THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2015 - 02112

BETWEEN

WAYNE OUDIT

Applicant

AND

THE EASTERN REGIONAL HEALTH AUTHORITY

Respondent

Before the Honourable Mr Justice Ronnie Boodoosingh

Appearances:

Mr Michael Quamina instructed by Ms Lesley-Ann Assee for the Applicant

Mr Kelvin Ramkissoon for the Respondent

Dated: 16 March 2016

JUDGMENT

1. This is an application for leave to apply for judicial review.

Factual Background

2. The applicant was employed by the Eastern Regional Health Authority (ERHA) as General Manager - Finance. The ERHA is managed through the Regional Health Authorities Act Chap. 29:05 by a Board of Directors with the power to appoint such employees as it considers necessary for the due performance of its functions. The conduct of persons, such as the applicant, is governed by the Regional Health Authorities (Conduct) Regulations.

3. The applicant was informed that there was an issue relative to the use of his personal credit card for work related matters. A tribunal was appointed to hear the allegations of misconduct. The applicant was represented by attorneys-at-law at the various hearings. The applicant was provided with an opportunity to call witnesses and provide any evidence he deemed necessary for his defence. The tribunal made several findings and found that the applicant was guilty of misconduct.

4. The applicant's employment was then terminated. Through his attorney-at-law, the applicant informed the CEO of the ERHA that he wished to apply for a review of decision of the Tribunal. By letter dated March 27th 2015, the CEO responded and indicated that having reviewed all of evidence, findings and recommendations of the tribunal, in those circumstances, a review was not considered to be just and equitable.

5. The applicant wishes to challenge the Board's refusal to review the decision.

Public or Private Law

6. The preliminary issue, which must first be settled, is whether this court is properly seized of the jurisdiction to hear this matter as one of public law, in the form of judicial review.

7. There were several arguments raised by Counsel on either side. Counsel for the respondent aptly quoted **De Smith's Judicial Review 7th Ed. at para 3-063**, which states:

> "Where a public authority takes action in relation to an employee; such as disciplinary action or termination of an employment relationship, this will normally be a matter of contract or employment law rather than judicial review…"

Then at para **3-065**:

> "Judicial review may also be possible in relation to disciplinary proceedings against office holders that are specifically provided for in legislation, as opposed to being wholly informal or domestic matters. The principles of procedural propriety apply, so an officer cannot be lawfully dismissed without first telling him what is he is alleged against him and hearing the defence or explanation. As in other contexts, the claimant may, however, be expected to have exhausted internal grievance procedures and other remedies before resorting to judicial review. In "the great majority of cases", a person will be expected to seek remedies for breach of contract or the statutory remedy of unfair dismissal in the Employment Tribunal."

8. Counsel for the respondent went further to quote from **Lewis' Judicial Remedies in Public Law 4th Ed at para 2-153 and para 2-154**, wherein it states:

> "It is well established that the mere fact that a person is employed "by a public authority does not per se inject any element of public law" into the relationship. Public authorities may enter into contracts of employment and an employee may be seeking to do no more than enforce their contractual rights. That would normally involve issues of private law. Alternatively, there may be no contract of employment and the employment relationship, or at least certain aspects of it, may be directly regulated by statue or the prerogative. In such cases, issues of public law may arise...A dispute arising out of the termination of a contract of employment or service will be treated as a private law dispute, even if the claimant is seeking to have principles normally seen as public law principles (such as the obligation to observe procedural fairness or natural justice) grated onto the employment relationship…Other examples may include situations where there is a sufficient statutory or prerogative aspect to the dispute."

9. Even further, Counsel for the respondent also cited the authority of **Seth Quashie v The Tobago House of Assembly** **CV 2013-4226**, where Rahim J reiterated the position held in the case of **The North West Regional Health Authority v Ameena Ali** **CA CV No. 11 of 2005**. Rajnauth-Lee J.A. in delivering the judgment quoted the test as applied in the case of **R v Derbyshire Council ex parte Noble** **[1990] I.C.R. 808** at page 816 where Woolf L.J. stated:

> "As I understand the approach which the courts now adopt, and which has been made clear in a series of cases, it is to look at the subject-matter of the decision which it is suggested should be subject to judicial review and by looking at the subject-matter then come to a decision as to whether judicial review is appropriate.

