**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**CV 2020-04003**

**BETWEEN**

**TRACEY TURNER-ALLEYNE**

**Claimant**

**AND**

**TRINIDAD AND TOBAGO POSTAL CORPORATION**

**Defendant**

**Before the Honourable Madame Justice Margaret Y. Mohammed**
**Dated 31 May 2023**

**APPEARANCES:**
**Mr Anil Maraj and Mr Joshua Hamlet instructed by Mr Khalid Hassanali Attorneys at Law for the Claimant.**
**Ms Kavita Ramadhar Attorney at Law for the Defendant**

## JUDGMENT

### INTRODUCTION

1. The Claimant is a former employee of the Defendant. She has applied[1] ("the Application") for summary judgment pursuant to Rule 15.2(a) of the Civil Proceedings Rules ("CPR") 1998 as amended, on the whole or part of the claim and in the alternative to have paragraphs 5,8,10,12,14,16 and 18 to 20 of the Defendant's Amended Defence filed 1 October 2021 ("the Amended Defence")

[1] Filed 30 November 2022

struck out pursuant to Rule 26.2(1)(c) and (d) of the CPR. The Application was filed after pleadings were closed and after the disclosure and inspection of documents were completed.

2. To place the Application in context it is appropriate to set out the pleaded case of the respective parties.

**THE CLAIM**

3. The Claimant's position is set out in her Statement of Case filed 25 November 2020 ("the Statement of Case") and Reply to Amended Defence filed 31 December 2021 ("the Reply").

4. There are three aspects to the Claimant's claim, namely (i) the breach of the statutory duty owed under the National Insurance Act[2] ("the NI Act") and under section 8 of the Trinidad and Tobago Postal Corporation Act[3] ("TTPC Act"); (ii) the breach of the duty of care by the Defendant in mishandling her employment benefits; and (iii) the breach of her contract of employment by failing to redeploy her to light duties after receiving medical advice and failing to give her one month's notice terminating her contract as required.

5. The Claimant's case is that she began her employment with the Defendant on 5 January 2009 and was promoted to permanent delivery officer on 24 November 2014. She was registered with the National Insurance Board ("the Board") under the NI Act and the Defendant is listed as her employer. Section 46 of the NI Act lists several benefits including the sickness and sickness continuation benefit. These benefits provide periodical payments to employees who are rendered incapable of working for a maximum period of 52 weeks. Her weekly salary was $1,080.75 and she is seeking to recover 52 weeks' sickness and sickness continuation benefit in the sum of $56,199.00.

[2] Chapter 32:01
[3] Chapter 47:02

6. According to the Claimant's case, the Claimant experienced multiple complications during her 3rd pregnancy from around late 2014 to early 2015 which affected her ability to work. The Claimant was hospitalised on or around April or May 2015 as a result and received treatment, then later gave birth on 21 August 2015. In early 2016 the Defendant informed her that her extended sick leave with full pay was coming to an end after which she would be placed on no-pay sick leave. She was advised to apply to the Board so that she could receive benefits for her no-pay sick leave. In making the application for the benefit the Claimant completed section 1 of the NI 15 and NI-15A form, her doctor then inserted the necessary medical information and the Claimant lodged the documents with the Defendant's Human Resources Department in or around March or April 2016 as each form has a section to be completed by the applicant/ Claimant and a section for the Defendant as the employer to fill out using its employment records. The Claimant followed up several times with the Defendant's employees on the status of the application form. Her salary ceased in July 2016. The Defendant returned the completed forms to the Claimant on 20 November 2017 and the Claimant submitted them to the Board on or around 22 November 2017 which was after the 12-month deadline had passed. In the instant case the latest to submit the forms was May 2017 which was 12 months after the circumstances arose.

7. On 26 February 2018, the Board responded to the Claimant disallowing her claim on the basis that it was submitted outside the stipulated time. The Claimant appealed the decision to the Appeal Tribunal of the Board but it was rejected.

8. The Claimant's case is that the Defendant is involved in the administration of the sickness and sickness continuation benefit because it must fill out a section of the form(s) and return them to the Claimant so that they can be submitted before the strict 12-month deadline as set out in Regulation 7(4) of the National Insurance (Benefit) Regulation ("the Regulations"). The Claimant alleges that the Defendant breached its statutory duty by failing to complete and return to her within the 12-month deadline the NI-15 and NI-15A forms wherein she had applied for sickness and sickness continuation benefits under the National Insurance Scheme.

