

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2018-02049

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW PURSUANT TO
PART 56 OF THE CIVIL PROCEEDINGS RULES, 1998 AND PURSUANT TO SECTION
6 OF THE JUDICIAL REVIEW ACT CHAP 7:08**

AND

**IN THE MATTER OF AN APPLICATION WITHOUT NOTICE BY
ASSISTANT PROFESSOR DR. APHZAL MOHAMMED, ASSISTANT
PROFESSOR ATTACHED TO THE UNIVERSITY OF TRINIDAD AND TOBAGO,
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

BETWEEN

ASSISTANT PROFESSOR DR. APHZAL MOHAMMED

Claimant

AND

THE UNIVERSITY OF TRINIDAD AND TOBAGO

Defendant

Before the Honourable Madame Justice Margaret Y Mohammed

Date of delivery: February 1, 2019

APPEARANCES:

Ms. Roshni Balkaran Attorney at law for the Claimant.

Mr. Stephen Singh instructed by Ms. Tracey Rojas Attorneys at law for the
Defendant.

JUDGMENT

1. The Claimant is unhappy. His unhappiness arose on the 14 March 2018 when the Defendant dismissed him from his position as Assistant Professor of Animal Sciences. To cope with his distress, the Claimant has approached the Court in judicial review proceedings to referee his claim against his former employer, the Defendant, that the latter acted unfairly when it took the decision to dismiss him.

2. The Claimant wants the Court to make orders which in essence would set aside the Defendant's decision to terminate him and to re-instate him to his former position. For the purist, it is necessary that I detail the types of orders which the Claimant seeks, namely:
 - i. A declaration that the decision of the Tribunal ("the Tribunal") of the Defendant which convened on 27 February, 2018 and which by letter dated 14 March, 2018 informed the Claimant of its decision to terminate his services with immediate effect, without the Claimant being able to confront his accuser is unlawful, unreasonable, irrational, procedurally improper, in breach of the principals of natural justice, null and void and of no legal effect;

 - ii. An Order of Certiorari to bring into the High Court of Justice and quash the said decision of the Tribunal of the Defendant to terminate the services of the Claimant;

 - iii. A declaration that the decision of the Tribunal of the Defendant by letter dated the 14 March, 2018, and communicated to the Claimant by electronic mail correspondence of even date

terminating his services with the Defendant is unlawful, unreasonable, irrational, procedurally improper, in breach of the principals of natural justice, null and void and of no legal effect;

- iv. An Order of Certiorari to bring into the High Court of Justice and quash the said decision of the Tribunal of the Defendant to terminate the services of the Claimant with immediate effect;
- v. A declaration that the Claimant is the beneficiary of a legitimate expectation that he would be allowed the opportunity to confront his accuser having regard to the complaints levied against him;
- vi. A declaration that the immediate termination of the Claimant in his capacity as Assistant Professor is irrational, unreasonable, unlawful, procedurally improper and in breach of the principals of natural justice;
- vii. A declaration that the decision of the Tribunal of the Defendant which was convened on 27 February, 2018 and which said decision conveyed by letter dated 14 March, 2018 to terminate the services of the Claimant herein without there being a complaint lodged by the person to whom the Claimant allegedly conveyed text messages is irrational, unreasonable, illegal, procedurally improper and in breach of the principals of natural justice and contravened the Claimant's fundamental right to equality of treatment as guaranteed by Section 4(d) of the Constitution of Trinidad and Tobago;

- viii. An order that the Claimant be reinstated to his previous substantive post of Assistant Professor immediately upon the adjudication of the Honourable Court that the decision by the Tribunal is found to be unlawful, unreasonable, irrational, procedurally improper, in breach of the principals of natural justice, null and void and of no legal effect.
- ix. An Order for monetary compensation to be assessed in favour of the Claimant;
- x. Costs;
- xi. Interest;
- xii. Pursuant to section 8 of the Judicial Review Act¹ (“the JRA”) any further orders, directions or writs as the Court considers just as the circumstances warrant.

THE MATERIAL FACTS

- 3. The facts are set out in the Claimant’s Affidavit² (“the Claimant’s Affidavit”) and for the Defendant in the affidavit of Leah Ramgattie³ (“the Ramgattie Affidavit”).
- 4. The Defendant is a private company formed under the laws of Trinidad and Tobago.
- 5. A complaint was reported on 7 December 2017 by a student Ms. Kelly

¹ Chapter 7:08

² Filed on the 5 July 2018

³ Filed 17 September 2018

Seelal to one of the Senior Instructors, Mr. Reeza Ramgattie regarding the impropriety of WhatsApp messages sent to her by the Claimant.

