

JERSEY / JUDGMENT

Alwitry v States Employment Board

[2020] JRC 206 (08 October 2020)

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judgment

the COMMISSIONER: 1. This is an application by the States Employment Board ("the SEB") which, if successful, will effectively reduce to de minimis sums the claim of Mr Amar Alwitry for damages arising out of the unlawful termination of his contract of employment. 2. To recap, on 20 th July 2018 the Court ordered that it should take first the issue of liability and whether Mr Alwitry's claims in damages came within what is known as the "Johnson's Exclusion Area" and is therefore limited to the contractual notice period, together with what is known as the "Gunton Extension". 3. On 6 th February, 2019 and following a trial on these preliminary issues, the Court found that (Alwitry v States Employment Board

[2019] JRC 014): (i) The termination of his contract of employment was unlawful (paragraph 343); (ii) The damages in this case did not come within the Johnson's Exclusion Area and were not limited to any period of contractual notice or any Gunton Extension (paragraph 365); and (iii) The damages were to be assessed on the basis of compensation, not punishment (paragraph 374). 4. On 10 th July 2019, the Court of Appeal dismissed the appeal of the SEB (States Employment Board v Alwitry

[2019] JCA 134) and on 3 rd April 2020 the Privy Council refused the SEB leave to appeal. The decision of the Royal Court is therefore final and the proceedings have now moved on to the assessment of Mr Alwitry's claims for damages. 5. Mr Alwitry's schedule of loss comes to just under £8 million, comprising losses up to the date of assessment in terms of salary, private practice income and pension rights, and future such losses up to the age of 65. 6. In its summons of 3 rd June 2020, the SEB seeks an order that: "[Mr Alwitry's] damages for wrongful dismissal should be assessed on the basis that the employment relationship had irretrievably broken down at the point of dismissal and would not have continued beyond that date." 7. This application is founded upon a finding of fact made by the Court of Appeal which I need to set in context. Schedule 18.2.1 of Mr Alwitry's contract of employment permitted the SEB to terminate his contract for the following reasons, namely conduct, capability, redundancy, failure to hold or maintain the requisite qualification, in order to comply with statute or other statutory regulation or where there is some other substantial reason to do so in a particular case. Schedule 18 is set out in full

at paragraph 266 of the Royal Court's judgment. The Royal Court made the following findings: (i) The Royal Court found that Mr Alwitry had not repudiated his contract of employment (paragraph 319); and (ii) In the view of the Royal Court the sole ground relied upon by the SEB for terminating his contract under Schedule 18.2.1 was that it had "some other substantial reason", namely the fundamental breakdown in working relationships between the parties. The Royal Court found that there had not been a fundamental breakdown in the working relationships between the parties and that accordingly the SEB did not have "some other substantial reason" for terminating his contract (paragraphs 330 - 342). 8. In its judgment the Court of Appeal found that the Royal Court had in fact been invited by the parties to also rule on the question whether the SEB could terminate the contract for "conduct" (paragraph 67). The Court of Appeal ruled on the question itself, finding that the SEB had fallen well short of discharging the burden of proving that it had reasonable grounds for terminating Mr Alwitry's contract on the basis of conduct (paragraph 75). 9. Reverting to "some other substantial reason" the Royal Court made this observation at paragraph 332: "332 A frequent instance of dismissal for 'some other substantial reason' in unfair dismissal proceedings arises where there had been a fundamental breakdown in working relationships between the parties. This recognises the pragmatic requirement that co-employees must be able to function in a harmonious and co-operative manner as one of the essential facets of the employment relationship and one which fundamentally distinguishes it from arms-length commercial relationships. As Lord Steyn said in *Johnson v Unisys* at paragraph 20: 'It is no longer right to equate a contract of employment with commercial contracts. One possible way of describing a contract of employment in modern terms is as a relational contract.'" 10. The Royal Court then went on at paragraphs 339-342: "339 We are not concerned here with whether Mr Alwitry's conduct had irreparably damaged the employment relationship of trust and confidence as we were under the section dealing with repudiation. Under Schedule 18.2.1 'conduct' is a quite separate ground for termination than "some other substantial reason" and the SEB has not sought to rely on it. If it had done so, the disciplinary procedures and appeals under the contract of employment, which it sought to avoid, would have come into play. We are concerned here with whether, as a matter of fact, and viewed objectively, as at the 22 nd November 2012, there had been a fundamental breakdown in working relationships between the parties, Mr Alwitry's responsibility for that breakdown being incidental. Again, the burden of proof is upon the SEB. The emphasis here is on working relationships between the parties and as the SEB is a corporate entity, that can only mean Mr Alwitry's working relationships with his co-employees. It might be thought to be stretching it somewhat to talk in terms of Mr Alwitry's working relationships when his contract was terminated before he had started work at the General Hospital at all and before his contract had become effective (clause 2). The email from the BMA stands to be treated in the same way as when we were dealing with repudiation, namely something which could not contribute to any asserted breakdown in Mr Alwitry's working relationships with his co-employees. We have already found that as at the 22 nd November 2012, the employment relationship between the co-employees concerned in the hospital

