[2023] JMCA App 35

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MISS JUSTICE SIMMONS JA
THE HON MRS JUSTICE V HARRIS JA

APPLICATION NO COA2023APP00055

BETWEEN	**THE MINISTER OF LABOUR AND SOCIAL SECURITY**	**APPELLANT**
AND	**DONOVAN BROWN**	**RESPONDENT**

Stuart Stimpson and Miss Jevaughnia Clarke instructed by the Director of State Proceedings for the appellant

Phillip Bernard instructed by Bernard & Co for the respondent

10 October and 24 November 2023

Education – jurisdiction of visitor - whether the decision of the visitor is amenable to judicial review – whether the visitor and the Industrial Disputes Tribunal have concurrent jurisdiction - section 22(ii)(b) of the Labour Relations Code – section 11A(1)(a)(i) of the Labour Relations and Industrial Disputes Act - article 6, 2018 amendment to article 6 and statute 2A of the Royal Charter

BROOKS P

[1] I have read, in draft, the judgment of my learned sister, Harris JA. I am pleased to be able to say I agree with her reasoning and conclusion and I have nothing to add.

SIMMONS JA

[2] I, too, have read the draft judgment of my sister Harris JA. I agree with her reasoning and conclusion and have nothing useful to add.

V HARRIS JA

[3] The Minister of Labour and Social Security ('the appellant') is applying for permission to appeal the order of a judge of the Supreme Court ('the learned judge') made on 16 February 2023. By that order, the learned judge granted Mr Donovan Brown ('the respondent') leave to judicially review the appellant's decision, given on 3 March 2022, refusing to refer a dispute between the respondent and his former employer, the University of the West Indies ('the University'), to the Industrial Disputes Tribunal ('IDT') for determination. She also refused to grant the appellant permission to appeal, among other things. The appellant's application for a stay of the judicial review proceedings was also refused in the court below by a different judge.

[4] This application for permission to appeal raises two critical questions. The first is whether the decision of the Visitor declining jurisdiction to consider the respondent's petition falls within the scope of judicial review. The second is whether the Visitor and the IDT have concurrent jurisdiction over the dispute between the respondent and the University. But first, a brief outline of the factual background is necessary.

Background facts

[5] On or about 24 February 2017, the respondent's employment with the University was terminated. At that time, he had been employed for at least 30 years and held the post of acting purchasing manager. The circumstances giving rise to the respondent's termination concerned his association with a company that supplied goods to the University. Serious allegations of conflict of interest and misconduct were made against the respondent due to his affiliation with the company, culminating in disciplinary proceedings and his eventual dismissal.

[6] The respondent denied the allegations of misconduct on the basis that he had disclosed his association with the company and that the University had approved transactions with the company. He contended that his dismissal was unjust and breached the Labour Relations and Industrial Disputes Act ('the LRIDA') as well as section 22(ii)(b) of the Labour Relations Code ('LRC') because he had never faced disciplinary proceedings before and ought not to have been dismissed for a first infraction unless there was gross misconduct on his part.

[7] On 3 March 2017, the respondent appealed against his dismissal to the Vice Chancellor of the University ('the Vice Chancellor'), who dismissed his appeal. The respondent was not informed of the dismissal of his appeal until 30 November 2017. However, prior to being notified of the outcome of his appeal, the respondent sought the intervention of the Ministry of Labour and Social Security ('the Ministry') on 6 November 2017. Although there were several conciliatory meetings between the respondent and the University between November 2017 and June 2020, they failed to resolve the issue of the respondent's termination of employment. On 4 June 2020, the respondent requested that the matter be referred to the IDT but, on 6 July 2020, he was informed by the Ministry that this would not be done. He was further advised to consider placing the matter before the Visitor. Before doing as recommended by the Ministry, the respondent lodged an appeal with the Chancellor on 17 November 2020, against the Vice Chancellor's decision. The Chancellor then directed him on 14 December 2020, to refer his case to the Visitor.

[8] The respondent's petition to the Visitor was filed on 19 April 2021. The Visitor declined jurisdiction to determine that petition in a written decision on 22 September 2021. The Visitor's reason for doing so was that the decision of the Vice Chancellor that the respondent was challenging (made on 30 November 2017) pre-dated his appointment as the University Visitor and, therefore, was outside the ambit of his jurisdiction. In other words, the remit of the Visitor's jurisdiction extended only to decisions made after his appointment on 1 May 2019. Additionally, the Visitor found he could not adjudicate upon an alleged breach of section 22 of the LRC. For those reasons, he dismissed the respondent's petition.

