COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2007/COM/lab/FP/00011

BETWEEN

JACOB CHARLES JOHNSON

Plaintiff

AND

THE GRAND BAHAMA UTILITY COMPANY LIMITED

Defendant

BEFORE The Honourable Mrs Justice Estelle Gray-Evans

APPEARANCES: Mr Alonzo Lopez for the Plaintiff

Mrs A. Kenra Parris-Whittaker along with
Mr Jacy Whittaker for the Defendant

2012: February 16

RULING

Evans, J

1. The plaintiff is a former employee of the defendant. He was dismissed from the defendant's employ on 17 November 1999. He presented a complaint against the defendant to the Industrial Tribunal (the "Tribunal") claiming wrongful dismissal. The Vice-President of the Tribunal in a written decision dated 20 December 2001 found that the plaintiff was dismissed for cause and dismissed his action.
2. Rather than exercising his right to appeal the Tribunal's decision pursuant to section 64 of the Industrial Relations Act ("IRA"), the plaintiff commenced this action in New Providence on 4 August 2005 by a writ of summons claiming damages for breach of contract, wrongful dismissal, negligence and slander.
3. The defendant now applies to strike out this action on the ground that the plaintiff's claim is *res judicata* and an abuse of the process of the court.
4. The plaintiff also seeks leave to amend his statement of claim.
5. On 3 November 2005, the plaintiff filed a summons seeking leave to enter interlocutory judgment.
6. On 27 January 2006 the defendant filed its defence denying the plaintiff's claim and indicated its intention to apply to have the plaintiff's action struck out. The defendant's summons in that regard was filed on 3 February 2006 and set for hearing on 21 March 2006, when it was adjourned *sine die* by the Deputy Registrar in New Providence. On 10 May 2006, the defendant filed an amended summons in terms identical to its 3 February 2006 summons, except for the date of the writ of summons which had been incorrectly stated in the 3 February 2006 summons, seeking the following relief:

    1) That the writ of summons dated 28 July 2005 and filed 4 August 2005 be struck out under Supreme Court Rules Order 18 rule 19 (1) (a), (b), (c) and (d) on the grounds that it discloses no reasonable cause of action, that it is scandalous, frivolous or vexatious; it may prejudice, embarrass or delay the fair trial of the action; and/or that it is otherwise an abuse of the process of the Court; alternatively that the writ be struck out under the Court's inherent jurisdiction;

    2) That the plaintiff's action be dismissed accordingly;

3) That the plaintiff's application by way of summons filed November 3, 2005 be dismissed;

4) Alternatively, that all further interlocutory hearings and the trial of this action take place at the Courts of the Supreme Court located at the Garnet Levarity Justice Centre, Freeport, Grand Bahama;

5) And that the costs of and occasioned by this application be paid by the plaintiff to the defendant.

7. The plaintiff had by that time entered a judgment in default of defence, on 8 March 2006, which the Deputy Registrar, on 12 May 2006, set aside on the ground of irregularity, although I note here that the Order filed on 12 July 2006 refers to a "judgment of default filed on 21 February 2006".

8. On 5 December 2006, Deputy Registrar Newton heard the defendant's amended summons, at the conclusion of which she made the following order:

> "Statement of claim ought to be amended to particularize the claim of negligence and slander pursuant to the rules of pleading, to be filed and served within two weeks. All further proceedings in the matter to be filed in Freeport. File to be transferred pursuant to section 66(3)(a)(b) and (c) of the Supreme Court Act. Costs to the defendant to be taxed if not agreed."

9. It does not appear from the notes that the Deputy Registrar ruled on the defendant's strike out application and although counsel for both sides (Mr Michael Smith of former counsel for the plaintiff and Mr George Missick of counsel for the defendant) appeared on that occasion, it does not appear that the Deputy Registrar's order on that occasion had been perfected.

10. Nevertheless, the file was transferred to Grand Bahama and the plaintiff filed an amended statement of claim on 14 May 2008 in the Supreme Court Registry in Freeport, Grand Bahama. A note on the amended statement of claim indicates that it was amended pursuant to the Deputy Registrar's 5 December 2006 order.