9. The Claimant also contends that the Defendant was negligent in its duties as an employer as it failed to have competent staff to complete or correct the NIS Application Forms in a timely manner and failed to ensure that its staff discharged their duties with the necessary care.

10. The Claimant further contends that the Defendant breached its contract of employment by failing to redeploy her after receiving medical advice from Dr Sonia Roache on 31 January 2019 which stated that the Claimant was medically unfit to work as a mail delivery worker and that the Claimant should be redeployed in any area where she would not be very physically active during working hours. After the 31 January 2019 medical report the Claimant had a meeting with the Defendant and her then union representative. The Defendant informed the Claimant that light duties cannot be accommodated. The Claimant did not receive one months' notice of termination of her contract of employment, she was not redeployed and she has not been paid since July 2016.

11. As a consequence, the Claimant is seeking certain declarations as well as damages for negligence in the sum of Fifty-Six Thousand, One Hundred and Ninety-Nine Dollars ($56,199.00) with interest at the rate of 2.5% per annum from 26 February 2018 until judgement; damages in the sum of Two Hundred and Seventy-Seven Thousand, One Hundred and Twenty-Eight Dollars ($277,128.00) with interest at the rate of 2.5% per annum from 31 January 2019 until judgement; and statutory interest at a rate of 5% per annum pursuant to Legal Notice 168 of 2016, section 25A (2) of the Supreme Court of Judicature Act on the judgement sum due and owing from the date of judgement to the date of payment; and costs.

**THE AMENDED DEFENCE**

12. The Defendant's response to the three aspects of the Claimant's claim are as follows. The Defendant admitted that as a statutory corporation established by the TTPC Act and an employer within the meaning of the NI Act it has a statutory duty to comply with the provisions of the NI Act and the Regulations.

13. The Defendant admitted that in its capacity as the Claimant's employer, it had both a statutory and common law duty to take all reasonable steps to facilitate the Claimant's access to employment benefits which included completing section C of the NI 15 form and NI 15A form, as well as acting upon and/or taking reasonable steps based on the medical advice of a practitioner appointed by itself relative to the redeployment of its employees.

14. The Defendant asserted that it had personnel at all material times who were assigned to deal with the processing of the NI 15 form and NI 15A form within the Defendant. There were queries with the NI 15 form and NI 15A form submitted to the Board, which were later returned to them for those queries to be addressed.

15. The Defendant asserted that it was unaware of any complications relative to the Claimant's health in or around April 2015, or that she had been placed on bed rest for a few days. Instead, it asserted that it had written to the Claimant between 12 June 2015 and 13 July 2015, acknowledging receipt of the medical reports she had submitted with respect to her pregnancy; advised that she was required to submit certain documents in order to process her maternity leave; and advised her on the different classifications of leave (with pay or without). These were the usual letters the Defendant sent to its employees who were on extended sick leave. It denied that it had informed the Claimant in early 2016, that her extended sick leave with full pay was coming to an end and thereafter she would be placed on no pay leave. The Defendant also denied advising the Claimant to apply to the Board to receive the sickness benefits or having any record of the Claimant following up with it in relation to the status of her NI 15 form and NI 15A form.

16. The Defendant's response to the Claimant's assertion that it delayed and only completed and returned the NI 15 and NI 15 A forms to her on 20 November 2017 was that Mrs Alleyne John was never assigned to assist in the processing of the NIS applications as she had suffered a stroke and was not in active duty when the Claimant submitted them. Mrs John had only assisted the Claimant with her application for maternity leave. The Defendant also asserted that it had personnel at all material times who were assigned to deal with the NIS Application forms

within the Defendant and there were no continuing vacancies as alleged by the Claimant. There were however queries with some of the NIS Application Forms submitted to the Board, which were later returned to them for those queries to be addressed.

17. The Defendant's position on the allegation of the breach of contract was that the Claimant began working as its employee in January 2009 and was appointed to a permanent post as a delivery officer on 24 November 2014. The Claimant was paid a monthly salary of $4,323.00 and a cost of living allowance of $145.00 per month. As a delivery officer, her duties included delivering mail to its intended recipients via foot/bicycle as well as signing for registered mail and distribution of materials, such as fliers and small packages in the District that she was assigned.

18. The Defendant asserted that in keeping with its standard procedure, it appointed Dr Roache to medically review the Claimant and provide it with medical reports and/or opinion on the Claimant's health. On 31 January 2019, Dr Roache advised the Defendant that the Claimant was medically unfit to work as a mail delivery worker and should be redeployed in any area where she would not be very physically active during working hours. The Claimant was later given a "Fit to Work" certificate which was effective from 1 March 2019 on light duties only, but the Defendant could not accommodate her as it had no light duties.

