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IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. 297 of 1998

BETWEEN: ANDY DARKOH-AGYEMAN Applicant

AND:
1. THE DIRECTOR OF LEGAL STUDIES CAYMAN ISLANDS LAW SCHOOL
2. THE CHIEF SECRETARY
3. THE CHAIRMAN OF THE PUBLIC SERVICE COMMISSION
4. THE GOVERNOR OF THE CAYMAN ISLANDS

Respondents

Appearances

Mr. Stephen Hellman of Quin & Hampson attorney for the applicant
The Solicitor General, Mr. Samuel Bulgin and Miss Jacqueline Wilson for the respondents.

JUDGMENT

1. The applicant, Andy Darkoh-Agyeman, was employed by the Cayman Islands Government as a Lecturer in Law at the Cayman Islands Law School on a two year contract. The appointment required, as I understand, although there is no specific evidence on the point, the applicant to possess a degree in law and to be legally qualified. The possible relevance of that will be dealt with later in this judgment. The contract was dated 22nd July 1991. The applicant commenced his tour of

duty in September of that year; the contract being renewed for a further two year period in or about September 1993.

2. On 7th November, 1994, an allegation of sexual misbehaviour was made against the applicant by a female undergraduate whom he taught. As a result of that complaint, the Director of the Law School sent a written Memorandum to the applicant on 8th November 1994. In the light of that complaint, and others of a similar nature, there was considerable debate between the Director of the Law School and the Acting Permanent Secretary, Personnel as to whether the applicant's contract should be renewed for more than one year. In the event, and on the basis that the applicant agreed to accept professional advice and undertook properly to conduct himself in the future, his contract was renewed from September 1996 to September 1998.

3. Unfortunately, further allegations surfaced in late 1996 and a written complaint was made by a recent graduate of the school. That written complaint was dated 30th June 1997. It contained allegations of considerable substance, if true. On 7th October 1997 the Director met the applicant and discussed the various allegations which had been made.

He was handed a memorandum setting out in detail the allegations which had been made, without specifically identifying each complainant. There was a discussion however, in which it is agreed by both sides that Mr. Darkoh knew precisely who was making which allegation; as a result of hints given by the Director.

4. On 10th October, 1997, the Director and the Acting Permanent Secretary, Personnel, met the applicant. The object of the meeting was to enable the applicant to respond to the allegations contained in the memorandum. In the event, he denied each and every allegation made against him and alleged a conspiracy. He was invite to reply in writing to the allegations; but declined to do so at that stage.

5. On 16th October, 1997, the Director sent a memorandum to the Chief Secretary recommending that the applicant's contract be prematurely terminated in accordance with Clause 13 thereof.

6. On 11th November, 1997, the Director wrote to the applicant informing him of the recommendation he was making to the Chief

Secretary and inviting him to make written representations. He did so on 17th November, 1997.

7. On 17th December, 1997, the applicant was informed by letter of the decision of the Chief Secretary, the Public Service Commission and H.E. the Governor terminating prematurely his contract with effect from the 1st January 1998.

8. On 21st May, 1998, this Court gave leave to the applicant to seek judicial review of the entire process culminating in his dismissal. Allegations were made as to procedural unfairness and a specific allegation of bias was made against the Director. By paragraph 3 of the amended application for leave to appeal, damages were claimed for breach of contract and consequential loss suffered by his wife. In addition, a claim was made seeking a declaration that the proceedings leading to, and the final decision of termination itself, were unlawful.

9. On Friday 12th September, 1998, the Solicitor General, on behalf of all the defendants sought to have the application for judicial review rejected on the grounds that the termination of the applicant's contract

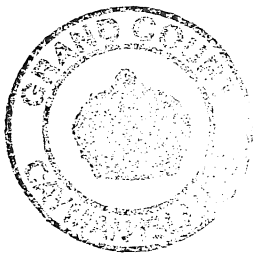
of employment was a matter of private law inappropriate for relief by way of judicial review. I part-heard that application in Chambers. Mr. Hellman agreed that it would form part of the main proceedings which had been set down for full hearing in open court on 14th September, 1998. I heard the remainder of the application on 14th September and announced that I rejected the application for judicial review with costs. I undertook to provide reasons for my decision later.

