THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. **CV2018-03600**

IN THE MATTER OF AN APPLICATION BY DHELIA GABRIEL FOR LEAVE TO APPLY FOR JUDICIAL REVIEW PURSUANT TO THE JUDICIAL REVIEW ACT NO. 60 OF 2000

AND

IN THE MATTER OF THE DECISION OF THE MINISTRY OF HEALTH

BETWEEN

DHELIA GABRIEL

Applicant

AND

THE MINISTRY OF HEALTH

Respondent

Before the Honourable Mr. Justice Robin N. Mohammed

Date of Delivery: Thursday 30 January, 2020

Appearances:

Mr. Colin Selvon instructed by Ms. Delicia Bethelmy for the Applicant

Ms. Monica Smith and Ms. Trisha Ramlogan instructed by Ms. Janine Joseph for Respondent

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DECISION ON APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

I. The Application

[1] Before the Court for determination is the Applicant's Application dated 8 October 2018 for leave to apply for Judicial Review pursuant to **section 6 of the Judicial Review Act Chapter 7:08** and **Rule 56.3 of the Civil Proceedings Rules 1998 (CPR)**.

[2] The Applicant, Dhelia Gabriel, sought to challenge a decision of the Respondent, the Ministry of Health, given on 6 July 2018 to terminate her services as Medical Intern. The Application was supported by an affidavit of the Applicant filed on 8 October 2018.

[3] The Applicant wants the Court to make orders which in essence would set aside the Respondent's decision to terminate her and to re-instate her as a Medical Intern. The reliefs sought by the Applicant are as follows:

(i) An Order quashing the Respondent's decision to terminate the Applicant's services as a Medical Intern.

(ii) An Order compelling the Respondent to re-instate the Applicant as a Medical Intern.

(iii) A Declaration that the Respondent's failure and/or refusal to refer the Applicant to routinely attend psychiatric clinics within the public health sector and failing to follow up on the diagnosis and/or recommendations and/or prescriptions made by the psychiatrist(s) who attended to the Applicant acted unreasonable *(sic)* and in contravention of the settlement agreement in Trade Dispute TD No 743 of 2016 and nevertheless terminating the services of the Applicant is unlawful on the grounds that the decision was procedurally improper and/or irrational and/or unreasonable.

(iv) Costs.

(v) Any other relief that the Court may deem necessary in the circumstances.

[4] The Court being of the opinion that a hearing was desirable in the interests of justice, directed that a hearing in open court be fixed pursuant to CPR Part 56.4 (3) (c) and also directed that notice of the application for leave be given to the Respondent pursuant to CPR Part 56.4(4).

[5] On 17 October 2018, the Court heard both parties on the application and gave directions for the filing of response affidavits, affidavits in reply and written submissions with authorities. However, on 9 November 2018, the Respondent's attorneys applied for a variation of the Court's original timetable on the basis that the Respondent's attorneys were still awaiting pertinent instructions from the relevant personnel at the Ministry of Health and so were unable to finalise the affidavits in opposition. An order for the variation as requested was granted.

[6] The Respondent filed two response affidavits on 30 November 2018 in the names of Dr. Dominic Obaijulu Nwokolo, Consultant Psychiatrist at the St. Ann's Psychiatric Hospital and Natasha Seecharan, Legal Adviser at the Service Commissions Department. The Court granted a further variation to the timetable to allow the Respondent's attorneys to put in evidence two further response affidavits which were filed on 12 December 2018 in the names of Asif Ali, Acting Permanent Secretary at the Ministry of Health and Dr. Nelleen Baboolal, Head of Department of Psychiatry, University of the West Indies, St. Augustine.

[7] The Applicant thereafter filed four affidavits in reply on 13 March 2019 each one individually replying to the respective affidavits of the four affidavits filed on behalf of the Respondent. Written submissions with authorities in support of her Application for leave were also filed on her behalf as well. To date, the Respondent's attorneys have not filed any written submissions on behalf of the Respondent.