19. The Defendant made no admission to the allegations of loss or damages.

**THE APPLICATION**

20. The Application is supported by the Claimant's affidavit ("the Claimant's Principal Affidavit") filed 30 November 2022 and her supplemental affidavit ("the Claimant's Supplemental Affidavit") filed 27 January 2023. In opposition, the Defendant relied on the affidavit of Mr Saood Mohammed filed on 6 January 2023 ("the Mohammed Affidavit"). Prior to the hearing, the parties filed their respective speaking notes and the authorities they sought to rely on.

21. In the Claimant's Principal Affidavit, the Claimant asserted that she completed and signed her aspect of the NI 15 form and NI 15A form and forwarded them to the Defendant for completion on or before May 2017. The said forms were signed by the Defendant on 2 November 2017 and returned to the Claimant who submitted it to the Board on 9 November 2017. However, the said forms were returned to the Defendant because of its errors and later resubmitted on 22 November 2017. The Board disallowed the applications as set out in the NI 15 form and NI 15A form on 26 February 2018, on the basis that it had been made after the expiration of the stipulated deadline ("the decision"). She appealed the decision on 14 October 2019 but the Appeal Tribunal upheld the rejection by the Board.

22. The Claimant asserted that the delay in the processing of the NI 15 form and NI 15A forms was caused by the Defendant's agents and/or servants, which the Defendant admitted to in two letters addressed to the Board and dated 2 October 2017 and 2 November 2017[4]. These letters were disclosed by the Defendant after the Claimant's Attorney at law requested inspection.

23. The 2 October 2017 letter stated that the Defendant had submitted the said applications to be processed and forwarded to the Board, but due to administrative problems including staff shortage and sourcing the relevant information it was not submitted in a timely manner. The letter then requested that the Board treat with the said applications favourably, in order to prevent the Claimant from suffering due to no fault of her own since she is on extended sick leave with no pay. Similarly, the 2 November 2017 letter sought to address certain queries made by the Board and again admitted that because of a lack of staff in the Defendant's Human Resource Department the said forms were not submitted in a timely manner.

24. The Claimant asserted that the Defendant had appointed Dr Roache, who medically reviewed her and provided a medical report dated 5 July 2018 relative to her medical condition. In the said report, Dr Roache advised the Defendant that

[4] Exhibit T.T.A 7 of the Claimant's Principal Affidavit

the Claimant was medically unfit to return to work due to neuropathy that affects her lower limbs. Dr Roache then advised the Defendant on 31 January 2019, that the Claimant should be redeployed in any area where she would not be physically active. However, the Defendant failed to redeploy her to 'lighter duties' despite the 31 January 2019 medical advice and wrongly applied the medical advice received in a restrictive manner to her detriment, which deprived her of the substantial benefit of her employment contract. The Defendant also failed to set out a different version and/or reasons for contradicting the Claimant's version of the events; and to annex any documents to its Amended Defence or disclose any documents in its List of Documents to support its position.

25. The Mohammed Affidavit raised two material facts. He deposed the Defendant could not accommodate the Claimant's request as there are no light duties. He stated that part of the decision making process within the Human Resources Department of the Defendant was that it is bound by section 6 of the Occupational Safety and Health Act[5] (the "OSH Act."). In keeping with the Defendant's practice that all mail delivery officers are required to comfortably carry twenty-five (25) pounds of mail at any point in time and that the Claimant was employed as a mail delivery officer she was required to be fully fit to effectively perform the duties of a mail delivery officer. The duties of a delivery officer were delivering mail throughout the district in which the deliveries officers were assigned either by foot or by bicycle.

26. According to Mr Mohammed, the Defendant was unable to redeploy the Claimant since there were no 'light duties' to be designated to the Claimant within the Defendant and in particular, there are no 'light duties' for a mail delivery officer. There was therefore no avenue or opportunity for redeployment of the Claimant within her designation as a mail delivery officer and to seek to do so would have amounted to a breach of the Defendant's duties as an employer under the OSH Act.

[5] Chapter 88:08

27. He further deposed that the Claimant is not entitled to the payment of the sum of Fifty-six Thousand, One Hundred and Ninety-nine dollars ($56,199.00), as the Claimant has not adduced any basis for the quantification of the said sum.

**LAW AND ANALYSIS**

28. The principles of law which the Court ought to apply in determining both limbs of the Application are not in dispute by the parties.