11. No further steps were taken in the action between December 2006 and 20 October 2008, on which date a summons was filed by Michael T. Smith on behalf of the plaintiff seeking:

> "an order for unliquidated damages against the defendants claimed in the statement of claim with interest and costs."

12. Then, on 24 February 2009 Mr Smith filed another summons on behalf of the plaintiff seeking:

"an order for damages against the defendants as claimed in the statement of claim with interest and costs."

13. On 9 March 2009, the defendant filed a summons in which it sought the following relief:

    1) The writ of summons filed herein on 4 August 2005 be struck out on the grounds that it is scandalous, frivolous or vexatious; and/or it may prejudice, embarrass or delay the fair trial of the action; and/or it is an abuse of the process of the Court.

    2) The plaintiff's action be dismissed accordingly;

    3) The plaintiff do pay to the defendant the costs of this action, including the costs of this application, to be taxed if not agreed.

14. Although the plaintiff's 20 October 2008 and 24 February 2009 summonses as well as the defendant's 9 March 2009 summons were scheduled for hearing on 16 March 2009, on that date, only the defendant's 9 March 2009 summons was heard.

15. During the course of the hearing, Mr Smith for the plaintiff undertook to provide the court and counsel for the defendant with cases which he thought may be relevant to the issue to be decided by the court. The matter was adjourned for the submission of additional authorities by counsel for the plaintiff and thereafter for the court's decision. However, shortly thereafter, and before I delivered my decision, it was brought to my attention that Mr Smith, counsel for the plaintiff at the time, had been suspended from practice and was in fact, suspended, on 16 March 2009 when he appeared before this court on the plaintiff's behalf. I, therefore, recalled the parties, informed them of the above and, over the objections of counsel for the defendant, gave the plaintiff time to seek other counsel. I also determined that I would re-hear the defendant's strike out application.

16. The matter finally came on for re-hearing on 28 March 2011, by which date, the plaintiff had retained his present counsel who had, on 21 May 2010 filed a summons on his behalf seeking, inter alia, leave to make further amendments to his statement of claim.

17. I, therefore, re-heard the defendant's application to strike out the plaintiff's action and heard the plaintiff's application for leave to amend his writ of summons.

18. I note here that although the defendant's strike out summons was with respect to the original writ of summons filed 4 August 2005, at the date thereof, the plaintiff had on 14 May 2008 filed its amended writ of summons; and although counsel for the defendant accused the plaintiff of having amended his pleadings without the leave of the Court "on two different occasions, December 20, 2006 and May 14, 2008", as I have indicated the amended writ of summons filed on 14 May 2008 appears to have been amended with leave of the Deputy Registrar.

19. Consequently, at 16 March 2009, the date of the initial hearing of the defendant's application as well as 28 March 2011, the date of the re-hearing, the relevant statement of claim was the one filed on 14 May 2008 in which the plaintiff sets out his claim as follows:

(*Amended*) STATEMENT OF CLAIM
Pursuant to the Order of the Assistant Registrar on
5th day of December A.D. 2006

1. The plaintiff's claim is for damages for wrongful dismissal and breach of the employment contract having been employed in the position of meter installer/pipe fitter with the Defendants from the period 8th April 1991 – 17th November 1999 (8 years 7 months approximately). On the 17th November 1999, the Defendants wrongfully terminated the Plaintiff's said contract of employment, thereby causing the Plaintiff loss, damages and expenses.

Particulars of Breach

The Defendants, their employees servants/agents were in breach of contract in that they:

i) Failed to perform any or any proper investigation of the allegations resulting in the wrongful dismissal of the Plaintiff.

ii) Negligent in the performance and or conduct of any or any investigation of the allegations resulting in the wrongful dismissal of the Plaintiff.

Further as a result of the aforementioned matters the following breaches have occurred relative to the (Grand Bahama Port Authority and The GBPA Workers Union) Collective Labour Agreement 1997:

(i) Breach of Article 30/C

(ii) Breach of Articles 38-47.

2. That by reason of the aforesaid breach of contract and or negligence on the part of the Defendants their employees servants/agents the Plaintiff has suffered and continues to suffer loss damages and expenses.