[8] However, from the response affidavits and arguments in Court, it can be gleaned that the Respondent opposes the Applicant's Application for Leave on the basis that there is an alternative remedy available to the Applicant and in any event the Applicant has no realistic prospect of success on any substantive application for judicial review.

II. Relevant Factual Background

[9] The Applicant graduated with a Degree in Medicine from the St. George's University, Grenada in 2015. She, thereafter, applied for an internship with the Respondent. By letter dated 14 December 2015, the Human Resource Management Division (Medical Section)

of the Respondent notified the Applicant that approval was conveyed for her employment on contract as an Intern, Medical Services for a period of 12 months with effect from 1 January 2016.

[10] The Applicant assumed her position as Intern, Medical Services, at the Mt. Hope General Hospital on 1 January 2016. However, by letter dated 21 June 2016, the Chief Medical Officer of the Respondent informed the Applicant that she was not to report for duty until she provided a Medical Report from her Psychiatrist indicating her fitness to perform duties as an Intern, Medical Services.

[11] Dr. Gerard Hutchinson, Consultant Psychiatrist conducted an assessment of the Applicant and wrote to the Respondent, by letter dated 21 July 2016, recommending that the Applicant be allowed to resume work given appropriate support and more formal feedback about problems with her performance. However, the Applicant continued on suspension.

[12] By letter dated 29 September 2016, the Ministry of Labour acknowledged receipt of a letter dated 29 September 2016 concerning the existence of a trade dispute between the Respondent, the Chief Personnel Officer and Trinidad and Tobago Workers' Association (hereinafter "the Workers' Association"). The Respondent was copied on this letter.

[13] By letter dated 8 November 2016, the Workers' Association, pursuant to **section 59(2) of the Industrial Relations Act, Chap 88:01**, made an application to the Industrial Court to determine the trade dispute. It was stated that the dispute emanated from the wrongful dismissal of the Applicant on 31 May 2016. The trade dispute was given the case number TD No. 743 of 2016 – Trinidad and Tobago Workers' Association (Party 1) and the Chief Personnel Officer (Party 2) and the Ministry of Health (Party 3).

[14] However, the Respondent contended that there was no record of any dismissal of the Applicant. Nonetheless, the Respondent, by letter dated 20 April 2017, agreed to settle

the matter upon the Applicant fulfilling certain conditions[1]. From the Workers' Association response letter dated 16 May 2017, it appears that the Respondent offered to allow the Applicant to re-enter the Internship Programme in July 2017 subject to routine psychiatric and psychological evaluations. The Workers' Association stated that the Applicant was anxious to re-enter the Internship Programme in July 2017. The Workers' Association, however, indicated that the Applicant's acquiescence of the routine psychiatric and psychological evaluations is contingent upon the said evaluations being conducted by Dr. Gerard Hutchinson.

[15] The Respondent responded by letter dated 23 June 2017 maintaining its initial offer, namely, "*to allow Dr. Gabriel to re-enter the next batch of the Internship Programme in July 2017 with the proviso that she routinely attend Psychiatric clinics within the public health sector as directed by the Ministry.*" The Applicant accepted the Respondent's offer by two letters dated 16 and 22 June 2017, one addressed to Dr. Misir and the other to Dr. Parasram.

[16] By letter dated 28 July 2017, the Human Resource Management Division (Medical Section) of the Respondent notified the Applicant that approval was conveyed for her employment on contract as an Intern, Medical Services for a period of 12 months with effect from 1 August 2017. This letter further stated as follows:

> "*You are reminded that your internship is premised on the condition that you routinely attend Psychiatric and Psychological public health clinics as directed by the Ministry of Health. The purpose of same is to ensure the proper monitoring and management of your behavior during and ultimately, if successful, thereafter as a medical practitioner. Accordingly, you are required to be clinically assessed as determined by the Chief Medical Officer.*"

[1] This letter, however, is not before the Court. Nonetheless, the letter dated 23 June 2017 exhibited to Mr. Asif Ali's affidavit reiterated the Respondent's position from the letter dated 20 April 2017.