29. Rule 10.5 of the CPR sets out the Defendant's duty to set out his case if he intends to defend. It states that –

> (1) The defendant must include in his defence a statement of all the facts on which he relies to dispute the claim against him.
> (2) Such statement must be as short as practicable.
> (3) In his defence the defendant must say—
>  *(a)* which (if any) allegations in the claim form or statement of case he admits;
>  *(b)* which (if any) he denies; and
>  *(c)* which (if any) he neither admits nor denies, because he does not know whether they are true, but which he wishes the claimant to prove.
> (4) Where the defendant denies any of the allegations in the claim form or statement of case—
>  *(a)* he must state his reasons for doing so; and
>  *(b)* if he intends to prove a different version of events from that given by the claimant, he must state his own version.
> (5) If, in relation to any allegation in the claim form or statement of case the defendant does not—
>  *(a)* admit or deny it; or
>  *(b)* put forward a different version of events, he must state each of his reasons for resisting the allegation.

(6) The defendant must identify in or annex to the defence any document which he considers to be necessary to his defence.

30. Mendonca JA explained how a Defence should be set out pursuant to Rule 10.5 CPR in the judgment of **M.I.5 Investigations Ltd v Centurion Protective Agency Ltd[6].** At paragraph 7, Mendonca JA stated:

> "In respect of each allegation in a claim form or statement of case therefore there must be an admission or a denial or a request for a claimant to prove the allegation. Where there is a denial it cannot be a bare denial but it must be accompanied by the defendant's reasons for the denial. If the defendant wishes to prove a different version of events from that given by the claimant, he must state his own version. I would think that where the defendant sets out a different version of events from that set out by the claimant that can be a sufficient denial for the purposes of 10.5 (4) (a) without a specific statement of the reasons for denying the allegation. Where the defendant does not admit or deny an allegation or put forward a different version of events he must state his reasons for resisting the allegation (see 10.5 (5)). The reasons must be sufficiently cogent to justify the incurring of costs and the expenditure of the Court's resources in having the allegation proved."

31. **Zuckerman on Civil Procedure Principles of Practice[7]** summarized the effect of Rule 10.5 CPR as:

> "The old system of bare denials and "holding defences" was wasteful and no longer acceptable. Today, the function of the defence is to provide a comprehensive response to the particulars of claim so that when the two documents are read together one can learn precisely which matters are in dispute."

[6] Civil Appeal No 244 of 2008
[7] Third Ed at page 301, para 7.27

32. Rule 26.2 (1) of the CPR empowers the Court to strike out a pleading which discloses no ground for bringing or defending a claim or where the pleading is prolix or does not comply with Part 8 or 10. Rule 15.2 (a) CPR empowers the Court to grant summary judgment where the Defendant has no realistic prospect of success on his defence to the claim, part of claim or issue.

33. Kokaram J (as he then was) in t**he University of Trinidad and Tobago v Professor Kenneth Julien & Ors**[8]**,** set out the approach to be applied where a party seeks to strike out a defence and to obtain summary judgment in the same application. Kokaram J (as he then was) described the striking out application as the soft approach or the lower test and the summary judgment application as the hard approach or the harder test to overcome. At paragraph 24, Kokaram J (as he then was) explained:

> "In my view I agree with the observations made in **Swain v Hillman** [2001] 1 ALL ER 91 that there is an obvious relationship between CPR rule 26.2 (c) and rule 15. They are both summary proceedings that seek to bring a premature end to proceedings without the opportunity being given for the parties or the Court to fully investigate the facts and the law at a trial. The premise of both applications is that it would be a waste of the parties' and Court's resources to do otherwise and that further management to trial is an uneconomical, un-proportionate response to the nature of the case presented by the litigant. The approach maintains the equality of arms between a litigant spared the further expense of a hopeless or weak case and a Defendant's right not to be harassed by such cases. The assessment in both cases is an exercise of the Court's case management powers to give effect to the overriding objective. See CPR rules 1.2, 25.1 (a) (b) and (h). See also the judgment of Jamadar JA in **Real Time Systems Ltd v Renraw Investments Ltd** CA Civ. 238 of 2011. The Court makes a broad judgment after considering the available possibilities and concentrates on the intrinsic justice of a particular case in the light of the

[88] CV2013-00212

overriding objective. See Walsh v Misseldine [2001] CPLR 201. In examining the tests in a rolled up application one may look at the individual trees but then must step back to "look at the forest" in making an overall assessment of the case."

