of **Edward Gabbidon v Sagicor Bank Jamaica Limited (formerly RBTT Jamaica Limited)** is quoted as follows:

-

*“[2] A common law principle regarding wrongful dismissal has remained virtually unchanged for over 100 years. In 1908, the House of Lords, in **Addis v Gramophone Company Limited** 1909 AC 488; [1908-1910] All ER Rep 1, HL (Addis), stated that, although an employee was entitled to damages for the loss suffered as a result of the employer’s failure to give proper notice of termination, damages will not be awarded to the employee for the manner of the dismissal, the actual loss of the job, or pain and distress that may have been suffered, as a consequence of the contract of employment having been terminated.*

[3] Since 1908, the social and political attitude towards employment has changed. Legislatures in various countries, including the United Kingdom (UK) and Jamaica, have provided varying alternative statutory measures protecting

⁹ Routledge, 2014

¹⁰ See also – Pages 155 and 156 of the Commonwealth Caribbean Employment and Labour Law, which tabulates the major differences between wrongful and unfair dismissal claims.

employees from oppressive dismissals. In the interim too, the Addis principle has been criticised, but it has not been overturned in either the UK or Jamaica.”

[18] Further, from paragraphs **[18]** to **[90]**, Brooks JA comprehensively distinguished between wrongful dismissal and unjustifiable dismissal, tracking the trajectory of the development of our law in our jurisdiction, the United Kingdom and other commonwealth jurisdictions. Brooks JA made the following important pronouncements: -

“[18] It is important, at the outset, to draw the distinction between wrongful dismissal and unfair dismissal. Wrongful dismissals are, essentially, breaches of the contract of employment, and are the subject of litigation through the courts, while unfair dismissals are unreasonable dismissals in substance and/or procedure. A dismissal may be wrongful yet not be unfair and vice versa.

...

*[22] The shift in attitude also brought about the concept of viewing dismissals as being unfair. Lord Dyson SCJ in **Edwards v Chesterfield Royal Hospital NHS Foundation Trust; Botham v Ministry of Defence** [2011] UKSC 58; [2012] 2 All ER 278, has provided a concise exposition of examples of unfair dismissals. He said, in part, at paragraph [40] of his judgment:*

‘...A dismissal may be unfair because it is substantively unfair to dismiss the employee in the circumstances of the case and/or because the manner in which the dismissal was effected was unfair. The manner may be unfair because it was done in a humiliating manner or because the procedure adopted was unfair inter alia because the agreed disciplinary procedure which led to the dismissal was not followed. It may be unfair because defamatory findings were made which damage the employee’s reputation and which, following a dismissal, make it difficult for the employee to find further employment. Any such complaint was intended by [the UK] Parliament to be adjudicated on by the specialist employment tribunal...’

Complaints of unfair dismissals are dealt with, in the UK, by the statutorily established tribunals dealing with industrial relations. Such complaints are not adjudicated upon in the courts.

...

*[40] This issue was considered by the UK Supreme Court, in **Edwards v Chesterfield Royal Hospital**. In that case, their Lordships held, in part, that “if provisions about disciplinary procedure were incorporated as express terms into an employment contract, they were not ordinary contractual terms”, and not actionable at common law (see the headnote, at page 279, and Lord Dyson SCJ’s judgment at paragraph [38]). That curious finding resulted from the statutory framework. His Lordship went on to explain, at paragraph [40], that:*

‘The unfair dismissal legislation precludes a claim for damages for breach of contract in relation to the manner of a dismissal, whether the claim is formulated as a claim for breach of an implied term or as a claim for breach of an express term which regulates disciplinary procedures leading to a dismissal...Parliament did not intend that an employee could choose to pursue his complaint of unfair dismissal in the ordinary courts, free from the limitations carefully crafted by Parliament for the exercise of this statutory jurisdiction.’