management and Mr Alwitary had not been irreparably damaged by his conduct (in reality the only co-employees with whom he had any real contact) and it must follow that his working relationships with them had not fundamentally broken down. Mr McNeela had always been happy to work with him and there is no evidence that working relationships with other members of staff employed at the General Hospital had fundamentally broken down. We find that as at the 22 nd November 2012, there had not been a fundamental breakdown in the working relationships between the parties and accordingly that the SEB did not have 'some other substantial reason' under Schedule 18.2.1 for terminating Mr Alwitary's contract of employment." 11. Turning to the findings of the Court of Appeal on whether the SEB could terminate for " some other substantial reason ", it is best to set out its finding in full: "Termination for 'some other substantial reason' In case we are wrong on the SEB's hypothetical entitlement to terminate for 'conduct' we will also address its other argument (in fact, its preferred outcome), namely that the SEB could have terminated the Contract on three months' notice for 'some other substantial reason'. The official passages in the Royal Court's judgment have been quoted in Paragraphs 16(ii) & (ii) above. In our judgment, they display a logical flaw. The Royal Court said that having already found that the relationship between the hospital management and Mr Alwitary 'had not been irreparably damaged by his conduct ... it must follow that his working relationships with them had not fundamentally broken down' (paragraph 341, emphasis added). That is a non sequitur. The question of responsibility for the breakdown is entirely separate from the question of fact whether there had indeed been a breakdown. The unavoidable conclusion is that, rightly or wrongly, the relationship between Mr Alwitary and hospital management had irretrievably broken down by 13 November 2012, and the decision to terminate the Contract is proof of that breakdown, as is (for example) Mr Downes's threat to resign. Under this heading, it is important to repeat that responsibility and culpability for the breakdown are irrelevant: the question is simply whether the relationship had gone, and the truth is that it had. This conclusion is not altered by the fact that the Royal Court commented (paragraph

- 341) that 'Mr McNeela had always been happy to work with him and there is no evidence that working relationships with other members of staff employed at the General Hospital had fundamentally broken down'. Reaching this stage of the analysis brings us to the issue addressed in paragraphs 332
- 338 of the Royal Court's judgment. In circumstances where the true reason for an employee's dismissal is (alleged) misconduct, can the employer 'side-step' the consequences of classifying it as such by relying instead on 'some other substantial reason'? The decisions in *Lauffer* (supra) and *Kerslake v North West London Hospital NHS Trust*
- [2012] EWHC 1999 (QB) suggest that the answer is 'no'. In *Kerslake* the court said at paragraph 182 that an employer 'is not permitted to dismiss under the guise of 'some other substantial reason' if the real reason for the dismissal is capability or conduct'. We agree. Indeed any other outcome would risk violating the principle of contractual interpretation that a party

