

THE REPUBLIC OF TRINIDAD AND TOBAGO

**IN THE HIGH COURT OF JUSTICE
SUB-REGISTRY, SAN FERNANDO**

Claim No. CV 2016-02462

BETWEEN

DOOLAM REKHA

Claimant

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Defendant

Before Her Honour Madam Justice Eleanor J. Donaldson-Honeywell

Appearances:

Mr. Anand Ramlogan SC, Mr. Kent Samlal, Ms. Jayanti Lutchmedial and Mr. Douglas Bayley
Attorneys-at-Law for the Claimant.

Mr. Douglas Mendes SC, Mr. Michael Quamina, Mrs. Zelica Haynes Soo-Hon and Mrs Kamala
Mohammed-Carter Attorneys-at-Law for the Defendant

Delivered on: January 10, 2018

Judgement

I. Introduction

1. The Claimant is one of a number of former employees of the Strategic Services Agency [SSA] established in 1995 under the **SSA Act Chap 15:06**. Having been employed on contract in or around 2013 for a set number of years, he and some others were dismissed prior to the end of their term around early 2016. The Claimant filed a Claim seeking relief for his dismissal. This Ruling concerns two preliminary applications in relation to the Fixed Date Claim which was filed as a Constitutional Motion applying for Administrative Orders but including both public and private law claims.
2. Firstly, the Claimant applied pursuant to **Part 56 .9 of the Civil Proceedings Rules 1998** [CPR] for directions from the Court that either the private law and constitutional law aspects of the application be dealt with separately or that the whole matter be dealt with as a Claim.
3. Secondly, the Defendant has applied pursuant to **CPR 26.2(1)(b) and (c)** as well as **26.1(1)(k)** to strike out the Claimant's fixed date claim form on the ground that it discloses no grounds for bringing the claim and/or is an abuse of the process of the Court. The main aspect of the Claim that the Defendant seeks to strike out as being without basis is that the dismissal was unconstitutional and in breach of contract because the Claimant was dismissed without cause, without being forewarned of any shortcomings and without an opportunity to be heard.
4. The Claimant says although his written contract did not provide for such processes this had to be implied as a term of his contract. The alleged implied term is set out in detail at paragraph 10 of the grounds upon which his claim is based. He argues that it was necessary to recognise such an implied term because of the unconstitutional failure of the Minister to prescribe regulations to guide disciplinary procedures against SSA employees even though he was empowered to issue such regulations under **Section 14(b) of the SSA Act**. The Claimant contends further that there was an issue of race bias that led to his dismissal. He claims violation of his constitutional rights to enjoyment of his property, namely his salary and benefits, as well as violation of his rights to fair hearing and protection of the law.

5. The Defendant contends that the Claim should be struck out on grounds fully explained in written submissions. The grounds are outlined as follows:
 - a. The implied term pleaded at paragraph 10 of the “Grounds Upon Which The Claim For Relief Is Based” of the Fixed Date Claim Form filed on 20th July 2016 does not form part of the Claimant’s contract of employment;
 - b. Even if the Claimant’s contractual employment terms did include the alleged implied term, the Claimant has not been deprived of his right to sue for breach of that term. Accordingly, he has not been deprived of his property and his right to the protection of the law has not been infringed;
 - c. Without more, a breach of contract by a public authority does not give rise to the breach of a constitutional right. There must be an additional element of constitutional breach and there is no evidence here of such an additional element;
 - d. There is no evidence that the Claimant was dismissed because of his race;
 - e. The power of the Minister to introduce regulations governing the disciplinary process of SSA employees is discretionary and not mandatory and there was no case made out in the Claimant’s pleadings to support the Minister’s duty to include the right to be heard in such regulations, if introduced.
 - f. Alternatively, relief sought under **Section 14 of the Constitution** is a remedy of last resort. A constitutional motion is not the appropriate form to seek the reliefs sought by the Claimant as the Claimant had the alternative option of bringing an action for breach of contract and/or wrongful dismissal;
 - g. Accordingly, to file the matter as a Constitutional Motion is an abuse of the process of the court.

