

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2012 -02853

BETWEEN

DERWIN MC EWEN

Applicant

AND

DIRECTOR PERSONNEL ADMINISTRATION

Intended 1st Defendant

PUBLIC SERVICE COMMISSION

Intended 2nd Defendant

Before The Hon. Justice Andre des Vignes

Appearances:

Mr. Mobota for the Applicant

Mr. Martineau S.C. leads Ms. Jodhan and Mr. Chaitoo instructed by Mr. Brent James for the Defendants

DECISION

Introduction

1. By letter dated 9th March 2012, the Director of Personnel Administration (hereinafter referred to as “the DPA”) on behalf of the Public Service Commission (hereinafter referred to as “the Commission”) notified Attorney-at-Law for Derwin Mc Ewen, (hereinafter referred to as “the Applicant”) of the Commission’s decision to declare that the Applicant had resigned his office in the Public Service with effect from the 9th March 2009 in accordance with Regulation 49 of the Public Service Commission Regulations.

2. On the 23rd March 2012, the Applicant's Attorney lodged with the Public Service Appeal Board (hereinafter referred to as "the Board") a Notice of Appeal against that decision.
3. By letter dated 28th May 2012, the DPA informed the Applicant's Attorney that the appeal lodged on behalf of the Applicant had no merit and that the Board was not empowered to hear appeals arising out of matters where the Commission had exercised the function of removal.

The Application

4. On the 13th July 2012, the Applicant filed an application for leave to apply for judicial review of the decision of the DPA and the Commission that the appeal filed by the Applicant had no merit and that there is no basis for the Board to pursue the matter. The reliefs sought by the Applicant on his application are, inter alia, as follows:
 - (i) A declaration that the Appeal lodged by the Applicant with the Appeal Board on the 23rd March 2012 is meritorious and valid;
 - (ii) A Declaration that the decision of the DPA and the Commission contained in their letter dated 28th May 2012 is wrong and constitutes a violation of the Applicant's constitutional right to appeal such a decision as contained in sections 131 (1) and (2) of the Constitution;
 - (iii) An order of certiorari quashing the decision of the Commission that the appeal lodged by the Applicant has no merit;
 - (iv) An order of mandamus pursuant to Regulation 8A (2)(a) of the Public Service Appeal Board Regulations compelling the Respondents to provide the Applicant with the record of information upon which they declared the Applicant to have resigned his office in the Public Service with effect from the 9th March 2009.
5. The Application was supported by an affidavit of the Applicant also filed on the 13th July 2012. On the 24th July 2012, I adjourned the hearing of the application for leave to the 15th October 2012 and directed the Intended Claimant/Applicant's Attorneys to serve the Application upon the Intended Defendants and the Solicitor General.
6. The hearing of the Application for leave was rescheduled to the 20th November 2012 when I heard submissions from Attorneys for the Applicant and the Intended Defendants.

Undisputed facts

7. For the sake of determining this Application, and not otherwise, the following facts, as set out in the Applicant's affidavit, shall be treated as undisputed:
- (a) The Applicant was appointed a Clerk 1, Ministry of Education on a temporary basis from the 20th October 2005 to the 31st December 2005;
 - (b) During the early years of the Applicant's employment, he experienced problems with his productivity level, his attendance and his punctuality and these issues resulted in a written complaint and verbal warnings;
 - (c) The Applicant had been involved in a motor vehicular accident very early in his career and the trauma of this accident had a deleterious effect upon his mental and physical health and his efficiency was adversely affected. As a consequence, the Applicant was placed on day to day salary;
 - (d) From about mid-2008, the Applicant experienced delays in receiving his salary payments on time;
 - (e) The applicant did not report for work between 10th March 2009 and 8th May 2009;
 - (f) On the 24th April 2009 the Applicant received his salary for the month of January and February 2009 and on the 8th May 2009, the Applicant, armed with an undated medical certificate from Dr. Balbirsingh for "at least 60 days sick leave from 9th March 2009", presented himself at the Technical Vocational and Education and Training Division. However, he was prevented from signing the register by Junior Samuel and he was referred to the Civil Service Department of the Ministry of Education;
 - (g) The Applicant was referred by the Civil Service Department to the Service Commissions Department where he was handed a letter dated 5th May 2009 from the Permanent Secretary of the Ministry of Education. This letter drew to the attention of the Applicant Regulation 49 of the Public Service Commission Regulations and informed him of the Ministry's proposal to recommend to the Commission that he be declared to have relinquished his appointment with effect from 9th March 2009;