[17] The Applicant assumed her position, with effect from 1 August 2017, as Medical Intern at the Port of Spain General Hospital. Pursuant to the conditions attached to the Applicant's acceptance of re-entering the Internship Programme, she was directed by the Respondent to attend the office of Dr. Nelleen Baboolal, Specialist Psychiatrist, on three separate occasions. The Applicant attended three appointments with Dr. Nelleen Baboolal. However, Dr. Baboolal fully assessed the Applicant on one occasion.

[18] Dr. Baboolal met with the Applicant on 30 November 2017 for the purpose of conducting a psychiatric evaluation. Dr. Baboolal, however, stated that the Applicant refused to consent to the psychiatric evaluation. The Applicant, thereafter, had another appointment with Dr. Baboolal on either the 11 or 12 December 2017. On this date, the Applicant consented to allow Dr. Baboolal to perform the psychiatric evaluation. Dr. Baboolal prepared a report dated 20 February 2018 and forwarded same to Dr. Roshan Parasram. Dr. Baboolal concluded that the Applicant has a paranoid personality disorder with possible intermittent psychotic episodes[2].

[19] The Applicant, however, alleged that she enquired about her diagnosis from Dr. Baboolal but Dr. Baboolal refused to discuss same in detail with her. Dr. Baboolal, on the other hand, stated that she could not recall whether the Applicant ever enquired about her diagnosis at any of their meetings.

[20] The Applicant returned to the Internship Programme and continued her employment without any word from the Respondent. She stated that she directed her Union to contact the Respondent concerning her counselling with Dr. Baboolal. However, there was no response. The Respondent, on the other hand, stated that there was no communication by the Applicant or her representatives after the Respondent's letter dated 6 December 2017.

[21] The Applicant stated that the Respondent refused to do any follow up; she believed that the Respondent was required to do so under the settlement that was undertaken since she had no control over her own assessment, diagnosis and treatment. The Respondent,

[2] Paragraph 12 (last line) of the affidavit of Dr. Nelleen Baboolal filed 12 December 2018

however, stated that the responsibility for the Applicant's assessment, treatment and diagnosis remained with her.

[22] On or around the month of June 2018, the Applicant made some discriminatory posts on Facebook. A meeting was held on 11 June 2018 with the Acting Medical Director, the Head of Surgery, the Orthopaedic Consultant and the Applicant to discuss the posts made on Facebook. The Applicant was advised that she was to be relieved of all clinical responsibility until further advised by the Respondent.

[23] By letter dated 14 June 2018, the Respondent informed the Applicant of some twenty-six allegations of misconduct made against her, her suspension from duty with effect from June 11 to 28, 2018 and her requirement to attend clinical assessment with Dr. Dominic Nwokolo at St. Ann's Hospital. Dr. Nwokolo met with the Applicant and her mother on 21 June 2018 at the St. Ann's Psychiatric Hospital. Dr. Nwokolo prepared a report dated 27 June 2018. The Respondent received said report on 2 July 2018. Dr. Nwokolo opined that the Applicant suffers from an Autism Spectrum Disorder.

[24] By letter dated 21 June 2018, the Applicant responded to the twenty-six allegations of misconduct made against her. By letters dated 25 June 2018, Mr. Asif Ali, the Acting Permanent Secretary of the Respondent selected the Legal Advisor, Service Commissions Department, the Health Sector Advisor, Ministry of Health and the County Medical Officer of Health for St. George Central to meet and discuss the allegations of misconduct made against the Applicant and her responses. The letters highlighted that the meeting will be held on 27 June 2018.

[25] The Respondent stated that during the meeting on 27 June 2018, the Applicant admitted to some seven (7) allegations but with explanations given. However, the Applicant contended that though she admitted to particular facts in the allegations, she did not admit that on those facts, she either brought her employer into disrepute or was insubordinate to her supervisors or that she performed her duties in a negligent manner.