6. While contending that the Claim in its current Constitutional Motion form must be struck out, the Defendant appears from its submissions not to object to the relief sought in the Claimant’s Notice of Application. The Defendant says “*It is not in dispute that the Claimant has a remedy at common law for wrongful dismissal and the Defendant will not resist an application by the Claimant pursuant to CPR 56.9(2) (b) that the Originating Motion be dealt with as a claim.*”

II. Issues

7. As it relates to the Claimant's Application, the Defendant has conceded that the Court has jurisdiction to give directions to deal with the matter as a Claim. Accordingly, all that remains to be decided on that application is whether, if the Constitutional Motion aspect of the Claim survives the striking out application, it should be dealt with separately or the entire matter as a Claim.

8. The issue to be considered in determining the Defendant's Application is whether the Claimant has established, in his Claim Form and Affidavits in Support, any ground for bringing the Claim. In particular what must be determined is whether the Claimant established any ground for contending the following:
 - a. That he had a right to be heard before termination;
 - b. That the failure of the Minister to make regulations violated his right to protection of the law;
 - c. That the decision to terminate his employment was motivated by racial bias;
 - d. That his right to property has been breached;
 - e. That the breach of contract gave rise to a constitutional breach; and
 - f. That the present action amounts to an abuse of process due to the existence of an alternative remedy in breach of contract and wrongful dismissal.

III. Background

9. The fixed date claim was brought pursuant to **CPR Part 56.7(2)** claiming constitutional relief as follows:
 - a. A declaration that the Claimant's right to use and enjoy his property and not be deprived thereof except by due process of law under Section 4(a) of the Constitution of the Republic of Trinidad and Tobago was violated and breached;

- b. A declaration that the Claimant's right to the protection of the law in accordance with Section 4(b) of the Constitution of the Republic of Trinidad and Tobago has been violated and breached;
 - c. A declaration that the Claimant's right to not be deprived of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations in accordance with Section 5(2)(e) of the Constitution of the Republic of Trinidad and Tobago has been violated and breached;
 - d. A declaration that the Claimant's rights to not be deprived of the right to such procedural provisions as are necessary for the purpose of giving effect to the protection to the fundamental rights and freedoms in accordance with Section 5(2)(h) of the Constitution of the Republic of Trinidad and Tobago have been breached and violated;
 - e. Damages including vindicatory damages.
10. Pursuant to **CPR Part 56 Rule 9(1)**, the Claimant has also included in his Constitutional Motion the private law cause of action of breach of contract/wrongful dismissal as an alternative or in addition to the constitutional action. The private law claim seeks the following relief:
- a. A declaration that his termination/dismissal was unlawful and illegal with consequential damages for breach of contract and/or wrongful dismissal from his employment as Assistant Director of Administration from the Strategic Services Agency, including damages for loss of future employment prospects and consequential loss;
 - b. Damages including aggravated and/or exemplary damages for the breach of contract and unlawful termination.
11. This dispute arose when the employment of the Claimant by the Defendant was terminated. The Claimant was employed as a Senior Field Officer of the SSA on 1 November, 2013 on contract for a period of three years. The Act governing the SSA includes two provisions

allowing for the introduction of disciplinary and termination procedures. Firstly, at **Section 5 (1) (c) and (d)** the SSA is empowered as an agency to exercise disciplinary control, terminate and establish grievance procedures for employees. Secondly, at Section 14(b) *“the Minister **may** make Regulations generally to give effect to this Act and in particular regarding— (a) the exercise of the powers and the performance of the duties and functions of the Agency; and (b) the conduct and discipline of employees and the disciplinary procedures to be observed in the adjudication of grievances.”*[Emphasis added]

12. The Claimant’s contract included the following written terms:

- Clause 11 provides for summary dismissal in cases of misconduct, inability to perform or disclosure of information concerning the SSA.
- Clause 12 provides for termination of the contract in any other circumstance *“by either party giving to the other one (1) months’ notice in writing or on payment of one (1) months’ salary in lieu of notice”*

13. The Claimant’s employment was terminated without notice by the Defendant 9 months prior to the expiry of that period on 11 February, 2016.

