

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 18/2013

**BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE BROOKS JA
THE HON MS JUSTICE LAWRENCE-BESWICK JA (Ag)**

BETWEEN	THE CHAIRMAN, PENWOOD HIGH SCHOOL'S BOARD OF MANAGEMENT	1ST APPELLANT
AND	THE ATTORNEY GENERAL OF JAMAICA	2ND APPELLANT
AND	LOANA CARTY	RESPONDENT

Harrington McDermott instructed by the Director of State Proceedings for the appellants

Mrs Angela Cousins-Robinson instructed by Robinson and Clarke for the respondent

4 and 25 July 2013

PROCEDURAL APPEAL

PANTON P

[1] I have read, in draft, the judgment of Brooks JA. I agree fully with his reasoning and conclusion and have nothing to add.

BROOKS JA

[2] In or about October 2004, the respondent, Ms Loana Carty, a teacher at Penwood High School for over 28 years, was assaulted by the then principal of the school. The principal was convicted for the offence but, according to Ms Carty, subsequent to her having made the complaint, she was victimised in her employment. That victimisation, she asserts, led to her being relieved of her responsibilities as a senior teacher, and, eventually, to her being dismissed from the institution.

[3] Ms Carty filed a claim in the Supreme Court, initially to have her status as a senior teacher restored, and subsequently to be re-instated in her job. Although the claim has been lingering in that court since 2005, it has yet to be tried. The school's Board of Management (the Board) and the Attorney General are the defendants to the claim and the appellants before us. They shall be referred to, hereafter, as the appellants.

[4] The appellants applied twice in the court below to have Ms Carty's claim struck out in its entirety. In their third application, the appellants adjusted their approach somewhat. They sought to have struck from Ms Carty's claim, the portions whereby she seeks:

- a. a declaration that she was dismissed in breach of the Education Regulations 1980; and
- b. damages for unfair dismissal.

[5] The appellants' applications were refused on each occasion. The last refusal was by Marsh J on 19 February 2013. In response to that refusal, they have filed this procedural appeal. In the appeal, they seek to have the order of the learned judge set aside, and to have the impugned portions of Ms Carty's claim, struck out.

[6] The main issues raised by the appeal, are:

- a. firstly, whether the aspects concerning the Education Regulations properly fall under the auspices of public law and, therefore, to institute them in a private law claim is an abuse of the process of the court; and
- b. secondly, whether the claim for unfair dismissal is wholly misconceived as the Supreme Court has no jurisdiction in that matter, it being the exclusive province of the Industrial Disputes Tribunal.

The statement of case

[7] In order to better appreciate the submissions made it would be helpful to set out the relevant portions of Ms Carty's further amended particulars of claim.

"PARTICULARS OF BREACH

19. The 3rd Defendant [the principal] and agent of the 1st and 2nd Defendants [the Board and the Attorney General respectively] breached the Claimant's Contract of employment in that:

- a) The implied term of the Claimant's Contract that she would be provided with a safe place of work was breached when;
- I. The 3rd Defendant set upon and physically abused the Claimant without lawful authority or excuse.
 - II. [The 3rd Defendant locked] the Claimant out of the class room, forcing her to conduct classes in the open space thereby exposing the Claimant and those in charge to danger.
 - III. The 3rd Defendant and other personnel consistently molested the Claimant.
20. The 3rd Defendant breached the duty of mutual trust and confidence owed to the Claimant.
21. The 3rd Defendant unilaterally removed the Claimant from her duties as head of the Mathematics and Science Departments without first consulting with her.
22. **The 3rd Defendant together with the 1st Defendant terminated the Claimant's contract of Employment without any lawful justification and in breach of the procedures set out in Parts 56-59 of the Education Regulations 1980.**
23. The 3rd Defendant and agent of the 1st and 2nd Defendants assumed the duties of the Head of Department without going through the proper procedures.
24. The 1st Defendant failed to protect the Claimant from being assaulted and harassed by the 3rd Defendant, their agent whether by himself or together with other personnel.
25. The 1st and 3rd Defendant deliberately caused pain and suffering and financial hardship to the Claimant by attempting to terminate her contract of Employment without due process." (Emphasis supplied)

The portion of the extract that has been emphasised will be relevant to the issue of whether Ms Carty's claim lies in public or private law or both.