34. At paragraphs 28 to 33 Kokaram J (as he then was) continued:

> "28. I consider the approach in "dismissing" a claim under a rolled up application of striking out and summary judgment such as this one as adopting at the same time a "soft" and "hard" or more robust approach in the assessment of a Claimant's case. The governing caveat of course is that a Court must not, regardless of the nature of its assessment, embark upon a mini trial requiring the resolution of the minutiae of detail in evidence or the applicable law to disputed facts only available at a full blown trial. If there is a legally determinable claim based upon the Claimant's facts, then the Court must consider the available evidence in assessing the prospect of success. See Caribbean Civil Court Practice Note 23.23 and **Chief Constable of Kent v Rixon** [2000] AER 476".

35. The enquiry under CPR rule 26.2 (c) is in my view the soft approach where the language of rule 26(2) (c) is so generous that so long as the statement of case discloses a ground for bringing the claim it cannot be struck out. The Court of Appeal and Privy Council in **Real Time** CA Civ. 238 of 2011 and [2014] UKPC 6 respectively added a new dimension to the curative powers available in lieu of the draconian measure.

36. There are two features of the rule in our jurisdiction which distinguishes it from the former Order 18 rule 19 RSC that is deserving of note. First in the former rule it explicitly provided for the Court's power to be exercised both curatively and robustly in that the power was cast both in terms to strike out "or amend". No such curative power was expressly included in rule 26, although arguably the effect of rule 1.3 (giving effect to the overriding objective) and **Real Time Systems Ltd v Renraw Investment Ltd** [2014] UKPC 6 suggests that the Court may have such

curative powers to allow an amendment. In my view such powers are restricted however to the strictures of Part 20 and are not at large as the former Order 18 rule 19 suggests. In this case there is no application for an amendment, the Claimant stands or falls on his pleaded case.

37. Second the power to strike out under the Order 18 r 19 RSC was available where there was no "reasonable cause of action". Those words were replaced in CPR rule 26.2 (c) by "no ground for bringing a claim". Interestingly the rule does not retain the word "reasonable ground" as it does in the equivalent rule in the UK rule 3.4. In my view the wording of our rule may suggest that it is wider than that previously cast and does certainly encompass "no reasonable cause of action". It does not suggest however that it is a mere pleading issue where the Court is restricted to an examination of the pleadings alone. Evidence may be accepted. This in my view is borne out by the fact that the drafters of this rule omitted deliberately the stricture in Order 18 rule 19 that a Court shall not receive any evidence when deciding whether a statement of claim is to be struck out on the ground of no reasonable cause of action. Further the system of pleadings under the new rules contemplates the reception of documentary evidence where documents may be attached to the pleading.

38. It is clearly possible for the Court to receive evidence to clearly dismiss certain documentary evidence that are foundational pillars to claim in a CPR r 26.2 (c) application. As May LJ observed in **S v Gloucestershire County Council** [2001] 2 WLR at 936 there is "no longer an embargo on the court considering evidence but the application relates centrally to the statement of case." In a claim such as this one for example I am not restricted by the pleadings. Certainly of course accepting all the facts in the statement of case as being proven and testing whether it demonstrates a complete cause of action is the starting point. I do not accept therefore that the CPR rule 26.2 (c) applications are restricted to a pleading issue, although inexorably they generally have been so decided. For this reason the learning on this rule for other jurisdictions and pre CPR should be looked at with some degree of caution.

39. It is indeed worthy of note of this soft approach, especially in the context of this case that a case will not be struck out in an area of developing jurisprudence and where the facts need to be to be investigated before conclusions can be drawn about the law. **Farah v British Airways plc and the Home Office** (2000) Times 26 January. In **Partco Group Ltd v Wragg** [2002] EWCA Civ. 594. This "soft approach" is further explained in Zuckerman:

> "A strike out decision may also be criticized on an entirely different ground: that the court was in error in deciding that the issues did not require investigation by the normal procedural process. In certain circumstances it would be appropriate to allow an issue to be aired at the trial even if the court believes that the claim or defence is groundless. For instance, even though the court considers an allegation of sexual abuse farfetched, it may be desirable to allow the allegation to be tested at the trial. See S v Gloucestershire County Council. Similarly the court may allow proceedings to go forward in order to enable the court to clarify an uncertain point of law."