[9] Following the Visitor's decision, the respondent wrote several letters to the Ministry requesting that his matter be referred to the IDT. On 3 March 2022, the respondent was advised of the appellant's decision not to do so. Dissatisfied with that outcome, on 11 April 2022, the respondent filed an *ex parte* notice of application seeking leave to apply for judicial review. That application was amended on 1 July 2022 and heard by the learned judge on 25 January 2023. As indicated above at para. [3], on 16 February 2023, the learned judge granted the respondent leave to apply

for judicial review of the appellant's decision on the basis of irrationality and she refused permission to appeal.

The findings of the learned judge

[10] The learned judge identified seven issues that required resolution. Only those that are germane to this application will be delineated. Her findings on the relevant issues, as summarised from her written judgment, are as follows:

i) The respondent properly invoked the Visitor's jurisdiction because the disciplinary complaint against him concerned the interpretation of the University's domestic law, including their policies and procedures under the Financial Code (2013), the Procurement Policies and Procedural Manual (2003) and the Statement of Principles/Code of Ethics for Academic and Senior Administrative Staff (paras. [31] – [40]);

ii) The Visitor's conclusion that his jurisdiction to consider the respondent's petition was ousted was correct in the light of Article 6 of the Royal Charter (as amended in 2018) and Statute 2A, which amended the schedule to the Royal Charter, given that the decision being challenged by the respondent pre-dated the Visitor's appointment (paras. [42] – [47]);

iii) The decision of the Visitor declining jurisdiction to consider the respondent's petition is final and not amenable to judicial review since the Visitor was interpreting and applying his views of the domestic law of which he is the sole judge (paras. [48] – [56]);

iv) There was no concurrent jurisdiction between the Visitor and the court, and the jurisdictions were mutually exclusive. As a matter of law, the court cannot "entertain a claim, the subject matter of which falls within the jurisdiction of the Visitor", and "in the ordinary course of things", it would have been improper for the appellant to exercise his discretion to refer a matter to the IDT over which the Visitor had jurisdiction. The appellant was, therefore, correct when he initially refused to refer the matter to the IDT (paras. [58] – [60]);

v) It was not advanced that the respondent had a viable alternative remedy that he failed to pursue, and his ability to have his case considered by a previous University Visitor is remote and highly unlikely (para. [68]); and

vi) It was debatable whether the respondent's case falls within the purview of the LRIDA. As a result, when the Visitor declined to exercise his jurisdiction to hear the respondent's petition, it is arguable that it was then open to the appellant to refer the matter to the IDT if his only "perceived bar" was the Visitor's exclusive jurisdiction. In the circumstances, the appellant's decision not to do so provides the basis for the respondent to be granted leave to apply for judicial review on the grounds of irrationality (para. [68]).

[11] Displeased with the learned judge's ruling, the appellant filed a notice of application for permission to appeal on 2 March 2023, which was amended on 29 March 2023. The initial and amended applications are supported by the affidavit and supplemental affidavit of Ms Kristina Whyte filed on the respective dates.

[12] The appellant seeks orders for permission to appeal the order of the learned judge, a stay of the judicial review proceedings, the hearing of the application for permission to appeal to be treated as the hearing of the appeal, the appeal to be allowed, and costs. The appellant proposed a total of eight grounds of appeal. The grounds of importance being relied upon are that the appeal has a real chance of success (in keeping with rule 1.8(7) of the Court of Appeal Rules ('CAR')), and if the proceedings in the court below are not stayed, the appeal would be rendered useless and result in an injustice to the appellant. The grounds can, therefore, be conveniently evaluated and addressed within the confines of the two broad issues identified at para. [4] above.

Submissions of the appellant

[13] The central plank of the appellant's submissions, which in essence captures the main complaints in the proposed grounds of appeal, was that the learned judge erred when she found that there was an industrial dispute in the context of the LRIDA, and, therefore, the appellant's decision not to refer the case to the IDT following the ruling of the Visitor was irrational. This was in the light of her finding that the matter

possessed the relevant domesticity to fall within the exclusive jurisdiction of the Visitor, and the Visitor's decision that he lacked jurisdiction to consider the respondent's petition was final and not reviewable by the court.

