REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No**. CV2019-00550**

BETWEEN

TRICIA BROWN

Claimant

AND

ELROY JULIEN

First Defendant

THE NATIONAL COMMISSION FOR SELF HELP LIMITED

Second Defendant

Before the Honourable Mr. Justice V. Kokaram

Date of Delivery: Thursday 21 March, 2019
Appearances:
Mr. Farai Hove Masaisai instructed by Ms. Antonya Pierre, Attorneys at Law for the Claimant.
Mr. Jean-Louis Kelly instructed by Mr. Danté Selman-Carrington, Attorneys at Law for the Defendants.

JUDGMENT

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1. Ms. Tricia Brown, the Claimant, complains that her working relationship is deteriorating with Mr. Elroy Julien, the Chief Executive Officer (CEO) of the Second Defendant, NCSHL[1]. This unhappy working relationship arises for the main part from her transfer to another office within the organisation and subsequent disciplinary proceedings initiated against her by NCSHL. She complains that she has been bullied, harassed and victimised by the CEO. She views her transfer as an act of punishment and the manner in which the disciplinary proceedings was pursued as an act of harassment. She now seeks interim injunctive relief to restrain the Defendants from "pursuing any conduct which amounts to bullying and/or

[1] The National Commission for Self Help Limited

harassment" and from pursuing the disciplinary proceedings pending the determination of her Claim.

2. Ms. Brown claims declaratory reliefs including breach of duty of care and contract and damages for harassment[2]. Her Counsel's main submission is that this is a fitting case for the Court to recognise "harassment" as a cause of action similar to some other Commonwealth jurisdictions notably the United Kingdom (UK) and Canada.

3. Although harassment in the workplace have been previously analysed by our Courts in the context of breach of the employment contract and negligence, it has not been recognised as a distinct cause of action. As the mental health and the wellbeing of the employee in the

[2] The Claimants claims against the Defendants for:

1. A declaration that the Claimant is a permanent employee of the 2nd Defendant;
2. A declaration that the Claimant was subjected to a detriment and harassment by investigative and disciplinary proceedings for making a disclosure about the 1st Defendant;
3. A declaration that the investigation against the Claimant conducted in January of 2019 by the 2nd Defendant on the instructions of the 1st Defendant is null and void;
4. A declaration that the Defendants have breached an implied term of the Claimant's employment contract by failing to pay her compensation for extra duties performed in her acting role in Human Resources;
5. A declaration that the 1st Defendant's behaviour is outrageous and was a reckless disregard to the Claimant's emotional well-being;
6. A declaration that the 2nd Defendant breached a term of the Claimant's employment contract to provide a safe and healthy work environment;
7. A declaration that the Defendants have breached a term of the Claimant's employment contract by the 1st Defendant initiating the investigation into the allegations of misconduct instead of the Human Resource Manager which is stated in the terms of employment as outlined in the 2nd Defendant's policy and procedures manual;
8. A declaration that the 2nd Defendant has breached the duty of care owed to the Claimant to provide a safe and healthy work environment;
9. A declaration that the 2nd Defendant is vicariously liable for the behaviour of its employee, the 1st Defendant;
10. An injunction restraining the 1st Defendant from pursuing any conduct which amounts to bullying and/or harassment of the Claimant;
11. An order that the Claimant be transferred back to the Port-of- Spain office of the 2nd Defendant;
12. In the alternative to 11; an order that the Claimant be given a travel allowance;
13. Special damages in the sum of One Hundred and Sixteen Thousand, Five Hundred and Twenty Dollars ($116,520.00).
14. In the alternative to 13: Damages as against the 2nd Defendant for Unjust Enrichment;
15. Compensation for the detriment suffered;
16. Damages included general, punitive and aggravated damages for harassment;
17. Damages included general, punitive and aggravated damages for breach of duty of care by the 2nd Defendant;
18. Interest pursuant to the Supreme Court of Judicature Act Chapter 4:01;
19. Costs;
20. All necessary and consequential orders, directions, inquiries that this Honourable Court may order;
21. Any other relief that the Honourable court may seem just and expedient.

work place becomes an important issue for the overall productivity of an organisation, it is easy to see how workplace harassment and bullying deserves a Court's anxious scrutiny. I have recently commented that employment contracts are a specie of relational contracts which may require a different analysis from the norms of purely commercial contracts[3]. In modern employment law, the treatment of the person, the humanity of relationships, the dignity and self-esteem associated with employment are valued much more greatly in these very personal relationships. It is also a relationship where both parties are enjoined in a co-operative joint exercise of productivity. It is in this context that recently Courts have embraced the view that the obligation of the employer whether as a duty of care or an implied duty of the employment contract must be not only to take care of the physical health of the employee such as providing safe plant and equipment but also take reasonable care to protect them from mental injury[4]. However, the principles of foreseeability in tort or the nature of the contractual term in contract have traditionally set the boundaries of the obligation of the employer to the employee.