14. The reason for the Defendant’s decision to terminate was expressed in a letter dated February 11, 2016 authored by Mr. George Robinson, Director SSA. He said in the letter that the Claimant’s employment was terminated “effective immediately” and that the decision was based on the following grounds:

“Loss of confidence and trust by the Honourable Minister of National Security in your ability to perform your duties as Senior Field Office and to represent the Strategic Services Agency of the Ministry of National Security.”

15. According to the Claimant, the following terms set out at paragraph 10 of the “Grounds Upon Which The Claim For Relief Is Based” of his Fixed Date Claim Form, were implied by law and formed part of his contract of employment:

- a. That he would be notified by the SSA of any perceived shortcomings in the standard of his work;

- b. That he would be given an opportunity to respond to any suggestions of perceived shortcomings in the standard of his work;
 - c. That he would be notified by the SSA of any perceived breaches of his contract of employment;
 - d. That he would be notified, with sufficient particularity, of any acts or omissions which could lead to his dismissal;
 - e. That he would be given an opportunity to respond to any suggestion that his acts or omissions could lead to his dismissal;
 - f. That any action taken against him for any acts or omissions during the course of his employment which were alleged to constitute a breach of his contract of employment would be reasonable and proportionate to the matters alleged.
16. The Defendant's written submission usefully compressed the above so as to reflect that it is in fact one term that the Claimant claims is implied in the Employment Contract. The Defendant submits that *"This term has been presented in para B (10) of the Grounds in many iterations but it may be summarised, without doing violence to the Claimant's claim, as an implied term to be given notice of any allegations made against him and an opportunity to be heard in his defence before any disciplinary action is taken against him."*
17. It is the Claimant's contention that prior to receiving his termination letter he was given neither notice of any shortcomings in his work nor of breaches of his contract. Further he was given no opportunity to be heard or make representations regarding what was said in the letter terminating his employment. It is on this basis that the present action was filed as a Constitutional Motion but raising both Public Law and Private Law claims.
18. The relief sought by the Claimant includes several declarations as well as damages to compensate for his salary and allowances for the nine month period remaining on his contract and gratuity for the three-year period. He further seeks vindictory, aggravated and/or exemplary damages.

19. The Claimant alleges that he is a victim of racial bias by the Minister of National Security and the Director of the SSA. This allegation is based upon certain newspaper articles which reported alleged statements of the Acting Director of the SSA, Mr Mathew Andrews to the former Director of Information and Technology, a Mr. Dennie. Mr. Dennie said that he was approached by the Mr. Mathews, who was acting as Director of the SSA, with a view to targeting and firing officers of East Indian descent from the SSA. The Claimant filed in support of his Fixed Date Claim an affidavit from Mr. Dennie who avers that one Mr. Matthew Andrews, told him “there were too many Indians in the SSA and that he felt the Minister wanted to get rid of some of them”.
20. Finally, he claims that he is disadvantaged by the absence of Regulations made by the Minister regarding the SSA as provided for at Section 14(b) of the **Strategic Services Act, Chap. 15:06** (the “Act”) as the Minister had not made Regulations to allow him to make representations challenging the decision to terminate his employment before it took effect.
21. Although relying primarily on the Notice of Application to strike out the Claim being determined herein the Defendant has also filed an Affidavit in response to the evidence led by the Claimant regarding his termination. The alleged events in the Defendant’s Affidavit are not by and large relevant to the determination of this Application but are set out for ease of reference as follows.
22. The Defendant’s Affidavit evidence is that Mr Robinson, the Director of the SSA who eventually dismissed the Claimant, had upon his appointment inquired into certain positions in the SSA, particularly that of Senior Field Officer.
23. This inquiry was based upon the fact that it became apparent that officers holding certain positions within the SSA did not report to a superior office holder on a regular basis or at all. The Claimant was identified as one such individual. Further, the Director became aware that the Claimant’s contract did not contain an Appendix B which lists the duties the employee is hired to perform. During searches of the SSA records, no records of the Claimant’s duties, performance appraisals or investigative files were found.