[14] Learned counsel for the appellant, Mr Stuart Stimpson, economically refined this submission within the context of the settled principle that the jurisdictions of the courts and the University or College visitors are mutually exclusive (per Hoffman J (as he then was) in **Hines v Birkbeck College and another** [1985] 3 All ER 156 at 161 ('**Hines v Birkbeck**')), and similarly, the jurisdictions of the IDT and the Visitor were mutually exclusive. In other words, as I understand the argument, the real issue was whether the learned judge was inconsistent and fell into error, having concluded that there was exclusive jurisdiction in the Visitor but simultaneously finding that concurrent jurisdiction existed with the IDT when the Visitor declined jurisdiction to consider the respondent's petition.

[15] Mr Stimpson submitted that the learned judge did, in fact, err because there was no such concurrent jurisdiction, with the consequence that the appellant had no basis to invoke his discretion under the LRIDA. He further posited that the proper course the court should have taken, in the circumstances, was to order that the Visitor's decision be judicially reviewed. Reliance was placed on several authorities in support of those submissions, including **Suzette Curtello v The University of the West Indies (Board for Graduate Studies and Research)** [2023] JMCA Civ 11, **Deborah Chen v The University of the West Indies** [2022] JMCA Civ 19, **Latoya Harriott v University of Technology Jamaica** [2022] JMCA Civ 2 and **Dr O'Neil Lynch v Minister of Labour and Social Security** [2021] JMCA Civ 43 ('**Lynch v MLSS**').

Submissions of the respondent

[16] The respondent, through learned counsel Mr Phillip Bernard, countered the appellant's position that the learned judge ought to have ordered judicial review of the Visitor's decision by relying on the seminal judgment of the House of Lords on visitorial jurisdiction, **Regina v Lord President of the Privy Council, *Ex parte***

Page [On appeal from Regina v Hull University Visitor, *Ex parte* Page] 1993 AC 682 ('**Regina v Lord President of the Privy Council**').

[17] Mr Bernard submitted, based on that authority, that the learned judge was correct when she found that the Visitor's decision declining jurisdiction, even if a mistake of law, was not an abuse of power and was beyond the scope of judicial review. Mr Bernard further submitted that this was so because, in arriving at that conclusion, the Visitor was interpreting and applying the domestic laws of the University (section 6 as well as the 2018 amendment of section 6 of the Royal Charter and Statute 2A) that gave him the power to act and of which he is the sole judge.

[18] Regarding the issue of whether concurrent jurisdiction existed between the Visitor and the IDT, Mr Bernard contended that in the circumstances where the Visitor had declined jurisdiction, it was open to the learned judge to consider whether there was an industrial dispute in the context of the LRIDA, and she correctly so found. It would then be unfair, unjust, and unreasonable, the argument continued, for the respondent to be denied the opportunity to have his case heard by the IDT, particularly where, as the learned judge found, he did not have a viable alternative remedy, and it was highly unlikely that he would be able to put his case before a previous University Visitor. Against this background, any finding that the jurisdictions of the Visitor and the IDT were mutually exclusive would be incorrect. As a result, the learned judge correctly ordered judicial review of the appellant's decision, refusing to refer the matter to the IDT for the reason she did. The authorities of **Duke St John-Paul Foote v University of Technology Jamaica (UTECH) and Elaine Wallace** [2015] JMCA App 27A ('**Foote v UTECH**'), **Othniel Dawes and Robert Crooks v Minister of Labour and Social Security** [2013] JMSC Civ 64, and **University of Technology, Jamaica v Industrial Disputes Tribunal and others** [2017] UKPC 22 were cited in support of these submissions.

The legal principles

[19] The general rule is that permission to appeal in civil cases will only be given if the court considers that an appeal will have a real chance of success (see rule 1.8(7) of CAR). The court has interpreted a real chance of success to mean that there is a

realistic as opposed to a fanciful prospect of success (see **William Clarke v Gwenetta Clarke** [2012] JMCA App 2, paras. [26] - [27] and **Foote v UTECH**, para. [21]). Accordingly, to succeed on this application, the appellant must establish that, should permission be granted, he will have a realistic prospect or chance of succeeding on the substantive appeal.

