[2023] JMSC Civ. 20

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2022CV01253

IN THE MATTER OF an Application by **DONOVAN BROWN** for leave to apply for Judicial Review pursuant to Rule 56.3 of the Civil Procedure Rules.

IN THE MATER OF the Labour Relations and Industrial Disputes Act.

IN THE MATTER OF a decision of the Minister of Labour and Social Security dated March 3, 2022

IN THE MATTER OF a decision of the Visitor of the University of the West Indies dated September 22, 2021.

BETWEEN	**DONOVAN BROWN**	**APPLICANT**
AND	**MINISTER OF LABOUR AND SOCIAL SECURITY**	**1ST RESPONDENT**
AND	**UNIVERSITY OF THE WEST INDIES THE VISITOR**	**2ND RESPONDENT**

IN CHAMBERS VIA ZOOM

Mr. Phillip Bernard instructed by Bernard and Co. for the Applicant.

Miss Kristen Fletcher instructed by the Director of State Proceedings for the First Respondent

Mr. M. Maurice Manning KC and Miss Allyandra Thompson instructed by Nunes, Scholefield, DeLeon and Co for the Second Respondent

Heard: January 25, and February 16, 2023.

Leave to apply for judicial review- Extension of time- University Visitor ruled that he had no jurisdiction- Error of law - Whether decision of Visitor subject to judicial review - Whether leave should be granted against the Minister.

PETTIGREW-COLLINS, J

BACKGROUND

[1] The applicant was employed to the University of the West Indies as Acting Purchasing Manager. On or about February 24, 2017, he was dismissed from his job. He commenced his employment in the capacity as a clerk in 1987, and was promoted until he assumed the position from which he was dismissed. Questions arose regarding the applicant's association with a company which was a supplier of goods to the University. A formal investigation was conducted. It was alleged that there was a conflict of interest due to the applicant's affiliation with the company, and that there was misconduct on his part. The applicant did not deny his affiliation with the company, but stated that, he had disclosed his affiliation and had received approval from the University to carry on transactions with the company.

[2] The applicant stated that prior to his dismissal, he had never had disciplinary proceedings brought against him. He alleged that his dismissal was unjust and in breach of the Labour Relations and Industrial Disputes Act and the Labour Relations Code. Although vehement that there was no misconduct on his part, he relied in particular on ***section 22(ii) (b)*** of the ***Labour Relations Code*** for he said that even if there was misconduct, based on this provision, he ought not to have been dismissed for a first breach of discipline except there was gross misconduct on his part.

[3] The applicant brought an appeal against his dismissal to the Vice Chancellor of the university on March 3, 2017, but his appeal was dismissed. The fact of the dismissal was communicated to him by letter dated November 30, 2017. In the meanwhile, on

November 6, 2017, the applicant had sought the intervention of the Ministry of Labour and Social Security. Several conciliatory meetings were facilitated between the applicant and the university, but there was no resolution of the matter. The applicant then, by way of letter dated June 4, 2020, requested that the matter be referred to the Industrial Disputes Tribunal (IDT). By way of letter dated July 6, 2020, the Ministry advised that the matter would not be so referred and it was recommended that the applicant invoke the jurisdiction of the Visitor of the university. On November 17, 2020, the applicant filed an appeal with the Chancellor. The Chancellor directed the applicant to lodge his case with the Visitor. The petition to the Visitor was filed on April 19, 2021. By way of a written decision dated September 22, 2021, the Visitor delivered his reasons for declining jurisdiction to entertain the applicant's petition.

[4] It is noted that there is a discrepancy between the date given by the applicant in his affidavit and that which appears in the Visitor's written reasons regarding the filing of the applicant's petition with the Visitor. He stated that he filed his petition with the Visitor in August of 2020, but in the Visitor's decision that date is stated as April 19, 2021.

THE APPLICATION

[5] The applicant filed an ex Parte Notice of Application for Court Orders on April 11, 2022, seeking leave to apply for judicial review. He indicated that he wished to file a Fixed Date Claim Form to seek orders including the following:

(a) An order of certiorari quashing the decision of the 1st respondent made on March 3, 2022 that the proper recourse is not via the Industrial Disputes Tribunal

(b) An order of mandamus compelling the 1st respondent to refer the applicant's dispute to the Industrial Disputes Tribunal for determination.

[6] On July 1, 2022, the applicant filed an amended ex parte Notice of Application. In addition to the orders sought in his earlier application, he also in the alternative, sought leave to apply for judicial review against the second respondent, as well as, an

abridgement of time for making the application against the second respondent. Among the orders sought are:

(a) An order of certiorari quashing the decision of the Visitor of the 2nd respondent made on September 22, 2021 that "the matters raised by the petitioner do not fall within the ambit of the Visitor's jurisdiction."

(b) An order of mandamus compelling the Visitor of the 2nd respondent to hear and determine the dispute between the applicant and the second respondent.

[7] In each instance, the applicant set out the grounds on which he sought those orders. In relation to the second respondent, among the grounds put forth, is that the court may extend time for applying for leave for judicial review if good reason is shown. The Visitor made his decision on September 22, 2021, and the applicant filed his application for leave on July 1, 2022, outside of the period stipulated in the Civil Procedure Rules. It is taken that the applicant meant to request an extension of time to apply for leave and not an abridgement of time. It must be pointed out that the court sought clarification from counsel but his response did not offer much in the way of clarification.

THE ISSUES

[8] The issues arising for determination in this application are:

1. Whether an extension of time should be granted to the applicant to apply for judicial review against the second respondent.

2. Did the visitor have jurisdiction to entertain the applicant's petition based on the nature of the applicant's complaints.

3. Did the Visitor have jurisdiction to entertain the applicant's petition based on the Visitor's date of appointment, having regard to the date of the decision being challenged.

4. Does the court have jurisdiction to grant leave to permit the applicant to pursue the remedies he intends to seek against the Visitor, in light of the Visitor's ruling that he had no jurisdiction to entertain the petition

5. Was the Minister correct in ruling that he has no jurisdiction to refer the matter to the Industrial Disputes Tribunal.

6. Whether the applicant should be granted leave to apply for judicial review against either respondent.

7. Should costs be awarded in favour of the second respondent against the applicant.

Whether an extension of time should be granted to the applicant to apply for judicial review against the second respondent.