4. Whether a tort of harassment should now be recognised in this jurisdiction as a separate cause of action or additional feature in this relational contract deserves further interrogation. What is the definition and ingredient of this tort? Is it necessary for our common law to create such a remedy distinct from the law of negligence and contract which already provides the employee with suitable common law remedies? What remedies are available if such a tort is proven to have been committed? Some Canadian jurisprudence have already emerged to recognise this tort and define its limits. The Superior Court of Ontario was satisfied that such a tort does exists based upon the accumulation of jurisprudence developed in that area. See **Merrifield v The Attorney General of Canada** 2017 ONSC 1333. It would of course be wrong to transplant the maple trees of Canada into the tropical soil of the Caribbean without a proper analysis of the employment relationship and the nature of such a tort which should be reserved for a trial and not at an interim stage.

[3] See **Roger Carrington v The University of Trinidad and Tobago** CV2016-03482
[4] **Quigley v Complex Tooling and Moulding** [2005] IEHC 71

5. The limited question at this stage is whether and what form of injunctive relief should be granted so that the Court can ultimately do justice to both parties at the end of the trial in determining these questions. For the reasons set out in this judgment, a limited injunction will be granted to stay the continuation of the disciplinary proceedings against Ms. Brown until trial.

6. This restraint cannot be said to do injustice to either party. It preserves a state of affairs for the Court to examine the triable issues and assess the impact of the dealings between the parties. More particularly, it maintains the parties on equal footing while the Court probes the process adopted by the Defendants to lay disciplinary charges against the Claimant. To this extent the Court can, at the trial determine, quite apart from the need to create a tort of harassment, whether or not the decision to lay disciplinary charges was a breach of its own stated policy and express or implied terms of the employment contract. Such a limited injunction gives to the Court a "free hand" in making final determinations as to the question of the occurrence of any breach of the employment relationship by the Defendants.

Brief facts

7. Ms. Brown is the administrative assistant of the NCSHL. She contends that on 3rd October 2016 she was orally appointed by the Chairman to be a Human Resource (HR) Officer/HR Assistant. She was informed she would receive her appointment letter as HR Officer/HR Assistant when the Acting HR Manager returned from her vacation upon which she would receive increased remuneration and allowances for her new duties. However, no appointment letter was received nor extra remuneration or allowances paid.

8. It is in dispute whether her new role in the HR Department was one which exceed the duties and functions of administrative assistant for which she ought to have received compensation. From March 2017 to November 2018, Ms. Brown tried to resolve the issue of her compensation internally with several correspondence with the officials of the NCSHL, the Line Minister, the Honourable Mrs. Gadsby Dolly, the Public Services Association who wrote to NCSHL but to no avail.

9. On 12th December 2018, Ms. Brown was called into a meeting with the CEO where she was

questioned about the closure of one of the Corporate Secretary's/Legal Advisor's personnel file. She contends her explanation was laughed at by the CEO. The CEO informed her and Ms. Gale Samuel that they had to prepare a report on the matter and would receive a formal letter regarding same but were instructed to begin the report while they awaited the letter.

10. The formal letter indicated that the report had to be prepared before 3:00pm that day. Ms. Brown completed the report within that time. At 3:30pm that same day, she was called to the CEO's office again where she was told she would be reassigned to the South Office. She contends she objected to this and requested two weeks but this was ignored by the CEO. She further contends that she was verbally chased out of the HR Department by the CEO and instructed to handover the keys to another administrative assistant, Ms. Marsha Ramkissoon Mohammed.

11. By letter dated the same day she was instructed to hand over all HR related documents to Ms. Mohammed and to report to the office of the CEO to provide administrative assistance on the 13th and 14th December 2018.

