REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE
CV 2010- 01304
BETWEEN

ANAND CHATOORGOON **Applicant/ Intended Claimant**
AND
THE PUBLIC SERVICE COMMISSION
AND
INDRA RAMOUTAR-LIVERPOOL
ALAKE ATIBA
LOUIS WILTSHIRE
(In their capacity as members of the Disciplinary Tribunal appointed by the Public Service Commission to hear charges of alleged misconduct preferred by the Public Service Commission against Dr. Anand Chatoorgoon)
Intended Defendants

AND
THE MINISTRY OF HEALTH **Interested Party**

Before R. Boodoosingh J.

Appearances:
Mr Ramesh Maharaj SC leading Mr Rikki Harnanan instructed by Ms Vijaya Maharaj for the Applicant/ Intended Claimant
Mr Russell Martineau SC leading Ms Giselle Jackman instructed by Ms Savi Ramhit for the Public Service Commission and the Members of the Disciplinary Tribunal
Mr Kerwyn Garcia and Mr Michael Quamina instructed by Ms Vishma Jaisingh for the Ministry of Health

Delivered: 14 April 2010

REASONS

1. This is an application for permission to file judicial review proceedings. The applicant/intended claimant (the applicant) has been charged with 6 disciplinary offences by the Public Service Commission (the Commission). These charges relate to the applicant's conduct on 31 August 2006 where he performed anaesthetist services at the Eric Williams Medical Sciences Complex. The applicant is a public officer due to retire compulsorily from the public service on 20 April 2010.

2. After an investigation, the Commission preferred 6 charges on or about 14 May 2008. Six amended charges were preferred on or about 22 June 2009. A Disciplinary Tribunal (the tribunal) was appointed to hear the charges and a hearing was fixed for 15 March 2010. The applicant's attorneys made oral submissions on that day before evidence was led. This was supplemented by detailed written submissions by the applicant and by the attorneys for the Ministry of Health who were prosecuting the charges.

3. These submissions were made under sections 98(1)(c) and 98(2) of the **Public Service Commission Regulations Chap. 1:01**. These sections state:

> "98. (1) (c) Before the case against the officer is presented, the officer may submit that the facts alleged in the charge are not such as to constitute the offence with which he is charged, and the disciplinary tribunal shall make a report of the submission to the Commission for its decision.

…

(2) Nothing in this regulation shall be construed so as to deprive the officer from at any time making a submission that the facts disclosed in the evidence do not support the charge.

4. On 29 March 2010 the Chair of the tribunal said as follows:

"We thank both sides for their very incisive and detailed submissions, and the Tribunal, having considered the submissions of both sides, is of the view that regulation 98(1)(c) is not applicable here, since it is not strictly a submission that the facts, that is, in the particulars of charge, do not conform with the offence; that is the statement of charge.

As regards regulation 98(2) submission, the tribunal is of the opinion that this application is premature and could be relied upon at the appropriate time."

5. Various submissions were made before me by the claimant. The first challenged the charges laid by the Commission. The second challenged the decision regarding the section 98(1)(c) submission and the third challenged the decision to overrule the section 98(2) submission. I do not think it necessary to consider the first and third submissions having regard to my decision on the second submission.

6. In considering this application the test I have applied is whether the applicant is likely to succeed if given permission to file judicial review proceedings.

7. The claimant's submission relating to the tribunal's handling of the section 98(1)(c) submission is that the tribunal had no jurisdiction to decide as it did. They were obliged to report the submission to the Commission for its decision. They had no power to make the evaluation they did. Mr Maharaj suggested that it is only if it was a clearly frivolous or vexatious submission that the tribunal could decide not to report it. The provision is mandatory. It is a procedural provision designed to ensure a fair hearing. A public officer who succeeds in this submission will not have to undergo the process of a full hearing with the costs, time and hardship associated with a trial process.