That approach is an approach which can be found, for example, in Reg. v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Everett [1989] Q.B. 811, in which this court had to decide whether or not the issue or refusal to issue a new passport to the applicant was a matter which was appropriate for judicial review. Having referred to the speeches in the Civil Service Unions v. Minister for the Civil Service [1985] I.C.R. 14, O'Connor LJ, in giving the judgment of the Court, said [1989] Q.B. 811, 817:

> "Three of their Lordships, Lord Diplock, Lord Scarman and Lord Roskill unequivocally held that judicial review did lie of decisions taken under the prerogative. Lord Scarman in his speech stated that it was not the origin of the administrative power, but it was the actual factual application which had to be considered." I would echo those remarks of O'Connor LJ and suggest that what one does is look at the actual, factual application."

10. Counsel for the applicant has also supplied authorities to support their position. The first of which was the case of **Singh v Agricultural Development Bank** **HCA S-430 of 2003.** However I will examine the decision by their Lordships in the Court of Appeal at citation **C.A.CIV.61/2006**. The excerpt relied on by counsel for the applicant is not applicable as the learned judge, Warner J.A., dismissed this argument since the applicant in that matter was employed as the Chief Executive Officer and not a Managing Director or other Director of the Bank, as was required. It therefore meant that the section being relied on, to give the dispute a public law nature could not stand and it was ultimately held that the dispute was one of a private nature. One instructive passage quoted by the learned judge is as follows:

    "One of the earlier cases which ruled on the scope of public law actions was **R.V. East Berkshire Health Authority ex parte Walsh** [1984] 3 All ER 425. A nursing officer had been employed with the Authority under contract of employment which incorporated terms and conditions negotiated by a recognised

body and approved by the Secretary of State. The district nursing officer suspended the officer and terminated his employment. The Court of Appeal reversed the judge's order by which he held that the applicant's rights were of a sufficiently public nature to entitle him to seek public law remedies. 24. Sir John Donaldson said at page 430: 'Employment by a public authority does not per se inject any element of public law. Nor does the fact that the employee is in a higher grade or is an 'officer'. This only makes it more likely that there will be special statutory restrictions on dismissal, or other underpinning of his employment (see per Lord Reid in Mallock v. Aberdeen Cooperation, at p 158). It will be this underpinning and not the seniority which injects the element of public. Still less can I find any warrant for equating public law with the interest of the public. If the public through Parliament gives effect to that interest by means of statutory provisions, that is quite different, but the interest of the public per se is not sufficient.'"

11. Second, in the case of **<u>The Northwest Regional Health Authority v Ameena Ali</u> C.A No. 11 of 2005**, their Lordships in delivering judgment stated the following opinion:

> "36. The court has asked the question what was the "actual, factual application" in which the decision maker was engaged. In order to arrive at the correct answer, it is important to bear in mind the issues which fall to be determined. In this case, the issue is not simply whether there has been a breach of contract by the decision maker carrying out an employment function. This matter concerns the rights and obligations of the parties in the light of the statutory option contained in section 29(4) of the Regional Health Authorities Act, the lawfulness of the NWRHA's decisions, and, whether in the circumstances of this case, Ms. Ali enjoyed a legitimate expectation of a substantive or procedural benefit and should be compensated for same.
>
> 37. What is at issue, therefore, is not merely a matter of breach of contract and of private law. I am of the view that this case contains a sufficient element of public

law, and, accordingly, judicial review is the appropriate means by which the challenge to the decisions of the NWRHA should be pursued."

12. Also of noteworthy importance were the comments by Ventour J in his judgment relative to the above mentioned case. He said:

> "A considerable portion of the applicant's contract is controlled or governed by the Act and other subsidiary legislation. In particular, the applicant's employment is expressly made subject to a code of discipline deriving its authority from subsidiary legislation i.e. the Public Service Regulations, Ch: 1:01. In such circumstances, I am of the view that public law issues are bound to arise. The case of Ex parte Walsh (1984) (supra) the Court of Appeal led by Sir John Donaldson, M.R. decided that whether a dismissal from employment by a public authority was subject to public law remedies depended on whether there were special statutory restrictions on dismissal which underpinned the employee's position, and not on the fact of employment by a public authority per se or the employee's seniority or the interest of the public in the functioning of the authority."