3. Further, that as a consequence of the wrongful breach of contract on the part of the Defendants, their employees servants/agents, the Plaintiff has thereby been gravely injured in his character, credit and reputation and has been brought into public scandal, odium contempt AND hurt in his feelings.

Particulars of Slander

(i) After being dismissed from the Defendants' employment, the Plaintiff thereafter sought to find employment with other establishments in the Freeport and wider Grand Bahama business community such as the Princess Hotel (where the Plaintiff was a former employee) the Xanadu Hotel and other such establishments; more particularly the Plaintiff attempted to find employment among businesses and contractors involved in the plumbing trade. The Plaintiff had extensive experience in the construction industry prior to his employment with the Defendants. However, despite his qualifications the Plaintiff was unsuccessful in securing employment with any or any establishment. The Plaintiff was informed by a colleague who owned a plumbing establishment that he could not hire him because his name (Plaintiff's) was "black balled" in the Grand Bahama community. The Plaintiff then attempted to bid for several well paying jobs as an independent contractor but was unsuccessful in all major tenders submitted despite, in some cases, offering the lowest bid. On one such tender (circa June 2002), the Plaintiff was given a verbal commitment to be awarded the contract for plumbing works. However on the day he was to commence the work, the offer was unceremoniously revoked. The Plaintiff was told by the project manager that suppliers had threatened to withhold supplies if the Plaintiff was found to be affiliated with the project.

(ii) The Plaintiff is an avid sportsman and is well known in sporting circles in the Island of Grand Bahama. Prior to his unlawful dismissal by the defendants, the Plaintiff prided himself in having a reputation of credit worthiness both in the business community and among colleagues and family members. However as a consequence of the aforesaid matters, the Plaintiff's credit worthiness was devastated; eventually resulting in his inability to repair loans [particularly between the period March 2000 – July 2005]. The Plaintiff often had to rely on family members and colleagues to assist in debt payments. As a result of the above matters, the Plaintiff sometimes faced open ridicule in public places concerning his finances.

4. The Plaintiff will rely on the following facts and matters in support of his claim for damages:

i) The Plaintiff and his family were subjected to daily visitation and or calls from his creditors and bill collectors. This unceasing harassment caused much stress and anxiety to the Plaintiff and his family. Inevitably the harassments escalated into personal confrontations with collectors and even resulted in a physical attack to the Plaintiff's person.

ii) In August 2003 the Plaintiff was incarcerated at the Freeport Central Police Station for 5 days on the order of Commonwealth Bank.

5. As a consequence of the above mentioned matters the Plaintiff has suffered loss of reputation, distress, mental anxiety, physical and verbal abuse and damages.

Special damages

A schedule of past and future expenses and losses are set out in the Schedule of Special Damages (attached).

6. The Plaintiff further claims Interest on those damages pursuant to The Civil Procedure (Award of Interest) Act 1992.

Particulars

A) Special Damages
Interest is claimed upon special damages at the rate of % and then accruing at the daily rate of %

B) General Damages
Further the Plaintiff claims interest on General Damages at the rate of 10% from the date of the said wrongful dismissal until the date of judgment or sooner payment.

And the plaintiff claims:-

1) Damages
2) Damages for slander
3) Special Damages
4) Interest pursuant to The Civil Procedure (Award of Interest) Act 1992
5) Such other relief as the Honourable Court may deem just.

Dated the 24th day of April A.D. 2008

(*Amended*) SCHEDULE OF SPECIAL DAMAGES
Pursuant to the Order of the assistant Registrar on
5th day of December A.D. 2006

On the 17th November 1999, the Plaintiff was wrongfully dismissed from the employment of the Defendants having been in their employ for some 8 years 7 months 2 weeks (approximately). Had the Plaintiff remained in the employment of the Defendants between the date of dismissal and trial he would have had the following benefits dating from 17th November 1999 – 1st August 2005 (5 years 8 months 2 weeks approx.)

1) Loss of Earnings (17th November 1999 – 1st August 2005)

2) Loss of future earnings (wage increases for an employee of like position, experience and years of employment as the Plaintiff)

3) Loss of benefits under the (GBPA and Group of Companies and the GBPA Workers Union) Collective Labour Agreement pursuant to Articles 38 to 47

4) Cost of relocating family in Freeport

5) Repayment of funds to family members made to creditors

6) Miscellaneous.

