HIGGS & JOHNSON
Counsel & Attorneys-at-Law

Honor Et Integritas

BULLETIN

Awards in Legal Costs in Employment Law Actions

Employment law has been an area of law ripe with uncertainty for decades within The Bahamas. In 2001 the Employment Act (the "EA") was passed and came into force on 1st January, 2002. One of the objectives of the EA was to provide, to a certain extent, a codification of the law relating to employment so as to clearly define the relationship between employer and employee in regard to standard hours of work, vacation, dismissal and wages. However, section 4 of the EA contains a vital caveat which effectively preserved greater rights to which an employee may have been entitled by contract or under any other law, custom or practice, in circumstances where there existed a conflict between such rights and the EA. However , the EA has, thus far, failed to reduce the amount of employment litigation as may have been initially envisioned.

Litigants in employment matters have two available venues within which to commence their actions; the Industrial Tribunal (the "Tribunal"), and the Supreme Court. Actions brought within the Tribunal are brought under the jurisdiction of the Industrial Relations Act 1970 (the "IA"). Both the Tribunal and the Supreme Court have similar powers to hear matters and to make determinations on disputes, although proceedings within the Tribunal are intended to be less formal and to have a more limited form of discovery. The Tribunal is intended to be easily accessible to claimants, with the aim of avoiding the time and expense which may otherwise deter a claimant from pursuing an action.

One of the key aspects of the Tribunal's accessibility is the issue of legal costs. In the Bahamian Court System, costs are within the discretion of the Court, and, as a general rule, the unsuccessful party is ordered to pay the costs of the successful litigant. However, in matters before the Tribunal, legal costs are not awardable. Therefore a litigant need not refrain from commencing an action solely due to a fear of having to pay a costs order. On the other hand, where an employment related action is commenced in the Supreme Court, the traditional position has been thus far upheld; with costs being awarded to the successful litigant in most cases. As such, a claimant has had the strategic advantage of pursuing an employment related claim in the venue which had the potential of exerting the greatest degree of pressure on the other party. The effect of the legal costs issue has been, to some extent, coercive; a litigant with a less than meritorious claim, or a marginal claim, can readily take advantage of the specter of a costs award as a tool to obtain a settlement.

Two recent cases have placed renewed consideration on the issue of costs awards in employment cases and have, perhaps, opened a dialogue as to whether an award of costs should be made in employment cases at the Supreme Court level in normal circumstances. The first of these cases **Gibson v Keijn [2010] BHS J No.17** was

Higgs & Johnson
Ocean Centre
Montagu Foreshore
East Bay Street
P O Box N 3247
Nassau, BAHAMAS
Tel: 242 502 5200
Fax: 242 502 5250
E-mail: info@higgsjohnson.com
Web: www.higgsjohnson.com

decided in March, 2010. Although the Chief Justice determined that the plaintiff had been wrongfully dismissed, and therefore entitled to damages, he declined to award costs providing, at paragraph 26:

> *"This claim for damages for wrongful dismissal could have been pursued in the Industrial Tribunal, which is the mechanism established by Parliament for the adjudication of these kind of claims arising out of employment disputes. The Plaintiff by electing to pursue this claim in the Supreme Court should not recover costs which he could not receive if he had properly brought the claim in the Industrial Tribunal pursuant to the provisions of the Industrial Relations Act. Accordingly, I make no order as to costs."*

Based upon the foregoing dicta, it is arguable that the Chief Justice intended to establish a precedent whereby a claimant should not be entitled to costs in the Supreme Court in relation to an employment matter which could have been alternatively pursued before the Industrial Tribunal. While of course this decision is merely within the ambit of the overall discretion of the Court in relation to the award of costs, it appears to establish a principle which is somewhat of a departure to the manner in which costs have been traditionally awarded in the Supreme Court in employment related actions.

Appearing to accept that **Gibson v Keijn** may have the potential to be interpreted as a general principle within employment cases, Justice Adderley seemingly attempted to temper such an application and to confirm that a determination as to costs in employment cases was an issue that remained within the Court's discretion. In **Davis-Evans v. Bahamas First Corporate Services Limited and another [2011] 1 BHS J. No. 27** Justice Adderley provided, at paragraph 26, simply thus:

> "*The court notes the view of Barnett, CJ expressed in **Gibson v Keijn** that a claim such as this could have been pursued in "the Industrial Tribunal, which is the mechanism established by Parliament for the adjudication of these kind of claims arising out of employment disputes, and that the plaintiff ought not to receive costs when [she] could not receive them at the Tribunal." Nevertheless upon the application of counsel for the plaintiff I will hear the parties on costs at a date fixed."*

This decision was rendered in February, 2011, and while it is unclear whether Justice Adderley was in concurrence with the determination in **Gibson v Keijn**, it is clear that he was minded to consider arguments on the point.

Regardless whether the potential principle in **Gibson v Keijn** eventually becomes the standard practice of the Supreme Court, this case should provide a strong legal footing moving forward to resist costs awards in employment matters before the Supreme Court. It may therefore lead litigants to pursue their claims before the Industrial Tribunal thereby reducing the work load on the Supreme Court and removing a tool from the arsenal of the vexatious litigant.