12. She was notified by letter dated 14th December 2018 that an investigation would be conducted regarding alleged deleted information of employee vacation and sick leave. She contends she had indicated that she did not have the existing spreadsheet on her desktop. On that same day, she wrote a grievance letter on the actions of the CEO to the HR Committee of the Board for NCSHL.

13. She contends that she became stressed, depressed and anxious. Her attorneys wrote a pre-action letter to the Defendants indicating that Ms. Brown would not be able to attend the investigation on 19th December 2018 since she was given sick leave from 19th December 2018 to 2nd January 2019.

14. On 3rd January 2019, she sent an email to the CEO requesting that his office refer all matters relating to the investigation to her attorney at law. By letter dated 7th January 2019, she was notified the investigation would continue in her absence.

15. On 9th January 2019 her attorneys at law wrote to the CEO indicating her willingness to

attend an investigation once they were present and given at least three working days notification in advance. On the same day, the Defendants replied that the investigation was completed in Ms. Brown's absence.

16. She received a copy of the investigative report on 22nd January 2019 along with a letter indicating that she was charged with serious/gross misconduct. She was required to respond to the report by 30th January 2019. She contends that her attorneys responded to the report and charges by letter dated 30th January 2019. However, a letter dated 1st February from the CEO was hand delivered to her informing her that no response was received from her on the investigative report. She contends the charges against her were withdrawn and replaced. She was also required to attend a disciplinary hearing on 10th February 2019 based on the investigation completed.

17. Ms. Brown contends that the CEO acted beyond his powers in initiating the investigation since allegations of possible employee misconduct are only to be investigated by the HR Manager as set out in the NCSHL Policy and Procedures Manual.

18. The Defendants contend that Ms. Brown was assigned to the HR Department in her capacity as an Administrative Assistant to fulfil the clerical and secretarial administrative functions of the HR Department. Her tasks did not go beyond the job description of Administrative Assistant. Further, the titles HR Assistant/HR Analyst/HR Officer does not exist within the organizational structure.

19. At the meeting on 12th December 2018, the CEO contends that he informed Ms. Brown that it was not within her discretion as an Administrative Assistant assigned to the HR Department to close an employee's files without supervisory instruction which, the Defendants contend, Ms. Brown accepted.

20. On that day, the CEO informed Ms. Brown that due to human resource shortages, her services would be required at the NCSHL's South Office. The Defendants contend that Ms. Brown did not object to being transferred but requested two weeks of postponement of the transfer. The CEO was only able to delay her reassignment until the end of that week which Ms. Brown agreed.

21. The Defendants contend that it was based on Ms. Brown's suggestion that the folder containing employee vacation and sick leave was mistakenly deleted or hidden in her desktop, the CEO commissioned an internal investigation to resolve the disappearance of sensitive employee information. He wrote to her on 13th December 2018 informing her that he would be appointing an independent investigator to investigate the deleted spreadsheet. On 14th December 2018, he wrote to inform her that the investigation would be carried out on 19th December 2018. She was given two opportunities to participate in the investigation but failed to do so. The CEO contends that he only became aware of her grievance letter from her affidavit in this matter.

22. The Defendants contend that the CEO never chased or verbally abused Ms. Brown at any time in the NCSHL. Additionally, from 1st August 2018 until 24th January 2019, the NCSHL Human Resource Manager position remained vacant. Upon the CEO's return from administrative leave on 20th September 2018 he assumed the duties and functions of the HR Manager within his discretion as CEO of the NCSHL until someone was appointed.

23. The CEO's letter of 1st February 2019 indicated that Ms. Brown had not personally responded to his letter dated 22nd January 2019 and that her attorney's letter failed to address any charges set out in that letter. He therefore provided a list of four charges of "gross negligence", "serious misconduct", "insubordination" and "failure to co-operate"[5].

