ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

ANUHCV Claim No. 2004/0306

BETWEEN:

NATASHA FRANCIS

Claimant

And

NEIL COCHRANE
SONYA ROBERTS
DORNALYN BEAZER
ATTORNEY GENERAL OF ANTIGUA AND BARBUDA

Defendants

Appearances:

Arthur Thomas for the Claimant
Sydney Christian and Jason Martin for the First to Third Defendants
Ann Henry for the Attorney General

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2004: July 29th 30th August 27th
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JUDGMENT

[1] Joseph-Olivetti J: This issue concerns the continuation of an injunction which was granted ex parte by me on the afternoon of the 26th July 2004 and made returnable at 1:30pm on the 29th July, 2004. I gave an oral judgment on the 30th July but because of the importance of some of the procedural issues raised indicated that I would give a written judgment and I now do so.

[2] Natasha Francis is a young Antiguan calypsonian and like all artistes, especially those of that genre, she is passionate about her art. She qualified for a place in the finals of both the Female Calypso Competition and the Calypso Monarch Competition, both national events and integral parts of the carnival festival currently taking place in Antigua under the auspices of the Carnival Development Committee ("the CDC"). Her singing sobriquet is "Nattie Francis". Ms. Francis is aggrieved by the CDC's decision to exclude her from participating in the finals.

[3] The first three Defendants are members of the CDC and are sued in that capacity. The 4th Defendant is the Attorney-General joined nominally as the representative of the State as the CDC can loosely be called a public body having been established by the Minister responsible for Health, Sports and Carnival Affairs to manage the festival.

[4] By Rule 6 of the rules of the calypso competitions promulgated by the CDC, which all persons taking part including Ms. Francis were made aware of prior to them entering the competitions, participants were not allowed to sing songs other than new and original songs which were not performed in public before with one exception in respect of the contestant from Barbuda which is not applicable.

[5] Ms. Francis alleged that she learnt via Observer Radio, a popular, local broadcasting station, that the originality of her song "Child Maintenance" which she sang at both qualifying events was being challenged. Subsequently, the CDC notified her by telephone that the song was not an original song and asked her to disqualify herself. The CDC refused to give her full particulars of the allegations and denied her an opportunity to make any explanations. Being understandably aggrieved at the CDC's actions Ms. Francis brought these proceedings. She sought and obtained an ex parte injunction from me to restrain the CDC from preventing her from singing in the finals of both contests.

[6] The finals of the Female Calypso Contest was held on the night of the 26th July and in obedience to the court's order the CDC did not prevent Ms Francis from participating. She did so but not place. The finals of the Calypso Monarch contest is to be held next Sunday, 2nd August.

[7] The CDC filed several affidavits in opposition to the continuation of the injunction. The main facts as alleged by Ms. Francis were not in dispute and therefore deponents were not cross-examined. Only legal issues were raised.

[8] I shall first consider Counsel for Ms Francis' submissions in support of the continuation of the injunction. He based the trust of his argument on the allegation that there was a breach of the principles of natural justice by the C DC. This was the very basis on which the injunction had been granted in the first place. That allegation has not been refuted by the CDC as it admitted in the affidavits filed on its behalf that it arrived at the decision to exclude Ms Francis from the finals without giving her a hearing or formally advising her of its decision. Counsel relied on several cases which illustrate the circumstances in which the courts will impose a duty to follow the rules of natural justice. Among them were the cases of Nagle v. Felden [1966] 2. Q. B. 633, in which the court ordered the stewards of the Jockey Club which exercised a monopoly on flat racing in England to grant a trainer's licence to the plaintiff as its practice of refusing to license women trainers was against public policy as it deprived women of the right to work and A.G. of Hong Kong v. Ng Yuen Shiu [1983] 2 All ER 346 in which the Privy Council held that an immigration officer had a duty to grant a fair hearing to an illegal immigrant before his removal as he had a legitimate or reasonable expectation to be accorded such a hearing. Counsel invited the court to follow the principles enunciated in those cases as Ms. Francis had a legitimate expectation to be heard prior to any decision being taken as her right to work was affected and that the CDC's denial of a hearing deprived her of an opportunity to participate in the competitions and thus a chance to earn the prizes.

[9] The arguments on behalf of the CDC and the Attorney-General were presented by their individual counsel. However, I shall not treat them separately as they cover the same grounds namely objections to procedure and the same issues on the merits of the case.

[10] On the procedural ground the Defence submitted that the wrong procedure was employed in bringing the action and that it ought to be dismissed. That having regard to the relief claimed and to the fact that the action was instituted by Fixed Date Claim Form the action was in reality one for judicial review and was

governed by Part 56 CPR 2000 . That Rule 56(3) mandates that an applicant for judicial review must first obtain leave of the court and counsel for the Attorney-General queried whether leave had been obtained. I pause to say that on review of the record before me it is clear that no such leave was sought or granted.