Dated the 24th day of April A.D. 2008

20. The defendant relies on the affidavits of Deidre Henfield and Sheila Blanc, Legal Assistants in the firm of the defendant's attorney, filed respectively on 6 February 2006 and 11 March 2009.

21. The basis of the defendant's application to strike out the plaintiff's claim, as foreshadowed in the defence filed 27 January 2006, is set out in paragraph 8 of the affidavit of Deidre Henfield filed on 6 February 2006, as follows:

> "That the plaintiff commenced a similar action number 0333 of 2000 in the Industrial Tribunal, Northern Region against the defendant alleging wrongful dismissal on the same facts. The court heard evidence in the matter on May 10 and May 14, 2001 and in its judgment on December 20, 2001 dismissed the plaintiff's claim after making a finding that the plaintiff was not wrongfully dismissed. The defendant was never served with any proceedings that the plaintiff wished to appeal the Tribunal's decision."

22. In opposition to the defendant's application, as well as in support of his application to amend the statement of claim, the plaintiff relies on his affidavit sworn on 12 May 2010 and filed on 13 May 2010, in which he deposes inter alia, as follows:

1) That I am the Plaintiff herein and duly qualified to make this Affidavit. I do so from my own knowledge save where stated otherwise.

2) That I retained counsel, Mr. Michael Smith, to commence this action in the Supreme Court.

3) That he represented me in Nassau in 2006 before the Deputy Registrar and made application for judgment to be entered against the defendant on my behalf once the matter had been transferred to Freeport.

4) That at the hearing for entry of judgment against the defendant, the defendant alleged that it was an abuse of process for me to bring this claim as the matter had already been heard in the Industrial Tribunal and the matter was therefore res judicata.

5) That my present counsel advises me and I verily believe that I have a good cause of action and that the same is not an abuse of process as claimed by the defendant.

6) That I am advised by my Attorney Alonzo Lopez and verily believe that the entire process of the Industrial Tribunal is consensual only and that consequently there is nothing binding about its decisions as enacted in law and as relates to my case.

7) That even if the process is a compulsory one and not consensual from first to last as I contend, I did not have a fair hearing at the trial of this matter before the Industrial Tribunal.

8) That as I did not have a fair hearing and as I am entitled to one under the constitution the principles of res judicata cannot be applied to deprive me of my constitutional right to a fair hearing.

9) That at the hearing before the Tribunal I informed the President that I had not stolen anything, that I was not able to drive the digging machine which is specialized equipment and that I had not tied in any pipe to the mains so as to allow for water to be stolen.

10) That I also informed the Tribunal President that I had informed my superiors of these facts.

11) That the Tribunal President without dealing with this knowledge in the minds of my superiors determined that my superiors could brand me a criminal without proper enquiry and that it was reasonable for them to dismiss me notwithstanding that they knew that I could not drive the machine and that I was denying having tied in the pipes to allow for water to flow and that there was no investigation to determine if the pipes were tied in.

12) That I went to the Police Station myself and the Criminal Investigation Department which had been contacted by my employers questioned me and did their own investigation and ascertained that I had broken no laws so that I was never arrested or charged with anything.

13) That notwithstanding the Police's refusal to even arrest me, my employers dismissed me alleging criminal conduct.

14) That I am informed by my counsel and verily believe that when a criminal allegation is made against an individual the grounds for it have to be stronger than usual. The tribunal in this case has assisted the Defendants to deprive me of my right to work, which I am advised by my counsel and verily believe is a constitutional right and has upheld the removal of my constitutional right to be presumed innocent until proven guilty.

15) That I verily believe that the Tribunal was biased against me for some reason and its decision is proof of that fact.

16) That I am entitled to a fair hearing and verily believe that to be fair both parties must be heard.