[5] Mr. Julien's letter to Ms. Brown dated 1st February 2019 listed the following charges:

> "1. **Gross Negligence-** As evidence in your email dated 13th December 2018, you admitted that the Company's critical and important data relating to records of vacation and sick leave taken by employees of the Commission were deleted. You were responsible for the maintenance and safekeeping of this information and it was entirely under your control. The deletion of this critical information reflects inefficiency and/or incompetence on your part and is a direct violation of the Commission's Police and Procedure Manual as set out in **Sections 3(h) and 3(j).**
>
> 2. **Serious Misconduct-** The failure to comply with a legitimate and lawful instruction from the Chief Executive Officer, through your inability to secure and furnish sensitive Company data regarding employee vacation and sick leave. This constitutes the violation of **Sections 3(a) and 3(f)** of the Commission's Policy and Procedure Manual.
>
> 3. **Insubordination-** The blatant insubordination by suggesting that the Chief Executive Officer use another employee and another method to carry out an instruction given directly to you, as expressed in your email to the CEO dated 13th December 2018. This act is in direct violation to the Commission's Policy and Procedure Manual on disciplinary action and constitutes a level 3 offence as set out in **Section 7(b).**

The Court's Approach-The exercise of the discretion

24. It is trite law that the Court must at this stage exercise its discretion in a manner which will cause the least risk of irremediable prejudice and is guided by the fundamental question of determining where the balance of justice will lie in either granting or refusing an injunction. See **National Commercial Bank Jamaica Ltd v Olint Corporation Ltd** [2009] 1 WLR 1405 and **Jetpak Services Ltd v BWIA International Airways Ltd** (1998) 55 WIR 362. Recently, Aboud J (in **Niquan Energy Trinidad Limited v World GTL Trinidad Limited and others** CV2013-02699) examined **Olint** in the context of **American Cyanamid Co. v Ethicon** Ltd [1975] A.C.396 and **Jetpack** and confirmed the approach to injunctions is now a holistic one rather than a "box ticking" exercise.

25. The following general principles culled from **Cyanamid** as explained in **Olint** and **Niquan** provide a useful guide to the Court in exercising its discretion in granting an interim injunction:

    a) The essential objective is to preserve the Court's freedom to do justice at the trial;

    b) Whether there is a serious issue to be tried is determined upon an evaluation of the relative strength of the parties case;

    c) The weaknesses of a party's case must be taken into account;

    d) The Court should consider the prejudice the claimant may suffer if no injunction is granted or the defendant may suffer if it is. A claimant can reduce the potential injustice to the defendant by drafting the terms of the injunction as narrowly as is consistent with preserving the claimant's interests, or by offering undertakings to provide extra safeguards for the defendants[6];

    e) The likelihood of such prejudice actually occurring;

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4. **Failure to Cooperate-** You failed to make yourself available to the rescheduled internal investigation on Friday 4th January 2018 as directed by the Chief Executive Officer. Your failure to appear without reasonable excuse constitutes a violation of the implied term in your Contract of Employment as relates to your duty of fidelity to your employer."

[6] **See Blackstone's Civil Practice 2018**

f) The extent to which a party may be compensated by an award of damages or enforcement of the undertakings in damages. Lord Diplock in **American Cyananid Co. v Ethicon Ltd** said the extent to which the disadvantages to each party would be incapable of being compensated in damages is always a significant factor in assessing where the balance of convenience lies. In **Dyrlund Smith AIS V Tuberville Smith Ltd** [1998] FSR 774 the apparent inability of the defendants to meet an award of damages was regarded as the decisive factor in favour of granting an interim injunction. However, there is no general rule that if damages are an adequate remedy an injunction will not be granted;

g) The likelihood of whether a party is able to satisfy such an award. However, the indigent ought not to be penalised where there are merits in their claim or in the balance it is just to grant interim relief;

h) In determining this question, the Court should not confine itself to damages in the sense only of special damages, but should also consider damages to reputation and loss of goodwill. In fact, all damages, special and general, are on the table;

i) Where does the balance of convenience lie;

j) The likelihood that the injunctions will turn out to have been wrongly granted or withheld (i.e. the Court's view of the relative strengths of the parties' cases).

k) Other special relevant factors recognising that human activity is too idiosyncratic and the range of disputes and complexity of them are too unpredictable to ignore special factors which will impact in weighing the relative justice in granting or refusing relief.

l) None of these factors are to be considered as isolated modules. The Court adopts "a wide angle lens" to answer the organic question "where does the balance of justice lie" or "what course seems likely to cause the least irremediable prejudice to one party or the other."

m) The overriding objective is relevant in the exercise of the power to grant injunctive

relief.