10. Clause 3 of the Agreement reads:-

> "This agreement is subject to the conditions set forth in the Schedule hereto annexed and the Schedule shall be read and construed as part of the agreement. The person engaged will, in other respects, be subject to colonial regulations and general orders and other orders and regulations and conditions of service in force from time to time *provided that where they may conflict with the terms of this agreement, this agreement shall prevail."*

By an order made on the 29th October 1985 pursuant to Regulation 17, 26, 32, & 33 of the 1985 Regulations Clause 2 excluded from consideration by the Public Service Commission 'any office holder subordinate to the Attorney General for which a legal qualification is required. As the Attorney General is the supervising authority of the Law School and a legal qualification was required for the post of Law Lecture, this applicant's contractual relationship was probably excluded from consideration by the Public Service Commission in respect of any dispute as to the terms of his contract whether it was, or was not, does not affect the result of this case.

11. Clause 13 of the Contract reads:-



Determination of Engagemement

"the Government may at any time determine the engagement of the person engaged, on giving him three months notice in writing or on paying one month salary and in either case, if he is in the Cayman Islands at any time the Government will furnish him with a free passage to his country of domicile".

Clause 14 contains a reciprocal right for the contract officer to disengage from the contract after a three months period on certain conditions.

12. Clause 30 (1) of the Public Service Commission Regulations 1985 reads:-

> "When a public officer is serving under an agreement, which provides for the termination of that agreement by notice before the expiration of the period of service stipulated in the agreement, and his Head of Department is of the opinion that the agreement should be terminated without due notice and/or without full gratuity the Head of the Department shall report the matter to the Chief Secretary with a full statement of his reasons. If the Chief Secretary considers that there is on first appearance a case for such termination, he shall arrange for the Head of Department to inform the public officer in writing of the intention to recommend the premature

termination of this agreement. The public officer shall be given the opportunity to forward representations about the intention to terminate the agreement prematurely and such representations shall be transmitted to the Chief Secretary, with all other relevant papers and documents. The Chief Secretary shall then transmit such papers and documents to the Chief Secretary with his own observations thereupon. The Commission shall advise the Governor whether or not such public officer's agreement shall be terminated."

This procedure was adopted in this case, although as I have indicated above, it is my judgment that this officer's contract was probably excluded from consideration by the Public Service Commission by the regulations I have quoted. If so, he cannot suffer an injustice by reason of the operation of the additional safeguard contained in Clause 30(1) to which he was probably not wholly entitled.

13. The procedure which applies to a contracted officer is in striking constrast to the procedure applicable to a "pensionable public officer". Where misconduct justifying dismissal is alleged, Regulation 47 requires the setting up a tribunal under a legally qualified chairman in which evidence and witnesses may be called on both sides. There is no procedure whereby such an officer can have his employment terminated in the manner laid down for a contracted officer. Whether the continued distinction between a contract officer and a pensionable officer is justifiable or desirable in today's conditions is not a matter for the Court.

14. The agreement between the applicant and the Government of the Cayman Islands dated 22nd July 1991 has been described by me herein as a "contract". I find it to be a contract as it contains an offer and acceptance with consideration flowing from the Government to the applicant. It is evidenced in writing and signed on behalf of the Government and by the applicant. There is nothing in the agreement nor in any supervening legislation or regulation granting a pensionable right to the applicant. Accordingly, I find that as a matter of law, he was not entitled to the benefit of Regulations 47 or 48 as claimed in his application for judicial review. Firstly, on the grounds just stated, and

secondly, that as I have found that this appointment was probably excluded from consideration by the Public Service Commission by the operation of regulations made on 29th October 1985.