8. The reply by Mr Garcia and Mr Martineau was essentially on two limbs. Mr Garcia submitted, somewhat colourfully, that the tribunal was not a rubber stamp. They were, to use his expression, "not comatose". They were not obliged, once a party says section 98(1)(c), to refer the matter to the Commission. They were entitled to apply their judgment to the submission and come to the conclusion that they did. More than that, the applicant is not entitled at this stage to bring judicial review proceedings. While a hearing is proceeding, that hearing should only be interrupted by the court, in exceptional circumstances. This, he said, is not an exceptional case. He would not have described the section 98(1)(c) submission as frivolous, but this is not the time to come to the court about it. The applicant would be entitled to raise it later on in similar proceedings or by an alternative remedy. Mr Martineau agreed with Mr Garcia. He further said the Commission should not be here and he spoke of the disruptions, delay and threats to the efficient disposition of matters before the Commission that the court's entertainment of applications like this can cause.

9. Much of what Mr Garcia and Mr Martineau submitted makes sense and is good law. A tribunal should ordinarily be allowed to proceed with a hearing without the court's intervention. This in fact is emphasised in **Sherman Mc Nicholls v Judicial and Legal Service Commission [2010] UKPC 6** by the Judicial Committee of the Privy Council. But in so emphasising the Judicial Committee made specific reference to the regulations under consideration here, in particular sections 98(1)(c) and 98(2). They in effect said that a public officer should focus his or her energies there and not before the judicial review court. And that is precisely what the applicant attempted to do. He gave notice of a preliminary point. His counsel made a submission attacking the facts on which the charges were based. There seems to have been a submission relating to both subsections. Certainly, the applicant asked that the matter be reported to the Commission for its decision on the 98(1)(c) submission. But the tribunal said this subsection was not applicable.

10. It seems to me that a strong argument likely to succeed can be mounted that the tribunal erred in its approach here. The regulation is clear. The tribunal is in the position to receive the submission to report it to the Commission. This does not make the tribunal a body that simply sits, receives information indifferently, and transmits it mechanically to the Commission. Implicit in the receipt of the submission is the power to ask questions, seek clarification, request further material, identify key documents, ask for the views of the other side, and so on. Their job is to gather sufficient material that would facilitate the Commission in making a proper determination on the submission. I can see no reason in principle why they may not even express a view in making a report once it is

clearly understood that it is not for them to prosecute a case either way. They may even dispose of a patently frivolous submission. But that is the end of their function. They have no power to make any decision relating to the merit of the submission. And I note that it is not contended that this was a frivolous submission designed simply to delay the process. The written material placed before the tribunal has been put before me and I am also of the view that the submission is reasonably arguable. But whether it would have succeeded or not before the Commission is not for me to decide.

11. I have concluded that on this point the claimant is likely to succeed in a judicial review application. Section 98 is one of the procedural mechanisms designed to ensure the officer gets a **fair hearing**: see **Mc Nicholls case, paragraph 46**. It gives a public officer facing a disciplinary charge the opportunity to make a preliminary submission. The mechanism provided is for it to be made to the tribunal and reported to the Commission. If the Commission upholds the submission, that is the end of the charge. The public officer will not have to face a tribunal. It is an important aspect of procedural fairness. The public officer is entitled to the opportunity to advance it and have it decided upon by the correct authority. This is additional to any submissions which can be made to the tribunal.

12. These sections must be seen in context. An event takes place. The Commission appoints an investigator. An investigation occurs relating to the conduct of a public officer. A report is made to the Commission. The Commission makes a decision if to lay disciplinary charges. If charges are laid, a tribunal is appointed. The parties come before

the tribunal. Directions are given. Now comes the hearing. The regulations give the public officer the entitlement to make a submission regarding the charges. It is contemplated that the Commission will give due consideration to it. The Commission gets an opportunity to evaluate the merits of it. If the submission is accepted, the public officer is saved having to go through a full hearing. But such a decision also conduces to efficiency in the operation of the disciplinary mechanism of the Commission. It means the tribunal is saved having to undertake a full hearing. The members could apply their energies to other matters. This approach promotes efficiency. What is more it affords fairness to the public officer who it must not be forgotten is presumed innocent. Even more, the prosecution must prove the case to the standard "required in a court of law in criminal cases": **PSC Regulations, section 101. (1)**.

