5/9/08

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

CAUSE NO 303 OF 2008

IN THE MATTER OF THE COMPLAINTS COMMISSIONER LAW (2006 REVISION)

AND IN THE MATTER OF AN APPLICATION BY THE COMPLAINTS COMMISSIONER UNDER SECTION 11(6)

Appearances: Mr. Nigel Meeson Q.C. of Conyers Dill & Pearman for the Commissioner

Before: Hon. Justice Henderson

Heard: 28th August, 2008

GRAND COURT - CAYMAN ISLANDS

JUDGMENT

Does the Complaints Commissioner have jurisdiction to investigate complaints made against the Health Services Authority ("the HSA") by employees or former employees of the HSA? This question, which is submitted to me for determination under section 11(6) of the *Complaints Commissioner Law* (2006 Revision), depends upon the proper construction to be given to provisions of the *Labour Law* (2007 Revision) and the *Public Service Management Law* (2007 Revision) ("the PSML").

Analysis

The HSA was created in 2002 by the *Health Services Authority Law* of that year. It is a body corporate with its own board of directors. Section 15(1) of the *Health Services Authority Law* provides that "any public servant employed in any of the health care facilities" at the date the Law came into force was transformed, on that date, into an employee of the HSA "on the same terms and conditions as those applicable to him" in the past.

From time to time since 2002, employees of the HSA have sought and obtained redress for employment-related grievances by complaining to the Director of Labour under the *Labour Law*, 1987. That Law, in section 3(a), provides that "this Law shall not apply to the public service ...". The term "public service" has never been defined in the *Labour Law*. (The term is defined in section 50(1) of the Cayman Islands (Constitution) Order 1972 to mean: "the service of the Crown in a civil capacity in respect of the government of the islands.") From the creation of the HSA in 2002 until July 1st, 2006, the Director of Labour has accepted that HSA employees are not members of the "public service" and may therefore invoke their employment-related rights under the *Labour Law*: see letter of April 17, 2008 from Mr. Philip Scott, Acting

Director of Employment Relations, attached to the first affidavit of John Epp.

That position changed on July 31st, 2006. On that date, a revision of the *Public Service Management Law* (Law 19 of 2006) came into effect. Section 2 of that Law defines the term "public service" to mean "the civil service and employees of statutory authorities and government companies."

The Director of Labour, having received legal advice on the subject, has now taken the position that the quoted definition in the PSML "effectively prevents" HSA employees from seeking redress under the *Labour Law*: letter dated April 17, 2008 from Philip Scott, *ibid.*

There is an appeals process for employment-related grievances in the PSML (see section 54) but the process is available only to "a staff member or civil servant." Each of these terms is defined in section 2(1) of the PSML; a "staff member" means a civil servant, and a "civil servant" means a "person employed by the government." Employees of the HSA are employed by a statutory authority.

The definitions I have quoted from the PSML manifest a clear intention of the Legislative Assembly to distinguish between public servants (a term which includes employees of a statutory authority) and civil servants (a term which does not). The appeals process under the PSML is unavailable to employees of statutory authorities, and this was intended.

If the Acting Director of Employment Relations is correct in his current view of the *Labour Law*, employees of the HSA (and other statutory authorities) with employment-related grievances have nowhere to turn. By its terms, the PSML procedure is unavailable to them. The Acting Director of Employment Relations considers that he no longer has jurisdiction. It is in this context that the Complaints Commissioner asks if he may exercise his jurisdiction with respect to such a complaint. He is prevented by section 11(2)(a) of the *Complaints Commissioner Law* from taking any action if the employee has a right of appeal to any tribunal; if there is no such right of appeal, the Commissioner may feel some degree of obligation to make the facility of his office available.

There is nothing in the PSML of 2006 which suggests an intention on the part of the Legislative Assembly to remove from HSA employees the important procedural right (the right of appeal under the *Labour Law*) which they enjoyed up to that point. Nor is there any reason to think that

the Legislative Assembly, while providing carefully for the right of appeal for government employees (civil servants), intended their counterparts working for statutory authorities to have no such right. No public policy rationale has been suggested for such a change. Given the significance to the individual employee of the right of appeal under the *Labour Law*, I would be reluctant to construe that Law as having extinguished the right except in the face of clear and explicit language in the legislation. Nothing of the sort is present here.

It seems that the Acting Director of Employment Relations and his legal advisors have proceeded on the assumption that the phrase "public service" in section 3 of the *Labour Law* must be given the same meaning as is assigned to it in section 2(1) of the PSML. Moreover, they appear to have concluded that the meaning of the phrase in the *Labour Law* changed radically on the day the PSML definition came into effect.

Neither assumption is correct. Although it is permissible, when construing the meaning of a phrase in a particular statute, to look at the definition of that phrase assigned to it in some other statute, the latter is only a weak aid to construction at best. The law is replete with examples of words and phrases which are used in different ways in different contexts. There is no compelling reason to adopt a definition found in the

PSML when construing an undefined phrase in the *Labour Law*. This is especially true when such an adoption would serve to extinguish an existing right. It has always been open to the Legislative Assembly to define the phrase "public service" in the *Labour Law* so as to exclude employees of statutory authorities. It has not done so. Unless and until such a definition is enacted, the phrase should be construed in a manner consonant with the existing rights of HSA employees.

Conclusion

I find that employees of the HSA are not engaged in "the public service" within the meaning of section 3(a) of the *Labour Law* and may therefore invoke the complaint procedure found there. As there is an existing remedy, it follows that the Complaints Commissioner has no jurisdiction to investigate such a complaint and the question posed at the outset should be answered in the negative.

Dated this 5th day of September, 2008

Henderson, J.

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Judge of the Grand Court