13. **Section 26 of the Regional Health Authorities Act Chap. 29:05** provides:

> "26. (1) Subject to this section and sections 27, 29 and 30 an Authority may—
>
> (a) appoint such employees as it considers necessary for the due performance of its functions;
>
> (b) fix qualifications and terms and conditions of service, except that salaries and allowances in excess of one hundred and fifty thousand dollars per annum in the aggregate shall be subject to the Minister's approval;
>
> (c) transfer employees, either permanently or on secondment, between that Authority and other Authorities and such other bodies as may be considered necessary or desirable.

(2) The Minister may, by Order, alter the limit stated in subsection (1)(b)."

14. Under **section 26 of the Regional Health Authorities Act**, the applicant was hired by the Board of Directors of the ERHA. The authorities discussed above, all support the conclusion that this by itself does not inject the necessary public law element, to substantiate a claim in judicial review. As highlighted in De Smith's Judicial Review quoted above, judicial review may also be possible in relation to disciplinary proceedings against office holders that are specifically provided for in the legislation. I find that the abovementioned cases support the conclusion that this is a matter amenable to judicial review. The applicant's dismissal did not only find its basis in a contract of employment, but rather, was governed by the rules and procedures as outlined in the subsidiary legislation, namely, the **Regional Health Authorities (Conduct) Regulations**. The applicant was informed of the charges against him, a tribunal was convened, and upon completion of the hearing, a report was issued. The applicant then sought to have the decision of the tribunal reviewed – this request was declined. This process was prescribed by the Regulations and the applicant wishes now to seek leave to challenge the refusal of the Board to review the decision.

15. Regulation 19 (1) even provided the types of scenarios which could result in a finding of misconduct. It was on one these factors that the applicant was found guilty of misconduct after the process prescribed by the regulations was completed. Taking together the special statutory restrictions on the applicant's termination and that the substance of this application is for leave to appeal the Board's refusal, that there is sufficient statutory underpinning to introduce the element of public law and make possible a further consideration of this application for leave to apply for judicial review.

Leave to Apply for Judicial Review

16. It is well established that the test to be applied when considering whether to grant leave to apply for judicial review is as outlined in the case of **Satnarine-Sharma v Browne-Antoine & Ors [2006] UKPC 57**, and states as follows:

> "The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy: *R v Legal Aid Board, Ex p Hughes* (1992) 5 Admin LR 623, 628; Fordham, *Judicial Review Handbook*, 4th ed (2004), p 426. But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application. As the English Court of Appeal recently said with reference to the civil standard of proof in *R(N) v Mental Health Review Tribunal (Northern Region)* **[2005] EWCA Civ 1605, [2006] QB 468**, para 62, in a passage applicable mutatis mutandis to arguability:
>
> > "… the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities.""

Delay

17. By letter dated February 19th 2015, the applicant was informed of the decision of the Board to terminate his employment and contract of services with the ERHA. Then, by letter dated March 4th 2015, Counsel for the applicant wrote to the Board and indicated that they wished to apply for a review of the decision of the tribunal. Further to which, the Board then responded to Counsel for the applicant, informing him by way of letter dated March 27th 2015, that they had reviewed all of the evidence, findings and recommendations of the Tribunal and having regard to the case against the applicant, it was not considered just and equitable to review the decision.

18. This application for leave to apply for judicial review was filed on June 22nd 2015.

19. **Section 11 of the Judicial Review Act Chap. 7:08** (JRA) provides:

> "11. (1) An application for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made.
>
> (2) The Court may refuse to grant leave to apply for judicial review if it considers that there has been undue delay in making the application and that the grant of any relief would cause substantial hardship to, or substantially prejudice the rights of any person, or would be detrimental to good administration.
>
> (3) In forming an opinion for the purpose of this section, the Court shall have regard to the time when the applicant became aware of the making of the decision and may have regard to such other matters as it considers relevant.

(4) Where the relief sought is an order of certiorari in respect of a judgment, order, conviction or other decision, the date when the ground for the application first arose shall be taken to be the date of that judgment, order conviction or decision."

20. In addition **Part 56.5 of the Civil Proceeding Rules** (CPR) states:

"(1) The judge may refuse leave or to grant relief in any case which he considers that there has been unreasonable delay before making the application.