13. On the other hand, if the Commission, after properly considering the submission, forms the view that the charges should stand then the matter is referred back to the tribunal. It is only after such a determination that the tribunal would have the jurisdiction to proceed to hear the evidence. Had that been done, there could have been no complaint to the judicial review court at this time. Everything submitted by Mr Garcia and Mr Martineau would then apply. Also, had that been done and the tribunal had then gone on to consider a submission made under section 98(2), or after the prosecution case, under section 104, there could then be no complaint. It would only be in exceptional circumstances, of which the applicant would have the onerous burden to show, that the judicial review court could be asked to intervene.

14. But here there is a strong case that a procedural provision ensuring fairness was by passed. The tribunal's jurisdiction to continue on with the hearing depended on the Commission making a decision on the section 98(1)(c) submission.

15. There is another point that shows the importance of the observance of this section to ensure fairness and to support the judicial review court intervening here. If the applicant has to wait until the end to challenge the decision a considerable amount of time will pass. He may risk being convicted. He may have to pursue an appellate process. If his submission is later found to be justified then the prejudice would be significant. In contrast, there ought to be no substantial delay for the Commission to consider the submission. With efficient operations this should take no more than days or weeks. In any event, the Commission having instituted the charges, and this being a statutory mechanism, adequate resources would have to be applied to give effect to it. Weighing the scales between the parties it makes sense for the officer to be given the opportunity to advance his submission.

16. One final point of comparison. The power under section 98(1)(c) has its equivalents in both the civil and criminal process. In civil proceedings a party can apply for a statement of case to be struck out as disclosing no reasonable cause of action. In the criminal courts an accused can apply to quash an indictment on various grounds. In both these instances the application is dealt with at an early stage so that if the application is successful there is no need for a trial. The denial of a party or an accused the **opportunity** to have those applications put forward and decided upon would no doubt be

seen as unfair. It would be a different matter if the opportunity was given and the application refused after proper consideration. In this case because of the constitutional powers given to the Commission it is for the Commission to have decided on the issue and not the tribunal.

17. For these reasons I am of the view that this application is likely to succeed and this is an appropriate case to give permission to file judicial review proceedings. Both Mr Garcia and Mr Martineau cautioned about encouraging the interruption of proceedings. I do not think that my decision will lead to a multiplicity of claims being filed since it is based on a narrow ground arising from a decision which is unlikely to occur often in practice.

18. The tribunal may have understandably been trying to speed up the hearing given that the applicant is due to retire on 20 April 2010. But the incident which gave rise to these charges occurred as far back as August 2006. Charges were laid in May 2008 and amended in June 2009. The first date of hearing was fixed for 15 March 2010. Despite the consequences, the limited time before the applicant's retirement cannot excuse the failure to afford the claimant an aspect of his fair hearing entitlement.

19. I do not think it is appropriate to give permission regarding the actual charges laid since, if the applicant succeeds in this judicial review application, one of the reliefs he can be given is to have the Commission review the charges in light of the facts. I also do not think it appropriate to review the evidence presented to the tribunal concerning the

applicant's third submission made before me because, depending on the outcome of the judicial review application, the Commission may have the opportunity to evaluate the charges. If the applicant succeeds in his submission to the Commission the tribunal's proceedings would have been of no consequence.

The Order

20. Permission is given for the applicant to make a claim for judicial review in respect of the decision of Mrs Indra Ramoutar-Liverpool, Ms Akale Atiba and Mr Louis Wiltshire (in their capacity as members of a Disciplinary Tribunal appointed by the Public Service Commission to hear 6 charges laid against the applicant) dated 29 March 2010 to not refer the submission made on behalf of the applicant under section 98(1)(c) of the Public Service Commission Regulations to the Public Service Commission for decision and to instead decide that regulation 98(1)(c) is not applicable.

21. The applicant is accordingly given permission to apply for judicial review to seek the following reliefs:

- A declaration that the above decisions are ultra vires, void and of no effect.
- An order of certiorari to remove into this court and to quash the said decisions.
- An order of mandamus directing the Tribunal to make a report of the applicant's section 98(1)(c) submission to the Public Service Commission for its decision.
- Costs.
- All other consequential directions and relief.

22. The hearing of the said charges by the tribunal is stayed pending the hearing and determination of this claim.

23. I would give any consequential directions after hearing from the parties. The issue of costs is reserved until the conclusion of the judicial review application.

24. I wish to thank all of the attorneys for their very helpful written and oral submissions.

Ronnie Boodoosingh
Judge