17) That the Tribunal has not properly taken into account the evidence I gave and has not fully and properly heard me. As a result the decision merely shows the Tribunal determining that I was aggrieved and complaining about being treated unfairly with dismissal. In fact, the Industrial Contract prevented me from being dismissed as the alleged incident did not occur during the course of my employment nor on the defendant's premises and therefore was not a dismissible matter. Further, the Tribunal quite arbitrarily dismissed the evidence of a number of persons who were called by the defendant but whose evidence was helpful to me on the The basis that the said facts were not known at the time; the Tribunal failed to address the fact that my employer knew the police were not charging or arresting me and that they refused to take so much as five minutes to verify my claim that there was no connection made. This cannot be evidence of a fair hearing.

18) That I now seek leave of the court to amend my writ of summons as stated in my draft amended writ of summons herein now produced.

19) That the matters I allege are beyond the scope of the Tribunal to consider and accordingly it was not competent for the Tribunal to hear such matters.

20) That further, my new counsel informs me and I verily believe that he is considering referring the court to a case argued by Mr. Fred Smith and accordingly requests the court to give directions for the further prosecution of any arguments concerning the constitutionality of the Industrial Tribunal.

21) That the contents of this affidavit are true and correct to the best of my knowledge, information and belief.

The Strike out application

23. The defendant argues that by commencing this action, the plaintiff is in effect seeking to appeal the decision of the Tribunal, which, the defendant says amounts to a re-litigation of the same issue which was the subject of the proceedings before the Industrial Tribunal.

24. In that regard, counsel for the defendant submits that to permit the plaintiff to maintain this action would be an abuse of the process of the court and in support of that submission, counsel relies on several authorities which establish that it is an abuse of the process of the court:

1) To advance the same claim that was previously advanced in a previous claim. See Dean and others v Arawak Homes Limited BHS J No. 48 [2010] paragraph 14; or

2) To attempt to re-litigate issues on claims that have already been decided against a litigant. See Stephenson v Garret [1898] 1 QB 677; Dean and Others v Arawak Homes Limited; and Rondel v Worsley [1969] 1 AC 191; or

3) To raise issues in subsequent proceedings which could have and should have been litigated in earlier proceedings. Yat Tung Investment Co Ltd v Dao Heng Bank [1975] AC 581; and Saif Ali v Sydney Mitchell & Co [1980] A.C. 198, 222-223.

25. Counsel for the defendant submits further that the plaintiff is using these proceedings as an attempt to cause expense, and harassment to the defendant, which is another reason, she submits, for striking out the action as an abuse of process. Wallis v Valentine [2002] EWCA Civ 1034.

26. In opposition to the defendant's strike out application, counsel for the plaintiff submits that, notwithstanding an action having been brought before the Industrial Tribunal previously, the plaintiff is nevertheless entitled to bring this action for the following reasons:

1) The issues are continuing causes of action extending from the date of the plaintiff's dismissal onward.

2) The process at the Tribunal is consensual only and consequently the plaintiff is not bound by the Tribunal's decision; and

3) Even if the process before the Tribunal is compulsory and not consensual, the plaintiff did not have a fair hearing before the Tribunal and the Tribunal's judgment should be set aside.

4) As the plaintiff did not have a fair hearing, which he is entitled to under the Constitution, the principles of res judicata cannot be applied to deprive him of his constitutional right to a fair hearing.

5) In any event, the matters which the plaintiff now alleges are beyond the scope of the Tribunal to consider and accordingly it was not competent for the Tribunal to hear such matters.

27. Consequently, counsel for the plaintiff submits that this action does not amount, in law, to re-litigation of the claim before the Tribunal.

28. The learned authors of Spencer Bower and Handley: Res Judicata Fourth edition at paragraph 1.02 summarize the principles relating to the plea of res judicata as follows:

> "1.02 A party setting up a *res judicata* as an estoppel against his opponent's claim or defence, or as the foundation of his own, must establish its constituent elements; namely that:
>
> (i) the decision... was judicial in the relevant sense;
>
> (ii) it was in fact pronounced;
>
> (iii) the tribunal had jurisdiction;

(iv) the decision was:
   a. final
   b. on its merits;

(v) it determined a question raised in the later litigation; and

(vi) the parties are the same or their privies, or the earlier decision was in rem."

