[2024] JMCA App 27

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE P WILLIAMS JA
THE HON MR JUSTICE D FRASER JA
THE HON MRS JUSTICE G FRASER JA (AG)

APPLICATION NO COA2023APP00279

BETWEEN	**JOY PATRICIA HARRISON**	**APPLICANT**
AND	**THE COUNCIL OF THE CARIBBEAN MARITIME UNIVERSITY**	**RESPONDENT**

Douglas Leys KC instructed by Hay and Johnson for the applicant

Mrs Symone Mayhew KC instructed by Mayhew Law for the respondent

17 and 20 June 2024

Civil Procedure – Supreme Court – Judicial review – Application for leave to appeal, Part 56 of the Civil Procedure Rule, 2002 – Whether the learned judge can convert an application for leave to apply for judicial review to a civil claim in Supreme Court – Whether proposed appeal has a real chance of success – Rule 1.8(7) of the Court of Appeal Rules, 2002

Costs – Whether costs are to be awarded to the unsuccessful party at the leave stage for judicial review

ORAL JUDGMENT

P WILLIAMS JA

[1] This is an application for leave to appeal the decision of Wint-Blair J ('the learned judge') contained in a written judgment with neutral citation [2023] JMSC Civ 219 delivered on 16 November 2023, where she refused the declarations and an order for *certiorari* sought by Miss Joy Patricia Harrison ('the applicant'), and refused the application for leave to apply for judicial review. She also ordered that the application be dealt with

as a claim, and made a consequential order that a case management conference be fixed by the Registrar as soon as practicable, and awarded costs to the respondent.

[2] In determining whether permission to appeal ought to be granted we are guided by rule 1.8(7) of the Court of Appeal Rules ('CAR') which provides that "the general rule is that permission will only be given if the court or the court below considers that an appeal will have a real chance of success". This court was advised that the applicant sought and was refused leave in the court below.

[3] This is a matter in which the challenge is in relation to the learned judge's exercise of her discretion and as such this court is mindful of its function when reviewing this exercise. The basis on which this court will interfere with the exercise of a judge's discretion is well settled. An appeal against a judge's exercise of discretion will generally only succeed if it can be shown that it was based on a misunderstanding of law or evidence, or based on an inference that particular facts existed or did not exist, which can be shown to be demonstrably wrong or the decision is so aberrant that no judge, mindful of her duty to act judicially, could have reached it (see **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042 and **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1).

[4] The applicant was contractually employed as the interim treasurer of the Caribbean Maritime University ('CMU') for an initial two years, effective 5 May 2020 with continuous subsequent renewals to 31 January 2023. The applicant signed employment letters confirming the terms and conditions outlined in her contracts.

[5] The Council of the CMU ('the respondent') was established by the Caribbean Maritime University Act, 2017 ('the CMU Act'), which repealed the Caribbean Maritime Institute Act ('the CMI Act').

[6] The applicant complained that during the period of her employment, she was not paid the annual salary increment for the year ending 7 May 2021 to 7 May 2022. By letter dated 12 December 2022, she raised the matter with the President of the CMU and

he responded in an email dated 6 March 2023, explaining why she was not entitled to the benefits she was seeking. He stated that, the position of director of finance was an independent position under the CMI Act and following the repeal of that Act, the position transitioned to that of the treasurer under the CMU Act. The benefits of the position of director of finance remained for the person who held the position when the transition was made. However, the position of interim treasurer was independent of the position of director of finance, an established post, and therefore the applicant was not entitled to any benefit tied to that post.

[7] The applicant disputed this. She contended that she was entitled to the benefits accorded to the former post of director of finance whose post transitioned to that of treasurer, which benefits included the annual salary increments and the travelling allowance payable to the holder of the post.