- (h) On or about the 5th June 2009, the Applicant submitted a letter requesting that the recommendation of abandonment be rescinded and that he be assigned to another Ministry. In that letter, the Applicant set out that he had experienced problems in obtaining his salary on time between January and March 2009 and *“finally, on the 10th March 2009, I was forced to cease reporting for active duty as with my last full pay being granted in late December 2008, my financial resources were completely depleted....”* Further, he explained that on the 24th April 2009 he received a cheque from the Finance and Accounts Department for his salary for January and February and *“after taking some further days to rectify my affairs, and bearing a medical certificate, I reported to my post for duty at the TVET Division, Ministry of Education on Friday 8th May 2009...”*;
- (i) By letter dated 27th May 2010, the DPA wrote to the Applicant informing him that, by reason of his absence from duty without permission with effect from the 9th March 2009, the Commission proposed to declare him to have resigned his office in the Public Service with effect from the 9th March 2009 in accordance with regulation 49 of the Public Service Commission Regulations. Further, the Applicant was invited to submit within 14 days any representations he wished to make;
- (j) By letter dated 16th July 2010, the Applicant’s Attorney submitted representations on behalf of the Applicant. Quite significantly, the facts set out in this letter differed in very material respects from the facts set out in the Applicant’s letter in that it put forward that the Applicant was absent due to illness and that he had attempted to submit a medical certificate from Dr. Balbirsingh on the 9th March 2009 to Mr. Junior Samuel who refused to accept same. According to the Applicant’s letter, however, he was forced to cease reporting for active duty due to the depletion of his financial resources and he attempted to submit the medical certificate on the 8th May 2009.
- (k) By letter dated 9th March 2012, the DPA notified the Applicant’s Attorney that after consideration of his representations, the Commission had declared

the Applicant to have resigned his office in the Public Service with effect from 9th March 2012;

- (1) The Applicant's Attorney lodged an appeal against this decision on the 23rd of March 2012 and, in response to the notice of appeal, the DPA, on behalf of the Commission, by letter dated the 28th of May 2012, informed the Applicant's Attorney that the appeal had no merit since Mr. Mc Ewen was removed under Section 121 of the Constitution and not disciplined as required by Section 132 of the Public Service Commission Regulations. The letter also advised the Applicant's Attorney that the Appeal Board was not empowered to hear appeals arising out of matters where the Commission had exercised the function of removal and that it was only empowered to hear appeals resulting from disciplinary proceedings brought against public officers.

The Grounds of the Application

8. The Applicant relies on the following grounds in support of his application:

- (i) No reasons or no intelligible, adequate or proper reasons were given by the Public Service Commission for the decision to declare that the Applicant had resigned his office in the Public Service;
- (ii) Procedural impropriety whereby the Public Service Commission contends that it does not have jurisdiction to hear the appeal of the Applicant since he was removed from the Public Service under section 121(1) of the Constitution and he was not disciplined in such a way to access the recourse provided by section 132 of the Public Service Commission Regulations;
- (iii) The process adopted by the Respondents pursuant to Regulation 49 whereby the Applicant was invited to make representation on his own behalf, constitutes disciplinary proceedings and there is no provision in the Regulations that removes the constitutionally preserved right of Appeal with respect to disciplinary proceedings.
- (iv) Pursuant to Section 5(3)(d) of the Judicial Review Act 2000, the decision is in breach of the principles of natural justice and the

Applicant is being treated unfairly and is being denied protection by the law.