40. At paragraph 35 In **UTT v Professor Kenneth Julien,** Kokaram J (as he then was) set out the extent the Court must examine the case as it stands at the time the summary application is made. He stated that:

> "On a summary judgment application however the assessment is more robust which I refer to as the "robust approach". It now calls upon a more thorough examination of the available facts and the law even if there are difficult issues. See **Trinidad Home Developers Ltd v IMH Investments Limited** [2003] UKPC 85. It will call for the resolution of discrepancies in the evidence where possible without conducting a mini trial. It calls for an assessment of the possibility and plausibility of evidence to support a claim in an assessment of whether there is a real prospect of succeeding or defending the claim. Lord Woolf MR in **Swain v Hillman** observed that the words no real prospect of being successful do not need amplification, they speak for themselves. The word real directs the court to the need to

see whether there is a "realistic" as opposed to a "fanciful" prospect of success". The chances of success should not be speculative nor all surmise and Micawberism. Whether a party has a real prospect of success depends generally on an assessment of two matters, whether the party has a real prospect of success on the basis of the facts that are known at the time and second on whether there is a real prospect that some additional support for the party's case would emerge if the case followed the normal procedural route."

41. According to **UTT**, if a party does not succeed with the striking out application there is no need to consider the summary judgment application as the threshold to overcome that application is much higher than for the striking out. Further a party may succeed with the striking out application but may not meet the higher threshold required for the summary judgment application.

42. The Claimant seeks to strike out the pleadings at paragraphs 5,8,10,12,14,16 and 18 to 20 of the Amended Defence under Rules 26.2(1)(c) and (d) CPR on the basis that they disclose no grounds for defending the claim and/or has no realistic prospect of success, as they contain bare denials and make several admissions to the points of law and the facts as alleged by the Claimant.

43. It was submitted on behalf of the Claimant that paragraphs 5,8,10,12,14,16 and 18 to 20 of the Amended Defence are fundamentally flawed and should be struck out as: they offend Rule 10.5 CPR ; the Amended Defence consists of bare denials and makes several admissions which, severally or jointly, can satisfy the Court that no further investigation will assist in arriving at the correct outcome; and the Defendant's admissions collectively accept the factual and legal arguments which underlie the Claim and offer no real defence.

44. Counsel for the Defendant argued that paragraphs 5,8,10,12,14,16 and 18 to 20 of the Amended Defence complies with Part 10 of the CPR and do not contain bare denials, but instead provides reasons for the denial and suggests the Defendant's version of events which amounts to a substantive defence. The Defendant has

provided all the necessary information about its case and the Court must therefore have regard to its overriding objective and its general powers of management, and only exercise the power to strike out pleadings in severe cases or in plain and obvious circumstances.

45. In the substantive action, there are three issues to be determined, namely (a) whether the Defendant breached its statutory duties as an employer by failing to complete and/ or return the NI 15 form and the NI15 A form before May 2017 which was the expiration of the 12 month strict deadline imposed by section 7(4) of the Regulations; (b) whether the Defendant was negligent when it failed to complete and/ or return the NI 15 form and the NI15 A form before May 2017 NIS which was the expiration of the 12 month deadline imposed by section 7(4) of the Regulations; and (c) whether the Defendant breached its contract of employment with the Claimant by failing to redeploy the her pursuant to recommendation of the Defendant's appointed medical practitioner and by failing to give her one month's notice of termination of her contract of employment.

46. In my opinion, the Claimant is entitled to an order to strike out the paragraphs of the Amended Defence as sought in the Application for the following reasons. Paragraphs 7,8 and 10 of the Amended Defence are bare denials as they put the Claimant to strict proof even though the Statement of Case has annexed medical reports supporting her claim and the Defendant has no documents to prove otherwise. Paragraph 8 does not offer an alternative version. Paragraph 10 contains no plea that the Defendant's employees returned the completed forms NI 14 and NI 15A in a timely manner. It does not answer the claim that the Claimant's NI 14 and NI 15A forms were disallowed for being late and the annexures F and G of the Statement of Case were the errors of the Defendant. The Claimant pleaded that she took all reasonable steps to pursue her sickness and sickness continuation benefit form after dropping it in. Also, paragraph 12 contains no alternative version to challenge the Claimant's version of the particulars of negligence/ breach of statutory duties as set out at paragraph 37 of the Statement of Case. Further, paragraphs 14 and 19 of the Amended Defence do not contain

any averment or supporting documents that the Claimant was informed of any alternatives.

47. Having found that paragraphs 5,8,10,12,14,16 and 18 to 20 of the Amended Defence are to be struck out I now turn to the summary judgment application.