[11] I note that counsel for Ms Francis did not attempt to refute the objections as to procedure. On review of the record the claim was commenced by Fixed Date Claim Form and that taken together with the allegations against the CDC and the nature of the relief sought leaves little doubt that the Defendants' submission that the claim is in reality one for judicial review and that Ms. Francis needed leave before she could begin the action must be upheld. I say this despite the inclusion in the Fixed Date Claim Form of a claim for damages for breach of contract as the substantive relief is for declarations that the CDC did not act in accordance with the rules of natural justice.

[12] I must digress somewhat to say that this case is a good example of the procedural difficulties which arise when one is seeking relief against a public body because of the distinct procedures mandated by Part 56 CPR2000 when one's remedies lie in public law rather than private law. This difficulty is referred to by De Smith, Woolf and Jowell Judicial Review of Administrative Action 5th edn. at para.3-055 page 186. "The area in which most difficulty has occurred in the courts as to the distinction between public and private law activities is in relation to employment by public bodies. It also illustrates vividly the problem which can arise because of the distinction between public and private law."

[13] And, Wade & Forsyth on Administrative Law 7th edition criticised trenchantly this procedural divide or the divorce of public and private law as they term it. I quote from page 682-"The rigid dichotomy which has been imposed, and which must now be explained must be accounted a serious setback for administrative law. It has caused many cases which on their merits might

have succeeded ,to fall merely because of choice of the wrong form of action. It is a step back towards the time of the old forms of actions, which were so deservedly buried in 1852. It has produced great uncertainty , which seems likely to continue, as to the boundary between public and private law since these terms have no clear or settled meaning……Procedural law, which caused very little difficulty before 1977 is now full of doubts and pitfalls. Nor are these in any way necessary as may be seen from a comparison of judicial review legislation practice in Scotland , Australia, New Zealand and Canada where procedural obstacles have been avoided".

[14] And his comments on the English case of O'Reilly v. Markham ([1983]2A.C.237 which highlighted the procedural difficulties caused by this divide at page 694 are thought provoking. He said: "…Lord Diplock"s speech was a brilliant judicial exploit, but it turned the law in the wrong direction, away from flexibility of procedure and towards a rigidity reminiscent of the bad old days of the forms of action a century and a half ago. The well-intentioned reforms of 1977 became a disaster area , a classic example of the remedy being worse than the disease. As Sir Michael Kerr has said in the Court of Appeal, our law "has suffered too much from the undesirable complexities of this over- legalistic procedural dichotomy."

[15] I trust that the development of our law would seek to avoid these pitfalls as not only litigants but the whole administration of justice will suffer if procedure is to be allowed to govern.

[16] What is the effect of this breach of procedure? Does it mean that the court must automatically dismiss the claim as is contended? Fortunately, I think not as the court always has a discretion whether or not it should dismiss a claim for procedural irregularity. This is clear from CPR2000 Rule 26 9(2) which provides that no irregularity shall nullify the proceedings; Part 1.2 which states that in exercising any discretion given by the Rules or in interpreting any rule the court must give effect to the overriding objective and to the overriding objective itself. I

am supported in this interpretation by CIVIL APPEAL NO.15 OF 2000 SAINT LUCIA FURNISHINGS LIMITED v. SAINT LUCIA CO-OPERATIVE BANK LIMITED FRANK MEYERS and KPMG (November 24th .2003) In that case Byron C.J. said -"The main concept in the overriding objective of the new rules set out in CPR Part 1.1 is the mandate to deal with cases justly. Shutting a litigant out through a technical breach of the rules will not always be consistent with this, because the Civil Courts are established primarily for deciding cases on their merits, not in rejecting them through procedural default." The court was of the view that striking out a claim purely for breach of procedure was a draconian response and one not in keeping with the overriding objective and went on to consider the merits of the case and did not decide solely on the basis of the procedural irregularity.

[17] I will willingly follow that lead and examine the merits of the case. The Defendants submitted, as is obvious, that the gravamen of Ms Francis' claim is that she was denied a fair hearing in accordance with the principles of natural justice and that such a complaint could only properly arise when one is reviewing administrative action. That the allegations made by her show that the claim arose out of an alleged breach of contract and not from the exercise of an administrative function and that CDC's actions were thus not administrative actions which would attract the court's powers of judicial review. Counsel relied primarily on the case of Regina v. East Berkshire Health Authority, Ex parte Walsh [1985]1Q.B. 152.

[18] The synopsis and commentary on the Walsh case at page 188 para. 3-060 of De Smith, Woolf and Jowell op cit. is useful both as to the facts of the case and the ratio. That case "concerned an application for judicial review by a nursing officer employed by the Health Authority under a contract which incorporated the Whitley Council agreement on conditions of service in the Health Service. The applicant contended that he was entitled to an order of certiorari because there had been a breach of the rules of natural justice in the procedure which led up to his dismissal. However, the court concluded that while the employee of a public body might have rights both

in public and private law , the present claim arose solely from a breach of the contract of employment and was therefore not the appropriate subject for an application for judicial review."