Legal Principles applicable to Judicial Review

9. The test to be applied when considering an application for leave to apply for judicial review was outlined by the Privy Council in **Sharma v Brown-Antoine and others**¹ in the following terms:

*“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 parte Hughes (1992) 5 Admin LR 623 at 628, and Fordham, Judicial Review Handbook (4th Edn, 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 (on the application of N) v Mental Health Review Tribunal (Northern Region) [2005] EWCA Civ 1605, [2006] QB 468, at 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.' (emphasis mine)

¹ [2007] 1 WLR 780

Discretionary Bars—Delay and Alternative Remedy

10. Section 11 of the **Judicial Review Act Chap 7:08** outlines that an application for judicial review shall be made promptly or in any event within three months. However, the Court has a discretion to extend the time in which an application can be made if there is good reason for extending the period.
11. In this matter, the application was filed on the 13th of July 2012 to challenge the decision which was contained in the letter from the DPA to the Applicant dated the 28th of May 2012 and is therefore well within the three months time limit as stated by the Judicial Review Act. Therefore, the application is not subject to the discretionary bar of delay.
12. **Section 9 of the Judicial Review Act, Chap. 7:08** provides that the Court shall not grant leave to an applicant for judicial review of a decision where any other written law provides an alternative procedure to question, review or appeal that decision, save in exceptional circumstances.
13. The Claimant at paragraph 6 of his application states that there is no alternative form of redress and this has not been challenged by the Intended Defendants. Accordingly, there are no discretionary bars which prevent the Court from considering whether this application discloses that there is an arguable ground for judicial review having a realistic prospect of success.

Application of the Law to the facts

14. Having considered the Applicant's affidavit and the exhibits thereto and having heard the submissions of Attorneys on both sides, I am of the opinion that this court is sufficiently appraised of the facts in this matter to be able to fully determine the substantive application, which focuses primarily on questions of law. This approach was adopted by Weekes J.A. in **His Worship Sherman Mc Nicholls Chief Magistrate v Fidelity Finance and Leasing Company Limited and Anor.**² who adopted the guidance of Glidewel LJ in **Mass Energy v Birmingham City Council**^{2a} where he stated that:

² Civ.App No. 127 of 2007

^{2a} [1994] Env 298 at 307

“First, we had the benefit of detailed inter partes argument of such depth and in such detail that, in my view, if leave were granted, it is more unlikely that the points would be canvassed in much greater depth or detail at the substantive hearing. In particular, we have had all the relevant documents put in front of us.

....Thirdly, as I have already said, we have most, if not all, of the documents in front of us; we have gone through the relevant ones in detail – indeed in really quite minute detail in some instances – in a way that a court dealing with an application for leave to move rarely does, and we are thus in as good a position as would be the court at the substantive hearing to construe the various documents. For those reasons taken together, in my view, the proper approach of this court, in this particular case, ought to be – and the approach I intend to adopt will be – that we should grant leave only if we are satisfied that Mass Energy’s case is not merely arguable but is strong; that is to say, likely to succeed.”

15. Adopting this approach to this Application, therefore, I will consider whether the Applicant has satisfied me that his case is not merely an arguable case but that he has a strong case that is likely to succeed.

The Constitution of Trinidad and Tobago

16. Section 121 of the Constitution empowers the Public Service Commission to appoint persons to hold or act in offices to which this section applies, including power to make appointments on promotion and transfer and to confirm appointments, and to remove and exercise disciplinary control over persons holding or acting in such offices and to enforce standards of conduct on such officers shall vest in the Public Service Commission.
17. Section 132 then provides that *“an appeal shall lie to the Public Service Appeal Board from any decision of a Service Commission.... as a result of disciplinary proceedings brought against a public officer.”*
18. Regulation 49 of the Public Service Commission Regulation provides that *“an officer who is absent from duty without leave for a period of one month may be declared by the Commission to have resigned his office and thereupon the office becomes vacant and the officer ceases to be an officer.”*