29. Lord Diplock in the case of Saif Ali v Sydney Mitchell & Co [1980] A.C. 198, 222-223, developed that point in the following passage:

> "Under the English system of administration of justice, the appropriate method of correcting a wrong decision of a court of justice reached after a contested hearing is by appeal against the judgment to a superior court. This is not based solely on technical doctrines of res judicata but upon principles of public policy, which also discourage collateral attack on the correctness of a subsisting judgment of a court of trial upon a contested issue by re-trial of the same issue, either directly or indirectly in a court of co-ordinate jurisdiction.
>
> My Lords, it seems to me that to require a court of co-ordinate jurisdiction to try the question whether another court reached a wrong decision and, if so, to inquire into the causes of its doing so, is calculated to bring the administration of justice into disrepute."

30. In the Privy Council case of Yat Tung Invesment Company Ltd v Dao Heng Bank Ltd [1975] AC 581, Lord Kilbrandon delivering the decision of the Board, said at page 590:

> "But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings. The locus classicus of that aspect of res judicata is the judgment of Wigram V.-C. in Henderson v. Henderson [1843] 3 Hare 100, 115, where the judge says:
>
> > ... where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."
>
> The shutting out of a "subject of litigation" - a power which no court should exercise but after a scrupulous examination of all the

> circumstances - is limited to cases where reasonable diligence would have caused a matter to be earlier raised; moreover, although negligence, inadvertence or even accident will not suffice to excuse, nevertheless "special circumstances" are reserved in case justice should be found to require the non-application of the rule...
>
> The Vice-Chancellor's phrase "every point which properly belonged to the subject of litigation" was expanded in Greenhalgh v. Mallard [1947] 2 All E.R. 255, 257, by Somervell L.J.:
>
> > ... res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but ... it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them."

31. Then In Barrow v Bankside Members Agency Ltd et al [1996] 1 All E.R. 981, Sir Thomas Bingham MR (as he then was) expressed the rule as follows:

> "The rule in Henderson v Henderson is very well known. It requires the parties when a matter becomes the subject of litigation between them in a court of competent jurisdiction, to bring their whole case before the court so that all aspects of it may be finally decided (subject of course to any appeal) once and for all. In the absence of special circumstances, the parties cannot return to court to advance arguments, claims or defences which they could have put forward for decision on the first occasion but failed to raise. The rule is not based on the doctrine of res judicata in a narrow sense, nor even on any strict doctrine of issue or cause of action estoppels. It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on forever and that a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed."

32. And Lord Morris of Borth-y-Gest in the case of Rondel v Worsley [1969] 1 AC 191, 251, expressed the view that it would be: "undesirable in the interests of the fair and efficient administration of justice to tolerate a system under which, as a sort of by-product after the trial of an action and after any appeal or appeals, there were litigation upon litigation with the possibility of a recurring chain-like course of litigation."

33. According to the written decision of the Vice-President, the action before the Tribunal "was brought by Charles Johnson, the applicant, an employee of the respondent for wrongful dismissal." The Vice-President, after hearing the parties, at paragraph 11 of her decision, found, based on the evidence before her, that the applicant/plaintiff was dismissed for cause and she dismissed the case.

34. Having heard the parties, the Tribunal on 20 December 2001 pronounced its final decision on the merits of the case, thereby determining the same issue raised in

the writ of summons in this case, namely, whether or not the defendant in breach of its contract of employment with the plaintiff wrongfully dismissed the plaintiff. There is no dispute that the parties in this action are the same parties as were before the Tribunal.

35. It is common ground that in employment matters, the Tribunal and the Supreme Court have coordinate jurisdiction. Hence the plaintiff had the option in November 1999, when he was dismissed by the defendant, of bringing his claim to the Supreme Court or taking it to the Tribunal. He opted to take his claim to the Tribunal. He was represented by counsel in those proceedings. The plaintiff, being dissatisfied with the Tribunal's decision, had a right by virtue of section 64 of the IRA to appeal that decision to the Court of Appeal.

36. His reasons for not exercising his right to appeal to the Court of Appeal are unclear. Instead, almost four years after the Tribunal's decision in December 2001, and almost six years after his dismissal in November 1999, the plaintiff commenced this action in August 2005 in which he claimed, inter alia, damages for wrongful dismissal.