[20] The decision of the learned judge granting judicial review of the appellant's decision arose from the exercise of her discretion. It is well settled that this court will not disturb the exercise of a discretion by a judge of first instance unless it was based on an error of law or misunderstanding of facts or the decision is such that no judge "regardful of his duty to act judicially could have reached it" (**Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042 ('**Hadmor Productions v Hamilton**') applied in **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1).

[21] Concerning the issue of whether the Visitor's decision is susceptible to judicial review, the case of **Regina v Lord President of the Privy Council** is instructive. The facts of that case, summarised from the headnote, are that the employment contract of Mr Edgar Page, a lecturer at Hull University, was terminated on the ground of redundancy. He petitioned the university visitor for a declaration that his dismissal was contrary to certain sections of the university statutes and, consequently, *ultra vires* the university's powers and, therefore, invalid. The Lord President of the Privy Council, acting on behalf of the visitor, rejected the petition. Mr Page sought judicial review of that decision, and the Divisional Court granted him relief in the form of a declaration. On appeal by the university and the Lord President, the Court of Appeal held that the visitor's decision was amenable to judicial review but that the university had not exceeded its powers in dismissing Mr Page, and his dismissal was valid. On appeal by Mr Page and cross-appeals by the university and the Lord President to the House of Lords, the cross-appeals were allowed, and Mr Page's appeal was dismissed.

[22] It was held that that where a visitor's decision was made within his jurisdiction in that he had the power under the relevant regulating documents to adjudicate on

the dispute in question, his decision was not amenable to judicial review on the ground of error in fact or law contained in that decision.

[23] Lord Browne-Wilkinson, delivering the majority decision of the House, made the following observations which are important, in my judgment, to the present application:

a) A university being an eleemosynary charitable foundation, the visitor of the university has exclusive jurisdiction to decide disputes arising under the domestic law of the university.

b) This is so even where the contractual rights of an individual (such as his contract of employment with the university) are in issue, if those contractual rights are themselves dependent upon rights arising under the regulating documents of the charity, the visitor has exclusive jurisdiction over disputes relating to such employment.

c) The courts had no jurisdiction to entertain such disputes, which must be decided by the visitor (applying **Thomas v University of Bradford** [1987] AC 795 ('**Thomas**')).

d) **Thomas'** case addressed the question of whether the courts and the university visitor had concurrent jurisdiction over disputes concerning employment contracts with the university and decided that the visitor's jurisdiction was exclusive in that context.

e) **Thomas'** case did not decide that the visitor's jurisdiction excluded the court's supervisory jurisdiction by way of judicial review. On the contrary, Lord Griffiths in **Thomas** (at page 825) stated that "there is the protection afforded by the supervisory jurisdiction of the High Court" and "[a]lthough doubts have been expressed in the past over the availability of certiorari" he had no doubt, given the modern development of administrative law, that the High Court would have the power, upon an application for judicial review, to quash (by *certiorari*) a decision of the visitor which amounted to an abuse of his powers. Lord Ackner

LJ (at page 828) indicated that **Thomas'** case fell within the exclusive jurisdiction of the visitor, "subject always to judicial review".

f) While under the modern law of judicial review, *certiorari* would generally be available to quash a decision by tribunals or inferior courts for errors of law, this principle is inapplicable to visitors for two reasons (applying **Philips v Bury** (1694) Holt 715):

   (1) Tribunals and inferior courts are applying the general law of the land. When those bodies make a ruling based on an error of the general law, they act *ultra vires*, and the decision is unlawful. Therefore, the High Court is constitutionally empowered to order *certiorari* to quash that decision. However, the visitor is not applying the general law of the land but the domestic and internal laws of the university of which he is the sole judge and "of which the courts have no cognisance". Therefore, he cannot err in law in reaching his decision once he is acting within his jurisdiction (in the narrow sense) since the general law is not applicable.

   (2) Where statute provides that the decision of an inferior court was final and conclusive, thereby excluding the power to review it, the High Court should not be "astute" to find that the inferior court's decision on a point of law had not been made final and conclusive. Consequently, if there were a statutory provision that the decision of the visitor on the law applicable to internal disputes of a charity (or university) was to be "final and conclusive", the courts would have no jurisdiction to review the visitor's decision on the grounds of error of law made by the visitor within his jurisdiction (in the narrow sense).

g) The court will grant *mandamus* to require a visitor to exercise his jurisdiction (**Rex v Bishop of Ely** (1794) 5 Durn & E 475 and **Rex v Dunsheath, Ex parte Meredith** [1951] 1 KB 127) and prohibition to restrain a visitor from acting outside his jurisdiction (**Bishop of Chichester v Harward** (1787) 1 Durn & E 650). The court will also intervene to prevent a breach of the rules of natural justice by the visitor (**Bently v Bishop of Ely** (1729) 1 Barn 192).

h) While judicial review does lie to the visitor in cases where he has acted outside of his jurisdiction (in the narrow sense), abused his powers or acted in breach of the rules of natural justice, judicial review does not lie to impeach the decisions of a visitor taken within his jurisdiction (in the narrow sense) on questions of either fact or law.

