

BRITISH VIRGIN ISLANDS

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim No. BVIHCV2007/0001

IN THE MATTER OF THE BRITISH VIRGIN ISLANDS ELECTRICITY ACT, CAP 277 OF THE
LAWS OF THE BRITISH VIRGIN ISLANDS REVISED EDITION 1991

IN THE MATTER OF A DECISION OF THE BRITISH VIRGIN ISLANDS ELECTRICITY
CORPORATION APPEAL TRIBUNAL

AND IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN:

STEVE TURNBULL

Applicant

-and-

- (1) LEROY ABRAHAM
- (2) BRITISH VIRGIN ISLANDS ELECTRICITY
CORPORATION APPEAL TRIBUNAL
- (3) AUDLEY MADURO
- (4) NEIL SMITH
- (5) MACFRED WHEATLEY

Respondents

Appearances:

Ms. Anthea Smith of J.S. Archibald & Company for the Applicant

Mr. Paul Webster QC and Ms. Willa Liburd of O'Neal Webster for the Respondents

2007: May 04

2007: May 08, October 05

JUDGMENT

Introduction

[1] HARIPRASHAD-CHARLES J: On 8 May 2007, I dismissed the Applicant's claim for judicial review so far as it relates to paragraphs 3 to 5 of the Claim Form. I also awarded

costs of \$3,500 to the Respondents. Concurrently, the Applicant applied to withdraw the remaining two paragraphs of the Claim. The application was granted. It was recently brought to my attention that the Applicant has appealed my decision. Although I delivered a lengthy oral judgment, I find it essential to reduce my oral reasons to writing.

[2] On 30 January 2007, the Applicant was granted leave to make a claim for judicial review. He now applies by way of Claim Form for the following relief:

1. a Declaration that his dismissal from his employment as the Deputy General Manager of the British Virgin Islands Electricity Corporation ("the Corporation") by the decision and letter of Leroy Abraham ("the First Respondent") dated 31 August 2004 was *ultra vires*; and that as a result, all subsequent proceedings relating thereto by way of a Formal Hearing, Internal Appeal and External Appeal are null, void and of no effect;
2. an Order quashing the decision of the First Respondent to dismiss the Applicant from his employment;
3. a Declaration that the Internal Appeal and the External Appeal processes were carried out in breach of the rules of natural justice;
4. a Declaration that the First Respondent was not a fit and proper person to conduct the Internal Appeal to the Corporation of the decision given in relation to the said Formal Hearing;
5. an Order quashing the decision of the Second, Third, Fourth and Fifth Respondents in their letter dated 9 March 2006.

[3] The Application for judicial review was set for hearing on 4 May 2007. On that day, Learned Queen's Counsel, Mr. Webster appearing for the Respondents took a preliminary objection. The gist of his objection is that the declarations sought in paragraphs 3 to 5 of the Claim Form are matters of private law that are not reviewable by public law

proceedings. Before I focus on this objection, it is necessary to particularize some salient background facts.

The background facts

- [4] The Corporation is a statutory body established under section 3 of the British Virgin Islands Electricity Corporation Act, Cap. 277 of the Revised Laws of the Virgin Islands, 1991 (“the Act”). Its External Appeal Tribunal is a creature of statute created to hear and determine appeals from employees of the Corporation who are aggrieved by its decisions.¹ The Third, Fourth and Fifth Respondents are at all material times the three members comprising the External Appeal Tribunal.
- [5] The Applicant was employed as the Deputy General Manager of the Corporation up to 31 August 2004. The terms of his employment are set out in his letter of employment dated 26 September 2000². By letter dated 18 July 2004, the Corporation suspended him from duty pending a Formal Hearing into allegations of misconduct by him. The Formal Hearing was to be conducted in accordance with the Corporation’s Terms and Conditions of Employment³.
- [6] The Formal Hearing was held on 18 and 26 August 2004 respectively. The hearing was conducted by the First Respondent who was also the Acting General Manager of the Corporation; assisted by Ms. Nanda Persaud, Secretary of the Corporation. Mr. Paul Webster QC, Counsel for the Corporation advised and assisted the First Respondent.
- [7] By letter dated 31 August 2004,⁴ the First Respondent terminated the Applicant’s employment with the Corporation for misconduct in relation to his employment. In the penultimate paragraph of the letter, the First Respondent wrote:

¹ See section 11A of the British Virgin Islands Electricity Corporation Act, Cap. 277 of the Revised Laws of the Virgin Islands, 1991.