*Lord Dyson SCJ went on to hold, at paragraph [49] of his judgment, that **Johnson v Unisys** “is a bar to a claim for damages for breach of an express term of an employment contract as to the manner of a dismissal”.*

*[41] There have been no later cases in the UK Supreme Court, which address **Johnson v Unisys** or **Edwards v Chesterfield Royal Hospital**. Before the decision in **Edwards v Chesterfield Royal Hospital**, the Privy Council, in the case of **Reda v Flag Ltd**, an appeal emanating from Bermuda, did consider **Johnson v Unisys and Malik**. Their Lordships found, in that context, that:*

- a. an express provision relating to the termination of a contract of employment cannot be qualified by the implied term of mutual trust and confidence.*

- b. *the implied term must yield to the express provisions of the contract.*
- c. *where the contract allows for dismissal without cause, the exercise of that power does not have to be justified.*
- d. *it is only where the contract does not contain an express provision for its determination, that it is generally, though not invariably, subject to an implied term that it is determinable by reasonable notice.”*

The Labour Relations and Industrial Disputes Act and the IDT

[19] By virtue of the LRIDA, it is the IDT which is statutorily empowered to preside over and determine industrial disputes,¹¹ and to make awards in matters which concern the dismissal of a worker which is found to be unjustifiable.¹² Section 11 of the LRIDA enables the responsible Minister to refer industrial disputes to the IDT for settlement, after receiving a request from all the parties to any industrial dispute. Section 11B of the LRIDA imposes a timeframe within which a worker, who is the subject of a disciplinary action, may lodge a complaint with the responsible Minister. Section 11B provides as follows: -

“11B. Notwithstanding the provisions of sections 9, 10, 11 and 11A, where an industrial dispute exists in any undertaking which relates to disciplinary action taken against a worker, the Minister shall not refer that dispute to the Tribunal unless, within twelve months of the date on which the disciplinary action became effective, the worker lodged a complaint against such action with the Minister.”

[20] Brooks JA in the authority of **The Industrial Disputes Tribunal v University of Technology Jamaica and Anor**^{13 14} made the following pronouncements: -

¹¹ See – Section 7 of The Labour Relations and Industrial Disputes Act

¹² See – Section 12(4B)(b) of The Labour Relations and Industrial Disputes Act

¹³ [2012] JMCA Civ 46

¹⁴ The parties appealed this Court of Appeal decision before the Board of the Privy Council. This appeal failed and the Board of the Privy Council found that the Court of Appeal was correct on ‘both the role of the IDT in dismissal cases and the role of the Supreme Court in reviewing the decisions of the IDT.’

*“14. Also, of critical importance in identifying the role of the IDT, in respect of disputes referred to it, is that, in determining whether a dismissal is unjustifiable, it is not bound by the strictures of the common law relating to wrongful dismissal. Ellis J, in **In re Grand Lido Hotel Negril** Suit No M-98/1995 (delivered 15 May 1997), said, at page 14 of the judgment:*

‘I am therefore of the view that a dismissal may be lawful at common law but still not justifiable under the [LRIDA]. Section 12(5)(c) does not direct itself to the lawfulness of the dismissal.’

[21] In the authority of **Village Resorts Limited v IDT**, Rattray P made the following pronouncements concerning the interpretation and the effect of the statutory regime established by the LRIDA: -

“...To achieve this Parliament has legislated a distinct environment including the creation of a specialized forum, not for the trial of actions but for the settlement of disputes.

...

The Labour Relations and Industrial Disputes Act is not a consolidation of existing common law principles in the field of employment. It creates a new regime with new rights, obligations and remedies in a dynamic social environment radically changed, particularly with respect to the employer/employee relationship at the workplace, from the pre-industrial context of the common law. The mandate to the Tribunal, if it finds the dismissal ‘unjustifiable’ is the provision of remedies unknown to the common law.”