6. Mr. Ramgattie forwarded the contents of the said complaint to the Defendant's Mr. Bridgemohan on 8 December 2017 and suggested that an investigation be conducted. The offending WhatsApp messages were also attached⁴.
7. The Claimant was placed on administrative leave until 8 January, 2018 and advised to remain within the jurisdiction and reachable by telephone. By correspondence dated 5 January, 2018, the Claimant was informed by notice in writing signed by the said Leah Ramgattie that his administrative leave was extended to 1 February, 2018. The said leave was further extended to 22 February, 2018 via notice dated 31 January, 2018 from the Defendant.
8. By letter dated 15 December 2017⁵ the Claimant was informed that a formal complaint was made against him by Ms. Kelly Seelal, a final year student of the Animal Science Programme where she alleged that the Claimant sent inappropriate messages to her. The Claimant was asked to state whether:
 1. On the 21 November 2017 Ms. Seelal attempted to contact the Claimant via telephone and mobile messaging regarding final examinations;
 2. The Claimant told Ms. Seelal via mobile message that he is a nice person and nicer in other ways too;
 3. The Claimant further told Ms. Seelal via a subsequent mobile

⁴ A.M 2 of the Claimant's Affidavit

⁵ See L.R 1 of the Ramgattie Affidavit

message that she looked a bit like one of those models from Victoria Secrets' pageant;

4. At 10:07 pm on 2 December 2017 the Claimant asked Ms. Seelal via mobile messages "So which model do you look like tonight. Care to show (sic) me;"
5. On 7 December 2017 the Claimant sent two mobile messages to Ms. Seelal at 6:03 pm and 8:47 pm which stated "OK unskinny bop Queen" and "Do you want to be my queen try me u will like me" respectively.

9. The Claimant was also invited to provide a written response to the aforesaid allegations.

10. The Claimant responded by Memorandum dated 17 December, 2017 and provided his copies of WhatsApp messages with Ms. Seelal.⁶

11. The Claimant's Attorney at law provided further clarification by letter dated 8 February 2018.⁷

12. The Defendant convened the Tribunal on 27 February, 2018 comprising the following members:
 - a. Professor Dr. Rodney Rambally;
 - b. Professor Festus Addo Yobo;
 - c. Professor Betty Mc Donald;
 - d. Mr. Al Salandy;
 - e. Mr. Dale Connelly;
 - f. Ms. Renita Cassie.

⁶ See "A.M.3" of the Claimant's Affidavit

⁷ See "A.M.4" of the Claimant's Affidavit

13. The Claimant attended the Tribunal hearing on 27 February, 2018 and was allowed to be accompanied by his Attorney at law. He was instructed that his Attorney was to provide advice but that he was to give direct responses to questions posed, which occurred.
14. The alleged complainant, Ms. Kelly Seelal was not present at the said hearing of the Tribunal nor was any account provided to the Claimant for her absence. The Claimant was not given an opportunity to cross examine the veracity of the alleged complaint by Ms. Seelal.
15. The members of the Tribunal did not provide any proof of the authenticity of the offending text messages being originated from the Claimant's mobile phone.
16. The Defendant by letter dated 14 March, 2018 advised the Claimant that it had reviewed the report of the Tribunal, which was convened to hear and determine the facts pertaining to the disciplinary charge. The letter also stated that he was in breach of the Defendant's policies and procedures and that a decision was taken to terminate his contract with immediate effect.⁸

THE DEFENDANT'S POSITION

17. The Defendant has opposed the Claimant being granted the orders sought for two reasons, namely: (a) its decision to terminate the Claimant's employment is not capable of judicial review since his dismissal from the Defendant ought to be ventilated in private law and that the Claimant has an alternative remedy and (b) the Tribunal of the Defendant fairly ventilated the complaint of Ms. Seelal and that the Claimant was dismissed

⁸ See "A.M.5" of the Claimant's Affidavit

on the basis that his conduct contravened Section 6.2 of the Code of Conduct and the Defendant's Human Resource Policy Ref. No. 6 Safety and Security.

THE ISSUES

18. The Defendant's position provided the springboard for the issues which the Court must now dive into. These are:
 - (a) Whether the Defendant's decision to terminate the Claimant is capable of judicial review.
 - (b) Whether the Claimant has an alternative remedy in law.