[8] At the end of the particulars of claim Ms Carty sought the following as relief:

"THE CLAIMANT claims:

1. A Declaration that the Defendants have breached the Claimant's Contract of Employment and that the said breach be rectified.
2. Damages for unfair dismissal
3. Special Damages
4. Exemplary Damages
5. Aggravated Damages
6. Reinstatement or Re-employment of the Claimant
7. Damages for assault
8. Costs" (Underlining as in original)

The submissions

[9] In his submissions on behalf of the appellants Mr McDermott argued that Ms Carty, having based her initial claim on alleged breaches of the Education Regulations has placed herself squarely in the domain of public law litigation. Having done so, learned counsel argued, she is not permitted to bring her claim by way of an ordinary claim. She should have, he submitted, pursued relief by way of an application for judicial review. Mr McDermott submitted that, not having sought judicial review within the time stipulated by the Civil Procedure Rules 2002 (the CPR), Ms Carty's attempt to

secure relief by way of an ordinary claim form amounts to an abuse of the process of the court.

[10] Mr McDermott accepted that an exception to that principle existed. The exception stipulated that where the relief sought involves a mixture of public and private law claims then an ordinary claim form may be utilised. He argued, however, that Ms Carty's situation does not fall within that exception.

[11] Learned counsel relied on a number of decided cases in support of his submissions, including **O'Reilly v Mackman** [1983] 2 AC 237 and **Roy v Kensington and Chelsea and Westminster Family Practitioner Committee** [1992] 1 All ER 705.

[12] On the second main limb of his arguments Mr McDermott pointed out that Ms Carty had claimed relief on the basis that her dismissal was unfair. He quite properly pointed out that there is a distinct difference between a claim for unfair dismissal and one for wrongful dismissal. Learned counsel argued that whereas the courts had jurisdiction to hear claims and grant relief in respect of wrongful dismissal, which is a common law issue, a claim for unfair dismissal was restricted to the statutory jurisdiction created by Parliament for the Industrial Disputes Tribunal. Ms Carty, he argued, was not entitled to relief for unfair dismissal in these courts. He relied on the cases of **Johnson v Unisys Ltd** [2001] 2 All ER 801 and **Johnson v Restaurants of Jamaica** [2012] JMCA Civ 13.

[13] In her response to these submissions, Mrs Cousins-Robinson argued that this claim did fall within the exception recognised in **Roy v Kensington**. She pointed to the fact that, included in Ms Carty's claim was a reference to a breach of contract by the Board and the claim for damages for assault. These, learned counsel submitted, were private law issues and provided the basis for claiming the exception from the general rule. The assault, victimisation and dismissal, Mrs Cousins-Robinson submitted, were "inextricably linked as it is [Ms Carty's] case that she was being victimized and dismissed because of the assault charges brought by her against the [principal]" (see paragraph 26 b of the respondent's written submissions).

[14] In respect of the issue of unfair dismissal, learned counsel pointed out that the Board dismissed Ms Carty in breach of an undertaking that the appellants had given to the Supreme Court. The undertaking was that they would take no steps to affect her employment status until after the mediation process between the parties had been completed. This was a case of injustice, Mrs Cousins-Robinson argued. In such circumstances, she submitted, the court would be entitled to exercise its equitable jurisdiction to assist Ms Carty.

The analysis

[15] The first principle guiding this analysis is that where the remedies sought by a claimant may be secured by an application for judicial review, as a general rule it would be contrary to public policy to seek to secure a remedy by way of a private law claim. In **O'Reilly v Mackman** the House of Lords held:

“...that since all the remedies for the infringement of rights protected by public law could be obtained on an application for judicial review, **as a general rule it would be contrary to public policy and an abuse of the process of the court for a plaintiff complaining of a public authority’s infringement of his public law rights to seek redress by ordinary action** and that, accordingly, since in each case the only claim made by the plaintiff was for a declaration that the board of visitors’ adjudication against the plaintiff was void, it would be an abuse of the process of the court to allow the actions to proceed and thereby avoid the protection afforded to statutory tribunals...” (Emphasis supplied)

[16] **Roy v Kensington** refers to exceptions to that general rule. The House of Lords, after considering the principle enunciated in **O’Reilly v Mackman**, outlined the exception mentioned in the submissions of both Mr McDermott and Mrs Cousins-Robinson. The headnote to the case indicates that their Lordships held, in part:

“Although an issue which depended exclusively on the existence of a purely public law right should as a general rule be determined in judicial review proceedings and not otherwise, **a litigant asserting his entitlement to a subsisting private law right, whether by way of claim or defence was not barred from seeking to establish that right by action by the circumstance that the existence and extent of the private right asserted could incidentally involve the examination of a public law issue....**” (Emphasis supplied)

[17] In assessing Ms Carty’s claim against the background of these principles, it should immediately be noted that the aspect of the claim for damages for assault is no longer a part of the claim. Ms Carty and the principal settled that aspect at mediation and the principal was removed as a party to the claim. It may not properly be said, therefore, that Ms Carty is seeking to assert a private law right in respect of the assault.