[24] Interestingly, Lord Griffiths in **Regina v Lord President of the Privy Council** made it plain that what he had said about the availability of *certiorari* in **Thomas** had been misinterpreted to include an error of law, which was not what he had intended.

[25] In **Lynch v MLSS**, this court considered whether the visitor and IDT shared concurrent jurisdiction to adjudicate on a dispute between the University and a lecturer whose employment had been terminated. Dr Lynch (like the appellant in this case) engaged the conciliatory process of the Ministry's Conciliation Unit to try and resolve the dispute between himself and the University that arose following the termination of his employment contract. When the Minister refused to refer the matter to the IDT after the attempts to resolve the dispute by conciliation had failed, Dr Lynch successfully obtained leave to apply for judicial review. However, at the hearing of the application for judicial review, Wolfe-Reece J, after a comprehensive and admirable analysis of several authorities, including **Hines v Birkbeck**, **Thomas**, **Suzette Curtello v University of the West Indies (Board of Graduate Studies and Research)** [2015] JMSC Civ 223 and **Foote v UTECH**, found that the dispute between Dr Lynch and the University "fell squarely within the jurisdiction of the visitor"; and that jurisdiction being exclusive, meant that the court could not intervene. Wolfe-Reece J also concluded that Dr Lynch was required to invoke the visitor's jurisdiction before seeking the intervention of the court.

[26] Dr Lynch's appeal to this court was dismissed. The court found that Wolfe-Reece J correctly determined that the dispute between Dr Lynch and the University fell within the jurisdiction of the visitor, the visitor's jurisdiction was exclusive, and there was "**no concurrent jurisdiction between the visitor and the court and the IDT**" (para. [77]) (emphasis supplied).

[27] Also, after examining the provisions of section 11 of the LRIDA, the court held that there was no dispute that the Minister could have properly referred to the IDT. The reasons given for that finding were: (1) the Minister had a discretion to refer disputes to the IDT where he was satisfied that an industrial dispute existed (section 11A(1)), and if the Minister was not so satisfied, no referral should be made; (2) the Minister, before making a referral, is required to be satisfied that attempts were made by the parties to settle the dispute by such other means that were available to them (section 11A(1)(a)(i)); (3) the involvement of the Conciliation Unit of the Ministry was "an alternative approach", but this did not oust the visitor's jurisdiction; (4) Dr Lynch did not seek the intervention of the visitor and, therefore, failed to utilise "the other means as were available" to attempt to settle the matter (as required by section 11A(1)(a)(i) of the LRIDA); and (5) there was no dispute which could properly be referred to the IDT in those circumstances, and the Minister was correct in not exercising his discretion to do so (see paras. [78] - [89] of the judgment).

Analysis and disposal

[28] It is not in dispute that the issue between the University and the respondent concerning the termination of his employment fell within the jurisdiction of the Visitor. The learned judge properly concluded that disciplinary proceedings were instituted against him for conflict of interest and misconduct arising from his failure to comply with the Procurement Policies and Procedures Manual, the Financial Code, and the Statement of Principles/Code of Ethics for Academic and Senior Administrative Staff, which were concerned with the internal policies and regulations of the University, thus providing the requisite domesticity to allow for the invocation of the Visitor's jurisdiction.

[29] That being said, applying the principles in **Regina v Lord President of the Privy Council** (set out in detail above at paras. [21] - [24]), I find that the argument advanced by Mr Bernard that the learned judge correctly decided that the decision of the Visitor declining jurisdiction to consider the respondent's petition, even if a mistake or error of law, was not amenable to judicial review, has merit.