[9] ***Rule 56.3(1)*** of the ***Civil Procedure Rules*** provides that a person wishing to apply for judicial review must first obtain leave. ***Rule 56.6(1)*** directs that an application for leave to apply for judicial review must be made promptly and in any event, must be made within three (3) months from the date when the grounds for the application first arose. This court is empowered to extend time to apply for leave for judicial review if good reason is shown for doing so, based on ***rule 56.6(2)***.

[10] ***Sub-rules (3)***, ***(4)*** and ***(5)*** of ***rule 56*** provide as follows:

> *"(3) Where leave is sought to apply for an order of certiorari in respect of any judgment, order, conviction or other proceeding, the date on which grounds for the application first arose shall be taken to be the date of that judgment, order, conviction or proceedings.*
>
> *(4) Paragraphs (1) to (3) are without prejudice to any time limits imposed by any enactment.*
>
> *(5) 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;*

(b) be detrimental to good administration"

[11] The court must consider if notwithstanding the delay, there are good reasons why the application should be allowed to proceed. In the case of ***Constable Pedro Burton v The Commissioner of Police [2014] JMSC Civ. 187***, where the applicant was 31 months out of time, Dunbar-Green J. (Ag) expressed as follows at paragraph 24 of her judgment:

> *"The import of Rule 56 is that it is not so much a question of whether there are good reasons for the delay as good reasons to extend time (see **R (Young) v Oxford City Council (EWCA)** Civ 240) albeit the existence of unexplained delay could be decisive in an exercise of discretion whether to grant leave for extension of time (see **R v Secretary of State exp. Furneau** [1994] 2 All ER 652, 658."*

[12] Dunbar-Green J. went on to say that in ***R v Secretary of State for Trade and Industry Exp. Greenpeace 200 Env. LR 221, 261-264***, it was said that, good reason for extending time may include the fact that there is no prejudice to third party rights, no detriment to good administration and if there is a public interest requirement, then the application should proceed.

[13] In setting out his grounds in relation to the second respondent, the applicant averred that:

> *"the reason for the delay in applying was due to relief being sought through the Industrial Disputes Tribunal owing to the fact that the Visitor did not determine the dispute on its merits but instead ruled that he did not have jurisdiction".*
>
> *And that:*
>
> ***"The delay was not intentional and the applicant has been prudent and prompt in seeking redress."*** *(emphasis added)*

[14] In his supplemental affidavit filed July 1, 2022, the applicant at paragraph 3, stated that the delay was unavoidable and was due to the delayed response of the first respondent. The applicant filed his application against the first respondent on April 11, 2022.

[15] Regarding the date of the decision by the Ministry of Labour and Social Security not to refer the matter, the applicant stated that by way of letter dated July 6, 2020, the first respondent refused to refer the matter to the IDT. Documentary evidence revealed that on December 9, 2021, the Ministry through Mr. Michael Kennedy, wrote to the applicant's attorney at law acknowledging receipt of letters dated September 24, 2021 and October 20, 2021. It was stated in the later of the two letters that the Industrial Dispute Department had sought advice from the Attorney General. On March 3, 2022, Mr. Kennedy again wrote to say that the Ministry maintained its position that the proper recourse was not by way of the IDT. This letter came after the Ministry was made aware of the fact that the Visitor had declined jurisdiction in the matter. It is on this basis the applicant says that the decision by the Ministry not to refer the matter to the IDT was made March 3, 2022.The court will accept that the final and resolute decision not to refer the matter was communicated to the applicant on March 3, 2022.

[16] On the face of it, the reason given by the applicant cannot explain the delay. It is nonsensical for the applicant to say that even up to the point of receipt of the Ministry's communication on March 3, 2022, he formed the view that the Ministry would act reasonably and rationally and refer the dispute to the IDT, when in fact the Ministry had been unequivocal in its position that the matter would not be referred and had communicated this position again after indicating that legal advice was being sought, the last communication being the March 3, 2020 letter, presumably after receiving legal advice. The applicant must have formed the view that the Minister would definitely not refer his dispute, when he filed his application for leave to pursue the claim against the Ministry.

THE LAW GENERALLY

[17] Where leave to apply for judicial review is being sought, the relevant question is whether the applicant has a realistic prospect of success. The test was explained by Lords Bingham and Walker in ***Sharma v Brown -Antoine [2007] 1 WLR 780***, a decision of the Judicial Committee of the Privy Council. At page 787 of the judgment, the applicable law was set out:

> *"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*** *(7992) 5 Admin LR 623, 628 and 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)*** *[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."*
>
> *It is not enough that a case is potentially arguable: an applicant 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."*

[18] ***Lord Diplock in Council of Civil Service Unions v Minister for the Civil Services [1985] AC 374*** at page 410 F-H**,** explained what was then the three grounds on which judicial review would be granted:

> ***i. "By "illegality" as a ground for judicial review, I mean that the decision–maker must understand correctly the law that regulates his decision–making power and must give effect to it. Whether he has or not is par excellence a justifiable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.***
>
> ***ii. "By irrationality" I mean what can by now be succinctly referred to as — Wednesbury unreasonableness (Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at it. …***

> ***iii.I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice."*** *(emphasis added)*

[19] It is now accepted that proportionality and unconstitutionality are also grounds for applying for judicial review but they do not arise in this instance.

[20] At paragraphs 43 and 44 of the Court of Appeal judgment in ***Dr Oneil Lynch v Minister of Labour and Social Security [2021] JMCA Civ. 43,*** Simmons JA reiterated the role of a court of judicial review. She said:

> *"It is important to note that an application for judicial review is not in the nature of an appeal. This point was addressed in Wade and Forsyth, 'Administrative Law', 10th edition, where, in addressing the distinction between an appeal and judicial review, the learned authors stated at pages 28 - 29:*
>
> *[43] "The system of judicial review is radically different from the system of appeals. When hearing an appeal the court is concerned with the merits of a decision: is it correct? When subjecting some administrative act or order to judicial review, the court is concerned with its legality: is it within the limits of the powers granted? On an appeal the question is 'right or wrong?' On review the question is 'lawful or unlawful?'"*
>
> *[44] In the Caribbean Civil Court Practice 2011, the learned editors, at page 431, have stated the principle to be as follows:*
>
> *"Judicial review of an administrative act is distinct from an appeal. The former is concerned with the lawfulness rather than with the merits of the decision in question, with the jurisdiction of the decision-maker and the fairness of the decision-making process rather than its correctness."*

[21] Thus in considering whether an applicant has met the threshold so as to be allowed to pursue judicial review, those parameters must also be borne in mind.