[26] By letter dated 6 July 2018, the Respondent informed the Applicant that her services with the Respondent as an Intern, Medical Services were terminated with immediate effect. The letter stated that the Respondent was of the view that the allegations to which she admitted concerned acts that are serious and equivalent to gross misconduct and conduct unbecoming of a medical professional. The Respondent noted numerous complaints made by the Applicant's supervisors in the Regional Health Authorities for the past three rotations that she underwent as part of her Internship Programme. The Respondent also noted Dr. Nwokolo's comments in his psychiatric evaluation of the Applicant on 21 June 2018.

III. Law and Analysis

[27] The Privy Council in **Attorney General of Trinidad and Tobago v Ayers-Caesar**[3] confirmed that the test to be applied in an application for leave for judicial review is that laid down in **Sharma v Brown-Antoine and others**[4]. The Privy Council stated as follows:

> "(4) *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: see 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 a balance of*

[3] [2019] UKPC 44
[4] [2007] 1 WLR 780

probabilities. Thus the flexibility of the standard lies not in the 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."

The Privy Council then went on to say:

"It is not enough that a case is potentially arguable: an Intended Claimant cannot plead potential arguability to "justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory processes of the court may strengthen": Matalulu v Director of Public Prosecutions [2003] 4 LRC 712, 733.

[28] The test, therefore, to be applied by the Court on an application for leave for judicial review is ***whether there is an arguable ground for judicial review that has a realistic prospect of success***.

[29] However, before the Court can apply this test, the Court must first determine ***whether the Respondent's decision to terminate the Applicant and the Respondent's breach of the settlement agreement are capable of judicial review***. Thereafter, the Court must consider ***whether there is an alternative remedy available to the Applicant***.

Is the Respondent's decision to terminate the Applicant and its breach of the settlement agreement capable of judicial review?

[30] **Section 5(1) of the Judicial Review Act, Chap 7:08** (hereinafter "**the JRA**") states as follows:

"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."

[31] It is undisputed that the Respondent is a public authority, which is charged with oversight of the entire health system in the Republic of Trinidad and Tobago. It plays a central role in protecting and promoting public health. Thus, the Respondent is amenable to judicial review.

[32] However, the issues in contention are (i) the decision of the Respondent to terminate the services of the Applicant and (ii) the Respondent's breach of the settlement agreement in Trade Dispute TD No 743 of 2016. The Court must first be satisfied that these matters have a public element and are amenable to judicial review.

[33] It is uncontested that the Applicant was employed with the Respondent on contract as a Medical Intern for a period of twelve months with effect from 1 August 2017. It appears that there is an Internship Agreement dated 30 August 2017 between the parties (reasonably inferred from the letter dated 6 December 2017 sent to the Applicant by the Respondent). However, this Internship Agreement was not before the Court; therefore, the Court is not privy to its terms and conditions. Nevertheless, the nature of the relationship between the Applicant and the Respondent was contractual.

[34] In **de Smith Woolf & Jowell on Judicial Review of Administrative Action**[5], the learned authors state as follows:

"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

[5] 15th Ed. Para 3-034

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."

[35] **Selwyn's Law of Employment**[6] 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*." **Selwyn's Law of Employment**[7] 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*."

(i) The decision of the Respondent to terminate the services of the Applicant

[36] The Court finds that the decision of the Respondent to terminate the services of the Applicant was contractual in nature and that there is no public element in the Applicant's termination. By the letter dated 6 July 2018, the Respondent informed the Applicant that in accordance with her Internship Agreement with the Respondent dated 30 August 2017, her services as an Intern, Medical Services were terminated with immediate effect.

[37] There was no evidence placed before the Court by the Applicant that there is any statutory procedure for the Respondent to follow in deciding to terminate her services. It is likely that the termination of the Applicant is covered in the Internship Agreement dated 30 August 2017 (the Court was not privy to this Agreement).