cannot profit from his own wrong-doing: if an employer's true reason for dismissal is his concern over the employee's conduct but, on analysis, the employer does not have objectively good reasons for dismissal based on misconduct, and thus a purported dismissal on that basis would be unlawful, it would be perverse to interpret the contract as nevertheless enabling the employer to dismiss for 'some other substantial reason'. Given that dismissal for misconduct would have triggered a disciplinary process, if the employer fails to prove misconduct justifying dismissal under that heading, it would be repugnant nevertheless to allow the employer to dismiss 'for some other reason' and thereby avoid any disciplinary process. Our conclusion in this regard is reinforced by the circumstances of this case. The Royal Court held (see paragraph 12(i) - (v) above) that the relationship had not broken down irretrievably by 12 November 2012. The decisive cause of the final breakdown was the receipt of the email from the BMA, but the reason that email had the effect it did was a combination of (a) the misunderstanding of the HSSB as to the nature of the contact between Mr Alwitry and the BMA clarifying matters with the BMA. That being the position, it would require a perverse interpretation of the Contract to allow the SEB to terminate on notice for 'some other substantial reason' when the circumstances ostensibly giving rise to that 'substantial reason' were the product of its own 'grossly unjust' process (paragraphs 316). Another way of looking at the same point is to recognise that the 'reasons' for dismissal listed in Schedule 18 of the T&C in this case operate as a constraint on the SEB's freedom to dismiss Mr Alwitry, and they must be interpreted and given effect with that function in mind. As such, the category 'some other substantial reason' should not be interpreted in such an open-ended way as to enable the employer to terminate effectively without a good reason. In context, the words 'other' and 'substantial' must each be given real value and it would deprive both words of any value if the contract were interpreted as permitting the SEB to terminate the contract in reality on the basis of conduct but in circumstances where there was on analysis no legitimate basis for terminating for misconduct. Any such interpretation would emasculate this category as a form of constraint on the SEB's freedom to dismiss Mr Alwitry, and would also be inconsistent with the mutual obligation of good faith which underpins the will or *volonté* of the parties to make the employment contact. In summary, we would accordingly accept in relation to the Contract in this case the approach suggested in Lauffer at paragraph 38 namely that 'some other substantial reason' 'is a residual category for cases where there is no misconduct or no capability issue' (emphasis added). As such the SEB could not have lawfully terminated the contract in this case under this heading if its true reason for termination was in fact Mr Alwitry's conduct. In our judgment, it is beyond argument that the SEB's true reason for dismissing Mr Alwitry was indeed founded on its perception of his conduct

- indeed that is how it was described in the minutes of the meeting on 13 November 2012 at which the decision to terminate was taken (referring to 'Mr Alwitry's communication attitude and behaviour') and it is the very first issue identified in the letter of termination dated 22 November 2012 (referring to 'The attitude and behaviour displayed in relation to

multiple aspects of the role'). It was also the reason for dismissal advanced in argument before us by the Solicitor-General on behalf of the SEB (albeit for the purpose of another aspect of his legal argument). Finally, it is also repeatedly reflected in the Royal Court's judgment, notably at paragraphs 308 and 328. For these reasons, we would accordingly hold that the SEB was not entitled to terminate on notice for 'some other substantial reason'."