A serious issue to be tried- The relative strength of each parties' case

26. At this stage of the proceedings, upon considering the pleadings and the parties' written submissions, I have discerned the following main issues which warrant further interrogation at a trial:

    a) Whether the tort of harassment should be recognised in this jurisdiction;

    b) If so, what is the definition of the tort, the ingredients, the test and the nature of the remedies available;

    c) Whether the acts of relocation of Ms. Brown and commencing the disciplinary process amount to acts of harassment or a breach of duty;

    d) Whether the investigative process was flawed by (a) the use of an independent investigator and not a Human Resource Manager as stipulated in the National Commission for Self Help Limited Policy and Procedures Manual and (b) failure to provide the grievance letter breaching the terms of the employment contract.

27. To determine whether there is a serious issue to be tried, the Court should not undertake an investigation in the nature of a preliminary trial of the action:

    "It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature consideration."[7]

28. In **Commercial Litigation: Pre-Emptive Remedies International Edition, Goldrein Q.C,** the authors also observed:

    "One of the reasons for the introduction of the practice of requiring an undertaking as to damages upon the grant of an interlocutory injunction is that "it aided the court in doing that which was its greatest object, viz. abstaining from expressing any opinion on

[7] **Commercial Litigation: Pre-Emptive Remedies International Edition, Goldrein Q.C,** it was observed at paragraphs A1-042

the merits of the case until the hearing."

It is open to the court to decide that there is not a serious issue to be tried if the material available at the interim hearing fails to disclose that the applicant has any real prospect of succeeding in his action for a permanent injunction at the trial……

Sir Robery Mergarry V.C also usefully observed in *Mothercare Ltd v Robson Books Ltd:*

> "The prospects of the plaintiff's success are to be investigated to a limited extent, but they are not to be weighed against his prospects of failure. All that has to be seen is whether the plaintiff has prospects of success which, in substance and reality, exist. Odds against success no longer defeat the plaintiff, unless they are so long that the plaintiff can have no expectation of success, but only a hope. If his prospects of success are so small that they lack substance and reality, then the plaintiff fails, for he can point to no question to be tried which can be called 'serious' and no prospect of success which can be called 'real.'"[8]

29. The Claimant contends that there is a serious issue to be tried as the Claimant is at risk of being disciplined on the basis of a flawed investigation which threatens her job, reputation and livelihood. The Claimant also contends that she has made out her allegations of harassment made against the Defendants. The Claimant relied on the Canadian case of **Merrifield v The Attorney General of Canada** 2017 ONSC 1333 where Vallee J determined that the tort of harassment does exist and the test to be followed is as:

"[719] The test for harassment is set out *in McHale and McIntomney* above. In this case, there are four questions to be answered.

(a) Was the conduct of the defendants toward Mr. Merrifield outrageous?

(b) Did the defendants intend to cause emotional stress or did they have a reckless disregard for causing Mr. Merrifield to suffer from emotional stress?

(c) Did Mr. Merrifield suffer from severe or extreme emotional distress?

[8] **Commercial Litigation: Pre-Emptive Remedies International Edition, Goldrein Q.C,** it was observed at paragraphs A1-042- A1-045

(d) Was the outrageous conduct of the defendants the actual and proximate cause of the emotional distress?"

30. Unfortunately, in that case Vallee J made the assumption that the tort of harassment exists without a proper analysis of the need to recognise such a tort and its proper definition. Reliance was placed on **Mainland Sawmills Ltd v IWA-Canada, Local 1-3567 Society** [2006] BCSC 1195, 41 C.C.L.T. (3d) 52 which was a trespass to property claim and the Court assumed that the tort of harassment should exist. This is an open question to be answered at this trial. Unfortunately, in the context of our existing statutory and common law, it would be wrong to identify the acts of a reassignment of duties and the commencement of a disciplinary hearing as satisfying the ingredients of a separate tort of harassment where adequate redress is available in negligence and breach of contract.

31. In any event, the Defendant quite correctly submits that even applying the **Mainland Sawmills** test, the evidence of Ms. Brown has not ascribed to the severity required for it to be considered "harassment". I leave it open, however, for fuller argument on this issue as to what should be the appropriate test, if the tort is to be recognised in this jurisdiction at all.

32. Unlike the UK, there is no statutory remedy for workplace bullying and harassment. See **Rayment v Ministry of Defence** [2010] EWHC 218 (QB). In the UK, The Protection From Harassment Act 1997 provides:

"1.—(1) A person must not pursue a course of conduct—

(a) which amounts to harassment of another, and

(b) which he knows or ought to know amounts to harassment of the other."