24. The Director then instructed Mr Matthew Andrews, then Director of Criminal Intelligence to have all Senior Field Officers report to him within 48 hours in order to determine their duties, to whom they reported and to be provided with an update on their activities. The Claimant failed to present himself at the Director's office and failed to communicate with Director up until 11 February, 2016 on which date his employment was effectively terminated. His concerns that the Claimant fulfilled no purpose in the SSA and upon the non-appearance by the Claimant to report on duties formed the basis of the Director's decision to terminate the Claimant's employment.
25. Director Robinson claims in his affidavit that the termination letter erroneously stated that the loss of trust and confidence was on the part of the Minister of National Security instead of Mr Robinson himself as Director. He avers that he was always of the opinion that the letter ought to have reflected that it was he who lost confidence in the Claimant. However, having sought legal advice from the SSA internal counsel he was advised to refer to the Minister instead.
26. As aforementioned, the Affidavit evidence filed by the Defendant is not the deciding factor as it relates to the application to strike out. The grounds that I must consider for that application are in the submissions of the Defendant filed on January 23 and September 19, 2017. Those submissions address all aspects of the Claimant's case and identify weaknesses in both the evidential and legal basis for the Claim. It is the Defendant's contention that there are no terms implied in the contract as set out by the Claimant. The Defendant also denies that there is any reliable evidence put forward by the Claimant as to the allegations of racial bias on the part of the Minister or the SSA Director or that such bias was the cause of his termination.

IV. Law and Analysis

Whether the Claimant has established a basis for the Claim that he had a right to be heard before termination

27. Counsel for the Claimant submits that the nature of the contract in question is not simply that of employer/employee due to its statutory underpinning. He contends that where the Parliament saw fit to statutorily provide for the making of Regulations as to specific conduct and disciplinary procedures, it must have been that Parliament intended that the officers be given an opportunity to be heard.

28. The Claimant cites Sections 5 and 14 of the Act which state respectively:

“5. (1) The Agency may –

(a) Employ staff as it considers necessary for the due performance of its duties and functions;

(b) Provide for the remuneration and other terms and conditions of their employment;

(c) Exercise disciplinary control over or terminate the appointment of persons employed under this section;

(d) Establish procedures relative to the presentation, consideration and adjudication of grievances of employee.

...

4. Subject to negative resolution of Parliament, the Minister may make Regulations generally to give effects to this Act and in particular regarding –

*(b) The conduct and discipline of employees and the **disciplinary procedures to be observed in the adjudication of grievances.**”*

29. Counsel for the Claimant argues that Parliament in its contemplation of disciplinary procedures must have intended that officers be given an opportunity to be heard.

30. The Defendant’s contention is that there is no basis upon which the Claimant can ask the Court to infer that Parliament intended that if the Minister had introduced Regulations the Claimant would be provided thereby with an opportunity to be heard. This is so they submit because the SSA has set out the terms governing termination procedures in the employment contract. They submit that Clause 11 of the Contract provides that the Director may

dismiss the Claimant if, inter alia, he neglects to comply with any order of the Director and Clause 12 of the contract provides for a one-month notice period upon termination. There is neither need nor basis for such an implication of additional implied termination terms.

31. The Defendant cites Lord Hoffman's decision in *Johnson v Unisys Limited* [2003] 1 AC 518 which held that an action for wrongful dismissal could yield no more than the salary which should have been paid during the contractual period of notice and that it would be very difficult to imply that there should also be good cause. Further, a term that the employee should be given an opportunity to make representation should not be implied in the face of an express provision that an employment contract could be terminated on one month's notice without any reason.