Submissions

12. The Attorney General submitted that the following principles emerged from the judgments of the Royal Court and the Court of Appeal: (i) Dismissal on notice for 'some other substantial reason' pursuant to Schedule 18.2.1 will be permissible in circumstances where there has been a fundamental breakdown in working relationships between the parties, the employee's responsibility for that breakdown being incidental. (Royal Court judgment paragraph 339) (ii) An employee who has been wrongfully dismissed cannot recover damages for injured feelings, mental distress or damage to reputation or for the fact that the dismissal makes it more difficult for him to obtain fresh employment. (Royal Court judgment paragraph 346 and 371) (iii) Applying ordinary principles of contract law, the calculation of damages must take account of contingencies such as the possibility of a ground for dismissal arising in the future. (Royal Court judgment paragraph 357) (iv) Exemplary and/or punitive damages are irrecoverable for wrongful dismissal. Damages fall to be assessed on a compensatory not punitive basis. (Royal Court judgment paragraphs 369-372) (v) Employment law proceeds on the assumed basis that an employer would have terminated a contract as 'promptly and economically as legally permissible'. (Court of Appeal judgment paragraph 60) (vi) The right to sue for continuing wages lasts only as long as it would have taken the employer to have dismissed lawfully. (Court of Appeal judgment paragraph 9) (vii) an employee cannot sue for future loss on the basis of a chance that he might have retained the job if the proper procedure had been used. (Court of Appeal judgment paragraph 9) (viii) it is impermissible to side-step the requirement to implement a disciplinary procedure 'thereby avoiding the financial consequence of the *Gunton* extension'. (Court of Appeal judgment paragraph 64) (ix) the consideration of whether a certain ground for dismissal on notice exists does not entail consideration of the employer's actual grounds for dismissal. (Court of Appeal judgment paragraph 69(i)) (x) instead, the assessment is objective: are there reasonable, substantive grounds for a lawful termination of the employment contract? (Court of Appeal judgment paragraph 69(iii)). 13. Applying those principles to the facts found by the Royal Court and the substituted finding of the Court of Appeal, the Attorney General submitted that: (i) by 13 November 2012, the relationship of trust and confidence had irretrievably broken down and was gone (Court of Appeal judgment paragraph 78). Leaving to one side the actions and motivations of the SEB, or indeed, Mr Alwitry, as a matter of objective fact the contract of employment was incapable of subsisting; (ii) had the Royal Court reached the same conclusion as the Court of Appeal as to the unviability of the employment relationship at the point of dismissal, it is an inevitable consequence of the Royal Court's reasoning that it would have concluded that Mr

Alwitry's contract of employment was properly terminable 'for some other substantial reason' and that his recoverable loss was his contractual notice. (Royal Court judgment paragraphs 341-2]. The Royal Court's process of reasoning in this regard was not criticised by the Court of Appeal; (iii) although it provides no guidance as to how the Royal Court should approach the task of quantifying Mr Alwitry's claimable loss in circumstances where there has been an irretrievable breakdown in working relationships at the time of his dismissal, the Court of Appeal makes it clear that the SEB could not rely upon 'some other substantial reason' in circumstances where the true reason for dismissal was related to conduct. To do so, in the judgment of the Court of Appeal, would entail an impermissible side-stepping of the relevant contractual procedures; (iv) it is clear and settled law, however, that the Court will not engage in any speculation as to what such a procedure might have produced in terms of outcome. The law assumes that the operation of such procedures would have produced the outcome most favourable to the employer as promptly and economically as reasonably possible (see the judgment of the Court of Appeal in *Jeanne v Jersey Telecoms Limited*

[2009] JCA 138 at paragraph 30); and (v) In the light of the Court of Appeal's crucial finding that the employment relationship had irretrievably broken down by 13 th November, 2012, the calculation of Mr Alwitry's claimable loss cannot tenably be approached on the basis that his employment would have continued beyond that point, as he seeks to assert. 14. In conclusion, the Attorney General submitted that Mr Alwitry's damages for unlawful dismissal could not possibly accrue beyond the date of 13 th November, 2012, because to permit otherwise would be in direct contradiction of the clear finding by the Court of Appeal that the employment relationship had " irretrievably broken down" by that point. He said the SEB had raised the issue as a preliminary point in the spirit of the overriding objective as seeking a decision on the matter now would have a substantial impact on the extent of what discovery and evidence would be required for the quantum hearing, and indeed whether the quantum hearing was required at all. 15. Advocate Chiddicks, for Mr Alwitry, made the following submissions: (i) Whilst the SEB sought to make much of the Court of Appeal's finding that Mr Alwitry's relationship with the hospital management had broken down by 13 th November 2012, it neglected the conclusions about the consequences of that finding as set out at paragraphs 81 - 85 of its judgment as set out above. In particular, he emphasised the following from paragraphs 81 and 82: "That being the position it would require a perverse interpretation of the contract to allow the SEB to terminate on notice for 'some other substantial reason' when the circumstances ostensibly giving rise to that 'substantial reason' were the produce of its own 'grossly unjust' process (paragraph 316). ... Any such interpretation would emasculate this category as a form of constraint on the SEB's freedom to dismiss Mr Alwitry, and would also be inconsistent with the mutual obligation of good faith which underpins the will or *volonté* of the parties to make the employment contract." (ii) Advocate Chiddicks said it was obvious that the Court of Appeal appreciated the consequence of its finding was that no 'Edwards cap' applied to Mr Alwitry's claim for damages. At paragraph 86 of the Court of Appeal's

