BARBADOS

IN THE EMPLOYMENT RIGHTS TRIBUNAL

NO: ERT/2020/044

BETWEEN:

STACY GREAVES **CLAIMANT**

AND

FAYE FINISTERRE T/A FINISTERRE ATTORNEYS **RESPONDENT**

DATE: July 5, 2024

TRIBUNAL:

Kathy-A. Hamblin, SC	**Deputy Chairman**
Beverley Beckles	**Member**
Edward Bushell	**Member**

APPEARANCES:

Larry Smith, KC in association with Jamar Bourne, Attorneys-at-Law for the Claimant
Kashawn Wood, Attorney-at-Law for the Respondent.

ORDER

1. BACKGROUND

1.1 The Respondent filed an amended Respondent's Form 2, which is in effect its Defence, on Friday, June 28, 2024, by email to the Tribunal's secretariat. That Defence, along with a 55-page witness statement of the Respondent, came to the attention of the Tribunal by email at 9:22 a.m. on July 3, 2024, just over half an hour prior to the scheduled 10:00 a.m. start of the hearing. In that amended Form 2, the Respondent/Employer asserted that the "*Claimant and the Respondent agreed that the Claimant will re-pay to the Respondent the sum of $12,000.00 arising from the Claimant's negligence in failing to alert the telephone service providers that the Respondent was travelling and to activate a roaming plan.*" The Respondent asserts that "*if, which is denied, the Respondent*

is under any liability to the Claimant on the claim the Respondent is entitled to set off for damage caused by the Claimant to the Respondent as set out in the counterclaim."

2. COUNSEL'S SUBMISSIONS

2.1 Counsel for the Claimant Mr. Larry Smith KC, made submissions *in limine* on July 3, 2024, objecting to the amendment to the Respondent's Form 2 /Defence. In brief, Mr. Smith argued that the Tribunal has no jurisdiction to entertain the counterclaim which he asserted is frivolous and vexatious and which he likened unto "*high-class nonsense on stilts*". The counterclaim, he argued, should properly be determined elsewhere, there being no evidence that it forms part of the employment contract between the parties. Mr. Smith noted that the Tribunal's remedies are limited to reinstatement, reengagement and compensation.

2.2 Mr. Kashawn Wood, counsel for the Respondent, countered that the Tribunal is entitled to consider the counterclaim under section 36 (b) of the Employment Rights Act 2012-9 ("the Act") pursuant to which the Tribunal is mandated to take into account "*any mitigating circumstances*" so as to reduce the liability of the employer. He posited that the counterclaim is a "*mitigating circumstance*". Mr. Wood also submitted that the Claimant agreed with the Respondent that money for her negligent work should be deducted from her wages. He described the counterclaim and set-off as "*merely a procedural step.*"

3. DELAY AND AMENDMENT

3.1 The Tribunal formally registers its profound displeasure with the lateness of the Respondent's filing. The late filing not only breaches the consent order which the parties settled at Case Management, pursuant to which all documents which the parties intended to rely on ought to have been filed by June 14, 2024, but also placed the Tribunal, two-thirds of whom are lay members without formal legal training, at a serious disadvantage. None of the members of the Tribunal had an opportunity to read and digest these pleadings prior to the hearing.

3.2 The amendment to the Respondent's Form 2 was effected without so much as the courtesy of a request for an extension of time by counsel, who is not so inexperienced as to know no better. Indeed, this is a continuation of a growing culture of discourtesy and disrespect by attorneys, seasoned and inexperienced, appearing before the Tribunal.

3.3 Some attorneys-at-Law (to their credit neither counsel in this matter has to date made that assertion) justify that disrespect by reminding the Tribunal at every juncture that the Tribunal is but an inferior body. They are emboldened by the fact that there are no rules governing the Tribunal's procedure. The absence of rules fosters the *laissez-faire* attitude which is pervasive in the Employment Rights Tribunal. But for the ruling summarised below, the Tribunal would have been inclined to counter the Respondent's discourtesy by striking out the amended Form 2, which was filed out of time, after the close of pleadings, without leave or notice to the Tribunal.

4. JURISDICTION OF THE TRIBUNAL

4.1 The Tribunal derives its jurisdiction from section 7 (2) of the Act. For avoidance of doubt, the Tribunal's jurisdiction is "*to determine complaints made to it under this Act and, subject to section 48, to make awards and other decisions in relation to those complaints.*"

4.2 Pursuant to section 2(1), "*complaint" means a complaint made to the Tribunal under this Act by way of the Chief Labour Officer.*" That definition, in the opinion of the Tribunal, cannot be so interpreted as to include a counterclaim of the type the Respondent purports to make, or indeed, any counterclaim. Without exception, every complaint to this Tribunal must be made through the

Chief Labour Officer pursuant to section 8 (2). No complaint can be made directly to the Tribunal in the manner in which the Respondent purported to file her counterclaim, or at all.

4.3 More importantly, the Act confers no right of action on an employer against his employee. The right to pursue a complaint before the Tribunal is the exclusive preserve of the employee.

4.4 Even if the Tribunal had by some statutory gymnastics assumed jurisdiction in relation to the counterclaim, that counterclaim was filed some 3.5 years after the claim itself was filed. Surely this employer could not seriously believe that, even if she had the right to make a claim to the Tribunal, she could do so more than three *years* after she contended it arose, when an employee's complaint is barred, except in limited circumstances, if not filed within three *months* of the effective date of dismissal.

4.5 For the Tribunal to set off the amount claimed by way of counterclaim against any award the claimant might receive should she prevail, the Tribunal would first be required to hear and determine the counterclaim. That counsel could suggest that the Tribunal should consider the Respondent's counterclaim for the express purpose of setting off the amount which the Respondent claims, in circumstances where he knows or ought to know that the Tribunal has no jurisdiction to hear the counterclaim itself, is preposterous and deserving of the harshest condemnation.

5. RESTRICTION ON DEDUCTION OF WAGES FOR NEGLIGENT WORK

5.1 There is an even more compelling reason for the Tribunal to strike the amendment to the Respondent's Form 2. The Respondent is in effect asking the Tribunal to legitimise a claim which, pursuant to section 8 of the Protection of Wages Act, Cap. 351 of the Laws of Barbados, is expressly prohibited. Under section 8, an employer is restricted from making any contract or agreement with a worker for the deduction from the worker's wages, or for any payment to the employer by the worker, of a sum of money for bad or negligent work, unless that bad or negligent work arose from the employee's wilful misconduct or neglect. Incredulously, Mr. Wood cited that very Act in support of the inclusion and retention of the amended counterclaim.

6. DISPOSAL

6.1 The Tribunal has no jurisdiction to entertain the counterclaim by which the Respondent seeks to enforce an illegal contract. Accordingly, the counterclaim is struck in its entirety from the record. The Tribunal regrets that there are no provisions in the Act to sanction in costs or otherwise, parties who waste the Tribunal's time in circumstances such as these, when they know or ought that their arguments have no prospects of success.

Deputy Chairman

Member

Member