[8] On 5 June 2023, the applicant filed her notice of application for court orders seeking leave to apply for judicial review of the decision of the President of the CMU communicated to her in the email of 6 March 2023. In the amended grounds in support of her application, the applicant sought the grant of leave to apply for judicial review by way of declarations that:

> a. she was entitled to anniversary increments and other pecuniary benefits inclusive of traveling allowance, pursuant to the provisions of the CMU Act and her contract of employment;
>
> b. the respondent was acting contrary to the provisions of the CMU Act in denying her just entitlements under the provisions of the CMU Act and her contract of employment; and
>
> c. for an order of *certiorari* to quash the decision of the respondent that she was not entitled to anniversary increments and other pecuniary benefits.

[9] The learned judge identified the issues for determination as being whether the decision of the President of the CMU was amenable to judicial review and if the answer to that issue was no, how should the matter then be treated (see para. [55]). She relied on the case of **Sharma v Brown-Antoine** (2006) 69 WIR 379 as setting out the test for the grant of leave to apply for judicial review, which is that the court is to be satisfied that there is an arguable ground for judicial review having a realistic prospect of success not subject to a discretionary bar such as delay or there being an alternative remedy (see para. [62]). She indicated that the assessment of the court at the permission stage was not a trial and did not necessitate an in-depth examination of the grounds, but rather required that the court satisfy itself that there are arguable grounds supported by evidence that have a realistic prospect of success (see para. [64]).

[10] The learned judge after conducting a comprehensive discussion concluded firstly that the impugned decision was not amenable to judicial review as the applicant's contract with the university was neither regulated nor established by statute. Secondly, she went on to find that the application did not merit the grant of an order of *certiorari*, which was not available as a remedy in such a case. She concluded that the respondent's decision was not subject to judicial review because (i) the applicant was not appointed to the civil service; (ii) there was no legislative underpinning of her employment; and (iii) there was no statutory restriction on the terms on which the applicant's employment may be founded, save for length of time. Consequently, the relationship was that of master and servant (see para. [115]).

[11] Against those findings, the learned judge considered how the claim should be treated. She found that the applicant was alleging a breach of contract which was ordinarily an action brought in contract as a matter of private law. She, therefore, concluded that the appropriate remedy was in private law. She recognised the discretion afforded her pursuant to rule 56.10(3) of the Civil Procedure Rules ('CPR') to order the claim to continue as if it had not commenced under Part 56 of the CPR. The learned judge acknowledged that the power to convert the claim into one in contract was not argued

by King's Counsel. She, therefore, made the subsequent order that the application be dealt with as a claim, conditional on further submissions from King's Counsel regarding any proposed variation in the terms of the exercise of the power, granted by the rule.

[12] Mr Douglas Leys KC, on behalf of the applicant, complained that the learned judge erred when she made orders refusing the declarations and then proceeded to order, even though conditional, that the application be converted to a claim pursuant to a reference under rule 56.10(3) of the CPR. Mr Leys contended that having ruled that the declarations sought were refused, it is difficult to see how a reference under rule 56.10(3) would survive any further litigation in the Supreme Court, unless that order refusing the declarations is set aside by this court. He noted that although one does not require leave to seek a declaration, the learned judge by refusing the declaratory remedies had effectively put an end to the applicant pursuing this remedy. Having refused the declarations, nothing remained to be referred for case management.

[13] Mr Leys submitted that the learned judge erred in finding that the decision of the President of the CMU was not amenable to judicial review as the applicant's post as treasurer was neither regulated nor established by statute. King's Counsel pointed to the learned judge's order that the order for *certiorari* sought was refused which was not the order which was being sought at the stage the matter was at before her. This, Mr Leys submitted, showed that although the learned judge's reasons purported to consider the threshold test, in reality, she considered and refused the relief itself. The refusal of the order of *certiorari* was a binding order on the applicant. Mr Leys indicated that the applicant intended to argue that by discussing in-depth the principles applicable to the issue of *certiorari* and refusing the order, the learned judge demonstrated that she was satisfied that the threshold step had been reached. He submitted that, at best, the learned judge's reasons are a conflation of the principles and the refusal of the application for leave to apply for judicial review was an afterthought, as she had already decided the case on the merits.