judgment it observed: "It is also common ground that, if the Contract fell to be treated as having been terminable for 'some other substantial reason', Mr Alwitry would not have been entitled to invoke any disciplinary process, because the ground of termination would not have been disciplinary. As such, his damages would have been limited by the 'Edwards cap'. (emphasis added) (iii) Directly pertinent to the present summons, in seeking leave to appeal against the Court of Appeal judgment, the SEB argued (their Ground 1). "Having found that, at the point of his dismissal, there has been an 'irretrievable' breakdown in the employment relationship, the Court of Appeal erred in holding that the SEB did not have a 'substantial reason' for dismissing Mr Alwitry on notice within the meaning of Schedule 18.2.1." (emphasis added) (iv) It was therefore (then) recognised by the SEB, he said, that the Court of Appeal has already decided that, despite an irretrievable breakdown in the employment relationship, they had no 'substantial reason' for dismissing Mr Alwitry on notice and therefore damages were at large. If there were any merit in the present summons, that primary ground of appeal would have been academic. The Court of Appeal refused the SEB's application for leave to appeal, and the Privy Council similarly declined leave on the grounds that the SEB's application did not raise an arguable point of law. (v) Having referred to the leading cases on issue estoppel and abuse of process under English Law and as accepted as forming part of Jersey law in *Brakspear v Nedbank Trust (Jersey) Limited*

[2018] JRC 121 at paragraph 29 (approved on appeal by the Court of Appeal

[2019] JCA 150), the Royal Court had identified as an issue for determination in the first trial whether as a matter of Jersey law, damages are limited to the contractual notice period plus any *Gunton* Extension, i.e. are damages subject to an Edwards cap. The condition for the imposition of an Edwards cap on damages is that the employer, although guilty of wrongful dismissal, could lawfully dismiss the employee on notice. The Court of Appeal plainly determined this issue. It was a necessary aspect of their decision since the application or disapplication of the Edwards cap depended upon whether the SEB had grounds to lawfully dismiss Mr Alwitry on notice. A clearer instance of issue estoppel was difficult to imagine. (vi) Furthermore, it was an abuse of the Court's process to seek to re-litigate matters which have already been decided by the Court. This is an attempt to re-open a matter already determined with binding force between the parties, and doubly so when the party had attempted unsuccessfully to appeal the very finding that they now seek to re-litigate. 16. Advocate Chiddicks submitted that the SEB's reasoning was in any event flawed for the following reasons: (i) It is obvious that the Court of Appeal has already determined the issues raised by this summons. The question of the SEB's entitlement to dismiss on notice for 'some other substantial reason' only arises in considering what would have happened if the SEB had not wrongfully dismissed Mr Alwitry summarily without notice. The law enquires as to whether the employer could lawfully have dismissed on notice instead because, if that was so, the law will calculate damages on the assumption that, but for acting unlawfully, the employer would have lawfully dismissed on notice (or at least will make that calculation to reflect the chance that a lawful dismissal