[18] The second aspect of Ms Carty's claim to a remedy for a breach of her private law right is her assertion that there was a breach of her contract of employment. Ms Carty has proffered that assertion on three separate bases, firstly, that her working conditions were adversely affected by the deliberate actions of her employers (paragraph 19 of her particulars of claim), secondly, that the contract of employment was terminated "without any lawful justification" (paragraph 22 of her particulars of claim) and thirdly, that the termination was also "in breach of the procedures set out in Parts 56-59 of the Education Regulations 1980" (paragraph 22 of her particulars of claim). Although the second and third bases are set out in the same paragraph, it would not be unreasonable to read them as being relied upon independently of each other.

[19] It may fairly be said that the third basis, with its reliance on the provisions of the Education Regulations, is clearly a public law entitlement. It may also be said, however, that a court considering the question of whether Ms Carty's employment was wrongfully terminated (that being a private law issue), would have reason to consider the terms of the Education Regulations. Considered in this way, it would be fair to say "that the existence and extent of the private right asserted could incidentally involve the examination of a public law issue", as stipulated in **Roy v Kensington**.

[20] Mr McDermott submitted that the Education Regulations could not be considered terms of the contract between the Board and Ms Carty. It is not necessary that that issue be decided in this appeal. It may be said, however, that it may well be an issue

joined between the parties at a trial. This would be a further basis for stating that the instant case falls within the exception recognised in **Roy v Kensington**.

[21] On the issue of the distinction between unfair dismissal and wrongful dismissal, Mrs Cousins-Robinson's reliance on the equitable jurisdiction of the court is misplaced. The undoubted breach of the appellants' undertaking to the court below, by dismissing Ms Carty before the conclusion of the mediation process, does not create a cause of action as Ms Carty's particulars of claim would seem to suggest. What perhaps, ought to have been done, was to invoke the powers of the Supreme Court to cite the appellants for contempt. Mr McDermott's explanation for their behaviour was that the mediation proceedings were frustrated by Ms Carty's continued failure to participate in those proceedings. He admitted, however, that before dismissing Ms Carty, the appellants made no application to be relieved of their undertaking to the court.

[22] The breach of the undertaking does not entitle the court to adjudicate Ms Carty's claim for unfair dismissal. Mr McDermott is correct in his submission that the remedies available for unfair dismissal, including re-instatement of an employee to the employment, are only available from the Industrial Disputes Tribunal. Ms Carty's claim for these remedies is, therefore, misconceived and the averments in her particulars of claim in respect of this issue may properly be struck out.

Costs

[23] In light of the fact that the appellants have been partially successful, they should have one-half of the costs of the appeal.

Conclusion

[24] The public law issues involved in Ms Carty's claim, based on her invoking the provisions of the Education Regulations, are very closely connected with her claim for damages for breach of contract. In the circumstances, her claim may fairly be said to fall within the exception to the rule that cases involving public law issues must be adjudicated upon in the context of judicial review. The appellants' complaint about that aspect of Ms Carty's claim must, therefore, fail.

[25] Ms Carty has, however, wrongly based her claim in respect of her dismissal from her employment, on the principle of unfair dismissal. The relief in respect of that area is available only from the Industrial Disputes Tribunal. Her claim in this regard in the instant matter must therefore be struck out as being misconceived.

LAWRENCE-BESWICK JA (AG)

[26] I have read, in draft, the judgment of my brother, Brooks JA. I agree with his reasoning and conclusions and have nothing to add.

PANTON P

ORDER

(1) The appeal is allowed in part.

- (2) The order of Marsh J is varied.
- (3) The following shall be struck from the further amended claim form filed herein:
 - a. Relief item 3 – the words “and that the said breach be rectified”
 - b. Relief item 4 - “Damages for unfair dismissal”
 - c. Relief item 5 – “An order for Reinstatement/Re-employment of the Claimant”
- (4) The following shall be struck from the further amended particulars of claim filed herein:
 - a. The heading “PARTICULARS OF UNFAIR DISMISSAL and paragraphs 31, 32, and 33, thereunder;
 - b. Item 1 in the prayer for relief – the words “and that the said breach be rectified”
 - c. Item 2 in the prayer for relief - “Damages for unfair dismissal”
 - d. Item 6 in the prayer for relief – “Reinstatement or Re-employment of the Claimant”
- (5) One half of the costs of the appeal to the appellants. Such costs are to be taxed if not agreed.