THE CASE AGAINST THE SECOND RESPONDENT

[22] As a matter of convenience, I will consider the case against the second respondent first. I do so against the background of the principles and guidelines mentioned.

[23] A Notice of Preliminary Objection was filed on behalf of the second respondent on June 27, 2022. Two grounds were put forward as the basis for the objection. It was said that the second respondent is not a necessary party and that the decision being challenged was the refusal of the Minister to refer the dispute to the IDT, which is not a decision that the second respondent could make.

[24] A perusal of the proposed orders to be sought against the second respondent makes it clear that, the applicant is also seeking to quash the Visitor's decision declining jurisdiction over the dispute, and to compel the Visitor to hear and determine the dispute. The applicant has adopted a somewhat curious stance. The applicant takes the view that the Visitor is not now able to entertain his petition. At paragraph 30 of his written submissions, he says that "*the University Visitor having ruled that he does not have jurisdiction to hear and determine the dispute between the applicant and the second respondent is functus officio*". He says that in the event the court finds that the Visitor is not functus officio, and that his petition possesses the necessary domesticity so as to confer exclusive jurisdiction on the Visitor, then the court should grant the order permitting him to apply for judicial review of the Visitor's decision.

[25] My task as far as the Visitor of the second respondent is concerned, is to consider whether his decision can be impugned on the basis that it was illegal, irrational or procedurally improper. More precisely, is there an arguable case that the second respondent was correct in refusing to entertain the applicant's petition. In considering whether the Visitor was correct in declining jurisdiction, this court must consider what was the essence of the applicant's complaint against the University and the bases on which the Visitor made his decision.

Did the visitor have jurisdiction to entertain the applicant's petition based on the nature of the applicant's complaints

[26] In paragraph 4 of his affidavit filed in support of his ex parte notice of Application for court Orders on April 12, 2022, the applicant stated that "*on or about February 24, 2017, I was unfairly and unjustly dismissed from my employment with the second respondent for alleged misconduct*". Thereafter, he stated the following at paragraphs 7 and 8:

> *"7. Prior to the circumstances surrounding the alleged misconduct, I have never had disciplinary proceedings of any kind brought against me by the 2nd Respondent; and I maintain that my termination was unjust and in breach of the Labour Relations and Industrial Dispute Code (LRC).*
>
> *8. Notwithstanding my position – that I have in no way breached any internal rules of the University – I raised and relied on section 22(2) (ii) b of the LRC that states "no worker should be dismissed for a first breach of discipline except in the case of gross misconduct."*

[27] At paragraph 9, he said:

> *"The 2nd Respondent indicated that my termination was for sufficient cause," however on termination, I was paid notice pay in lieu of notice: I am informed by my Attorney at Law and do verily believe that this is cogent evidence that the relevant dismissal cannot be considered in law as being one for cause. In circumstances where my dismissal cannot be categorized in law as "for cause' due to the second respondent's actions, then my termination was arbitrary and has derived me of my legitimate expectation of longevity in my career.*

[28] The applicant also insisted that there had been no misconduct on his part. The basis of the allegation of misconduct was the applicant's alleged nondisclosure of his admitted affiliation with a company, which conducted business with the second respondent and with which the applicant has extensive dealings on behalf of the university.

[29] One of the breaches complained of was said to have been a contravention of the University's Financial Code and another was a failure to comply with the Procurement Policies and Procedures Manual of the University. These were the basis on which the applicant challenged the Vice Chancellor's decision when he petitioned the Visitor.

[30] The essence of the Visitor's decision is captured at paragraphs 41, 48 and 49 of his written decision. At paragraph 41, he said

> *"A further problem arises from the fact that the gravamen of the Petitioner's complaint is that the actions of the University are in breach of section 22 of the Labour Relations Code of Jamaica and the principles of natural justice, as its actions have not been just, fair, and reasonable and amount to unjustified dismissal. These are matters which fall outside my jurisdiction and to adjudicate thereon would be to act ultra vires the domestic laws governing the Visitor."*

At paragraph 48 he stated:

> *"The Petitioner has advanced no breach of any internal laws of the University in framing his claim for wrongful dismissal. Private law claims arising from a breach of contract fall outside my jurisdiction as Visitor. As such, this aspect of his petition cannot succeed."*

And at paragraph 49:

> *On the question of natural justice, I will say only that the seminal principles of nemo judex in causa sua (the rule against bias) and audi alteram partem (the right to a fair hearing) are infused into the disciplinary procedures contained in Ordinance 8, Part 3. The Petitioner has not pointed to any breach of the said Ordinance. In any event, I have not been able to discern any violation of the rules of natural justice based on the material put before me by both parties.*

[31] The second respondent contends that this is not a case which deals predominantly with the interpretation of UWI's domestic law. I do not agree with that submission. In setting out the case against the applicant in the report generated after the investigation the accusations were:

> *"Not disclosing his interest in D & T Enterprises to the Campus Principal as required by Financial Code (2013), chapter2, section 12.*
>
> *Not complying with section 2.11.1 of the Procurement Policies and Procedures Manual (2003) which would require his disclosure of the conflict and subsequent removal from the post of Purchases Manager or disqualifications from participation in procurement transactions with the University.*
>
> *Adding himself as a vendor in the Banner Finance system to facilitate payment to himself.*

> *Requesting that an emergency PO [Purchase Order] be generated to facilitate payment of his transaction although this was not an emergency.*
>
> *Directing an Accounts Payables staff member to cancel the original PO and payment recreating the invoice in the name of his company, although the company was not contracted to deliver the service provided, to avoid tax deduction; and*
>
> *Using his company to facilitate a payment to himself for work performed in his capacity as Budgets Analyst, although most of this work was outside normal working hours. This could have been facilitated as an overtime payment through the payroll system.*

[32] The pith of the applicant's grievance was encapsulated in his challenge to the decision of the Vice-Chancellor, via his petition to the Visitor. As taken from the Visitor's written decision, the applicant mounted his challenge by reference to certain findings of the Vice-Chancellor and infusing therein a complaint that "*the Vice-Chancellor did not have jurisdiction to consider new and relevant matters that were not raised before the Disciplinary Committee".*