48. I will address the first and second substantive issues together as they are premised on the same facts. The first issue to be determined from the pleadings is whether the Defendant breached the statutory duty it owed to the Claimant under the NI Act and under section 8 of the TTPC Act. The second issue is whether the Defendant breached its duty of care towards the Claimant by delaying to complete and return the NIS Application Forms in a timely manner.

49. The Defendant's answer to the allegations set out at paragraph 37 of the Statement of Case was that it admits that it has a duty under the TTPC Act which includes a duty to facilitate access to employment benefits under the NI Act. In the case of the Claimant this meant it had a duty to her to comply with the provisions of the NI Act. The Defendant also admitted that the Claimant was its employee since 5 January 2009. The Defendant admitted the Claimant's averments in the Statement of Case which set out the Defendant's duties under the NI Act, the Claimants benefits and that there is a strict 12 month deadline for the employee to submit the requisite forms to the Board (see paragraphs 3,4,6 and 9 of the Amended Defence).

50. The Claimant's case is that an employer involved in the administration of a benefit has a duty to advise and assist its employee to obtain that benefit. The Claimant's Attorney at law referred the Court to three cases namely **Tarailo v Allied Chemical Canada Ltd**[9], **Pittman v Manufacturers Life Insurance Co.**[10] and **Herbert v Manulife Financial**[11] which showed that an employer involved in the administration of a benefit has a duty to advise and assist their employee in

[9] [1989] 68 O.R. (2d) 288
[10] 76 DLR (4th) 30
[11] 46 CCLI (3d) 54; 10 Alta LR (4th) 346

obtaining that benefit. The Claimant submitted that this principle equally applies to a public benefit scheme where the employer's input is necessary to access the benefit.

51. In **Tarailo**, a mentally ill employee who was terminated for behavioural problems sued his employers for wrongful dismissal and failure to provide long-term benefits. There was a group insurance plan requiring the employer to receive forms for claims. The employer failed to advise the employee about accessing the long-term insurance plan requiring the employer to receive forms for claims. The employer also failed to advise the employee about accessing the long-term insurance benefit. Although the claim for wrongful dismissal was dismissed, the employer was found liable because they breached their duty by failing to advise him about the benefit.

52. The case of **Pittman** concerned an appeal against the finding that an employer and insurance company were jointly liable. An employee wishing to insure his wife's life submitted the form to his employer whose role was to administer the plan. The employer failed to forward his application to the insurance company resulting in the wife's life being uninsured. In dismissing the appeal, the majority and dissenting judgments recognised that the employer was directly negligent for failing to forward his application to the insurance company.

53. The case of **Herbert** concerned an employer's refusal to give an employee the form which would help her access a long-term disability benefit. The employer's role was to transmit the form to the employee. She lost out on the benefit because of the missing form despite submitting all other documents. The court found that despite the employee acting responsibly and diligently that her employer thwarted her efforts to receive the benefit.

54. The Defendant admitted at paragraph 11 of the Amended Defence that it owed a duty to the Claimant to complete section C of the NI 15 form and NI 15A form in a timely manner with all proper skill, care and diligence and competence of an experienced employer. However, at paragraph 10 of the Amended Defence the

Defendant asserted that Mrs Alleyne John was never assigned to assist in the processing of the Claimant's NIS applications as she had suffered a stroke and was not in active duty when the Claimant submitted them. Mrs John had only assisted the Claimant with her application for maternity leave. The Defendant also asserted that it had personnel at all material times who were assigned to deal with the NIS Application Forms within the Defendant and there were no continuing vacancies as alleged by the Claimant. There were however queries with some of the NIS Application Forms submitted to the Board, which were later returned to them for those queries to be addressed.

55. However, the Defendant's answer is contradicted by its own evidence as the letters dated 2 October and 2 November 2017, which were disclosed by the Defendant in its list of documents and which are exhibited as T.T.A 7" of the Claimant's Supplemental Affidavit, the Defendant admitted that the delay in submitting the NI 15 and NI 15A forms was because of its lack of staff. These contemporaneous documents of the Defendant contradicted the Defendant's defence and proved paragraph 25 to 37 of the Statement of Case. In my opinion, it is highly unlikely that there is any witness who the Defendant can call to contradict the truthfulness of its contents as the author of those letters, an employee of the Defendant is now deceased.

56. Further, exhibit "T.T.A. 6" of the Claimant's Principal Affidavit is a letter in November 2017 from the Board to the Claimant setting out the queries to be addressed by the Defendant.