[6] Emir, A, 18th Ed, OUP, p 79
[7] Ibid, p 395

[38] Consequently, the issue of the Applicant's termination attracts the application of contract law principles in a private law action and not public law. In that regard, the Respondent's decision to terminate the Applicant's services is not amenable to judicial review.

(ii) The Respondent's breach of the settlement agreement in Trade Dispute TD No 743 of 2016

[39] The Applicant contends that pursuant to Trade Dispute TD No. 743 of 2016, the Respondent agreed to have the Applicant re-enter the Medical Internship Programme on the proviso that she routinely attends Psychiatric Clinics within the Public Health Sector as directed by the Ministry. She further contends that despite complying strictly with the Ministry's directions, there was never any follow up by the Ministry regarding her diagnosis and/or treatment notwithstanding being informed by the doctors who assessed and/or evaluated her that she had a "disorder" and that certain treatment and/or medication would be prescribed or suggested. She submitted that since all the doctors reported directly to the Ministry (the Respondent), failure by the Respondent to follow up on the diagnosis and/or recommendations for her treatment and/or medication was in contravention of the settlement agreement in Trade Dispute TD No. 473 of 2016.

[40] From the evidence of the Applicant and the submissions made on her behalf, it appears straightforward that there is no public element in the Respondent's breach of the settlement agreement with the Applicant. This matter, like the Respondent's decision to terminate the Applicant, is contractual in nature. Therefore, the general rules of employment law based on contractual principles apply and judicial review is not appropriate.

[41] In this regard, the Court finds that the Applicant's Application for leave to apply for judicial review ought not to be granted on the basis that the decisions of which she complains are not amenable to judicial review.

[42] Nonetheless, for completeness sake, I shall go on to consider the other issues raised by the Respondent in opposing the application for leave, namely (i) whether there is an

alternative remedy available to the applicant; and (ii) whether the Applicant can establish an arguable case with a realistic prospect of success.

Is there an alternative remedy available to the Applicant?

[43] **Section 9 of the JRA** provides as follows:

> *"The Court shall not grant leave to an applicant for judicial review of a decision where other written law provides an alternative procedure to question, review or appeal that decision, save in exceptional circumstances."*

[44] Counsel for the Respondent submitted that the Applicant has an adequate alternative remedy by way of referring the matter to the Industrial Court pursuant to the **Industrial Relations Act, Chap 88:01**. Counsel for the Applicant accepts that once there is a satisfactory alternative remedy available to the applicant, the grant of leave to apply for judicial review is not normally granted. In fact, counsel cites the case of **R (Cart) v Upper Tribunal (2011) UKSC 28** wherein Lord Phillips expounded the law thus:

> *"….it is not the practice of the Court to use the power of judicial review where a satisfactory alternative remedy has been provided by parliament."*

[45] Counsel for the Applicant, however, went on to argue that accessing the jurisdiction of the Industrial Court would be wholly inappropriate to pursue the reliefs sought by the applicant. Hence, counsel contended that there is no adequate or satisfactory alternative remedy available to the Applicant but judicial review proceedings. Counsel submitted that the case at bar falls into the category of being within the definition of "exceptional circumstances" as provided for in section 9 of the Judicial Review Act (supra). To bolster his submission on this point, counsel cited the case of **R (C) v Financial Services Authority (2012) EWHC 1417 Admin at [89]** where Silber J stated:

"These cases show (a) that judicial review will not be granted where there is an alternative remedy available as long as it is in Lord Widgery's words in the ***Royco*** *case "equally effective and convenient" or in Taylor LJ's words in* ***Ferrero*** *"suitable to determine" the issue and (b) judicial review can be brought where the alternative remedy is in Lord Denning's words in the* ***Peachey*** *case "nowhere near so convenient, beneficial and effectual"."*

[46] Counsel therefore submitted that the question as to whether there is an alternative remedy is not one which is determined by simply pointing to an existing alternative remedy: consideration of that question goes much deeper and must include an inquiry as to the suitability of such an alternative remedy, if one is determined to exist. In securing further support for this contention, counsel cited **Halsbury's Laws Volume 61A 2018 Edition** which cited **R (C) v Financial Services Authority** (supra) which states:

"The Courts in their discretion will not normally make the remedy of judicial review available where there is an alternative remedy by way of appeal or internal complaints procedure or where some other body has exclusive jurisdiction in respect of the dispute. However, judicial review may be granted in exceptional circumstances such as where the alternative statutory remedy is "nowhere near so convenient, beneficial and effectual" or "where there is no other equally effective and convenient remedy"."