[22] Additionally, in the authority of **Edward Gabbidon**, at paragraph **[69]**, Brooks JA is quoted as follows: -

“[69] In 2010, Parliament amended the LRIDA (by the Labour Relations and Industrial Disputes (Amendment) Act, 2010) to expand the ambit of the LRIDA as well as the powers of the IDT. The LRIDA, consequently, now also regulates disputes involving individual employees and allows the IDT to consider the cases of individual employees who have disputes with their employer. Accordingly, the IDT may now address complaints by an individual employee, that he or she has

been unjustifiably dismissed. Section 12(5)(c) of the LRIDA provides that the IDT may, in cases where it finds unjustifiable dismissal, order that the employee be:

- i. re-instated with a payment of lost wages;*
- ii. paid compensation for the manner of dismissal; or*
- iii. given such other relief as the IDT may determine.”*

The power of the Court to strike out a party’s statement of case

[23] The Court is empowered to strike out a party’s statement of case or a part of same in specified circumstances. Rule 26.3 of the Civil Procedure Rules, 2002, as amended (“the CPR”) outlines the parameters within which a court may exercise its discretion to strike out a party’s statements of case. The rule states as follows: -

“26.3(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; or*
- (d) that the statement of case or the part to be struck out is prolix or does not comply with the requirements of Parts 8 or 10.”*

[24] The traditional approach to striking out a party’s statement of case is that it is appropriate only in plain and obvious cases. Those cases which require prolonged and serious argument are unsuitable for striking out.¹⁵

¹⁵ See – **Williams & Humbert Ltd v W & H Trade Marks (Jersey) Ltd** [1986] AC 368, HL, per Lord Templeman and confirmed in **Three Rivers District Council v Bank of England (No 3)** [2001] 2 All ER 513, HL and **S & T Distributors Ltd v CIBC Jamaica Ltd et al** SCCA No. 112/2004, unreported, judgment delivered on 31 July 2007. This position

[25] In **Dotting v Clifford & The Spanish Town Funeral Home Ltd**,¹⁶ McDonald Bishop J (as she then was) is quoted as follows: -

*“In considering this application to strike out, I am mindful that such a course is only appropriate in plain and obvious cases. The authorities have established that a claim may be struck out where it is fanciful, that is, entirely without substance or where it is clear that the statement of case is contradicted by all the documents or material on which it is based (**Three Rivers District Council v Bank of England (No. 3)** [2003] 2 A.C. 1). It may also be said, on the guidance of the relevant authorities, that in determining the issue as to whether the claim should be struck out one may seek to ascertain, among other things, whether the claimant’s pleadings have given sufficient notice to the defendant of the case she wishes to present and whether the facts pleaded are capable of satisfying the requirements of the tort alleged. The ultimate question that should be considered in determining whether to strike out the statement of case on the basis that it discloses no reasonable cause for bringing the claim seems to be essentially, the same as that in granting summary judgment, that is: the claim against the defendant is one that is not fit for trial at all”.*

[26] The Board of the Judicial Committee of the Privy Council affirmed this approach in the authority of **Peerless Limited v Gambling Regulatory Authority and others**.¹⁷ At paragraph 24, Sir Paul Girvan had the following to say: -

“The power to terminate proceedings without any hearing on the merits is one which should be exercised with considerable caution and in a proportionate way. In its armoury of powers, the court has other less draconian ways of marking its disapproval of the conduct of a party and its legal advisers. It can, for example, make a wasted costs order against the legal advisers, it may disallow costs, or it may award the costs of the proceedings for the leave application to the respondent even if leave is granted.”

was reiterated in the case of **Herbert A. Hamilton v Minister of National Security and Attorney General of Jamaica** [2015] JMSC Civ 39.

¹⁶ Claim No. 2006 HCV 0338, unreported, judgment delivered on 19 March 2007, per McDonald Bishop J (as she then was), at paragraph 10

¹⁷ [2015] UKPC 29

- [27] An application to strike out a statement of case should be brought by way of a notice of application for court orders¹⁸ and, where certain facts need to be proved, should be supported by evidence on affidavit.
- [28] Additionally, the court has the power to treat an application to strike out as one for summary judgment. This enables the court to dispose of insubstantial claims or issues which do not merit a full investigation at trial.¹⁹

The burden and standard of proof

- [29] The legal burden of proof as to any fact in issue in a civil case lies upon the party who affirmatively asserts that fact in issue and to whose claim or defence proof of the fact in issue is essential.²⁰ The standard of proof in civil cases is satisfied on a balance of probabilities.
- [30] In **Miller v Minister of Pensions**,²¹ Denning J, speaking of the degree of cogency which evidence must reach in order that it may discharge the legal burden in a civil case, said: -

“That degree is well settled. It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say ‘we think it more probable than not’, the burden is discharged but if the probabilities are equal it is not.”