would have happened). (ii) The Court of Appeal was considering the question of dismissal for 'some other substantial reason' in the context of that enquiry i.e. whether, but for wrongfully dismissing Mr Alwitary without notice, the SEB could have lawfully dismissed him with notice. If it could not have done so, then it follows that the SEB could not lawfully have terminated Mr Alwitary's contract. (iii) It obviously follows that, absent lawful grounds for terminating the contract, damages for breach of contract cannot be calculated on the basis that the SEB could and would lawfully have terminated that contract. (iv) It was a non sequitur to argue that the breakdown in relationship between employer and employee meant that "as a matter of objective fact the contract of employment was incapable of subsisting". One party to an employment contract may consider the relationship irretrievably broken down, but in such a case, that party's error is subjective and self-fulfilling. It in no way follows that objectively the employment contract could not have continued. As the Court of Appeal observed at paragraphs 81 - 82, had the SEB not misunderstood the position and/or had taken the trouble to clarify the position, there would have been, objectively, no "good reason" that the contract could not have continued. (v) More fundamentally, this submission of the SEB misunderstands the nature of the enquiry being carried out by the Court. As a matter of fact, the contract of employment was terminated summarily (as even the SEB now accepts, wrongfully). The relevant enquiry for these purposes is what could the SEB have done to lawfully bring that employment relationship to an end if it had not wrongfully dismissed Mr Alwitary. It is a hypothetical enquiry. But for wrongfully terminating the contract, it would have continued in existence unless it could lawfully have been brought to an end. The relevant question is therefore whether the circumstances gave rise to a lawful right to terminate the contract. Both the Royal Court and the Court of Appeal judgments clearly answer that question in the negative. (vi) The SEB argues that if the Royal Court had reached the same conclusion as the Court of Appeal in respect of the 'unviability of the employment relationship at the point of dismissal', it would inevitably have concluded that Mr Alwitary's contract was 'properly terminable for 'some other substantial reason'. This repeats the errors of the SEB's submissions. The contract was not, objectively, unviable. In any event, the hypothetical exercise the SEB suggests the Royal Court should now conduct, has already been conducted by the Court of Appeal (upheld as unarguably right by the Privy Council) who found that the contract was not properly terminable for 'some other substantial reason' at that point. (vii) The SEB argues that (a) the Court of Appeal's concern lay in the impermissible side-stepping of disciplinary procedures, but (b) the law does not speculate as to what outcome might have followed if those procedures had been engaged, and (c) the law assumes that the operation of those procedures "would have produced the outcome most favourable to the employer". This completely misses the point made by the Court of Appeal judgment, that the grounds for dismissal on notice in Schedule 18 are a constraint on the SEB's ability to lawfully terminate the contract and must be construed as such. The Court of Appeal expressly held that it would require a perverse interpretation of 'some other substantial reason', emasculating the purpose of that constraint, to entitle the SEB to dismiss for a breakdown in the relationship when the circumstances ostensibly giving rise

to that 'substantial reason' were the produce of its own 'grossly unjust' process. The SEB effectively argues that side-stepping disciplinary procedures does not matter because even if they had hypothetically been followed, it is assumed that they would have produced the outcome most favourable to the employer. That is self-evidently wrong and underscores precisely why the Court of Appeal rejected the SEB's interpretation of 'some other substantial reason'. (viii) The SEB simply restates the conclusion it seeks, rather than making any argument in support of it. It fails to appreciate the distinction between the factual question of the (subjective) state of the relationship between employer and employee and the legal question of whether the employer had any contractual power to terminate the employment relationship. It is the latter which informs the question of whether damages are capped by reference to any notice period. (ix) Whichever way the SEB's case is analysed, it ultimately contends for an interpretation of the contract permitting it to lawfully dismiss Mr Alwitry on notice for 'some other substantial reason' which the Court of Appeal judgment described as 'perverse'. In reality, the SEB's complaint lies with the fact that the terms of the consultant contract protect senior doctors from being dismissed on notice in circumstances such as these. That is the conclusion of the Royal Court and Court of Appeal. The SEB's challenge to that position was found to raise no arguable point of law by the Privy Council. 17. In conclusion, Advocate Chiddicks said this was a brazen attempt by the SEB to seek for the fourth time the same outcome pursued at the first trial, on appeal, and in seeking leave to appeal to the Privy Council. Such an abuse of process would be objectionable enough in itself, but it is all the more so in light of the history of this case. Decision 18. The issue of liability and whether the claim for damages comes within the Johnson Exclusion Area or is the subject of the Gunton Extension has now been finally determined. In dismissing the appeal, the decision of the Royal Court was confirmed, namely that the termination of Mr Alwitry's contract of employment was unlawful and that his claim to damages did not come within the Johnson Exclusion Area and was not limited to any period of contractual notice or any Gunton Extension (paragraph 365 of the judgment of the Royal Court). In other words, there is no cap on the claim to damages which is at large. 19. The Court is now embarking upon the second part of the exercise, namely the assessment of the damages that Mr Alwitry is claiming, namely damages for loss of salary and private practice income to the date of assessment and in the future up to the age of 65, together with loss of pension rights and wasted expenses. The underlying premise of his claim for damages is that his employment with the SEB and associated private practice would have continued until his 65th birthday. The burden will, of course, be upon Mr Alwitry to prove on the balance of probabilities that his employment with the SEB would have continued until he was 65. 20. As Lord Manse said in *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* and *Botham v Ministry of Defence*