[30] It is clear from the authorities that in the interpretation and application of the internal and domestic laws of the University, the Visitor is the sole judge, and his decision is final. In declining jurisdiction, the Visitor was interpreting article 6 of the Royal Charter, which established the University, the 2018 amendment to article 6 and statute 2A, which amended the schedule to the Royal Charter. These statutes establish the jurisdiction and authority of the Visitor. In particular, statute 2A(5) provides that "[t]he Visitor shall have authority to adjudicate on matters from Staff and Students on the interpretation and application of the University's Charter, Statutes, Ordinances, Regulations and other governing instruments", and statute 2A(8) states "[t]he decision of the Visitor shall be final".

[31] The Visitor was not interpreting and applying the general law of the land but a "peculiar domestic law of which he is the sole arbiter and of which the court had no cognisance" (per Browne-Wilkinson LJ in **Regina v Lord President of the Privy Council**). Accordingly, his decision to decline jurisdiction was final and not subject to judicial review, even if he made an error of law. The appellant has no realistic prospect of success on this issue.

[32] Turning now to whether the IDT and the Visitor had concurrent jurisdiction over the respondent's dispute with the University, I am inclined to agree with the arguments advanced by Mr Stimpson, on behalf of the appellant, that there is none.

[33] The starting point of the analysis on this issue must be, in my view, an appreciation of the Visitor's decision on the jurisdictional issue that was raised before him. As I understand his ruling, after finding that the respondent had the legal standing to petition the Visitor, his interpretation of the 2018 amendment to section 6 of the Royal Charter led him to conclude that he lacked the jurisdiction to hear the petition because the decision being challenged by the respondent pre-dated his appointment and the extent of his remit extended only to decisions made after 1 May 2019. I wish to add that I am satisfied the Visitor's decision is correct.

[34] The Visitor, however, was by no means conveying that the visitorial jurisdiction of the University Visitor, *per se*, was ousted; simply, that he had no authority to adjudicate on the dispute between the respondent and the University based on the

date of the impugned decision and the remit of his jurisdiction. Therefore, it seems to me that the inescapable inference is that the respondent's petition was to be placed before a previous University Visitor who had the jurisdiction to consider it based on the date of the decision being challenged.

[35] In 2017, the University Visitor was Her Majesty Queen Elizabeth II, now deceased. Her Majesty delegated her visitorial function to the Honourable Mr Justice Paul Harrison (retired) on 10 August 2017. Justice Harrison carried out that function until the current Visitor, the Honourable Mr Justice Rolston Nelson (retired) was appointed on 1 May 2019 (see **Deborah Chen v The University of the West Indies** paras. [9]-[10]). It would appear that since the Vice Chancellor's decision to dismiss the respondent's appeal was given on 30 November 2017, the respondent should have petitioned Justice Harrison.

[36] Justice Harrison is now deceased. In light of this fact, it could be felt, as the learned judge did (based on her remarks that his ability to petition a previous University Visitor is remote and highly unlikely), that the respondent faces an insurmountable conundrum. However, as section 6 of the Royal Charter states (in part), "We, Our Heirs and Successors, shall be and remain the Visitor and Visitors of the University…". This means that visitorial jurisdiction and authority vests in the British monarch. While Her Majesty delegated her visitorial function to Justice Harrison in August 2017, this did not connote that she was wholly divested of her jurisdiction and authority as the University Visitor. In fact, these remained vested in her (as Britain's monarch) until 7 November 2018, when section 6 of the Royal Charter was amended to give the Council of the University the right to appoint as visitor of the University "a regional figure of high judicial office" on the recommendation of the President of the Caribbean Court of Justice.

[37] Her Majesty, too, has died. Notwithstanding, there is still the opportunity for the respondent to petition the British monarch, as the University Visitor in 2017. This prospect has not been lost, on account of Her Majesty's passing, for two reasons. First, the common law principle of *Rex nunquam moritur* ("the king never dies") means that succession to the British throne takes place instantly upon the death of a monarch

without the requirement of coronation for "practical reasons". Second, visitorial authority would pass to Her Majesty's heir and successor (His Majesty King Charles III) by virtue of section 6 of the Royal Charter.

[38] There is no doubt that the respondent has not attempted to petition His Majesty. Instead, he sought refuge in the court below and successfully obtained an order to judicially review the appellant's decision. However, in the light of the preceding discussion, that approach is flawed. Given the nature of the dispute, the Visitor has exclusive jurisdiction over the matter. No concurrent jurisdiction exists between the Visitor, the court, and the IDT. Therefore, on the strength of the authorities, the respondent is obliged to invoke the appropriate University Visitor's jurisdiction (in this case, that of His Majesty's) to investigate and decide on the dispute if he so wishes. Neither the court nor the IDT can give him the solace he seeks.