37. In my judgment, all of the constituent elements in setting up a plea of *res judicata* have been established with respect to the plaintiff's claim for damages for breach of contract and wrongful dismissal in this action and despite the plaintiff's contention that he is not bound by the Tribunal's decision, section 65 of the IRA makes it clear that an order or award of the Tribunal is binding on all parties to the dispute who appear or are represented before the Tribunal...." The plaintiff is such a party.

38. I, therefore, reject the plaintiff's contention that he is not bound by the Tribunals' decision, particularly as it was he who chose to take his complaint to the Tribunal and it is for that same reason that I reject counsel for the plaintiff's submissions regarding the independence and impartiality of the Tribunal.

39. It is disingenuous of the plaintiff, having chosen the venue for the adjudication of his claim, to now question the constitutionality, impartiality and/or independence of the very forum which he chose, simply because the decision was against him.

40. As for his complaint that he was deprived of his constitutional right to a fair hearing before the Tribunal, I agree with counsel for the defendant that that is an issue which the plaintiff could have raised at the Court of Appeal had he exercised his right under section 64 aforesaid and appealed to that Court, which

has the power, inter alia, on appeal to set aside the order appealed against and to order that a new hearing be held. It seems to me that a new hearing is what the plaintiff is now attempting by this action to achieve.

41. However, counsel for the plaintiff argues that some of the issues intended to be raised in this action could not have been raised in the Tribunal. In that regard, I note that, in addition to his claim for damages for breach of contract and wrongful dismissal, the plaintiff also alleges in his amended writ filed in May 2008: (i) negligence on the part of the defendant in the conduct of the investigation of the allegations resulting in his dismissal; and (ii) slander as a result of the wrongful breach of contract by the defendant, its employees, servants/agents. However, it is clear that those allegations all flow from the same claim for breach of contract. In fact, the plaintiff gives "negligence" as one of the particulars of the breach of contract and pleads the slander as a consequence of the breach of contract.

42. The Tribunal having determined that the plaintiff was terminated for cause, therefore, there was no breach of contract and since the other claims stem from the alleged breach of contract, the plaintiff would, in my view, have no reasonable cause of action against the defendant.

43. Further, as I indicated, the plaintiff had the option in 2001 of commencing an action in either the Supreme Court or the Tribunal. He chose to go to the Tribunal. Having done so, I do not see how it would be in the interest of justice to allow him, because he is dissatisfied with the Tribunal's decision to re-litigate this matter in this Court, particularly as, firstly, he failed to exercise his undoubted right to appeal to the Court of Appeal; and secondly, as he is relying on the same facts and cause of action as he did, or could have done before the Tribunal.

44. In the result, I accept the defendant's argument that the prosecution in this Court by the plaintiff of his claim as set out in his writ of summons filed August 2005, as amended with leave and filed in May 2008, is not only frivolous and vexatious, but it is also an abuse of the process of the Court for the reasons that the plaintiff is seeking in this action to re-litigate issues on claims that have already been decided against him; that he is advancing the same claim that was advanced before the Tribunal; and he is, in effect, attempting to treat this Court as an appellate court to the Tribunal.

The Amendment Application

45. The plaintiff also seeks leave to amend his statement of claim to include further particulars of libel and slander; allegations of unconstitutionality of the Tribunal; unfairness on the part of the Tribunal; breach of his constitutional rights; unlawful restraint of trade; exemplary and aggravated damages.

46. The plaintiff also seeks to have the Attorney General joined as a party to the action.

47. The principles regarding amendments are well settled. Firstly, whether or not leave to amend is granted is a matter for the discretion of the judge, who should be guided in the exercise of such discretion by an assessment of where justice lies (Ketteman v Hansel Properties Ltd [1987] AC, 189). Secondly, the power to amend is available at any stage of the proceedings (Roe v Davies (1876) 2 CH D 729, 733; Cropper v Smith (1884) 26 Ch D, 710) even if the effect of the amendment is to substitute a new party, alter the capacity in which a person sues or add or substitute a new cause of action after the expiration of any relevant limitation period. See RSC Order 20 rule 5. And thirdly, as a general rule, "however negligent or careless may have been the first omission and however late the proposed amendment...it should be allowed if it can be made without injustice to the other side" and "there is no injustice if the other side can be compensated with costs." Per Brett, MR in Clarapede & Co. v Commercial Union Assn (1883) 32 W.R. 262 at page 263.