[47] Based on the above, Counsel submitted that on the peculiar facts of the case at bar, the application for leave to apply for judicial review falls within the definition of "exceptional circumstances" as provided for in section 9 of the Judicial Review Act and further expounded in the R (C) v Financial Services Authority case.

[48] In support of this contention counsel submitted that the Applicant does not easily fall within the meaning of **"worker"** in the **Industrial Relations Act**. It was submitted that the Applicant is, for all intents and purposes, still a student subject to the supervision of others including the University of West Indies and subject to being graded and/or tested like any other student.

[49] Counsel for the Applicant contended that the underlying problem of the Applicant's mental health and her ability to do over and/or complete her internship go way beyond the issue of industrial relations and/or trade dispute but involve important public policy issues for which the Industrial Court and its powers and jurisdiction may be inappropriate or unsuitable to pursue her relief. Counsel further argued that it would be a stretch to clarify the issues before this Court as primarily a "trade dispute" as defined in the Industrial Relations Act in the same way as it is difficult to bring the Applicant within the meaning of "worker" as defined in the said Act. Counsel resolved that the issue in this case is not the conduct of the Applicant as a "worker" but whether the Ministry of Health (Respondent) complied strictly and/or properly or at all with the implementation of the settlement agreement regarding the Applicant's continued treatment.

[50] The Court is of the opinion that this submission, in itself, supports the Court's view above that this matter is not amenable to judicial review and is more in support of a private law action. As concluded above in paragraph [38], any breach of the settlement agreement between the Applicant and the Respondent is of a contractual nature.

[51] Pursuant to **section 2 of the Industrial Relations Act**, a "worker" includes:

> *"(a) any person who has entered into or works under a contract with an employer to do any skilled, unskilled, manual, technical, clerical or other work for hire or reward, whether the contract is expressed or implied, oral or in writing, or partly oral and partly in writing, and whether it is a contract of service or apprenticeship or a contract personally to execute any work or labour."*

[52] As stated above at paragraph [33], the Applicant was employed on contract for a period of twelve months as Intern, Medical Services. There is no dispute that there was an Internship Agreement highlighting the terms and conditions of the Applicant's employment with the Respondent. Indeed, the Applicant, in her principal affidavit in support of her application for leave, deposed at paragraph 5 thereof that by letter dated 14th December, 2015 she was granted approval for her **employment on contract**[8] as an Intern, Medical Services. Exhibit "D.G.1" attached to her said affidavit shows that the letter was signed by her signifying that she had accepted the offer of employment on contract **"on the terms and conditions as indicated in the attached Schedule"** [Emphasis added]. However, the "Schedule" was not attached to her affidavit.

[53] An ***intern*** is described as *an advanced student or recent graduate who is apprenticing to gain practical experience before entering a specific profession*[9]. Thus, as an Intern, Medical Services, the Applicant can be said to be **"apprenticing"** in the Regional Health Authorities in order to "gain practical experience" to satisfy the requirements of qualifying as a doctor to practice medicine in Trinidad and Tobago.

[54] The Court is therefore of the opinion that the Applicant falls within the definition of **"worker"** in the Industrial Relations Act. Consequently, the Applicant would have *locus standi* to initiate proceedings in the Industrial Court concerning the termination of her services with the Respondent. Indeed she had initiated such proceedings in the Industrial Court before when she was first suspended from the Internship Programme.

[55] Furthermore, the fact that there is an existing settlement agreement in Trade Dispute No. TD 743 of 2016 before the Industrial Court, the Industrial Court is the more appropriate Court to deal with the Respondent's alleged breach of this agreement.