WHETHER THE DEFENDANT'S DECISION TO TERMINATE THE CLAIMANT IS CAPABLE OF JUDICIAL REVIEW

19. It was submitted on behalf of the Defendant that the provision of education by the Defendant can be seen as a public function since the provision of tertiary education by it is funded by the Government. However, it was the Defendant's position that this matter concerns contractual law principles which attracts private law remedies since the Claimant was an employee of the Defendant who was charged with misconduct and terminated following the factual findings of the Tribunal and the Claimant has failed to establish any public element in the termination of the Claimant.
20. Section 5 (1) of the JRA provides that:

"An application for judicial review of a decision of an inferior Court, tribunal, public body, public authority or a person acting in the exercise of a public duty or function in accordance with any law shall be made to the Court in accordance with this Act and in such

manner as may be prescribed by Rules of Court.”

21. The decision of a private body can be subject to judicial review if it exercises public functions and if the decision it has made has a sufficient public element.⁹ In the Court of Appeal decision of **In an application by NH International (Caribbean) Limited v Urban Development Corporation of Trinidad and Tobago Limited and Hafeez Karamath Limited**¹⁰ Kangaloo JA dealt with the issue of whether the decision to award a tender contract after a tender procedure was reviewable under private or public law. Kangaloo JA stated that “unless there is a public law element in the decision, and unless the allegation involves suggested breaches of duties or obligations owed as a matter of public law, the decision will not be reviewable... the applicants... must demonstrate that the ... allegations involve infringement of rights to which they are entitled as a matter of public law...”¹¹

22. **Selwyn’s Law of Employment**¹² states that the contract of employment “is a contract like any other contract, and in principle subject to the general contractual rules of the common law. The normal canons of legal construction must be applied.”

23. **Selwyn’s Law of Employment**¹³ further states that “in rare cases, an employee may seek a public law remedy, by way of judicial review, generally when a private law remedy either does not exist, or would be inadequate in the circumstances.”

⁹ See Mohammed J in HCA No 3129 of 2001 In the matter of Spancrete Caribbean Limited v UDeCOTT Ltd at page 44.

¹⁰ CA 95 of 2005

¹¹ Ibid at Para 18

¹² Emir, A, 18th ed, OUP, p 79

¹³ Ibid Pg. 395

24. In **de Smith Woolf & Jowell on Judicial Review of Administrative Action**¹⁴ the authors state:

"However, not all decisions taken by bodies in the course of their public functions are the subject matter of judicial review. In the following two situations judicial review will not normally be appropriate even though the body may be performing a public function: (a) Where some other branch of the law more appropriately governs the dispute between the parties. In such a case, that branch of the law and its remedies should and normally will be applied; and (b) Where there is a contract between the litigants. In such a case the express or implied terms of the agreement should normally govern the matter. This reflects the normal approach of English law, namely, that the terms of a contract will normally govern the transaction, or other relationship between the parties, rather than the general law. Thus, where a special method of resolving disputes (such as arbitration or resolution by private or domestic tribunals) has been agreed by the parties (expressly or by necessary implication), that regime, and not judicial review, will normally govern the dispute."

25. The first hurdle which the Claimant must overcome in order to achieve any measure of success in his claim is he must demonstrate that the Defendant is a body exercising a public function and that the Defendant's decision to terminate had a sufficient public interest.
26. The nature of the function which the Defendant performs is public in nature in that it provides tertiary education which is funded by the

¹⁴ 15th Ed. para. 3-034 (and also in their work "Principles of Judicial Review (1999) para. 3-0360.

Government of Trinidad and Tobago. However, in my opinion based on the Claimant's evidence there was no public element in his dismissal for the following reasons. Firstly, there was no evidence from the Claimant that there is a statutory procedure for the Defendant to follow in taking the decision to dismiss its staff. According to paragraph 5 of the Ramgattie Affidavit¹⁵ the Claimant was dismissed by the Defendant on the basis that his conduct contravened section 6.2 of the Code of Conduct and the Defendant's Human Resource Policy Ref. No. 6 Safety and Security. Notably, the Claimant did not dispute that as an employee of the Defendant he was subjected to the said policies.

27. Secondly, the nature of the employment relationship between the Claimant and the Defendant, and his dismissal were both contractual in nature. The Claimant did not place any evidence before the Court to demonstrate otherwise. Indeed, one of the reliefs which the Claimant seeks is damages which is a monetary compensation consistent with a claim for wrongful dismissal in a private law breach of contract action.
28. Thirdly, the Claimant failed to demonstrate that his dismissal by the Defendant related to any public law matter since there was absolutely no evidence from the Claimant to demonstrate that his dismissal was a matter of national concern.
29. Based on these reasons, the Claimant's action in judicial review must fail. However, I will still examine the next issue for completeness.