> *"Mr. Brown's conduct was such that it was to (sic) likely bring the University into disrepute.*
>
> *Mr. Brown failed to disclose the conflict of interest between himself and D & T Enterprises to the University in accordance with the University's procurement policies.*
>
> *Mr. Brown was guilty of non-compliance with the "Procurement Policies and Procedures Manual, the Financial Code and the Statement of Principles/Code of Ethics for Academic and Senior Administrative Staff".*
>
> *The level and nature of the misconduct was such that he Appellant was unfit to hold office and should not be returned to the post. There was no impropriety or unfairness in the composition of the Disciplinary Committee.*
>
> *There was no impropriety or unfairness in the composition of the Disciplinary Committee*
>
> *There was no allegation of fraud and/or impropriety raised against Mr. Brown in respect to the credit card held by Mr. Brown.*
>
> *The Vice-Chancellor did not have jurisdiction to consider new and relevant matters that were not raised before the Disciplinary Committee.*
>
> *Mr. Brown's failure to have knowledge of or be familiar with the University's procurement policies supports the position that Mr. Brown was not conducting his duties with due diligence.*

> *Mr. Brown's lack of disclosure of interest in D & T Enterprises considered against Mr. Brown's positions as Assistant Manager in purchases and Senior Budget Analyst lowers the University's trust in Mr. Brown in any given financial role.*
>
> *Mr. Brown's disregard of the Procurement Policies and Procedures manual (sic) and the Financial Code negatively affects the heart of his contract as a staff member in the finance department."*

[33] In paragraph 14 of the Visitor's written decision, he summarized the applicant's submissions before him:

> *"The petitioner submitted that his dismissal was wrongful and unjustified and that the actions of the University amounted to a breach of section 22 of the Labour Relations Code of Jamaica. He maintained that there was no conflict of interest because he had fully disclosed his interest in D & T enterprises and there are no rules preventing an officer from transacting business with the University. He further alleged that the University had acted unfairly by being a judge in its own cause, failing to provide verbatim of the grievance hearing and the appeal, failing to consider fresh evidence and applying the ultimate sanction of dismissal even though his action has not resulted in loss or damage. In addition, the petitioner argued that his dismissal for sufficient cause and payment of salary in lieu of notice were inconsistent with accepted judicial principle as per Calvin Cameron v Security Administrators Limited [2013] JMSC Civ 95."*

[34] In the case of ***Dr Oneil Lynch v Minister of Labour and Social Security*** (Supra), writing on behalf of the court, Simmons JA observed at paragraph 58 of the judgment that:

> *"It was, therefore, clear to the court that to the extent that the issues concerned the internal policies and procedures of the university, those issues ought to have been resolved by the visitor. This was notwithstanding any attempt by the claimant to couch his complaint as a breach of his employment contract and counsel's submission that due to the termination of the contract, the visitorial jurisdiction was inapplicable. This issue has also been addressed in several other cases."*

[35] In the ensuing paragraphs, the court went on to examine the principle as adumbrated in a number of cases to include ***Re Wislang's Application [1984] NI 63*** ***Thomas v University of Bradford [1987] AC 795*** and ***Hines v Birbeck College and another [1985] 3 All ER 156***. The court elaborated upon the application of the relevant principles as extracted from the mentioned cases in local cases such as, ***Duke St John Paul Foote v University of Technology and Elaine Wallace [2015] JMCA App 27A***

and ***Vanessa Mason v The University of the West Indies (Unreported Supreme Court Jamaica Claim No. (2008) HCV 05999***.

[36] In ***Foote v UTECH*** for example, Morrison JA at paragraph 36 of the judgment, referenced the case of ***Thomas v University of Bradford***, which he considered as the modern leading authority on visitorial jurisdiction and said:

> *"The issue in that case was whether the complaint by a member of the academic staff of a university that she had been wrongfully dismissed fell within the jurisdiction of the High Court or that of the university visitor. It was held that the jurisdiction of a university visitor, which is based on his position as the sole judge of the internal or domestic laws of the university, is exclusive and not concurrent with the court's jurisdiction. The scope of the visitor's jurisdiction included the interpretation and enforcement, not only of those laws themselves, but also of internal powers and discretions derived from them, such as the discretion which necessarily had to be exercised in disciplinary matters. Accordingly, if a dispute between a university and a member of the university over his contract of employment with the university involves questions relating to the internal laws of the university or rights and duties derived from those laws, the visitor has exclusive jurisdiction to resolve that dispute. (emphasis added)*

[37] Mr. Manning KC relied on a passage from ***Thomas v University of Bradford*** in which Lord Griffiths quoted from an article ***Visitation of the Universities: A Ghost from the past III*** *(1986) 136 New Law Journal 567- 568*. He placed reliance on this passage in advancing the position that the Visitor had no jurisdiction over the applicant's dispute with the University, given the applicant's specific complaint. It was there acknowledged that visitorial jurisdiction lies over matters concerning the application or the interpretation of internal laws of the institution, but that questions concerning rights and duties derived otherwise than from such laws are outside the Visitor's authority. Mr. Manning relies in particular on the portion of the passage which states as follows:

> *"Conversely an issue which turns on the enforcement of or adjudication on terms entered into between an individual and his employer, notwithstanding that they may also be in the relationship of member and corporation, and which involves no enforcement of or adjudication concerning the domestic laws of the foundation, is ultra vires the visitor's authority and is cognizable in a court of law or equity."*

[38] He also relies on the following passage from ***Mason v University of the West Indies*** at paragraph 12, where Cooke JA referred to the dictum of Kelly, L.J. in ***Re***

Wislang's Application (cited by Lord Griffith in Thomas), which was reproduced in ***Alexander Okuonghae v University of Technology Jamaica [2014] JMSC Civ. 38***:

> *"Of course, the applicant has the right under his contract to have the criteria relating to assessment of his fitness as a lecturer observed and the special procedures of the university bodies who determine this and as a result terminate his employment, regularly and fairly followed. But this right while a right under a contract of employment seems to me to relate to the regular and fair execution of procedures in accordance with the internal rules and regulations of the university. If the matters in dispute under his contract of employment related to purely common law or statutory rights and not to private or special rights of the university, of course visitatorial jurisdiction could not determine them and Dr. Wislang's remedies would be in the ordinary courts or the appropriate statutory tribunals. This must follow from the nature of visitatorial jurisdiction itself as analysed and explained by case law, as well as the relationship between the university and a lecturer and who by his contract of employment becomes a member of the university and submits himself to its internal rules on matters touching his standing and progress at the university. Undoubtedly a contract contains terms some of which are concerned with private or special rights given as member of the university and other terms expressed or implied which give purely contractual or statutory rights. In these circumstances, the visitatorial and the common law or industrial jurisdiction co-exist. The common law or statutory rights are enforceable in the courts of the appropriate statutory tribunals but the visitatorial jurisdiction is not ousted."*

[39] To place reliance on these excerpts is to ignore the statement in the above passage that the Visitor's jurisdiction is ousted ***only*** where the dispute relates to ***"purely common law or statutory rights and not to private or special rights of the university"*** *(emphasis added)*.