33. In **Quigley v Complex Tooling and Moulding** [2005] IEHC 71, there was no need to create a tort of harassment for the Court to deal with workplace bullying and harassment to provide a remedy to the employee. In that case, in a claim for negligence and breach of contract, the plaintiff complained of mental suffering caused from workplace bullying. The Court recognised that at common law an employee may be personally liable for sexual

harassment or bullying of an employee either on the basis that the employer ought to have been aware of the offending employee's propensity to act in this way or on the basis of an unreasonable failure to provide a safe system of work.

34. The Claimant also submitted that in considering the harassment against the Claimant, the Court must consider the unfairness in the disciplinary proceedings. See **Prime Minister Patrick Manning v Feroza Ramjohn** [2011] UKPC 20.

35. The difficulty with the Claimant's claim for injunctive relief to "restraining acts of harassment and bullying" is that the acts which Ms. Brown point to as acts of harassment and bullying are the transfer to another location and the commencement of disciplinary proceedings. The starting point for the Claimant, however, is that our law does not recognise a common law tort of harassment. In **Patel v Patel** [1988] 2 FLR 179, Waterhouse J observed:

> "The essence of the appellant's complaint is that he has been the victim of repeated harassment since May 1985, but in the present state of the law there is no tort of harassment. The judge was right, in my judgment, in limiting the scope of the injunctions in the way that he did."

36. **Patel** concerned a dispute between a father-in-law (plaintiff) and son-in-law (defendant). In 1986 the defendant trespassed on the plaintiff's home and made threats and used abusive language against him. The plaintiff issued trespass proceedings and obtained an interlocutory non-molestation injunction against him. Committal proceedings were heard and the defendant was imprisoned for fourteen (14) days. In further committal proceedings he was fined £100. In 1987 he continued to harass the plaintiff by telephone calls and visits to his home. A third application for the committal was heard but the Judge declined to make a committal order. Instead, the defendant was fined £25, no order for costs was made, and the exclusion order was discharged. The plaintiff appealed the decision but it was held that harassment was not a tort known to law, and therefore acts of that nature could not constitute a breach of an injunction granted in trespass proceedings.

37. While it may be arguable that the tort should be recognised in this jurisdiction, without

settling the test that pre-qualifies this Claimant's entitlement to relief, it will be wrong to restrain the Defendants in this case on these facts from any activity that breaches a nebulous tort. Interim injunctions are after all not granted as a free standing right but to protect an existing legal or equitable right. Even if the emergence of the tort is arguable, it is difficult to say, at this interim stage, the extent to which the employees transfer can qualify as an act of harassment.

38. The only local authority referred to me that may remotely be of assistance to the Claimant is **Cecilyn Legall-Busby v Gail Valentine** CV 2013-02881**.** In that case the Claimant had not satisfied the Court that it had a cause of cation in harassment. See also **Therese Ho v Lendl Simmons** CV2014-01949 where interim injunctive relief was granted to restrain the dissemination of lewd pictures where the Court has not yet recognised the tort of breach of confidentiality. However, such a result would seem to emanate more from a common sense approach to preserve a state of affairs for the Court to do justice at the trial where there was plainly injustice to the Claimant if the actions of the Defendant were left unrestrained. It is not that clear here.

39. I contemplated granting the alternative form of interim relief sought by the Claimant which was: "In the alternative to prayer 1, an interim injunction restraining the 1st Respondent/Defendant from personally contacting the Claimant until the determination of this claim, all communications to be done through her attorneys-at-law". However, to restrain the Defendant from communicating with the Claimant and only to do so through her attorney is unworkable, unwarranted and disproportionate. There is no evidence of any act of personal victimisation apart from the transfer and disciplinary hearings. Channelling communications between members in an organisation through a third party may be time consuming and cumbersome. In any event the cost incurred by the Claimant herself with this method is disproportionate to the preservation of a suitable working arrangement between employer and employee.

40. However, the Claimant is not without relief. She has articulated a claim for breach of contract in the failure of the Defendant to comply with its own stated policy in laying charges. The manual provides at pages 18-19:

"**Investigation of Misconduct**

4. The Human Resources Manager shall investigate all allegations of misconduct; documenting the evidence or testimony of witnesses, other investigations, and the employee who it is alleged, committed an act of misconduct.