WHETHER THE CLAIMANT HAS AN ALTERNATIVE REMEDY IN LAW?

30. The Claimant deposed at paragraph 41 of the Claimant's Affidavit that he

¹⁵ Filed on the 17 September 2018

has no alternative remedy but the judicial review proceedings.

31. The Defendant's position was that based on the facts which the Claimant has relied on and the nature of the remedies which he has sought in the instant action, it is clear that he has alternative remedies to treat with the allegations of breach of contract instead of a claim in judicial review. However, the Defendant submitted that the Court should not exercise its discretion to treat the instant action as a private law matter since the Claimant's claim as constituted has no chance of success and it would also not save time and costs to continue the case against the Defendant as there are no issues to be ventilated at a full trial that cannot be decided presently before the court.
32. At paragraph 5 of the Ramgattie Affidavit, the Defendant stated that the Claimant was dismissed by the Defendant on the basis that his conduct contravened section 6.2 of the Code of Conduct and the University's HR Policy Ref No. 6 Safety and Security and that that one of the relief sought by the Claimant is monetary compensation which is damages for wrongful dismissal. At paragraph 6 of the Ramgattie Affidavit the Defendant also stated that another remedy which the Claimant seeks is reinstatement and that only the Industrial Court by virtue of section 10(4) of the **Industrial Relations Act**¹⁶ has the power to award reinstatement upon the finding that a worker was dismissed in a harsh and oppressive manner.
33. **Selwyn's Law of Employment**¹⁷ provides that common law remedies available for employment law matters are wrongful dismissal and for damages based on a failure by the employer to follow contractual

¹⁶ Chapter 88:01

¹⁷ At page 394

disciplinary procedures. The measure of damages being the loss suffered by the employee as a result of the failure. Therefore, the Court should be extremely reluctant to entertain a judicial review action where alternative remedies exist.

34. In my opinion, from the facts it is clear that the Claimant has alternative remedies other than judicial review. Indeed, the Claimant has sought remedies such as a monetary compensation and reinstatement which are more appropriate in a private action for wrongful dismissal.

35. In **The Caribbean Civil Court Practice 2011 ed** at page 458 the learned authors stated that a Court has the discretion if it finds that judicial review proceedings were inappropriately brought but relief might have been granted if same was sought in an action begun by a claim, then instead of refusing the application the Court may order that the proceedings continue as if they had been begun by claim. The authors cited two cases where the Court took such action. In **Moncur Et Al v Griffith et al; Sawyer v Griffith et al**¹⁸ leave to file judicial review was obtained ex parte by two taxi drivers to bring judicial review proceedings against the Bahamas Taxi Cab Union. In **Chang v Hospital Administrator, Port of Spain General Hospital and Permanent Secretary**¹⁹ the applicants sought injunctions to restrain the impending elections of the Union, in which they were unable to participate because of their explosion. Hosein J set aside the leave, granted on the basis that the decision of the respondents was not amenable to judicial review but directed that the matter proceed as if begun by writ.

36. In **Stacey Bailey v The Attorney General of Trinidad and Tobago**²⁰ Brown-

¹⁸ Bah Suit Nos PUB/JRV No 00009 of 2005 and PUB/JRV No 00010 of 2005

¹⁹ HCA 3835 of 2002

²⁰ HCA 3540 of 2001 delivered on 19 May, 2011

Antoine J concluded that “the court has a general discretion and an inherent jurisdiction to order and treat any action brought to be continued as if begun by writ or other procedure and grant relief. This would usually depend on the stage of the proceedings, if there are mixed reliefs sought, and whether or not there has been a finding of abuse of process.” In that case the reliefs sought were however purely constitutional reliefs or orders pursuant to the alleged breaches claimed. It was not a case where mixed reliefs were sought. Brown-Antoine J said that even though the court has the jurisdiction to treat it as if begun by writ and grant a declaration or damages for unlawful administrative action, no such relief was claimed on the motion. Further, no evidence or submissions were heard on the point.