² See Exhibit “LA-1” attached to the First Affidavit of the First Respondent.

³ See Exhibit “LA-4” to the First Affidavit of the First Respondent.

⁴ Exhibit “ST-2” to the Applicant’s Affidavit.

"It is my decision that your misconduct leading up to the signing of the Shell Fuel Supply Contract is so serious as to clearly demonstrate that the employment relationship cannot reasonably be expected to continue and the Corporation cannot reasonably take any other action than to terminate your employment. Accordingly, your employment with the Corporation is terminated with immediate effect. You have the right to appeal this decision to the Corporation."

- [8] By letter dated 2 September 2004, the Applicant appealed the First Respondent's decision to the Corporation ("the Internal Appeal"). The Internal Appeal was heard on 5 October 2004. It was conducted by the First Respondent, Mr. Robin Gaul and Mr. Troy Christopher, Members of the Corporation. By letter dated 8 October 2004, the Internal Appeal upheld the First Respondent's decision to terminate the Applicant's services. In other words, the Applicant's appeal was dismissed.
- [9] By letter dated 18 October 2004, the Applicant appealed the decision of the Internal Appeal to the External Appeal Tribunal. By letter dated 2 November 2004, the Chairperson of the Corporation acknowledged receipt of the Applicant's letter of 18 October 2004 and informed him that they were in the process of forwarding all pertinent information regarding the matter to the members who comprise the External Appeal Tribunal and that he will be contacted in due course.
- [10] The Members of the External Appeal Tribunal were given copies of all the papers that had been used in the proceedings as well as transcripts of the two previous hearings, in order to carry out their deliberations. They did not hear the Applicant.
- [11] The External Appeal Tribunal delivered its decision some 20 months later on 9 March 2006. The reason for the inordinate delay is explained in the First Affirmation of the Fourth Respondent. It appears to be satisfactory and needs no further narration. The External Appeal Tribunal found that the termination of the Applicant's employment by the Corporation was unnecessarily harsh and unwarranted. It ordered either the Applicant be retired with full pension as if he had served for 25 years, or that he be transferred to

another statutory body or to the civil service, and confirmed that "*of the two options, the second is preferred*".⁵

- [12] By letter dated 23 May 2006⁶, the Corporation advised the Applicant that it was willing to assist him with a transfer to another statutory body or the civil service, as recommended by the External Appeal Tribunal. The Corporation did not receive a response from the Applicant.
- [13] By letter dated 7 September 2006, the Applicant's solicitors wrote to the Chairman of the Corporation alleging that the Applicant's dismissal was unlawful and claiming salary from 1 September 2004 to the present together with all benefits and legal costs⁷. On 19 September 2006, the solicitors for the Corporation responded denying the unlawfulness of the Applicant's dismissal and his claim for salary and benefits.
- [14] The Applicant initiated these proceedings on 5 January 2007 seeking judicial review to quash the decisions of the Acting General Manager, the Internal Appeal and the External Appeal Tribunal.
- [15] The question to be decided is whether the Applicant's complaints give rise to any right to judicial review.

Whether judicial review is available?

(a) The Internal Appeal

- [16] Mr. Webster QC submitted that the Formal Procedure and the Internal Appeal are private law matters between the Corporation and its employees and are based entirely on contract and therefore, the decisions of the General Manager in those proceedings are not amenable to judicial review⁸. He also submitted that the Applicant had agreed by his

⁵ Exhibit "ST 9" to the Applicant's affidavit.