[2012] 2 AC 22 at paragraph 105: "The case of an employee with an express contractual right not to be dismissed save for cause is not before us, and gives rise to different issues to those which are. Damages for wrongful dismissal in breach of such a contract would on the face

of it be measured on the basis that the contract would have continued unless and until the employee left, retired or gave cause for dismissal (in relation to the prospects of all of which an assessment would have to be made) but questions would no doubt also arise as to whether the employee had accepted or had to accept the dismissal and/or had to mitigate or had mitigated his or her loss". 21. The summons of the SEB is in two parts, the first part being: "The plaintiff's damages for wrongful dismissal should be assessed on the basis that the employment relationship had irretrievably broken down at the point of dismissal." 22. In my view, the making of such an order is objectionable on the following grounds: (i) It seeks an assessment of damages "at the point of dismissal" but there has been no lawful dismissal. The Royal Court has found that the attempt to dismiss Mr Alwitary was invalid, a finding upheld by the Court of Appeal; and (ii) It seeks to limit the assessment of damages to that one basis alone, namely the relationship, without addressing the contractual position. Whilst the Court of Appeal did make a finding of fact that the relationship between Mr Alwitary and the hospital management had irretrievably broken down by 13 th November 2012, it also upheld the decision of the Royal Court that the SEB had no lawful grounds upon which to terminate the contract at that time, so that despite the breakdown, the contract would have continued presumably until such time as the SEB had lawful cause to terminate it. 23. The second part of the summons seeks a finding of fact that Mr Alwitary's employment relationship would not have continued beyond 13 th November 2012, which can only be interpreted, as the Attorney General contends, as meaning that his contract of employment would have ended on that date, reducing his claimable loss to that date. There is, as Advocate Chiddicks points out, a distinction between the relationship between an employer and employee and the legal question of whether the employer has any contractual power to terminate the contract of employment. Whatever the relationship, the contract continues until lawfully terminated by one party or the other. 24. This part of the order sought assumes Mr Alwitary's contract of employment could have been lawfully terminated by the SEB on that date, contrary to the express findings of the Royal Court, upheld by the Court of Appeal, that the SEB could not lawfully terminate his contract at that time. 25. There was no finding by the Court of Appeal that Mr Alwitary's contract of employment terminated on the 13 th November 2012. Indeed, the finding of both courts was that the SEB had no lawful means to terminate the contract of employment at that date and so it would have continued. When the contract of employment would have terminated will be a matter of fact for the Court sitting with Jurats to assess and is not a matter of law upon which a single judge can make a

determination.

26. Clearly, the finding of the Court of Appeal that the relationship between the management and Mr Alwitary had irretrievably broken down is a factor (amongst others) that the Court will take into account when assessing damages, but in granting this part of the order sought by the SEB, I would be making a finding of fact (impermissible for a single judge) that would fly in the face of the findings made to date, namely that despite his actual dismissal being

unlawful, his contract of employment was in fact lawfully terminated on 13 th November 2012, even though the SEB had no lawful grounds upon which to bring about its termination. 27. As Advocate Chiddicks said, the SEB are in reality seeking to have damages assessed on the basis that it could lawfully have terminated Mr Alwitry's contract of employment on 13 th November 2012 against the clear findings of the Royal Court and the Court of Appeal that it had no lawful grounds to do so. I agree, therefore, that the SEB is seeking to re-litigate an issue that has already been decided against it. 28. The application is therefore dismissed.

Authorities Alwitry v States Employment Board

[2019] JRC 014 . States Employment Board v Alwitry

[2019] JCA 134 . Jeanne v Jersey Telecoms Limited

[2009] JCA 138 . Brakspear v Nedbank Trust (Jersey) Limited

[2018] JRC 121 . Edwards v Chesterfield Royal Hospital NHS Foundation Trust and Botham v Ministry of Defence

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