THE SUBMISSIONS

The submissions advanced by the Defendant/Applicant

- [31] Learned Counsel Mr Harrington McDermott submitted that it is well established at common law, that wrongful dismissal has nothing to do with the ‘wrongness’ or ‘rightness’ of the dismissal of the employee. This cause of action, he maintained,

¹⁸ In accordance with the provisions of Part 11 of the CPR

¹⁹ See – **Taylor v Midland Bank Trust Co Ltd** [1999] All ER (D) 831

²⁰ See – **Murphy on evidence**, 9th edition, at page 71, paragraph 4.5

²¹ [1947] 2 All ER 372, at pages 373-374

is concerned with whether the employer dismissed the employee in breach of contract. In support of this submission, Mr McDermott relied on the authorities of **Edward Gabbidon v Sagicor Bank Jamaica Limited**²² and **Fernandes (Distillers) Limited v Transport and Industrial Workers Union**.²³ Mr McDermott also submitted that to satisfy the pleading requirement, a claim for wrongful dismissal must therefore disclose a contract provision which was breached by virtue of the claimant's termination. It was submitted that the typical example of this is where the claimant is dismissed in breach of a notice term set out in his contract.

- [32] In the present instance, Mr McDermott submitted, Mr Gayle has failed to identify any provision of his contract of employment which was breached by the Authority. Mr McDermott maintained that although Mr Gayle has used the term "wrongful", there is in fact no allegation which grounds a substantive wrongful dismissal claim. Mr McDermott further maintained that Mr Gayle's Statement of Case and/or the portions thereof which seek a Declaration that his dismissal was wrongful/unlawful, should be struck out pursuant to rule 26.3(1)(c) of the CPR.
- [33] Alternatively, Mr McDermott asserted that the courts have long made the distinction between whether a dismissal is wrongful/unlawful as opposed to being unfair/unjustifiable. The distinction is, Mr McDermott asserted, that wrongful dismissals are breaches of the contract of employment and are the subject of litigation through the court, while unfair dismissals are unreasonable dismissals in substance and or procedure. To buttress this submission, Mr McDermott relied on the dicta of Lord Dyson in **Edwards v Chesterfield Royal Hospital NHS Foundation Trust; Botham v Ministry of Defence**.²⁴
- [34] It was submitted that Mr Gayle's complaint is essentially that the Authority arrived at an incorrect conclusion about the disciplinary charges which were proffered against him and the sanction of dismissal which was imposed. Mr McDermott

²² [2020] JMCA Civ 9

²³ (1968) 13 WIR 336 at paragraph 19 per Wooding CJ

²⁴ [2011] UKSC 58

also submitted that the nature of the Claim against the Authority is that the sanction of dismissal was unjustifiable. It was further submitted that although Mr Gayle has referred to his dismissal as being “wrongful”, the Claim is, in substance, a complaint concerning the ‘unfairness’ of his dismissal.

- [35] In that regard, Mr McDermott asserted that the Supreme Court has no jurisdiction over unfair dismissal matters and further, that, in accordance with rule 9.6 of the CPR, the Court has the power to make a Declaration that it has no jurisdiction to try the instant Claim. Alternatively, Mr McDermott maintained that the Court may also strike out the Claimant’s Statement of Case. Further, Mr McDermott submitted that Mr Gayle failed to disclose any reasonable ground(s) for commencing the instant Claim and consequently, that this raises another ground upon which the Claim stands to be struck out. To support this submission, Mr McDermott relied on the authority of **Trillian Douglas v Commissioner of Police**.²⁵