[56] Counsel for the Applicant submitted that the Industrial Court does not have the power to grant a certiorari or mandamus which are the remedies that the Applicant seeks. The

[8] Emphasis added
[9] *Intern*, Black's Law Dictionary 890 (9th ed. 2009)

remedies sought by the Applicant are those listed in paragraph [3] above and in her Application for Leave filed on 8 October 2018. In essence, the Applicant seeks an order quashing the decision to terminate her services as an Intern, reinstatement and a declaration that the Respondent acted unreasonably and in contravention of the settlement agreement.

[57] In terms of the remedy of reinstatement, Counsel for the Applicant submitted that it was not reinstatement in the traditional sense nor compensation which was sought by the Applicant. However, he did not go further to explain what he meant by "not reinstatement in the traditional sense" but further submitted that only the High Court can award this remedy, supposedly in the "non-traditional sense".

[58] Pursuant to **section 10(4) of the Industrial Relations Act**, the Industrial Court has the power to award reinstatement upon the finding that a worker was dismissed in a harsh and oppressive manner. Consequently, the Applicant did have the remedy of reinstatement available to her if she had initiated her trade dispute in the Industrial Court.

[59] In this regard, the Applicant did, in fact, have a suitable alternative remedy available to her and this is clearly shown when she first initiated Trade Dispute TD No. 743 of 2016 which resulted in a compromise (settlement agreement) being reached between the parties for her continued employment as an Intern.

[60] This Court therefore finds that the facts of this case do not place the application for leave within any "exceptional circumstances" so as to invoke the principles highlighted in the Financial Services Authority case (supra). This therefore means that even if the Court had found that the matters in contention were amenable to judicial review, the application for leave to apply for judicial review would still not be granted on the basis that the Applicant had available to her an alternative remedy, which she did not access.

Has the Applicant raised an arguable ground with a realistic prospect of success?

[61] Notwithstanding my earlier findings that the matters in contention are not amenable to judicial review and that the Applicant has an alternative remedy available to her, the Court will still consider whether, in any event, the Applicant has raised an arguable ground for judicial review having a realistic prospect of success.

[62] From the grounds set out in the Applicant's Application, she has raised, *inter alia,* issues of unreasonableness, legitimate expectation, impropriety and breach of natural justice. The Court considered these grounds as against the test of arguability and with a view of determining whether each contention has a realistic prospect of success. The grounds of the Applicant's Application are as follows:

(i) Failing to follow up on the diagnosis and/or recommendations and/or prescriptions made by the Psychiatrist(s) who attended to the Applicant having directed the Applicant to attend Psychiatric Clinics within the public health sector, was unreasonable and in contravention of the settlement agreement in Trade Dispute TD 743 of 2016. As a result, the Applicant's legitimate expectations that the programme of attending Psychiatric Clinic would include a prescribed course of treatment was breached.

(ii) Failing to provide the Applicant with the relevant reports from Dr. Baboolal and Dr. Nwokolo was procedurally improper and unreasonable.

(iii)Failing to inform the Applicant of the complaints being made against her at the time when the complaints were made particularly allegations #1, #2, #3, #4, #5, #6, #7, #8, #9, #10, #11, #12, #13, #14, #15, #16, #17, #18, #19, #20, #21, #22 and #23 of the suspension letter was procedurally improper and in breach of the Applicant's right to natural justice.

(iv) The Ministry's conclusion and/or decision in its termination letter that the Applicant had admitted allegations #3, #4, #8, #23, #24, #25 and #26 was improper, wrong, unreasonable and ultra-vires.