⁶ Exhibit "LA-7" to the First Affidavit of the First Respondent

⁷ Exhibit "LA-8" to the First Affidavit of the First Respondent

⁸ Halsbury's Laws of England 4th Edition Vol 1 (1) paragraph 64 Tab 2

contract of employment to these procedures and if he is aggrieved by their decision, he can sue for damages for breach of contract⁹.

[17] Learned Queen's Counsel alluded to the cases of **Francis v Chochrane et al**¹⁰, **Regina v East Berkshire Health Authority, Ex parte Walsh**¹¹, **Vidyodaya University of Ceylon and Others v Silva**¹² and **R v. British Broadcasting Corp, Ex parte Lavelle**¹³.

[18] Mr. Webster QC submitted that it is plain from the last two cases of **Vidyodaya University of Ceylon** and **Ex Parte Lavelle** that the presence of disciplinary procedures in the terms of employment does not make a difference. He also referred to **R. v Lord Chancellor's Department, Ex parte Nangle**¹⁴ where it was held that the applicant's claim was outside of the scope of judicial review. The Court found that the applicant's employment in the civil service was governed by private law, the disciplinary procedures established were consensual domestic proceedings, and the employer's failure to comply with these procedures which caused him loss gave the applicant the right to sue for breach of contract, but not to seek judicial review. The court concluded that the dismissal of the applicant was a matter of private law.

[19] Ms. Smith appearing as Learned Counsel for the Applicant did not forcefully challenge Mr. Webster's submissions. Indeed, she seemed to have subtly accepted that the Formal Procedure and the Internal Appeal are matters of private law. Her bone of contention is that the External Appeal Tribunal is an independent statutory body amenable to judicial review.¹⁵

[20] For my part, I agree with Mr. Webster that the decision of the Formal Procedure and the Internal Appeal are not amenable to judicial review as they involve matters of private law rights and not public law rights. A distinction can be drawn between the internal procedure

⁹ **R v Lord Chancellor's Department Ex parte Nangle** [1992] 1 All E.R. 897 - Tab 3

¹⁰ ANUHCv No. 2004/0306 (Unreported) - Tab 4

¹¹ [1985] Q.B. 152.

¹² [1964] 3 All ER 865

¹³ [1983] 1 All ER 241.

¹⁴ [1992] 1 All ER 897.

¹⁵ See Paragraph 26 et seq.

in this case and that which obtains in England and Wales in respect of the internal procedures for prison officers. In **R v Secretary of State for the Home Department, Ex parte Benwell**¹⁶ the Applicant's employment was governed by the code of discipline for prison officers approved under r 84 of the Prison Rules 1964 made under s 47 of the Prison Act 1952. The code of discipline listed offences against discipline and the punishments which might be inflicted, the most severe being dismissal from the prison service. The code also laid down the procedure for dealing with disciplinary charges. The Court held that since the applicant's employment as a prison officer was governed by the code of discipline which derived its authority from statute and since the Secretary of State had a duty to apply the code when deciding whether to dismiss a prison officer, the Secretary of State had been required to perform a duty imposed on him as part of the statutory terms under which he had exercised his disciplinary power when he dismissed the applicant and that imported a sufficient public law element into the applicant's dismissal to give him the right to apply for judicial review of the Secretary of State's decision.

[21] Hodgson J. drew the distinction between that case and **Walsh's** case and stated: (at page 867):

"It seems to me that the reason why the Court of Appeal came to the conclusion it did in *Ex parte Walsh* was that the disciplinary procedures in s XXXIV of the Whitley Council agreement were incorporated into the contract of service and that it was this incorporation which deprived the procedures and compliance with them of any possible public law character."

[22] I am the considered opinion that the present case is similar to **Ex parte Walsh** and dissimilar to **Ex parte Benwell**. Here, the Applicant was employed pursuant to the terms of a private contract of employment. Paragraph 6 provides that the terms of his employment are in accordance with the Labour Code Ordinance 1975 and the Corporation's Terms and Conditions of Employment. Disciplinary Procedure is contained in Clause 10 of the Terms and Conditions. Clause 10.3 empowers the General Manager to

¹⁶ [1984] 3 All ER 854

conduct a formal hearing whenever he is of the opinion that an employee has been guilty of serious misconduct.