[19] And at para.3- 061 the learned authors explained - " Mr. Walsh's real complaint was that he had been dismissed in breach of contract. The fact that his employer was a public body required by statute to contract on terms which were negotiated as the result of particular statutory machinery did not affect the nature of his claim which remains one governed by private law. How the contract came into existence did not affect the subject matter of the dispute. On the other hand if conditions of employment, as in the case of the police and prison officers, are controlled by statute, the conditions may even be reviewable by way of judicial review".

[20] And at page 185 op.cit. the authors state in speaking of sporting bodies – "The Court of Appeal has since confirmed that judicial review is not available in cases where the applicants would be able to bring private law proceedings for breach of contract if his allegations were correct. See R. v. Disciplinary CDC of the Jockey Club ex p. H.H. The Agha Khan [1993]W.L.R.909." This is applicable by analogy although the CDC is not a sporting body.

[21] On consideration of the merits, I am of the opinion that the Defendants' submission that this matter is not a case for judicial review as it arises out of a contractual relationship between the parties and not as a result of an administrative action by a public body is correct. Yes, the CDC was appointed by the Minister to carry out a public function but not every act of a public body invites judicial review. The Walsh case governs. This means that the rules of natural justice are not applicable and therefore the substance of the claim as framed must go. If Ms Francis' reliance on a breach of natural justice falls what other serious triable issues remain which will persuade the court to allow her to pursue her claim by way of the ordinary claim form procedure ?

[22] I note that her counsel readily admitted that the lyrics of the song rendered by her are the same lyrics barring one word as those of the song allegedly sung by Miss Tara Holdip in Barbados. It is also very significant as pointed out by counsel for the Attorney- General that Ms Francis has remained silent about the originality of the song and having regard to the duty of an applicant for an exparte injunction to make full disclosure then one can only assume that she is not disputing the claim that the song is not an original one or she would have said so. If in fact this song is not an original then her chances of successfully bringing an action against the CDC for breach of contract are rather slim. I am therefore of the opinion that there is no serious issue to be tried which would warrant this court exercising its discretion in favour of Ms. Francis by giving her leave to amend her procedure.

[23] It was also correctly submitted on behalf of the Defendants in the alternative that if the court was not minded to dismiss the claim that the court had to consider the principles governing the grant of interim injunction as explained in the American Cyanamid case. Counsel argued that more harm would be caused to the CDC by continuing the injunction as Ms Francis was the one who had breached the contract and that the injunction would permit her to do something which was expressly disallowed by the contract as it would allow her to sing a song that was not an original and so give her an unfair advantage over other participants and also send the wrong message to contestants. Furthermore, that since Ms Francis was asked to withdraw from the finals CDC had contracted with two other persons to compete in her place and it would be prejudiced as if she were allowed to sing those two persons would effectively be prevented from participating and CDC would be in breach of their contracts. Therefore, it was argued the balance of convenience favoured CDC.

[24] It was also advanced that even if Ms Francis could establish a breach of contract any losses flowing therefrom could be easily quantifiable having regard to the provisions of the contract dealing with prizes or the rewards to be gained if she

participated. Thus any loss would be readily ascertainable and so damages would be an adequate remedy.

[25] Both these alternative arguments are well founded and could not be answered by Ms Francis.

[26] Accordingly, for the reasons given I am constrained to discharge the injunction and to dismiss both the application and the claim itself. The court has discretion on costs although normally costs follow the event. However I note that admirably the Defendants have not applied for costs and having regard to my poscript I make no order as to costs.

[27] By a way of postscript I must add that it is unfortunate that the CDC saw fit to act in the manner in which it did. Despite the fact that a contractual relationship existed between it and Ms. Francis its main and obvious function was of a public nature and that carried with it a high degree of accountability. Members of the public cannot be expected to repose their confidence in any body unless the procedures adopted by that body are seen to be fair, and can be subject to objective scrutiny. No prejudice would have been occasioned to the CDC if its members, no doubt all well-intentioned men and women, had written to Ms. Francis informing her of her alleged breach and that they were terminating the contract. I reject its claim that time did not permit it to write a letter when computers are so readily available and it had been able to make full investigations into the originality of the song before arriving at its decision to disqualify her. A letter would have been more than appropriate having Ms Francis hear of its decision via the media. It would not have gone amiss either if they had given her a copy of the CD, which they volunteered to make available to the court. This young artist's aspirations have no doubt being damaged by this unfortunate litigation which she felt constrained to pursue and the pity of it is that it could have been so easily avoided by more responsible action by the CDC. I trust that Ms. Francis' spirits are not unduly daunted and that she will continue with her chosen path.

Rita Joseph-Olivetti
High Court Judge