32. This submission of the Defendant is further buttressed by the statement of law in *Mailloch v Aberdeen Corpn* [1971] 1 WLR 1578, 1581:

"At common law a master is not bound to hear his servant before he dismisses him. He can act unreasonably or capriciously if he so chooses but the dismissal is valid. The servant had no remedy unless the dismissal is in breach of contract and then the servant's only remedy is damages for breach of contract."

33. The Claimant's attempt to distinguish **Johnson** on the basis that the present case involves a person employed in the service of a statutory authority and is not a normal employer/employee relationship is without merit. The reason put forward by the Claimant that Senior Field Officers would have performed sensitive functions including the interception of private communications is insufficient basis to imply such a term. . Additionally, the provisions of Sections 5 and 14 merely empower the Minister to create regulations. There is no specific direction in the SSA Act as to what the Minister would be required to provide for if he introduces such regulations.

Whether the Claimant has established a basis for the Claim that the failure of the Minister to make regulations violated the Claimant's right to protection of the law

34. Counsel for the Claimant submits that the failure of the Minister to make regulations providing for a right to be heard before dismissal infringed his right to the protection of the law. They cite the decision in *Alleyne & others v AG [2015] UKPC 3* which held that the failure of the State to make regulations under section 26 of the Statutory Authorities Act was a breach of the applicants' right to protection of the law.
35. In contending that this Claim must be struck out, Counsel for the Defendant submits that Section 14 of the Act provides that the Minister "may" make Regulations. Citing *Patel v Secretary of State for the Home Department [2013] 1 WLR 63*, the submission underscores that the use of the word "may" conveys a choice or discretion and does not create an obligation to make Regulations. The Defendant accepts, however, that there are circumstances in which the statutory bestowal of power on a Minister to make Regulations is to be interpreted as being coupled with a duty to do so - *Julius v Lord Bishop of Oxford (1880) 5 App Cas 214* and *Singh v Secretary of State [1992] 1 WLR 1052*.
36. In *Sharma v Registrar of the Integrity Commission [2007] 1 WLR 2849* at paras 25 and 26 Lord Hope envisaged circumstances in which a body may be under a duty to make regulations. In particular the court considered that a duty would be implied where such regulations would be obviously needed to enable the body to perform its functions. Additionally, at the Court of Appeal stage of *Sharma* (CA 60 of 2003, 2nd February 2006) Mendonca JA, citing *Julius v Lord Bishop of Oxford (1880) 5 App Cas 214* and *Singh v Secretary of State for the Home Department [1992] 1 WLR 1052*, understood the cases to have decided that "*where the power is given to do something to effectuate a legal right, particularly a private right, the power will always be treated as imposing a duty to do so. So that in Pargan Singh –v- Secretary of State for the Home Department [1992] 4 All E.R. 673, for example, it was held that the Secretary of State had a duty to make regulations where the regulations were necessary to give effect to rights of appeal given to affected persons.*"
- (para 32)

37. The case of *Alleyne* cited by the Claimant is distinguished by Counsel for the Defendant from the present case based upon the provision of the **Municipal Corporation Act 1990** (the “MCA”) on the making of Regulations. Section 60 of the MCA provided:

“The Commission may make Regulations providing for the classification of officers in a Municipal Police Service, including qualifications, duties and remuneration and providing generally for the discipline, good order and government of the Municipal Police Services and until such Regulations are made hereunder, Regulations made under the Police Service Act, insofar as the Commission deems them applicable to any matter concerning Municipal Police Services or Municipal Police Officers, shall apply mutatis mutandis.”

38. In *Alleyne* the failure of the Commission to make the regulations as well as to deem the regulations under the Police Service Act applicable clearly went against the intention of Parliament. As outlined by Lord Toulson and highlighted by counsel for the Defendant:

“It was obviously envisaged that by one means or the other there should be regulations in place for municipal police services covering the matters identified in the section.”