[23] The Internal Appeal to the Corporation is established by Clauses 10.6 and 10.7 respectively of the Terms and Conditions. It gives the employee the right to appeal to the Corporation against the decision or penalty in the Formal Procedure. The contract of employment incorporated the Terms and Conditions which were not approved under any rules made under the Corporation's Ordinance.

[24] It follows therefore that the incorporation of the Terms and Conditions into the contract of employment deprived the Applicant of any public law rights and only allowed him to acquire private law rights.

[25] The fact of employment by a public body does not *per se* mean that public law remedies are available. Such remedies would only apply where there are special statutory restrictions on dismissal which underpins the employee's position.¹⁷ In this case, the Applicant is not seeking to enforce public law rights but private law rights under his contract of employment. No statutory restrictions exist. As a consequence, judicial review proceeding is inappropriate.

(b) External Appeal Tribunal

[26] I turn now to the External Appeal Tribunal. Mr. Webster QC succinctly submitted that the External Appeal Tribunal set up under the Act is not amenable to judicial review, as its functions arose purely out of the contract of employment between the Applicant and the Corporation. For that reason, the hearing of the Applicant's appeal by the External Appeal Tribunal was a procedure of a purely consensual and domestic character. He argued that the important factor is the function that the body or tribunal is performing; if it involves a public law element then judicial review is available but if it is reviewing a decision that relates to a private matter then judicial review is not available.

¹⁷ See Ex Parte Benwell.

[27] Learned Queen's Counsel next submitted that it is different if a statute gives an employee a right to a fair hearing before he is dismissed then this brings in public law rights. He asserted that this is the case in England where prison officers are dismissed. The decisions are subject to judicial review because statutory rights are incorporated into the contract of employment. He argued that although the Terms and Conditions import section 11A, the section does not stipulate the procedure to be followed, for example, each party must be given a fair hearing and therefore judicial review is not available. According to him, all that section 11A does is to set up the tribunal and this does not take it out of the realm of private law.

[28] Ms. Smith vehemently disagreed with the submissions of Learned Queen's Counsel. She pointed out that paragraph 1.2 of the Terms and Conditions reads "... the Terms and Conditions are subject to all applicable legislation". She argued that the External Appeal Tribunal is not a domestic or private tribunal but a totally independent statutory body set up to hear appeals from employees of the Corporation. Counsel opined that the Terms and Conditions endorse section 11A which gives the External Appeal Tribunal the authority to hear and determine from employees of the Corporation who are aggrieved by its decisions. She submitted that it also prescribes that the appeal shall be in writing and the decision of the appeal tribunal shall be a majority vote and shall be binding on the aggrieved employee and the Corporation.

[29] She next submitted that the cases cited by Mr. Webster are all inapposite because they deal with internal domestic tribunals and they did not address the issue of an independent external tribunal, for example, in **Lord Chancellor's Department, Ex Parte Nangle**, no issue arose of an external appeal tribunal. She relied heavily on **R v Civil Service Appeal Board, ex parte Bruce**¹⁸ which involved an independent appeal board that was set up to hear appeals from the employees of the department. She stated that the Court of Appeal held that it was amenable to judicial review. She relied on **Ex parte Nangle** where Stuart-Smith LJ distinguished **Ex parte Bruce**. At page 906(f), he said:

¹⁸ [1988] 3 All ER 686

"The CSAB [Civil Service Appeal Board] is an independent body set up under the prerogative. It has four functions (para 10125 of the code):

i. to decide whether a department's decision to retire an individual early or to dismiss is fair; (ii)....; (iii)....;(iv).....

Under para (i) it entertains appeals from the employer's decision in relation to certain matters. Its decision is not that of the employer. The applicant has no direct relationship with the CSAB; he has to invoke its jurisdiction by way of appeal. That is typically a body that is amenable to judicial review. The disciplinary proceedings within the department result directly from the employer/employee relationship and result in a decision of the employer."