(2) Where the application is for leave to make a claim for an order of certiorari the general rule is that the application must be made within three months of the proceedings to which the order relates.

(3) When considering whether to refuse leave or to grant relief because of delay the judge must consider whether the granting of leave or relief would be likely to:

(a) cause substantial hardship to or substantially prejudice the rights of any person; or

(b) be detrimental to good administration."

21. Section 11 of the JRA provides that the application for leave to apply for judicial review shall be made promptly and in any event, within three months of the date when grounds for the application arose. Part 56.5 of the CPR also requires the same. In the instant case, the last decision given by the Board was provided on March 27th 2015. The application, having been filed on June 22nd 2015, fell within the three month time frame prescribed by section 11. Time cannot start to run for the purposes of establishing delay before the expiration of the three month period. I also find that time could only start to run from the date of the response by the Board on March 27th 2015. Judicial review should always be a last resort. The applicant was entitled to pursue all the avenues available to him as prescribed by the Regulations, requesting the Board to review the decision of tribunal

was one such option. It was only after the response was received that judicial review became an option. Therefore, I find no issue of delay.

Realistic Prospect of Success

22. The applicant applies for leave to apply for judicial review of the refusal of the Board to review the decision of the Tribunal.

23. The applicant has asserted in his application that the tribunal came to its decision in the absence of positive evidence, formed a conclusive view without justification and that this amounted to an error of law.

24. **Regulation 19 of the Regional Health Authorities (Conduct) Regulations** provides the following:

 19. (1) An employee may be found guilty of misconduct where he—

 (a) wilfully refuses or omits to perform his duty;

 (b) performs his duties negligently;

 (c) fails to discharge any other related duty which the Chief Executive Officer or other duly authorised officer may call upon him to perform;

 (d) is absent from duty without leave or reasonable excuse;

 (e) becomes indebted to the extent that it impairs his efficiency or is likely to bring the Authority into disrepute;

 (f) fails to report his bankruptcy in accordance with regulation 13;

(g) fails to report that he has been charged with a criminal offence which carries a penalty of imprisonment in accordance with regulation 18;

(h) is inefficient, incompetent or persistently unpunctual for reasons which are within his own control;

(i) is unfit for duty through drunkenness or the use of illicit drugs;

(j) engages in inappropriate behaviour, obscene or disorderly conduct in the course of his duties;

(k) violates any oath or affirmation of his office;

(l) uses any property or facility of the Authority for some purpose not connected with his official duties without the necessary approval;

(m) engages in any gainful occupation during working hours without the requisite consent;

(n) is a full-time student of any school, university or other educational institution without the prior approval of the Board;

(o) is a part-time student of any school, university or other educational institution and attends studies during working hours without the approval of the Chief Executive Officer or other duly authorised officer; or

(p) contravenes any of the Regulations.

25. Additionally, **section 5(3) of the JRA** includes:

(3) The grounds upon which the Court may grant relief to a person who filed an application for judicial review includes the following:

(a) that the decision was in any way unauthorised or contrary to law;

(b) excess of jurisdiction;

(c) failure to satisfy or observe conditions or procedures required by law;

(d) breach of the principles of natural justice;

(e) unreasonable, irregular or improper exercise of discretion;

(f) abuse of power;

(g) fraud, bad faith, improper purpose or irrelevant consideration;

(h) acting on instructions from an unauthorised person;

(i) conflict with the policy of an Act;

(j) error of law, whether or not apparent on the face of the record;

(k) absence of evidence on which a finding or assumption of fact could reasonably be based;

(l) breach of or omission to perform a duty;

(m) deprivation of a legitimate expectation;

(n) a defect in form or a technical irregularity resulting in a substantial wrong or miscarriage of justice; or

(o) an exercise of a power in a manner that is so unreasonable that no reasonable person could have so exercised the power.

26. The applicant has cited the following passage from **Michael Fordham's Judicial Review 6th Edition** at para 13.2:

> "Courts do not, and could not possibly, interfere by judicial review every time the judge might have reached an appraisal of the facts different from that reached by the primary decision maker. However, unjustified conclusions of fact can be overturned on judicial review, in a clear and appropriate case."