39. In the present case, there is neither evidence of the need for regulations to effectuate any legal right of the Claimant nor any indication that the regulations were necessary for the proper functioning of the SSA. In fact the Act provided for the SSA agency itself to control the termination process and there was contained in the Claimant’s contract provision for termination with notice. The failure of the Minister to make Regulations, therefore, cannot be considered to be a breach of the Claimant’s right to protection of the law. As pointed out by the Defendant, although empowered to do so, the Minister is not obligated to make regulations regarding the conduct and discipline of employees. Furthermore, there is no certainty that the Minister’s regulations, if made, would have contained such provisions that the Claimant has submitted. In any event, as pointed out by Counsel for the Defendant, a statutory regime governing the type of good industrial relations practices envisaged by

the Claimant did not have to be introduced in a Regulation by the Minister since it already exists under the **Industrial Relations Act**.

Whether the Claimant has established a basis for the Claim that the decision to terminate the Claimant's employment was motivated by racial bias

40. The evidence backing this allegation is weak and insufficient to prove that the dismissal was due to discrimination based on race. The newspaper extract relied upon by the Claimant is not admissible in evidence since it comprises hearsay. Additionally, there is no evidence of a connection between the Claimant's termination and the alleged position of a Mr. Andrews who is said to have told the Claimant's witness Mr. Dennie that there were too many Indians in the SSA and to have expressed his feeling that the Minister wanted to get rid of them. Mr. Andrews was not the author of the dismissal letter and hearsay evidence as to anything he may have said to Mr. Dennie cannot be ascribed without more to either Mr. Robinson, who signed the letter, or the Minister referred to therein.

41. The leading authorities on discrimination establish the requirement to show that the claimant has been treated differently to some similarly circumstanced person. In ***Bhagwandeem v AG PC App No 45 of 2003 [18]***, it was stated that a Claimant alleging discrimination must establish "*that he has been or would be treated differently from some other similarly circumstanced person or persons... as actual or hypothetical comparators*" and "*the comparison must be such that the relevant circumstances in the one case are the same or not materially different in the other*". The claimant "*need only show that he was treated less favourably than one similarly circumstanced*".

42. This has not been shown in the present case and therefore this alleged discrimination has not been sufficiently established to constitute a special feature of the case that would take it out of the context of a simple breach of contract matter and allow for its continuation as a constitutional motion.

Whether the Claimant has established a basis for the Claim that his right to property has been breached

43. Counsel for the Claimant, citing *Myron Rudder CV2012-05129*, argues that the failure of the Minister to enact regulations caused the Claimant's right to his full income and salary under the contract to be extinguished. At [118] and [119] of that decision it was held:

"118. A person is entitled to the enjoyment of his property. Money owing to an individual is an example of such property, and this was admitted by the Defendant: see Harry v Thom (1967) 10 WIR 348. The right to property however, is circumscribed by the principle of due process of law. That is, the individual is entitled to his property, except where a deprivation of such property is done with reference to those fundamental principles which are necessary for a fair system of justice: The State v Boyce (Brad) (2006) 68 WIR 437. The due process clause thus gives constitutional protection to the concept of procedural fairness: see Hillare v Baptiste Privy Council Appeal No. 60 of 1998.

119. The question thus for the court is whether there is anything particularly unfair or unjust in a statutory provision enabling the deferral of the recovery of money owed. Did the Act deprive the Claimants of their rights to a fair process: see Steve Ferguson v The AG and The DPP CV2012-04052".

44. As argued by Counsel for the Defendant, however, the Claimant's right to sue in private law for money due and owing has not been interfered with and therefore there has been no breach of the Claimant's right to his property.