15. Reliance was placed by counsel for the Defendant on a series of cases, in which the one time vexed question as to the distinction between private and public remedies were finally and comprehensively dealt with for cases of this type. I am obliged to counsel on both sides for their research and help to the Court in dealing with this matter. In ***R v. The Civil Service Board ex parte Bruce*** *[1989] 2 All. E.R. 907* the Court of Appeal in England confirmed the decision of the Divisional Court to reject a claim for judicial review. The applicant was an officer in the public service, who had been dismissed after a hearing by a civil service board. The main complaint was that insufficient reasons had been given for its decision. Taylor LJ (as he then was) would have granted judicial review but for the fact that the applicant had commenced proceedings for unfair dismissal in the industrial tribunal, and a High Court action to enforce the terms of settlement arrived at in the course of those proceedings. Dillon LJ at p. 912 did not wish to lay down any general principle as to the desirability of granting judicial review where

alternative remedies were available, but in that case declined to do so in view of the other proceedings initiated by the applicant. ***In R. V. East Berkshire Health*** Authority ***ex p Walsh [1985] 1 QB. 152*** the Court of Appeal in England held on an appeal by a Health Authority against an order for judicial review, granted by the High Court, that such an order was inappropriate. In that case, a senior nursing officer whose contract of service had been terminated due to misconduct, had sought to show on his application for judicial review, that he had enjoyed a public law right which had been impugned. That, as his terms of employment by a public body were underpinned by statute, he might have remedies both in private and private law. The Court rejected that approach and held that his complaints were in private law only. They arose, if at all, purely from the alleged breach of his contract of employment. As the Health Authority had fulfilled its duty as to the incorporation of agreed terms in its statutory proceedings, then the applicant was seeking not to enforce a public law right but his private contractual rights under the contract of employment. Accordingly, the Court held that the application was an abuse of the process of the Court. Purchas LJ at p. 174 said:-

"The remedy sought by the applicant arose out of

the terms of his contract with the Authority. This much is clear, and further that there is no doubt that the term came into existence against a statutory background."

And at p. 178:-

"There is a danger of confusing the rights with appropriately remedies enjoyed by an employee arising out of a private contract of employment with a performance by a public body of the duties imposed upon it. The former are appropriate for private remedies, inter partes, whether by action in the High Court, or in the appropriate statutory tribunal. Whilst the latter are subject to the supervisory powers of the Court under R.S.C. Ord. 53. This distinction was emphasised by both Lord Fraser of Tullybelton an Lord Wilberforce in ***Daivy v. Spelthorne Borough Council*** ***[1984] App. Case. 262.***"

In R. ***v. The Lord Chancellor's Department Ex parte Nangle*** p ***897*** ***[1992] 1 All. E.R.*** a junior civil servant employed without limitation of time, but subject to defined periods of notice, was alleged to have sexually harrassed a fellow employee; a departmental investigation had resulted in his transfer to another department and it was ordered that he should forfeit the loss of twelve months increments. On appeal to the the Permanent Secretary of the Department, the loss of increment was reduced to three months but the other order confirmed. He applied for judicial review was but met with the objection that the conduct of disciplinary proceedings, in relation to Crown servants, was not a matter of public law and therefore not susceptible to judicial review. He was employed under a contract of employment, and his remedy was therefore by writ action for breach of contract. Even if he was not employed under a contract, there was no sufficient public law interest in the dispute to justify judicial review. Stewart-Smith LJ said:-

> " Is the applicant employed by the Crown under a contract of service? If he is, it is accepted by Mr. Eldred Tabachnik Q.C on his behalf that the had no remedy in public law. The case is indistinguishable from ex parte Walsh."

(I put that precise question to counsel for the applicant in these proceedings and received a reply similar to that given by Mr. Tabachnik, although an attempt was made to distinguish the matter which I reject).

The Court went on to dismiss the applicant's claim for judicial review, pointing out to him his alternative remedy before the industrial tribunal. The facts of that matter and the decision arrived at by the Divisional Court are of great assistance to me in deciding the case before me.