[40] It appears to me that notwithstanding the manner in which the applicant couched his grievance, and despite his stated reliance on provisions in the Labour Relations Code, the crux of his dispute with the second respondent was the fact of his dismissal in circumstances he viewed as unwarranted. The factual background was the alleged breaches of internal policies and regulations and how these breaches impacted his contract of employment leading ultimately to dismissal. The circumstances of the resultant dismissal based on the alleged breaches possessed sufficient domesticity in that it involved the interpretation and application of internal rules and procedures of the University, and so fell squarely within the jurisdiction of the Visitor in my view. It is of importance as the Visitor observed in his written decision, that the seminal principles of

nemo judex in causa sua (the rule against bias) and audi alteram partem (the right to a fair hearing) are infused into the disciplinary procedures contained in Ordinance 8, Part 3 of The Charter, Statues and Ordinances, Volume II, (Ordinance 8).

[41] It is significant to note that the University took the view that the applicant's conduct amounted to gross misconduct. The applicant acknowledged that gross misconduct was a basis for dismissal under section 22 of the Code, even where there is a first breach of discipline.

Did the Visitor have jurisdiction to entertain the applicant's petition based the date of the Visitor's appointment, having regard to the date of the decision being challenged

[42] My finding discussed in the preceding paragraphs is not dispositive of the question of whether or not the applicant has made out an arguable case for leave to apply for judicial review against the decision of the Visitor. The Visitor also found, that he did not have jurisdiction to entertain the case for the reason that the decision of the Vice Chancellor that was being challenged fell outside of his jurisdiction and remit given that his appointment as the University Visitor was from May 1, 2019.

[43] Visitorial jurisdiction was established by virtue of the 1948 Royal Charter establishing the University college, the precursor to the University of the West Indies. Article 6 of the Royal Charter was retained upon the establishment of the University of the West indies. The Royal Charter was amended in 2018 and the relevant Article 6 now reads as follows:

> *"The Council reserves onto itself the right to appoint a regional figure of high judicial office as Visitor of the University, upon the recommendation of the Caribbean Court of Justice…for such period and with such duties and powers as the council shall see fit, and his or her decision on matters within his or her jurisdiction shall be final. For the avoidance of doubt, such visitor will be responsible for considering and resolving petitions, including those lodged prior to the date of his or her appointment that remain unresolved; save only that petitions lodged prior to the date of the first Visitor appointment under this provision and remaining unresolved shall be so resolved by the previous visitor (or delegate thereof as the case may be) whose decision shall be final."*

[44] Statute 2A, which amended the Schedule to the Royal Charter provides in part that, *"appeals lodged by way of petitions prior to 30 April 2019 and remaining unresolved shall be resolved by any person performing the function of Visitor prior to the appointment of the Visitor under this statute".*

[45] Part III, 6 of the Procedural Rules for Lodging Petitions to the University Visitor, states that any decision made before May 1, 2019, which was already adjudicated by the previous visitor or delegate of the previous visitor, will not be reviewable by the Visitor.

[46] On March 3, 2017, the applicant appealed the decision of his termination to the Vice-Chancellor. The Vice-Chancellor on November 30, 2017, dismissed the applicant's appeal. It is the decision of the Vice-Chancellor that the applicant sought to have the Visitor review. While regulations speak to petitions lodged prior to the Visitor's appointment, it further speaks to the decisions arrived at arising from the petition. It is clear that the statue contemplates petitions lodged before the visitor's appointment being within its purview but it must be unresolved. It does not contemplate a petition lodged before, with a decision given by a previous delegate who adjudicated on the matter to be within the Visitor's jurisdiction for review. In this matter the petition was filed in 2017, and a decision delivered in 2017, prior to the visitor's appointment in May 1, 2019. It is therefore not within the visitor's jurisdiction to review the decision of the Vice-Chancellor in this matter.

[47] On that basis, it seems clear enough that the Visitor could not properly have entertained the applicant's petition, on which a decision was given by the Vice-Chancellor in 2017. The applicant does not in my view have an arguable case against this aspect of the Visitor's decision on the basis of illegality or on any other ground.

Does the court have jurisdiction to grant leave to permit the applicant to pursue the remedies he intends to seek in light of the Visitor's ruling that he had no jurisdiction to entertain the petition

[48] The question whether leave to apply for judicial review in order to permit the applicant to seek an order of mandamus to compel the Visitor to hear and determine his

dispute, must also be considered in light of the Visitor's ruling that he had no jurisdiction to entertain the matter.

[49] The second respondent relies on dicta of Lord Griffiths in ***R v Hull University, Ex parte Page [1993] AC 682 at 696*** in guiding the court towards the factors to be considered, when assessing whether there should be judicial review where the Visitor declines jurisdiction:

> *"**Finally, there is the protection afforded by the supervisory, as opposed to appellate, jurisdiction of the High Court over the visitor. It has long been held that the writs of mandamus and prohibition will go either to compel the visitor to act if he refused to deal with a matter within his jurisdiction or to prohibit him from dealing with a matter that lies without his jurisdiction… Although doubts have been expressed in the past as to the availability of certiorari, I have myself no doubt that in the light of the modern development of administration law, the High Court would have power on an application for judicial review, to quash a decision of the visitor which amounted to an abuse of process. To misconstrue the University's statutes and act upon that misconstruction would indeed be an abuse of the visitor's powers." (**emphasis added)*

[50] This court will add to that passage, the dicta of Lord Browne Wilkinson at page 14 of his judgment in ***Regina v Lord President of the Privy Council, Ex parte Page [On appeal from Regina v University of Hull Visitor Ex parte Page] [1993] AC 682,*** page 696:

> *"Lord Ackner said, at p. 828, that the case fell within the exclusive jurisdiction of the visitor "subject always to judicial review."*
>
> ***Under the modern law, certiorari normally lies to quash a decision for error of law. Therefore, the narrow issue in this case is whether, as Mr. Page contends and the courts below have held, certiorari lies against the visitor to quash his decision as being erroneous in point of law notwithstanding that the question of law arises under the domestic law of the university which the visitor has "exclusive" jurisdiction to decide.***

[51] He later went on to state at page 702:

> ***Although the general rule is that decisions affected by errors of law made by tribunals or inferior courts can be quashed, in my judgment there are two reasons why that rule does not apply in the case of***

> ***visitors. First as I have sought to explain, the constitutional basis of the courts' power to quash is that the decision of the inferior tribunal is unlawful on the grounds that it is ultra vires. In the ordinary case, the law applicable to a decision made by such a body is the general law of the land. Therefore, a tribunal or inferior court acts ultra vires if it reaches its conclusion on a basis erroneous under the general law. But the position of decisions made by a visitor is different. As the authorities which I have cited demonstrate, the visitor is applying not the general law of the land but a peculiar, domestic law of which he is the sole arbiter and of which the courts have no cognisance. If the visitor has power under the regulating documents to enter into the adjudication of the dispute (i.e. is acting within his jurisdiction in the narrow sense) he cannot err in law in reaching this decision since the general law is not the applicable law. Therefore, he cannot be acting ultra vires and unlawfully by applying his view of the domestic law in reaching his decision. The court has no jurisdiction either to say that he erred in his application of the general law (since the general law is not applicable to the decision) or to reach a contrary view as to the effect of the domestic law (since the visitor is the sole judge of such domestic law)."*** *(emphasis added)*

[52] I cannot improve upon the words of Lord Griffiths. Although the quotation is a long one, the passages which follow, express with clarity the legal position.

> *"It is in my opinion important to keep the purpose of judicial review clearly in mind. The purpose is to ensure that those bodies that are susceptible to judicial review have carried out their public duties in the way it was intended they should. In case of bodies other than courts, in so far as they are required to apply the law they are required to apply the law correctly. If they apply the law incorrectly they have not performed their duty correctly and judicial review is available to correct their error of law so that they may make their decision upon a proper understanding of the law.*
>
> *In the case of inferior courts, that is, courts of a lower status than the high court, such as the justices of the peace, it was recognized that their learning and understanding of the law might sometimes be imperfect and required correction by the High Court and so the rule involved that certiorari was available to correct an error of law of an inferior court. At first it was confined to an error on the face of the record but it is now available to correct any error of law by an inferior court. But despite this general rule Parliament can if it wishes, confine a decision on a question of law to a particular inferior court and provide that the decision shall be final so that it is not to be challenged either by appeal or by judicial review. Such a case was* ***Pearlman v Keepers and Governors of Harrow School*** *[1979] Q,B. 56 in which the dissenting judgment of Geoffrey Lane LJ was approved by the majority of the House of Lords in In Rea Company (sub nom. In re-****Racal Communications Ltd.*** *[1981] AC 374.*

> *The common law has ever since the decision in **Phillips v Bury** (1694) Holt 715 recognized that the visitor acting as a judge has exclusive jurisdiction and that his decision is final in all matters within his jurisdiction. The common law court have through three centuries consistently resisted all attempts to appeal decisions of the visitor. The courts have however been prepared to confine the visitor to his proper role as a judge of the internal affairs of the foundation by the use of the writs of prohibition and mandamus.*

[53] Lord Griffiths clarified his decision in the earlier case of ***Thomas v University of Bradford:***

> *When I said in Thomas's [1987] AC 795, 825:*
>
> *"I have myself no doubt in the light of the modern development of administrative law, the High Court would have power upon an application for judicial review, to quash a decision of the visitor which amounted to an abuse of his powers," I used the word an "abuse of his powers advisedly. I do not regard a judge who makes what an appellate court later regards as a mistake of law as abusing his powers. In such a case, the judge is not abusing his powers, he is exercising them to the best of his ability albeit some other court thinks he was mistaken. I use the phrase "abuse of power" to connote some form of misbehaviour that was wholly incompatible with the judicial role that the judge was expected to perform. I did not intend it to include a mere error of law.*
>
> *The decision in In re A Company shows that Parliament can by the use of appropriate language provide that a decision on a question of law whether taken by a judge or by some other form of tribunal shall be considered as final and not be subject to challenge either by way of appeal or judicial review. For three centuries, the common law courts have recognized the value of the visitor acting as the judge of the internal laws of the foundation and has refused to trespass upon his territory. I do not believe that it would be right to reverse this long line of authority and declare that certiorari should now lie to reverse the decision of a visitor on a question of law. The value of the visitorial jurisdiction is that it is swift, cheap and final. These benefits will be largely dissipated if the visitor's decisions can be challenged by way of judicial review. Many decisions may turn upon the interpretation of the statutes and other decisions of a more factual nature can all too easily be dressed up as issues of law under the guise of "Wednesbury" principles (Associated **Provincial Picture Houses Ltd. V Wednesbury Corporation** [1948] 1KB 223). The learning and ingenuity of those members of the foundation who are likely to be in dispute with the foundation should not be lightly underestimated and I believe to admit certiorari to challenge the visitor's decision on the ground of error of law will in practice prove to be the introduction of an appeal by another name. The visitor is either a person holding a high judicial office or is advised on questions of law by such a person, in whose decisions on matters of law it is reasonable to repose a high degree of confidence. I say this not because*

> *any holder of judicial office should ever regard it as an affront to be overruled by an appellate court but merely to emphasize that as a practical matter the chances are that the visitor probably will get it right. If it is thought that the exclusive jurisdiction of the visitor has outlived its usefulness, which I beg to doubt, then I think it should be swept by Parliament and not undermined by judicial review.*

[54] The principle that where the Visitor makes an error of law in interpreting and applying the regulations granting the power to act is beyond the scope of judicial review emanating from ***Regina v Lord President of the Privy Council, Ex parte Page [On appeal from Regina v University of Hull Visitor Ex parte Page]*** was applied in ***Suzette Curtello v University of the West Indies [2015] JMSC Civ 223***.