37. In **Spancrete Caribbean Limited v UDeCOTT**²¹ Boodoosingh J examined several English decisions which support the position that the court has the power to allow a claim filed in judicial review to continue by ordinary claim. In allowing the matter before him to continue as a claim under the CPR he gave his reasons for so doing stating that it was a substantial claim, where if the applicant was successful, a large amount of damages may have been payable and based on the affidavits and material before the court, the applicant did have a viable claim even if it could not be said that it was guaranteed that the claim would succeed after all of the evidence was presented, tested in cross-examination and submissions made. He said that it certainly was not a frivolous claim and it was one that required proper ventilation.
38. In the instant action, the Claimant complained that the Tribunal was not fair since (a) he was not informed of and permitted to answer any adverse material against him; (b) he was not permitted to confront his accuser, Ms.

²¹ HCA 3129 of 2001 delivered on 9 February, 2017

Seelal, to cross examine her to test the veracity of her story; (c) he was not provided with a copy of the report of the Tribunal which formed the basis for the Defendant's decision to dismiss him; and (d) he was not informed if there was any formal appellate process.

39. At paragraph 14 of the Ramgattie Affidavit, the Defendant stated that according to the records of the Tribunal the Claimant was invited to ask questions or put forward evidence. The Claimant invited the Tribunal to look at what he considered the discrepancies in the times of the messages, that is in Ms. Seelal's account, a message may have been sent at 9:31 pm while in his account, the same message was recorded as having been sent at 9:40 pm. The Claimant also informed the Tribunal that he did not send some of the messages which Ms. Seelal claimed he sent.
40. The Ramgattie Affidavit accepted that the accuser Ms. Seelal was not present at the Hearing and that no reason was provided for her absence. At paragraph 17 of the Ramgattie Affidavit the Defendant stated that the Claimant was told that the Tribunal would submit its report to HR and that HR would communicate with him but that he was not promised a copy of the report. At paragraph 18 of the Ramgattie Affidavit the Defendant stated that there is no formal appellate process, but there is no evidence that the Claimant was so informed.
41. According to **Selwyn's Employment Law**²² a disciplinary hearing must be conducted fairly, and to achieve this a number of rules should be observed: (a) an employee is entitled to know the nature of the charge against him in sufficient detail to enable him to prepare his case; (b) an employee should be given the opportunity to state his case; (c) he should be permitted the

²² At page 342

right to be represented or accompanied in accordance with the procedure; and (d) he should be informed of his right to appeal to a higher level of management, who was not previously involved in his case or to an independent arbitrator.

42. In the instant case the Claimant knew the charges against him since he was so notified by letter dated 15 December 2017. **Selwyn's Employment Law** at page 343 provides that "it is only a failure of natural justice or general principles of law if the essence of the case against the employee is contained in the statements and he has not been otherwise informed of the nature of the case against him." The Claimant's Affidavit also exhibited the email from Mr. Ramgattie who reported the complaint brought by Ms. Seelal as well as the WhatsApp messages that she received from the Claimant. The Claimant submitted the text message conversations from his phone which were before the Tribunal and which on their face contained even more details than originally raised by the student, Ms. Seelal. Notably, the Claimant did not deny the contents of the WhatsApp exchanges.
43. The Claimant was given an opportunity to state his case. The Claimant was also allowed the right to representation or to be accompanied by his Attorney at law²³ and to ask questions at the hearing before the Tribunal.
44. In my opinion, given the facts of the instant case, the lack of Ms. Seelal's presence at the hearing of the Tribunal was not necessary since the Claimant was fully aware of the details of the complaint made by Ms. Seelal against him and he was given the opportunity to address them and present his case. Further, the Claimant was never promised the report of the Tribunal. In my opinion, the Tribunal acted fairly and it would not be time

²³ See paragraph 19 of the Ramgattie Affidavit

or cost effective to continue the case against the Defendant.

CONCLUSION

- 45. The Claimant’s action is dismissed since the Claimant failed to demonstrate that the Defendant is a public body exercising a public function and that the Defendant’s decision to terminate him had any public interest. In particular, there was no evidence that there is a statutory procedure for the Defendant to follow in taking a decision to dismiss staff; the nature of the employment relationship between the Claimant and the Defendant was contractual and so too was his dismissal and there was no evidence that the Defendant’s dismissal was a matter of national concern.

- 46. The Claimant’s action also fails since he has an alternative remedy in private law. Further, based on the facts there is no sufficient basis to treat the matter as a private action since the Tribunal acted fairly.

ORDER

- 47. The Claimant’s action is dismissed.

- 48. The Claimant to pay the Defendant costs in the sum of \$14,000.00.

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Margaret Y Mohammed
Judge