48. Notwithstanding the Court's undoubted discretion to grant leave to amend at any stage of the proceedings, in the case of Ketteman v Hansel Properties Ltd [1988] 1 All ER 38; [1987] A.C. 189, Lord Griffiths expressed the view, with which I respectfully agree, that different considerations apply to different stages and no doubt there is a difference between allowing amendments to clarify the issues in dispute and those that provide a distinct defence or claim to be raised for the first time.

49. Counsel for the defendant argues that the amendments proposed by the plaintiff, if allowed, would add a new cause of action to the plaintiff's statement of claim, which cause of action would now be barred by virtue of section 5 of the Limitation Act, chapter 83, Statute Laws of The Bahamas, having accrued on 17 November 2005, more than seven years before this application to include them.

50. In her submission, therefore, to allow the amendment would result in an injustice to the defendant as the defendant would be deprived of the benefit of the Limitation Act which, in her submission, cannot be compensated in costs.

51. Counsel for the plaintiff argues, as I understood him, that the proposed amendment in relation to, for example, the alleged constitutional breach, is not raised as a cause of action; and in the case of the claims for example, slander and restraint of trade, the facts are already before the court and the proposed amendments simply provide additional particulars. Therefore, he submits, there is no question of the defendant losing any rights under the Limitation Act.

52. According to counsel for the plaintiff, the proposed amendments relating to the addition of the Attorney General as a defendant and the alleged breach of constitutional rights of the plaintiff go to determining whether the breach of contract claim alleged by the plaintiff might otherwise be regarded as barred on the basis of *res judicata*. He appears to concede that if those claims are not allowed then the plaintiff has no defence to the defendant's claim of *res judicata* on the issue of breach of contract, although not in relation to the claims for slander and restraint of trade as, he says, the defamation has been co-incident with the restraint of trade and has continued after the Tribunal ruling.

53. As indicated, by the proposed amendments the plaintiff is seeking to include, inter alia, a claim for unlawful restraint of trade and a challenge to the constitutionality of the Tribunal, which is why he also seeks to have the Attorney General, whom he referred to as "the defender of the rights of the public", joined as a party to these proceedings.

54. However, it seems to me that except for the claim for unlawful restraint of trade and providing further particulars of the allegations of libel and slander, the proposed amendments include the arguments advanced by counsel on behalf of the plaintiff as to why the plaintiff ought to be allowed to bring this action, notwithstanding the same having been adjudicated on by the Vice-President of the Tribunal, namely: allegations of unfairness on the part of the Tribunal; breach of the plaintiff's constitutional rights and the unconstitutionality of the Tribunal, all of which I have indicated are matters that could and should have been dealt with either before the Tribunal or on appeal to the Court of Appeal.

55. As for the allegation of unlawful restraint of trade I accept the submission of counsel for the defendant that such a claim made more than seven years after

the commencement of this action would be barred by section 5 of the Limitation Act and to allow the amendment would, in effect, deprive the defendant of its defence under that Act which could not be compensated in costs.

56. Moreover, I agree with counsel for the defendant that to permit the plaintiff to continue with this action, with or without the proposed amendments, would be tantamount to allowing a party dissatisfied with a decision of the Tribunal to circumvent the process prescribed by the Parliament, which is to appeal to the Court of Appeal, and allowing an "appeal" of the Tribunal's decision to the Supreme Court. As observed by Lord Diplock in the case of Saif Ali: "to require a court of coordinate jurisdiction to try the question whether another court reached a wrong decision and if so, to inquire into the causes of its doing so is calculated to bring the administration of justice into disrepute."

57. In the result, in exercise of my discretion, I refuse to allow the amendments sought by the plaintiff in his proposed amended statement of claim and I dismiss his application therefor.

58. The costs of the applications as well as costs of the action are to be borne by the plaintiff, such costs are to be taxed if not agreed.

Delivered this 6th day of July A.D. 2012

Estelle G. Gray Evans
Justice