The most relevant recent authority is:-

R v. C.P.S. ex parte Hogg [1994] ALR 778 a Barrister employed by the Crown Prosecution Service, was dismissed by the Chief Crown Prosecutor for his area. The dismissal was confirmed by the D.P.P. The Court of Appeal in England upheld the decision of the High Court. The Court considered the dicta of Woolf LJ (as he then was) in ***McLaren v. The Home Office [1990] ICR 824*** as to when Crown servants might proceed by way of judicial review and considered that those dicta were "for guidance only". I find that none of those dicta assist the applicant in the instant case. The attempt to implant into the case a public law right by suggestions that the independence of judgment by employees of the

C.P.S. was being impugned was rejected by the Court. It was a pure matter of alleged breach of contract despite his claim that disciplinary procedures had not been followed. The "statutory underpinning" of the application created no public right. It is clear therefore there is a well established line of authority for the rejection of applications for judicial review in cases such as this one.

16. I have already found that the agreement dated 22nd July 1991 constituted a contract of service: its termination under Clause 3 therefore, involved no public law right susceptible to judicial review even though the employment arising from it had "statutory underpinning". In the application for judicial review the applicant has sought damages for breach of contract. In my judgment he should pursue that claim, if he wishes to do so, by writ, because the essence of that claim is a factual dispute between himself, his accusers and the Director of the Law School. Such a dispute can only be resolved by hearing the witnesses after the delivery of pleadings, the answer to requests for particulars and meticulous and full disclosure of all relevant documents. In ***Roy v. The Kensington & Chelsea SPC [1992] A.C.***

Lord Lowry said at page 646-647:-

"I draw attention to that affidavit because at least it can be said, having regard to the contents of the affidavit that the present application is one which is unsuitable for disposal on an application for judicial review - unsuitable because it clearly involves a conflict of fact and a conflict of evidence which would require investigation and would involve discovery and cross-examination. Cross-examination and discovery can take place on applications for judicial review, but in the ordinary way judicial review is designed to deal with matters which can be resolved without resorting to those procedures."

Discovery is not available on applications for judicial review under the Grand Court Rules.

17. It is further to be noted that the applicant has brought proceedings for defamation against the Director of the Law School. The defamation alleged arises out of the Director's dealings with the various allegations

made to him and by his passing them on to the Attorney General and the Permanent Secretary, Personnel. The defence to that action alleges absolute and/or qualified privilege. The applicant obviously faces considerably difficulties in succeeding in that cause of action, but it's eventual fate is not for me to decide at this stage. What is noteworthy however, is that very much the same issues and very much the same complaints will have to be dealt with in the defamation action as would be dealt with on a writ action for breach of contract for wrongful dismissal. Mr. Darkoh is alive to that possibility as he claims damages for "humiliation" in the defamation proceedings. That is to say damages for the manner of his dismissal. Such damages would not be available to him on an action for wrongful dismissal.

18. I mention those matters only, as had I been satisfied that there was a sufficient public law interest to permit this application to proceed , I would in my discretion have refused it on the grounds that the real issues can only properly be determined in the defamation action, and the potential wrongful dismissal action. In the defamation action the Defendant alleges that the complaints were true, so that the truth of the allegations will have to be determined in those proceedings and/or in the

proceedings for wrongful dismissal. It may be that those actions can conveniently be tried together although I express no final view on the matter. What is clear, is that those matters could be not resolved in these proceedings. I wish to emphasise that my primary reason for the dismissal of these proceedings is that no public law right arises out of the contractual relationship between the applicant and the Cayman Islands Government.

19. Finally, I have been asked by Mr. Hellman, if I would permit the present proceedings for judicial review to be converted into a writ action, in the event that I were to dismiss the claim for judicial review. I declined to do so in view of the complex factual issues which will arise in that suit. Such matters will have to be pleaded in a proper manner, discovery effected and the relevant witnesses assembled. I therefore decline to give leave for an amendment in the form requested. I therefore dismiss the application for judicial review, with costs to be taxed in default of agreement.

15th September 1998

The Hon. Mr. Justice Graham
Judge of the Grand Court