The submissions advanced by the Claimant/Respondent

- [36] Learned Counsel Mrs Marva Hanson-Burnett commenced her submissions by asserting that Mr Gayle was employed to the Authority, a statutory body which is established by the Transport Authority Act. Mrs Hanson-Burnett asserted that Mr Gayle occupied the statutory office of Transport Authority Inspector, an office which he occupied by virtue of being so designated by the relevant Minister.
- [37] Mrs Hanson-Burnett further submitted that the disciplinary regime which forms part of the terms of Mr Gayle’s employment establishes a schedule of offences, some of which attract a penalty of dismissal whilst others do not. Mrs Hanson-Burnett asserted that subject to the effect of the provisions of the Employment Termination and Redundancy Payments Act, the employment of a worker may be terminated with one (1) month’s notice, if the worker is found guilty of a disciplinary offence which attracts dismissal as a penalty.

²⁵ [2017] JMSC Civ 183 at paragraph 28

- [38] In respect of the jurisdiction of the Court to hear the substantive Claim, Mrs Hanson-Burnett submitted that the Authority has formed an erroneous view. Mrs Hanson-Burnett maintained that the Claim is one for wrongful dismissal. It was further submitted that a claim for wrongful dismissal is a well-known common law action within the ordinary jurisdiction of the Courts. To buttress this submission Mrs Hanson-Burnett relied on the authority of **Kaiser Bauxite Co. v Cadien**.²⁶
- [39] It was also submitted that the claim for unfair dismissal to which the Authority refers is one under the LRIDA. These claims, Mrs Hanson-Burnett agreed, are initiated by referral by the Minister of Labour, where he deems it fit so to do. Where the complaint relates to disciplinary matters, the Minister can only do so if a request is made within twelve (12) months of the disciplinary action of which the complaint is made. To support this submission, Mrs Hanson-Burnett referred to section 11B of the LRIDA. This remedy, Mrs Hanson-Burnett contended, is not available to Mr Gayle as he filed the instant Claim two (2) years after the disciplinary action was taken against him. Mrs Hanson-Burnett maintained that Mr Gayle was not trying to circumvent the provisions of the LRIDA. That Act, Mrs Hanson-Burnett agreed, creates a distinct regime which does not replace the common law claim for damages for wrongful dismissal. In this regard, Mrs Hanson-Burnett relied on the authority of the **University of Technology Jamaica v Industrial Disputes Tribunal**.²⁷
- [40] Additionally, Mrs Hanson-Burnett maintained that a claim for wrongful dismissal does not have to use the expression 'breach of contract' but must demonstrate that a claimant was dismissed for cause without that cause having been established. The usual common law remedy, Mrs Hanson-Burnett asserted, is Damages, the measure of Damages being the income that would have been earned had the claimant been given proper notice.
- [41] Finally, Mrs Hanson-Burnett urged the Court to dismiss the application with costs to Mr Gayle.

²⁶ 20 JLR 169

²⁷ [2017] UKPC 22

ANALYSIS AND FINDINGS

- [42] The authorities make it clear that on an application to strike out a party's statement of case, the court is constrained to assess the pleadings to determine whether to exercise its discretion to strike out a claim or portions of a claim. This exercise is to be done in accordance with the provisions of rule 26.3 of the CPR. The court is required to examine the pleadings to determine whether the current iteration of same discloses any reasonable ground(s) for bringing the claim. In the present instance, the Court must consider whether the elements of the cause of action of wrongful dismissal are established on the Claimant's Statement of Case.
- [43] By virtue of the Fixed Date Claim Form, which was filed on 15 August 2019, Mr Gayle seeks a Declaration that his dismissal was wrongful and consequentially, an award of Damages representing his salary and other benefits to which he would have been entitled, from the date of his dismissal to the date of judgment. The Fixed Date Claim Form was accompanied by the Affidavit of Hupert Gayle, which was also filed on 15 August 2019. It is on the face of those pleadings that the Court must determine whether the cause of action of wrongful dismissal is made out.
- [44] It is equally clear from the authorities that there is a distinction between claims for wrongful dismissal²⁸ and those for unfair or unjustifiable dismissal. The learned authors Corthésy and Harris-Roper, in their text **Commonwealth Caribbean Employment and Labour Law**,²⁹ provide the following context in respect of the cause of action of wrongful dismissal: -