[55] This court is firmly of the view as Mr. Manning KC contends, that the decision of the Visitor that he has no jurisdiction to entertain the matter is final and is not subject to review by this court. This is so even if the Visitor was wrong in so concluding. The Visitor's failure to appreciate that the matter was within his jurisdiction was in my view a mistake of law and not an abuse of power. A finding of abuse of power would have had a very different outcome, for it would mean that the decision is subject to judicial review if that were the only basis on which the Visitor came to the conclusion that the matter was outside his jurisdiction. The Visitor's decision in that regard was in part a finding of mixed fact and law (as it relates to the timing of his appointment vis a vis the date of the decision) and a question purely of law as it relates to the manner in which the applicant framed his complaint.

[56] Ultimately, the applicant does not have an arguable ground for judicial review with a realistic prospect of success, so as to permit this court to grant him leave to apply for judicial review against the decision of the Visitor. He has not shown any good reason why time should be extended for him to apply for leave.

THE CASE AGAINST THE FIRST RESPONDENT

[57] The applicant contends that the first respondent's failure and/or refusal to refer his dispute to the IDT is illegal, irrational and unreasonable in the Wednesbury sense. It is the contention of the first respondent that since the court has determined that matters

relating to the internal management of the institution (The UWI) falls outside the jurisdiction of the court and within that of the Visitor, it would be an anomaly if the Minister who is subject to the court's jurisdiction, could have jurisdiction to refer a dispute in circumstances where the court itself has no jurisdiction. The respondent cited the cases of ***Dr Oneil Lynch v Minister of Labour and Social Security [2019] JMSC Civ. 111***, as well as, that of ***Suzette Curtello v University of the West Indies (Supra)***, where the visitorial jurisdiction was discussed at length. The first respondent places heavy reliance on the former case, (the first instance decision which was upheld by the Court of Appeal) and stated that it would have been an improper exercise of the Minister's discretion under ***section 11A (1)(a)(i)*** of the ***Labour Relations and Industrial Disputes Act***.

No concurrent jurisdiction between the Visitor and the Court

[58] One principle emanating from the case of ***Alexander Okuonghae v The University of Technology Jamaica (Supra)*** is that the Visitor is the sole authority to determine matters falling within the domestic sphere of the University, over which he exercises jurisdiction. There is no concurrent jurisdiction between the Visitor and the Court. The jurisdictions are mutually exclusive. Consequently, the Court cannot entertain a claim, the subject matter of which falls within the jurisdiction of the Visitor. This is a substantive question of law and not a procedural one. It is therefore the nature and characteristic of the matter in dispute that will determine what is within or outside the visitorial jurisdiction. Matters relating to administration, policies, procedures, rules and regulations of the Defendant are within the jurisdiction of the Visitor.

[59] This court does not view it as necessary to undertake further discourse on the matter, except to say that the court agrees that in the ordinary course of things, it would have been an improper exercise of the Minister's discretion to refer a matter over which the Visitor has jurisdiction to the IDT.

[60] But did the ordinary course of things obtain in this instance? The dismissal took place on February 24, 2017. The applicant's letter to the Minister requesting that the matter be referred to the IDT is dated June 4, 2020. The Minister's initial response

indicating that the matter would not be so referred is dated July 6, 2020. It was by way of Petition dated April 19, 2021, that the applicant approached the University Visitor with a view to challenging the decision to dismiss him. It seems clear to me based on my acceptance of the position that this is a matter which ordinarily would fall within the exclusive jurisdiction of the Visitor, that the Minister was correct in declining to refer the matter to the IDT when he did so **initially**, since this was prior to the Visitor's decision that he had no jurisdiction.

Whether the applicant should be granted leave to apply for judicial review against either respondent.

[61] The court has already decided that the applicant does not have any arguable ground for judicial review against the decision of the second respondent. The question now remains what is the recourse open to the applicant in the light of the Visitor's decision that he had no jurisdiction to entertain the matter. It is not a case where a good argument can be made that the Visitor acted outside of his jurisdiction (in the narrow sense) or that he abused his powers or acted in breach of the rules of natural justice and in any event, quite apart from the decision to decline jurisdiction based on the manner in which the applicant framed his case before the Visitor, there was the issue of the bar to jurisdiction based on the date of the Visitor's appointment.

[62] The applicant has said that he faces a conundrum. His difficulty arose perhaps because he sought the referral of his dispute to the IDT prior to the Visitor determining that he had no jurisdiction to hear the petition. He did however urge the Minister to consider his request to refer the matter subsequent to the Visitor's decision. Ultimately, the applicant ought not to be left without a remedy if he deserves one.

[63] This court must now consider whether it is arguable that the relevant provisions of the Labour Relations and Industrial Disputes Act allow for the applicant's case to be addressed by the IDT. If it is arguable that the applicant's complaint falls within the purview of the act, then consideration has to be given to the question of whether there is any discretionary or other bar to a grant of leave. ***Section 11A (1) of LRIDA*** states:

> *I. "Notwithstanding the provisions of sections 9,10 and 11, where the Minister is satisfied that an industrial dispute exists in any undertaking, he may on his own initiative- (a) refer the dispute to the Tribunal for settlement-*
>
> *(i) if he is satisfied that attempts were made without success to settle the dispute by such other means as were available to the parties; or*
>
> *(ii) If, in his opinion, all the circumstances surrounding the dispute constitute such an urgent or exceptional situation that it would be expedient so to do;*

[64] Thus it is clear that the Minister's power of referral is exercisable where:

1. there is an industrial dispute;

2. the Minister is satisfied that the parties attempted to settle the dispute without success; or

3. there is an urgent or exceptional situation that would make it expedient for the Minister to make the referral. In this instance, it may fairly be said that there is an industrial dispute. It may also fairly be said that attempts were made without success to settle the dispute by other means which were available. The first respondent has not argued the question of whether there was an industrial dispute but simply rested the case on lack of jurisdiction by the minister on the basis that the Visitor had exclusive jurisdiction.

[65] Although the Minister was in my view correct when he initially declined to refer the matter, when entreaty was made after the Visitor declined to exercise his jurisdiction to hear the petition, there is an arguable case that it was then open to the Minister to refer the matter to the IDT, if his only perceived bar was the exclusivity of the Visitor's jurisdiction. In light of the applicant's request for a referral after the ruling of the Visitor, it cannot be said that his application for leave was out of time as it was made reasonably promptly, that is within a month of the Minister's final decision not to refer the matter, communicated via letter dated March 3, 2022.