57. In my opinion, given the admissions made by the Defendant in the Amended Defence and the contemporaneous documents at exhibits "T.T.A.6" and "T.T.A.7" the Defendant has no realistic prospect of defending the claim for breach of statutory duty and negligence.

58. The third issue to be determined is whether the Defendant breached its contract of employment with the Claimant by failing to comply with the termination notice which required it to give the Claimant one month's notice prior to terminating her

employment. The Claimant ceased being paid in July 2016 and the Defendant failed to redeploy her for lighter duties. The Claimant was not informed about her case.

59. At paragraphs 12 to 16 of the Mohammed Affidavit he stated that due to the provisions of the OSH Act and the Defendant's policy which requires it to find existing suitable alternative employment, the Defendant could not accommodate the Claimant with light duties. However, this was not the Defendant's pleaded case. In my opinion these are new matters which the Defendant cannot now raise in its Defence and therefore the Defendant cannot rely on it to show that it has a defence with a realistic prospect of success.

60. In my opinion, the Defendant also has no realistic prospect of succeeding with the Defence on the third issue. The Claimant's case is that the Defendant breached its employment contract with her by failing to redeploy her after receiving the advice of Dr Sonia Roache advising that the Claimant was medically unfit to work as a mail delivery officer, but should be deployed to perform lighter duties anywhere throughout the Defendant's operations. The Claimant pleaded that she was never redeployed nor did she receive the one month's notice of termination pursuant to her contract. The Defendant's Defence was that despite "its best efforts" it could not accommodate the Claimant with light duties. In my opinion, this defence is a bare defence as the Defendant has not particularised its best efforts. The attempt by the Defendant in the Mohammed Affidavit to put forward additional facts is impermissible as it is outside of the Defence.

61. The last aspect of the Claimant's case which was challenged in the Mohammed Affidavit but not in the Amended Defence was the calculation of the Claimant's loss. In my opinion the Defendant has no realistic prospect of succeeding with this aspect of its Defence, as there is no basis for the quantification asserted by Mr Mohammed. The Claimant's basic salary was set out in her employment contract, which is annexed as exhibit A of the Statement of Case and is an admitted document. The monthly salary is $4323.00, which is then divided by four to provide a weekly salary of $1,080.75. The Defendant has admitted that the period

of the benefit is 52 weeks which therefore amounts to $56,199.00. There is no basis for this issue to proceed to trial.

62. With respect to the the Defendant's failure to redeploy the Claimant which also resulted in her losing compensation from 31 January 2019 to the date of the filing of the Application, the Claimant contended that her compensation would have been increased annually and she would have been entitled to a monthly sum of $5,735.00 in 2019, $5,859.00 in 2020 and thereafter $6,000.00. The Claimant's loss is for a period of 43 months and therefore amounts to $277,128.00.[12]

63. The Claimant is the successful party in the instant action and therefore entitled to prescribed costs on the value of the claim, which is in the sum of $333,327.00. The prescribed costs on this value is $54,832.70 and after taking into consideration Appendix C which prescribes the percentage to be allowed at various stages of a claim, the Court will award the Claimant 55% of the prescribed costs as the Application was heard and determined at the Case Management Stage. The Court therefore finds that the Defendant is to pay to the Claimant prescribed costs in the sum of $30,157.99.

**ORDER**

64. Paragraphs 5,8,10,12,14,16 and 18 to 20 of the Amended Defence are struck out and that judgment be entered against the Defendant.

65. Pursuant to Part 15.2 (a) CPR summary judgment in favour of the Claimant against the Defendant.

66. The Defendant do pay the Claimant damages for negligence in the sum of $56,199.00 with interest at the rate of 2.5% per annum from 28 February 2018 until judgment.

[12] See paragraphs 27 and 28 of the Claimant's Principal Affidavit

67. The Defendant do pay the Claimant damages in the sum of $277,128.00 with interest at the rate of 2.5% per annum from 31 January 2019 until judgment.

68. The Defendant do pay the Claimant Statutory interest at a rate of 5% per annum pursuant to Legal Notice 168 of 2016 pursuant to section 25A (2) of the SCJA and Section 25A of the Supreme Court of Judicature Act on the judgment sum due and owing from the date of judgment to the date of payment.

69. The Defendant do pay to the Claimant the costs of the action. The said costs is on the prescribed basis pursuant to Part 67 CPR and is reduced to 55% which is the sum of $30,157.99 and the costs of this application are to be assessed by a Registrar in default of agreement.

**/s/Margaret Y Mohammed**
**Judge**