"The term 'wrongful or unlawful' dismissal denotes a situation where the employer terminates the employment contract in breach of the provisions which govern the expiration of the contractual term. The status quo ante modern employment law legislation was characterized by a notice rule that hung over the

²⁸ It should be noted that wrongful or unlawful dismissal is the same cause of action and distinguishable from unfair or unjustifiable dismissal. In Jamaica, it appears more common that the term 'wrongful dismissal' is more commonly used.

²⁹ Routledge, 2014

nape of the employee like the sword of Damocles. At common law, either party has the right to terminate the employment contract by giving reasonable notice, even in the absence of a legitimate reason for doing so... Thus, if the employee was not given any notice, or was provided with a shorter period of notice than required by the contract, he would be wrongfully dismissed.

*An apt definition of the concept in case law is found in **Wallace v United Grain Growers Ltd**, where it was held that:*

The action for wrongful dismissal is based on an implied obligation in the employment contract to give reasonable notice of an intention to terminate the relationship (or pay in lieu thereof) in the absence of just cause for dismissal... A 'wrongful dismissal' action is not concerned with the wrongness or rightness of the dismissal itself. Far from making dismissal a wrong, the law entitles both employer and employee to terminate the employment relationship without cause. A wrong arises only if the employer breaches the contract by failing to give the dismissed employee reasonable notice of termination.

The dismissal itself must be clear and unequivocal, indicating to the relevant party that the contract will be determined on a particular date... When dismissal is contemplated, the employee must also be personally notified that his contract is being terminated; and once notification is given, it cannot be unilaterally withdrawn- mutual consent is required.

The unlawful dismissal claim may also be sustained in circumstances where the contract stipulates a particular procedure to be followed for termination to be effected and this was not adhered to. Additionally, if the contract restricts the grounds on which workers can be dismissed, and they are dismissed for other reasons, there may also be an actionable claim for wrongful dismissal. Another instance where unlawful dismissal may be successfully claimed is the termination of a fixed term contract before the intended expiration date when there is no express notice clause. It should also be noted that unlawful dismissal also applies to the actions of employees who terminate their employment by giving no or inadequate notice.

...

Where either party to the contract has not been provided with the appropriate notice, as required by the contract, statute or imputed by the court (reasonable notice), a payment in lieu of notice could also come into play to address the lawfulness of the termination.”

[45] To mount a claim for wrongful dismissal, the following must be established on a claimant’s statement of case: -

- i. A contract of employment naming the claimant as an employee³⁰ of the (former) employer.
- ii. The statement of case ought to disclose or to adduce evidence that there was either no or no adequate notice given regarding the termination of the employee’s services (or alternatively, that the claimant did not receive payment in lieu of notice. This is best done by identifying the term(s) or clause(s) concerned with notice period for the termination of the contract of employment between the parties. This is necessary as the claimants in these matters normally pursue damages for the wrongful dismissal alleged and the court is limited to an award of damages (limited to the amount that would have been payable for the notice, or a contracted figure, or the remainder of the unexpired fixed term contract).
- iii. Lastly, but arguably most importantly, a claim for wrongful dismissal is also subject to a limitation period, specifically the six-year limitation period ascribed to civil claims.

[46] In light of the foregoing, Mr Gayle’s Statement of Case must disclose that he received either no or no adequate notice or no payment in lieu of notice, in

³⁰ See section 2(1) of The Employment (Termination and Redundancy Payments) Act, which defines an “employee” as an ‘individual who has entered into or works (or, in the case of a contract which has been terminated, worked) under a contract with an employer, whether the contract be for manual labour, clerical work or otherwise, be express or implied, oral or in writing, but does not include – (a) any person employed by the Government; or (b) any person employed in the service of the Council of the Kingston and St. Andrew Corporation or in the service of any Parish Council, and “employer” and any reference to employment shall be construed accordingly;”

accordance with his employment contract. The reasons for the dismissal, the manner of the dismissal or the procedure by which the dismissal was done do not form part of the considerations of a court before which a claim for wrongful dismissal is brought. Those considerations are properly the concerns of the IDT. The IDT is the sole forum for the ventilation of the grievances, complaints and allegations concerning unfair or unjustifiable dismissal.