[63] It is clear that ground (i) at paragraph [62] above is premised on the parties' settlement agreement in the Trade Dispute TD 743 of 2016. This is, undeniably, contractual in nature and bears no public element. The terms of this settlement agreement would have to be examined to determine whether the Respondent acted unreasonably and/or in contravention thereof. Furthermore, as it relates to the Applicant's legitimate expectation, this also depends on the terms of the settlement agreement. The Court is not privy to the full terms of this settlement agreement as the agreement was not exhibited to the Applicant's affidavit. Nevertheless, examining a settlement agreement to determine whether the Respondent is in breach is more in line with breach of contract than within the scope of the Court's powers in a judicial review proceedings. Consequently, the Court holds that the Applicant does not have an arguable ground for judicial review with a realistic prospect of success on this particular ground.

[64] As it relates to ground (ii) at paragraph [62] above, the failure by the Respondent to provide any medical reports to the Applicant is also dependent on the terms of the settlement agreement between the Applicant and the Respondent.

[65] In relation to ground (iii) at paragraph [62] above, the Applicant has not established, either in her affidavit evidence or in her Notice of Application or in submissions filed on her behalf, that there existed a statutory procedure for the Respondent to follow in taking the decision to terminate the Applicant's services. Nonetheless, according to **Selwyn's Employment Law**[10], a disciplinary hearing must be conducted fairly, and to achieve this a number of rules should be observed, namely: (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 right to be represented or accompanied in accordance with the procedure; and (d) he

[10] At page 342

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.

[66] In the case at bar, regardless of when the complaints were made, the Applicant knew of all the allegations of misconduct made against her since she was notified by letter dated 14 June 2018. The Applicant was given an opportunity to respond to the allegations which she so did by letter dated 21 June 2018. Thereafter, in the meeting held on 27 June 2018, the Applicant was given the opportunity to again respond to the allegations of misconduct made against her. At this meeting, the Applicant was allowed the right to representation and in this regard, she was accompanied by two Grievance Officers of the Public Service Association.

[67] Given the above, the Court is of the opinion that the Applicant was given a fair opportunity to be heard and that the Tribunal, convened on 27 June 2018, acted fairly. Consequently, the Applicant does not have an arguable ground for judicial review with a realistic prospect of success.

[68] Lastly, ground (iv) at paragraph [62] above, is not an arguable ground for judicial review with a realistic prospect of success. As stated previously, the Respondent's decision to terminate the Applicant's services is contractual in nature and does not have any public element therein. Further, there is no evidence that there is a statutory procedure for the Respondent to follow in taking a decision to terminate the services of the Applicant.

[69] Consequently, the Court is of the opinion that the grounds for judicial review proffered by the Applicant are devoid of merit and do not pass the requisite test of arguability as outlined in **Sharma v Browne-Antoine** (supra). As stated previously, the matters in contention are of a contractual nature, there is no public element therein. Accordingly, the Applicant has not articulated any grounds which are arguable and which have a realistic prospect of success.

VI. Disposition

[70] Taking all of the circumstances into account, namely (i) that the matters complained of are not amenable to judicial review; (ii) that the Applicant has not presented a case which is arguable and which has a realistic prospect of success; and (iii) that in any event, the Applicant has an alternative remedy which has not been utilized, the Court is of the opinion that the Application for Leave to apply for Judicial Review is without merit and, therefore, ought not to be granted.

[71] On the question of costs, I am of the view that the general rule that costs follow the event in accordance with CPR Part 66.6(1) ought not to apply on the basis that this application for leave was initiated in accordance with CPR Part 56.3(1) which requires the application to be made without notice, that is, *ex parte*. It is the Court that required the application to be served on the Respondent on the basis that a hearing was thought desirable to assist the Court, but also to prevent a weak, meritless case from going the full litigation distance. I have also taken into account that notwithstanding the Court's direction for written submissions to be filed by both parties, no submissions were filed on behalf of the Respondent. On these bases, an appropriate order would be: no order as to costs.

[72] Accordingly, in light of the foregoing analyses and findings, the Order of the Court is as follows:

ORDER:

1. **The Applicant's Notice of Application for leave to apply for Judicial Review filed on 8 October 2018 be and is hereby dismissed.**

2. **There shall be no order as to costs.**

Robin N. Mohammed
Judge