[39] Whereas it is recognised that this path may be littered with difficulties (as highlighted above at para. [36]), this would seem to be the only option that avails the respondent. I say so because, in this case, the possibility of the Visitor and the IDT sharing concurrent jurisdiction over disputes arising from disciplinary proceedings that originate from the internal policies, regulations and domestic laws of the University, which lead to the dismissal of members of the University, is non-existent.

[40] As the authorities and provisions of the Royal Charter clearly illustrate, any decision made by the University Visitor interpreting and applying the University's internal rules is final. So, for instance, if the University Visitor decides that an employee of the University was fairly and rightly dismissed, that decision is final. There is no recourse to the courts or IDT because, as a member of the University, the employee has undertaken to be bound by its internal rules and, in my view, the decisions of the University Visitor emanating from them.

[41] It is acknowledged that there are exceptions to this principle, such as where the dispute under the employee's contract of employment relates to purely common law or statutory rights and not to the special or private rights of the University, and where some terms of the contract are concerned with private and special rights given as a member of the University, and other terms, expressed or implied, that provide

purely contractual or statutory rights. Notably in the former scenario, the visitorial jurisdiction is ousted, and those rights would have to be determined by the courts or the appropriate statutory tribunals. In the latter, visitorial and common law jurisdictions, or industrial jurisdictions, co-exist. The common law or statutory rights are enforceable in the courts or the appropriate statutory tribunals. Still, the visitorial jurisdiction is not ousted (see **Re Wislang's Application** [1984] NI 63 per Kelly LJ at pages 80-81). However, I have seen no evidence in the record that would incline me to the position that one or both of these exceptions apply to the respondent. The appellant, therefore, has a real chance of succeeding on this issue.

[42] The resolution of this issue, in my judgment, amply addresses whether the learned judge correctly determined that there was an industrial dispute in the context of the LRIDA that could properly be referred to the IDT by the appellant. Given the circumstances of this case, there was none, as I have sought to show that the Visitor and the IDT do not share concurrent jurisdiction over the dispute in question. In any event, applying the scholarly analysis of my learned sister Simmons JA in **Lynch v MLSS** at paras. [78]-[89], it is clear that:

i) The discretion of the appellant to refer a dispute to the IDT is conditional upon him being satisfied that the parties attempted to settle the dispute by such other means that were available to them without success; and

ii) The respondent has failed to utilise the other avenue open to him to try and settle the dispute in question since he has not tried to petition His Majesty King Charles III, who would be the University Visitor with exclusive jurisdiction to deal with the matter.

[43] Consequently, there was no dispute that the appellant could properly refer to the IDT, and he correctly exercised his discretion not to do so. It would be incorrect to say, therefore, that his decision was irrational. The appellant has also established that he has a realistic prospect of succeeding on this issue.

Conclusion

[44] While the learned judge correctly determined that the decision of the Visitor declining jurisdiction to hear the respondent's petition was not susceptible to judicial review, regrettably, she fell into error when she granted leave to the respondent to review the appellant's decision refusing to refer the matter between the respondent and the University to the IDT on the basis of irrationality. That error was due to a misunderstanding of the law on her part, which provides a basis for the court to set aside her decision (see **Hadmor Productions v Hamilton** cited above at para. [20]).

[45] In light of the preceding discussion, the appellant has a real chance of success on appeal. I would, therefore, propose that i) the application for permission to appeal be granted; ii) the hearing of the application for permission to appeal be treated as the hearing of the appeal; iii) the appeal be allowed; iv) the orders of the learned judge, given on 16 February 2023, be set aside; (v) the application for leave to apply for judicial review be refused; (vi) there be no order as to costs in the proceedings in the court below; and vii) costs of the appeal be awarded to the appellant to be agreed or taxed.

BROOKS P

ORDER

i) The application for permission to appeal is granted.

ii) The hearing of the application for permission to appeal is treated as the hearing of the appeal.

iii) The appeal is allowed.

iv) The orders of the learned judge, given on 16 February 2023, are set aside.

v) The application for leave to apply for judicial review is refused.

vi) No order as to costs in the proceedings in the court below.

vii) Costs of the appeal to the appellant to be agreed or taxed.