Submissions and Analysis

19. The Applicant argued that the decision of the Intended Defendants to declare the Applicant to have resigned his office in the Public Service amounted to disciplinary proceedings taken against him and, as a consequence, an appeal against that decision would lie to the Board under section 132 of the Constitution. In support of this submission, he relied on the decision of the Privy Council in the matter of the **Public Service Appeal Board v. Omar Maharaj**³
20. The Intended Defendants responded that the appeal lodged with the Board by the Applicant on the 2^{3rd} March 2012 was not a valid appeal and the grounds of this Application were unmeritorious and unfounded. They submitted that under section 121 of the Constitution, the Commission is vested with the power to, inter alia, appoint, remove or exercise disciplinary control over public officers and when the Commission exercised its power under regulation 49 to declare the Applicant to have resigned from his office, such action did not amount to disciplinary proceedings. Therefore, the Applicant had no right of appeal to the Board. The Intended Defendants relied on the decision of the Privy Council in **Dougath Rajkumar v. Kenneth Lalla & Ors**⁴ and the unreported decision of Justice Seepersad in **Favianna Gajadhar v. Public Service Commission**⁵
21. On the facts as earlier recited, it is apparent that the Applicant failed to report to work between the 10th March 2009 and the 8th May 2009. It is also clear that during this period of absence from duty, the Applicant was not on any approved leave. In fact, it was only on the 8th May 2009, when the Applicant report to the Technical Vocational Educational Training Division, that the Applicant attempted to submit an undated medical certificate to justify his absence. Although the Applicant has submitted two different explanations for his absence, namely personal financial difficulties and illness, neither of these explanations can be relied upon by him to suggest that he was absent from office with due permission or authority from anyone.

³ [2010]UKPC 29

⁴ Privy Council Appeal No. 1 of 2001

⁵ CV2010-00326

22. It is based on the Applicant's absence from duty without leave for more than one month that the Commission invoked regulation 49 and declared the Applicant to have resigned his office and thereupon his office became vacant and the Applicant ceased to be an officer.
23. Having considered the decision of the Privy Council in **Omar Maraj**, I am of the opinion that that case is distinguishable on its facts. In that case, the issue was whether a public officer had a right of appeal to the Board when he had been dismissed following the summary procedure provided for in Section 129(5) to (7) of the Constitution. The Public Service Appeal Board decided that it did not have jurisdiction to hear his appeal but the Court of Appeal and the Privy Council concluded that Mr. Maraj's dismissal under the summary process provided for under section 129(5) to (7) amounted to disciplinary proceedings against him. As such, he was entitled to pursue an appeal before the Board.
24. However, regulation 49 gives the Commission the power to treat the Applicant's conduct as a resignation where he has been absent from duty without leave for a period of one month. The Applicant has admitted that he was absent for almost two months without leave and therefore it is his conduct that amounted to a virtual abandonment of his duties. In those circumstances, the Commission's decision to invoke regulation 49 and declare the Applicant to have resigned did not amount to a dismissal or termination or any form of disciplinary proceedings against him.
25. Accordingly, I agree with the reasoning of Justice Seepersad in **Favianna Gajadhar** when he said at paragraph 94:

“The PSC is entitled to enforce regulation 49 where the facts are clear and unequivocal and the officer having been absent from work for at least one month has effectively abandoned his job and has by his conduct resigned. In such circumstances, there is no need to conduct any disciplinary proceedings.”

26. In the circumstances, I have come to the conclusion that the Applicant does not have a strong arguable case that is likely to succeed and I will refuse his application for leave to apply for judicial review.

27. Since this was an application for leave to apply for judicial review and the Intended Defendants were represented thereat at the request of this Court, I will not make an order for costs in favour of the Intended Defendants. The application is dismissed with no order as to costs.

Dated this 27th day of June 2013.

André des Vignes

Judge