[47] On an examination of the Fixed Date Claim Form, which was filed on 15 August 2019, it is apparent that Mr Gayle seeks a Declaration that his purported dismissal was wrongful, null and void, and that he be paid his salary and other benefits that would have fallen due from the date of his dismissal to the date of judgment.

[48] It is equally apparent that the Affidavit of Hupert Gayle, which supports the Fixed Date Claim Form, largely contains averments that are tonally dissonant from the Orders sought by way of the Fixed Date Claim Form. In particular, the averments made in Mr Gayle's affidavit comprise complaints surrounding the circumstances of his dismissal. Paragraphs 8 and 9 of the Affidavit of Hupert Gayle bear repeating: -

"8. The decision and appeal dismissing me are wrongful because the Disciplinary Rules only permit my dismissal if there was a prior offence within a year of the instant decision as set out at paragraph 4.4.3 of the Transport Authority Grievance Procedure and Disciplinary Codes with which I had been furnished. The supposed prior offence as per Exhibit HG2 was committed almost fourteen years prior.

9. In the circumstances there was no power to dismiss me and my dismissal is unlawful, and a nullity and I ought to be re-instated in my job and paid all my benefits which have been denied since 2017."

[49] These paragraphs are bereft of averments that would buttress a claim for wrongful dismissal. The Court so finds because these paragraphs appear to be primarily concerned with the substance of Mr Gayle's dismissal and the procedure by which he was dismissed and not with the form of that dismissal.

Significantly, the Court observes that the first time that mention is made of the form of Mr Gayle's dismissal is in the Written Submissions which were advanced by Mrs Hanson-Burnett.

- [50]** The Court is unable to find any evidence, averments, or pleadings which substantiate the Claim for wrongful dismissal. The Court is equally unable to evince any reference to a specific term(s) or clause(s) of the contract of employment which was alleged to have been breached by the Authority, and which would demonstrate reasonable ground(s) for bringing the Claim for wrongful dismissal.
- [51]** The Court also finds that the allegation of wrongful dismissal is largely unsupported by the averments made in the affidavit evidence of Mr Gayle. As demonstrated by the authorities, the court before whom a wrongful dismissal claim is brought will primarily seek to determine whether notice (adequate or inadequate) was given or alternatively, whether the employee received payment in lieu of notice. Regrettably, as presently drafted, there is no reference to either. The averments made revolve around the reason(s) for Mr Gayle's dismissal. Regrettably, in those circumstances, the Court is constrained to find that Mr Gayle's Statement of Case is woefully deficient in this regard.
- [52]** Mr Gayle's concerns in relation to the reasons for his dismissal, the manner of his dismissal and the procedure by which he was dismissed colour the entirety of his Claim. The authorities are clear that the proper forum for the ventilation of any issue regarding the substance and/or procedure of Mr Gayle's dismissal is the IDT. Consequently, the Court is constrained to accept the submissions of Mr McDermott and finds that Mr Gayle's Statement of Case fails to demonstrate any reasonable ground(s) for bringing the Claim.
- [53]** In the result, the Court finds that Mr Gayle's Statement of Case ought properly to be struck out.

DISPOSITION

[54] It is hereby ordered as follows: -

1. The Claimant's Statement of Case is struck out.
2. It is hereby declared that the Supreme Court of Judicature of Jamaica has no jurisdiction to try the Claim herein.
3. The Costs of the Claim are awarded to the Defendant against the Claimant and are to be taxed if not further agreed.
4. The Costs of the Notice of Application for Court Orders, which was filed on 24 October 2019, are awarded to the Defendant against the Claimant and are to be taxed if not further agreed.
5. The Defendant's Attorneys-at-law are to prepare, file and serve this Order.