[66] The applicant has also established as required by ***rule 56.2(1)***, that he is a person adversely affected by the decision, the subject of the application and he has stated in accordance with ***rule 56.3 (3)(g),*** that he is directly affected.

[67] On the question of whether the applicant has an alternate remedy available to him Wolfe Reece J, in the case of ***Louis Smith and Director of Public Prosecutions and Parish Court Judge for the Parish of Saint James Sandria Wong-Small [2020] JMSC Civ. 15***, made the following observations:

> *"In the case of **Glencore Energy UK Ltd v Revenue and Customs Commissioners** [2017] EWHC 1476 (Admin) Green J expressed that the general principle as it relates to alternate remedy is as follows:*
>
> *"The basic principle is that judicial review is a remedy of last resort such that where an alternative remedy exists that should be exhausted before any application for permission to apply for judicial review is made. Case law indicates that where a statutory alternative exists, granting permission to claim judicial review should be exceptional. The rule is not however invariable and where an alternative remedy is nonetheless ineffective or inappropriate to address the complaints being properly advanced then judicial review may still lie."*
>
> *[46] The view as expressed by Green J is of equal bearing in Jamaica. In the Jamaican Court of Appeal decision of **Independent Commission of Investigations v Everton Tabannah and Worrell Latchman** [2015] JMCA Civ 54 Brooks J.A. noted at paragraph 62 that:*
>
> *"It is unnecessary to decide definitively in this judgment whether rule 56.3 of the CPR allows for leave to apply for judicial review where an alternative remedy exists. A reading of the rule certainly suggests, as the learned judge held, that at the leave stage the existence of an alternative remedy is not an absolute bar to the grant of leave.*

[68] It has not been suggested that the applicant now has a viable alternative remedy that he is able to pursue. Any chance of being able to have his case put before a previous Visitor seems remote and highly unlikely. None of the respondents to the application has suggested that there is a viable alternative remedy that has not been pursued. It is my considered view that the applicant should be granted leave to apply for judicial review of the decision of the Minister not to refer the matter to the IDT as in the circumstances, he has an arguable ground on the basis of irrationality

Should costs be awarded in favour of the second respondent against the applicant.

[69] Mr. Manning KC has asked that the application against the second respondent be dismissed with costs to the second respondent. The applicant's stated reasons for joining the second respondent in this application were delineated at paragraphs 13 and 14 of his

supplemental affidavit filed on July 1, 2022, in support of his application. He stated as follows:

> *"13. Having recognized that the outcome of the matter would without a doubt touch and concern the 2nd Respondent, we considered it prudent to add them as they may want an opportunity to be heard. However, the 2nd Respondent has objected to their inclusion as a respondent for reasons contained in their written preliminary objections.*
>
> *14. In the circumstances, to avoid additional cost and potential future proceedings concerning the 2nd respondent and the decision of the Visitor, I believe the most appropriate, convenient and efficient use of this Honourable Court's time and resources is to – in the alternative – apply for leave for judicial review of the decision of the Visitor of the 2nd Respondent."*

[70] I am of the view that it was unwise to have brought this application against the University Visitor. An application is not to be brought against a party because the applicant thinks that the party might wish to be heard. The applicant himself seemed to have formed the view that the Visitor had no jurisdiction to hear his petition. As observed earlier, he stated that the Visitor having ruled that he did not have jurisdiction to hear and determine the dispute between the applicant and the second respondent, he was functus officio. This position begs the question, why was the second respondent joined in this application? The applicant also stated that he was faced with a conundrum. Both respondents to this application refused to address the applicant's grievance. The applicant has adopted a "just in case" position as it relates to the second respondent, in the event his application against the first respondent is unsuccessful. One can't help but be sympathetic toward a desperate applicant who is made to feel as if he has no recourse, but nevertheless hopes that he will succeed against one party or the other. This court should add that it might not necessarily have been readily discernible whether there was an error of law on the part of the visitor as against an abuse by him of his powers. That distinction will in some instances lead to a different outcome in an application of this nature.

[71] The instances in which an order for costs may be made against an unsuccessful applicant for leave are restricted to circumstances where the applicant's conduct is considered to be unreasonable. It does not necessarily follow that an unwise decision is

an unreasonable one. The rationale for not generally making a cost order against an unsuccessful applicant is that private citizens should not be stymied in pursuing a challenge to decisions of a public authority and organs of the state which adversely affect them. Additionally, there is often a power imbalance as well as great disparity between the resources of the individual and that of such authority or the state. If a potential applicant for leave to seek judicial review apprehends that he might be faced with sometimes unaffordable legal bills, he might be hesitant to act even in instances where much is at stake.

[72] The application was brought pursuant to ***Rule 56***. The only provisions relating to costs in ***rule 56*** are set out in ***rule 56.15 (4)*** and ***(5)*** which states:

> *"(4) The court may, however, make such orders as to costs as appear to the court to be just including a wasted costs order.*
>
> *(5) The general rule is that no order for costs may be made against an applicant for an administrative order unless the court considers that the applicant has acted unreasonably in making the applicant has acted unreasonably in making the application or in the conduct of the application."*

[73] In all the circumstances, though not prudent, it could not be said that the applicant acted so unreasonably in bringing the application against the second respondent that costs should be awarded against him.

DISPOSITION

[74] In light of my reasoning the court makes the following orders:

(1) An extension of time for making the application for leave to apply for judicial review of the decision of the second respondent, the Visitor of the University of the West Indies is refused.

(2) The applicant is refused leave to apply for judicial review of the decision of the second respondent.

(3) The applicant is granted leave to apply for judicial review and to file a Fixed Date Claim Form seeking the following remedies:

(a) An order of certiorari quashing the decision of the 1st respondent made on March 3, 2022 that the proper recourse is not via the Industrial Disputes Tribunal.

(b) An order of mandamus compelling the 1st respondent to refer the applicant's dispute to the Industrial Disputes Tribunal for determination.

(4) There shall be no order as to costs against the applicant in favour of the second respondent.

(5) Leave to apply for judicial review of the first respondent's decision is conditional on the applicant making a claim for Judicial Review within (14) days of the receipt of this Order granting leave.

(6) The first hearing of the Fixed Date Claim Form for Judicial Review is scheduled for March 30, 2023 at 3:00 pm for 30 minutes.

(7) Costs between the applicant and the first respondent to be cost in the claim for judicial review.

(8) The second respondent is refused leave to apply.

……
A Pettigrew-Collins
Puisne Judge