27. Further, at para 13.2.1, the case of **R v Hillingdon London Borough Council, ex p Puhlhofer [1986] AC 484 at 518 D-E**, where Lord Bingham stated:

> "Where the existence or non-existence of a fact is left to the judgment and discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of fact to that public body to whom Parliament has entrusted the decision-making power save in a case where it is obvious that the public body, consciously or unconsciously, are acting perversely."

28. The applicant also relies on the authority of **R (Iran) and others v Secretary of State for the Home Department [2005] EWCA Civ 982** at para 11 and quotes the following:

> "It may be helpful to comment quite briefly on three matters first of all. It is well known that "perversity" represents a very high hurdle. In ***Miftari v SSHD*** **[2005] EWCA Civ 481,** the whole court agreed that the word meant what it said: it was a demanding concept. The majority of the court (Keene and Maurice Kay LJJ) said that it embraced decisions that were irrational or unreasonable in the *Wednesbury* sense (even if there was no wilful or conscious departure from the rational), but it also included a finding of fact that was wholly unsupported by the evidence, provided always that this was a finding as to a material matter."

29. Regulation 43 sets out the procedure for reviews by the Board and more specifically, regulation 43(5) provides:

> "The Board may entertain an application for review where it is of the opinion that this is just and equitable in the circumstances."

30. An examination of the Report provided by the tribunal dated December 10 2014 reveals the findings made upon conclusion of the proceedings. There was a finding of misconduct resulting from the applicant's use of his personal credit card for the payment of expenses relative to the then Chairman's travel to a conference in Paris. The tribunal also found that there was overwhelming evidence to support the charge of misconduct regarding a claim and acceptance of interest. There was also a finding of misconduct for the use of a personal credit card to cover the expenses for a work related conference when the regular procedures would have been sufficient. It is noteworthy that the tribunal found certain of the charges were not made out. In making its findings it noted the evidence it considered. The tribunal also made specific comments in relation to different aspects of the evidence including explanations given by the applicant and evidence which he advanced including a memorandum from the Chairman, Dr Stephan Bhagan, in support of the applicant. It set out the standard of proof which it applies consistent with its internal regulations. The report set out the basis of its findings. It set out that these amounted to a breach of the duty of fidelity owed by an employee to its employer. The report set out the options in terms of penalties and stated why the tribunal recommended termination with certain benefits being withheld.

31. The crux of the applicant's contention is the fact that there was no prohibition against the use of his personal credit card and that the transactions were not conducted in a surreptitious manner. These matters were given consideration by the tribunal and it found that there were alternative established procedures which could have been used. They noted he derived a benefit from the use of the credit card and the tribunal was unconvinced that the applicant did not know certain monies in the form of a refund from the Magdalena Hotel transaction were credited to his card.

32. Further the tribunal adopted a fair process in treating with the allegations. There was a hearing. Evidence was presented. The applicant was allowed to present witnesses and

any other evidence he deemed relevant. He was represented by able counsel who was allowed to cross-examine witnesses and make submissions.

33. The tribunal had the benefit of examining the Auditor's report and all other documentary evidence. The applicant was also cross examined.

34. Having reviewed the evidence put before me, I find that based on these circumstances, it cannot be concluded that the decisions were arrived at without any positive evidence, that is to say, that there were findings of fact wholly unsupported by evidence, as contended by the applicant. This court cannot substitute its own view over what was found by the tribunal. As noted before, the test at the leave stage is whether there is an "arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar." Based on what is put before the court, the applicant has not met this threshold. The Board had the opportunity to review all of the evidence and compare with the findings of the tribunal and concluded in those circumstances that it was not just and equitable to conduct a review. The decision cannot be seen in those circumstances to be so unreasonable or irrational to present an arguable case with a realistic prospect of success. The finding of misconduct also cannot be seen to be so unreasonable or irrational providing a platform for an arguable case with a realistic prospect of success.

35. Further, I find no grounds, pursuant to section 5(3) of the JRA, presenting the applicant with an arguable case with a realistic prospect of success to grant leave to apply for judicial review.

ORDER

1. The application for leave to apply for judicial review is not granted.

2. The Application filed on June 22 2015 is dismissed with costs to be paid by the Applicant to the Respondents to be assessed by a Registrar in default of agreement.

Ronnie Boodoosingh
Judge