[14] In written submissions, the thrust of Mr Leys' contention was that the learned judge erred in law in finding that the post of treasurer was neither regulated nor established by statute. He advanced that contrary to the findings of the learned judge, the post of treasurer is a specific statutory post established by the CMU Act and it is the Act that empowers the respondent to employ the treasurer on such terms and conditions as it sees fit. Therefore, it is clear that the post of treasurer has a clear statutory underpinning. Mr Leys also argued that the respondent cannot subvert the statutory intent by using the terms and conditions of a contract to deviate from and deprive the occupant of the benefits associated with the position. Reliance was placed on **The Chairman, Penwood High School's Board of Management v The Attorney General and Loana Carty** [2013] JMCA Civ 30. Mr Leys contended that there was in fact a public law element worthy of judicial review.

[15] On the issue of costs, Mr Leys submitted that the learned judge failed to appreciate that in an application for leave to apply for judicial review, costs are not generally awarded against an applicant at the leave stage, except in very exceptional circumstances, none of which obtained in this case. He pointed out that the parties had not been given an opportunity to be heard on the issue which would have been especially necessary where the learned judge was contemplating departing from the general practice of not awarding costs at the leave stage. Reliance was placed on the case of **Danville Walker v The Contractor General** [2013] JMFC Full 1 (A) for the applicable principles to be considered in awarding costs.

[16] Mrs Mayhew KC, on behalf of the respondent, commenced her submissions by describing the orders made refusing the declarations and the order for *certiorari* as superfluous. Following engagement with the bench she conceded that in making those orders the learned judge had erred. She accepted that, as Mr Leys had contended, having made the orders she described as superfluous, the conversion was potentially meaningless. Accordingly, she was unable to resist the conclusion that the applicant had an arguable ground with a realistic prospect of success in relation to the challenge to the

order that the application be treated as a claim, with the consequential order that a case management conference be fixed by the registrar as soon as possible.

[17] However, she maintained that there was no merit in the proposed grounds of appeal that sought to challenge the refusal of leave to apply for judicial review. She contended that in any event the applicant's complaint about anniversary increments and traveling allowance are matters that must be determined based on the contract between the parties. It was submitted that ultimately the applicant's claim was one for remuneration which she contended was due to her. Since she was engaged on contract, her claim must sound in contract and was a claim in private law with no public law element. Reliance was placed on **Wendal Swann v Attorney General of the Turks & Caicos Islands** [2009] UKPC 22, **Sykes v The Minister of National Security and Justice and The Attorney General** (1993) 30 JLR 76, **Sykes v The Minister of National Security & Justice and The Attorney General** [2000] UKPC 43 and **Minister of National Security & Attorney General v Herbert Hamilton** [2015] JMCA Civ 54.

[18] King's Counsel submitted that the applicant's contention that the learned judge erred in finding that the applicant's post was neither regulated nor established by statute lacked merit. The applicant was even on her own assertion employed by the respondent as interim treasurer and not in the post of treasurer. Ms Mayhew contended that the learned judge was correct that the classification of 'interim' was an irrelevant consideration without legal foundation in view of the applicant's evidence, her acceptance of her engagement, and the powers of the respondent in the CMU Act. Reliance was placed on the **Kingsley Chin v Andrews Memorial Hospital Limited** [2022] JMCA Civ 26.

[19] On the issue of the award of costs, King's Counsel submitted that this was at the discretion of the court. She acknowledged that it was unusual for costs to be awarded against a claimant in a judicial review claim but it was possible. Reference was made to **Kingsley Chin v Andrews Memorial Hospital Limited**. In any event, her further

submission was that the applicant acted unreasonably in making an application for judicial review which was an abuse of process warranting a costs sanction. There was no demonstration of an improper exercise of the learned judge's discretion.

[20] Having considered the helpful submissions of both King's Counsel along with the material provided, we have concluded that an appeal against the learned judge's decision has a real chance of success.

Order

[21] The order of the court is, therefore, as follows:

1. Leave to appeal the orders of Wint-Blair J, made on 16 November 2023, is hereby granted.
2. Costs of the application be costs in the appeal.