5. If, after hearing the employee's response and after making further investigation as warranted by the circumstances, the Human Resources Manager determined the employee has committed an act of misconduct, shall recommend appropriate disciplinary and corrective action.

6. The Human Resources Manager shall prepare for the Chief Executive Officer, a detailed report on the investigations and recommendations within seven days of the completion of investigations."

41. Although the independent investigator gathered statements from several witnesses, despite the Claimant's non-participation, it is alleged that, her grievance letter being a material document should have been disclosed to the investigator to ensure an unbiased investigation. See **Lyons v Longford Wesmeath Education Training Board** [2017] IECH 272, where an internal investigation at a workplace was found to be in breach of the employee's right to fair procedures. Indeed there is a triable issue as to whether the implied terms of the Claimant's contract were breached when an independent investigator was appointed to conduct the investigation and he was not provided a copy of the Claimant's grievance letter. While fault can be attributed to Ms. Brown in failing to attend the meetings with the independent investigator, the purpose of the investigation would have been to compile as full a report as possible with all sides of the allegations being examined.

42. The Defendants unfortunately failed to answer in their affidavit why it did not supply the Claimant's grievance letter, which would have fairly set out her case, to the investigator. Whether it would have impacted upon the investigator's final analysis is not a matter which this Court ought to determine at this stage.

Adequacy of damages to both parties

43. I have also considered whether damages would be an adequate remedy for the Claimant. If so then there is no need for injunctive relief because the Claimant could be adequately compensated if she is successful at the trial. In the alternative, if the Defendants are successful at the trial, the Court must consider if the Defendants would be adequately compensated under the Claimant's undertaking as to damages for the loss the Defendants would suffer. Although one cannot predict the outcome of the disciplinary proceedings, the Claimant does run the risk of the ultimate sanction of dismissal. It would be unfortunate to say to the employee at this stage "take your chances at the disciplinary proceedings" and if she is dismissed and the process is a breach of her contract she will be awarded damages. A court should be wary where the Defendant can purchase a wrong by asking "what will it cost if I breach the contract?" See **Niquan Energy Trinidad Limited v World GTL Trinidad Limited and others**. It is prudent for all parties if this Court at the trial makes its final determination as to whether the process embarked upon by the Defendants is in conformity with the employment contract with the relationship still intact. It would certainly be a waste of resources to continue with such a hearing only to have the Court rule that the proceedings were launched improperly and in breach of the Claimant's contract. Additionally, save for the question of delay there is no evidence of prejudice to the Defendants if these proceedings are placed on hold, neither has the Defendants explained that the severity of the charges demand immediate attention which will jeopardise the organisation if it is not dealt with expeditiously. Indeed, the balance of justice would weigh in favour in maintaining the parties on equal footing in the employment relationship.

The balance of justice

44. In **Olint** Lord Hoffman observed at paragraph 16:

> "It is often said that the purpose of an interlocutory injunction is to preserve the status quo, but it is of course impossible to stop the world pending trial. The court may order a defendant to do something or not to do something else, but such restrictions on the defendant's freedom of action will have consequences, for him and for others, which a

court has to take into account. The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result.."

45. The Claimant, relying on **Jetpack, Olint** and **American Cyanamid** submitted that the greater risk of injustice lies with the Claimant who continues to be subjected to harassment in the form of an unfair and unwarranted disciplinary proceeding and whose job is threatened by these disciplinary proceedings as a result of the flawed investigation.

46. I am of the opinion that the greater risk of injustice lies in having the disciplinary proceedings continue only to determine that it ought not to have been launched in the first place. Not only does this prejudice the rights of the Claimant but is also disproportionate to the proper use of the Defendants' own resources.

47. I have also considered the special factors in this case of the relational contract of employer and employee. It is a unique and special contract where both parties develop a degree of trust that the employer would take care of other employees' welfare while the employee obeys lawful orders and conducts herself for the overall benefit of the organisation. The Defendants have not deposed to any special factors which will affect its operations in any way if the disciplinary proceedings are postponed until the determination of the issues, in this case, at trial.

Conclusion

48. For these reasons, the Court grants an injunction that the Defendants, whether by their servants and or agents or howsoever otherwise, be restrained from continuing the disciplinary proceedings commenced by letter dated 1st February 2019 until trial or further order.

49. Costs of this application shall be in the cause.

Vasheist Kokaram

Judge