Whether the Claimant has established a basis for the Claim that the breach of contract gave rise to a constitutional breach

45. The written submissions of both parties reflect that there is no dispute as to the fact that without more, a breach of contract by a public authority does not give rise to a breach of constitutional rights. Before a breach of contract can form the basis of a claim for constitutional relief some additional element must be present to raise a constitutional issue. The Defendant cites as authority for the point, the Judgment delivered by Berreau JA, in

Boxhill et al v Port Authority of Trinidad and Tobago (Civil Appeal No. 11 of 2008, 28th February 2013). He said:

*"[51] Not all wrongful acts of a public authority will necessarily attract constitutional relief. That said, it does not always follow that to attract constitutional relief the act must be a public act in the purest sense. For the purpose of establishing a constitutional breach by a public authority, it will not always be necessary to establish that the acts complained of were of a public nature in the sense that that term is used in judicial review. Conversely, the fact that the act complained of may have been committed in the course of a contract will not defeat a constitutional claim by reason of that fact only. The fact that it may be in breach of contract does not necessarily pre-empt a constitutional challenge. For example, the failure by a public authority to pay for goods and services provided under a contract will found no constitutional claim if the complaint is strictly about non payment. **But if the contractor alleges non payment is part of a pattern of discrimination in which other contractors with outstanding invoices are favoured with payments while he is not, such an allegation may found an additional claim under the Constitution.** Similarly a decision by a public authority not to advertise in a particular newspaper or on a specific radio station, while on its face a question of freedom of contract, may well found a basis of complaint under section 4(d) (and section 4b) if it is alleged and proven that the decision may be motivated by considerations which are political, racial, gender related or religious or some other colourable basis. Equally, allegations that the workers were promoted ahead of the appellants because of political or familial concerns can also found a successful basis of complaint under sections 4(b) and 4(d). These examples are not exhaustive. **Any act of discrimination will attract the sanction of the Constitution. No pattern of discrimination is required. A single act will suffice.** The provisions of sections 4 and 5 themselves provide the basis of the complaint. They found the claim itself. That is a sufficient basis upon which a claimant may proceed. The fact that the act for which there is complaint arises out of a contract will be no relevance to the viability of the constitutional claim in those circumstances."*

[52] The private law nature of the act therefore will not be the sole basis by which the notice of motion will be judged. The decision will turn on the facts and circumstances of the case; that is to say, the nature of the allegations and the nature of the act complained of and the evidence led in support of the motion." [Emphasis Added]

46. Where the parties part ways in their submissions is in the position of the Claimant that there are additional elements in the circumstances of this breach of contract case that justify seeking relief by way of a Constitutional Motion. One aspect of the Claim based on which the Claimant's case may be seen to have an additional element suitable for Constitutional relief is the allegation that race based bias was the cause of the Claimant's dismissal. Discrimination based on race or other prohibited grounds was an element highlighted in **Boxhill** as a factor that, depending on the circumstances of the case, could justify bringing a constitutional claim in addition to the breach of contract claim. However, I have already addressed the fact that there is no evidence to support racial discrimination as an aspect of the present Claim.
47. On slightly stronger ground Counsel for the Claimant contends that the legislative provision for (i) staffing of the SSA; and (ii) for disciplinary and grievance procedures created a special feature in the contract that gave rise to constitutional recourse. Counsel cites Sections 4 and 5 of the Constitution which provide for equality and protection of the law as well as the right to a fair hearing. He further cites the decision in **Nizam Mohammed v AG CV2011-04918** as a case in which the right to a fair hearing was upheld.
48. Counsel for the Defendant has, however, successfully distinguished the present case from that case as it involved the dismissal of the Chairman of the Police Service Commission, a constitutionally created position with specific provision for the circumstances in which the administrative power of removal could be exercised. The position of the Claimant as Senior Field Officer cannot be likened to such a position as it lacks the protections and insulation from political influence as that of Chairman of the Police Service Commission.

49. The provision for the staffing and disciplinary procedure of the Agency in the Act is not sufficient to give this claim a special feature for constitutional recourse.

Whether the Claimant's present action amounts to an abuse of process due to the existence of an alternative remedy in breach of contract and wrongful dismissal

50. Counsel for the Claimant submits that a case may be brought by Originating Motion rather than a regular civil claim in circumstances where there are legitimate mixed constitutional and private law claims. In those circumstances the matter can be commenced by fixed date claim form – *Antonio Webster v AG [2011] UKPC 22*. The Claimant submits that the present case, in raising issues of fair hearing, protection of the law and failure to implement regulations, clearly falls within such a category.

51. Although the Claimant has failed to prove that he had grounds for claiming that constitutional rights have been breached, his application for administrative orders did raise certain constitutional questions to be examined and therefore, could not be considered to be wholly in the realm of private law. Despite the Claimant's possible recourse in breach of contract and/or wrongful dismissal, I do not consider the Claimant's fixed date claim form to be an abuse of the court's process due to the constitutional questions raised.

Whether the Court should exercise its jurisdiction under CPR 56.9(2) (b) by giving directions to deal with the matter as a Claim.

52. Although there is no basis for the Constitutional relief claimed by the Claimant there remains a viable action in breach of contract. The determination must be made as to whether the Claimant was properly summarily dismissed under Clause 11 of Appendix A of the Contract or whether he should have been afforded the one month notice period under Clause 12. Following such determination the issues as to the type and quantum of damages to be awarded would have to be addressed. Accordingly, it will be appropriate to deal with this matter as a Claim.

V. Conclusion

53. The Defendant's application to strike out the Claimant's claim has been successful due to the failure of the Claimant to show any grounds for bringing the substantive application as a Constitutional Motion. The Claimant's arguments that its rights to protection of the law and its right to property have been infringed are without merit as there is no constitutional basis for implying the terms outlined by the Claimant into his contract of employment.

54. Following the authorities of *Patel* and *Sharma* and distinguishing the decision in *Alleyne*, it is my conclusion that the Act imposed no duty on the Minister to make the regulations contemplated by the Claimant as the wording of the Act did not necessitate such regulations for the proper functioning of the SSA. Further there was no necessity to introduce such regulations as the Statutory Regime which includes natural justice and good industrial relations practices is in effect under **The Industrial Relations Act Chap 88:01** and can be accessed by the Claimant. The Claimant's case discloses no sound evidentiary basis for a Claim as to discrimination based on race.

55. The Constitutional aspects of the Claimant's fixed date claim form must, therefore, be struck out as disclosing no grounds for bringing the claim. However, the matter can be continued as a Claim for Breach of his Employment Contract. Accordingly, the Defendant having only partly succeeded in their Application to strike out the Claim and the Claimant having successfully applied to have the matter dealt with as a Claim, the award of costs will reflect this outcome.

56. It is **HEREBY ORDERED THAT**

- a. Paragraphs A. I, II, III, IV and V, B. 10 and 11 to 28 of the Claimant's Fixed Date Claim Form filed on the 20th day of July 2016 be struck out pursuant to Part 26.2(1) (b) and (c) of the CPR as the Fixed Date Claim Form discloses no grounds to bring the claims for administrative orders included therein.
- b. The Claimant do pay to the Defendant half the costs of the Defendant's Application filed on January 16, 2017, which are to be assessed in default of agreement.

- c. No order as to costs is made regarding the Claimant's application filed on October 20, 2016
- d. The whole application filed in the said Fixed Date Claim Form save for the parts struck out be dealt with as a Claim and the originating motion be converted to an action for breach of contract.
- e. The Claimant is directed to file an amended Claim forthwith to reflect the striking out order made herein.
- f. Submissions if any concerning the costs order will be heard at the case management conference.
- g. The parties are to attend a case management conference on the 10th of April 2018 at 9.00 am in Court Room SF08.

Delivered on: January 10, 2018

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Eleanor Joye Donaldson Honeywell

Judge

Assisted by: Christie Borely, JRC 1