[30] In addition, Learned Counsel placed great reliance on the judgment of Woolf LJ in **McLaren v The Home Office**¹⁹. At page 836, his Lordship said:

"There can however be situations where an employee of a public body can seek judicial review and obtain a remedy which would not be available to an employee in the private sector. This will arise where there exists some disciplinary or other body established under the prerogative or by statute to which the employer or employee is entitled or required to refer disputes affecting their relationship. The procedure of judicial review can then be appropriate because it has always been part of the role of the courts in public law proceedings to supervise inferior tribunals and the court in reviewing disciplinary proceedings is performing a similar function. As long as the 'tribunal' or other body has a sufficient public law element, which it almost invariably will have if the employer is the Crown, and it is not domestic or wholly informal, its proceedings and determination can be an appropriate subject for judicial review."

[31] Ms. Smith next submitted that the External Appeal Tribunal is an independent statutory body and its decision affected the rights of the Applicant and as a consequence, it is subject to the rules of natural justice and is not only a matter of private law. In support of this proposition Ms. Smith relied on **Halsbury Laws of England 4th Edition Volume I (1) para. 64**. This is what the Learned Authors had to say:

"Where any person or body exercises a power conferred by statute which affects the rights or legitimate expectations of citizens and is of a kind which the law requires to be exercised in accordance with the rules of natural justice, the court has jurisdiction to review the exercise of that power."

¹⁹ [1990] ICR 824 at 836.

[32] Ms. Smith argued that the present case raises issues that affect the employees generally as it affects the fairness of the Internal Appeal process whereby the General Manager is allowed to sit on the board and hear appeals from his decision. This, she said, was not dealt with by the External Appeal Board. She relied on **Ex Parte Nangle**. Stuart-Smith LJ had this to say (at page 908):

“Even in cases where there is a contract of employment involving a public body or the Crown the nature of the issue may be such that it affects many others or the wider public, such as for example questions of policy or interpretation of legal powers which will be justiciable in judicial review, subject only to the discretion to refuse it where an equally effective remedy lies in private law.”

[33] Learned Counsel submitted that in the instant case, the Applicant is aggrieved in that the First Respondent was part of the Internal Appeal hearing an appeal from his own decision and that he was never given an opportunity to be heard by the External Appeal Tribunal. Counsel also relied on the case of **In the Matter of an Application for Judicial Review Between British Virgin Islands Electricity Corporation and British Virgin Islands Electricity Corporation Appeal Tribunal and others**²⁰ (conveniently referred to as “**Turnbull No.1**”). This was a case where the Corporation itself sought judicial review of the decision of the External Appeal Tribunal and it was granted.

[34] All things considered, I am persuaded by the arguments advanced by Ms. Smith. I am of the firm view that the External Appeal Tribunal is an independent body set up to hear appeals from employees of the Corporation and as such, is amenable to judicial review. My view is fortified by two fundamental factors namely:

1. The External Appeal Tribunal is a statutory body set up to hear appeals from employees who are aggrieved by the decisions of the Corporation. By its very nature, it is exercising functions of a judicial character and as such, it is a public authority whose actions may call for the court’s intervention.

²⁰ BVIHCV2002/0179 –per Rawlins J [unreported \] –British Virgin Islands.

2. There is no contract between the Applicant and the External Appeal Board. There are no private law rights on which he can rely to require the External Appeal Tribunal to hear his appeal if it had refuses to do so. Similarly, there are no private law rights on which he can turn to if the External Appeal Tribunal has exercised its function improperly. The supervisory jurisdiction of the court is available to deal with these situations.

[35] Judicial support for my conclusion is the case of **Ex parte Bruce**. At page 701 in the judgment, after indicating that the Civil Service Appeal Board ("CSAB") was an independent body, Roch J said:

"In my judgment the board is a board or tribunal exercising functions of a judicial character and as such is a public or similar authority whose actions under its powers may call for the court's intervention.

The board was created by a minister of the Crown using the prerogative power of the Crown conferred on him by the 1982 Order in Council. It is, as the code states, an independent body set up to hear appeals by the servants of the Crown against decisions of the executive which affect those civil servants. The method of its creation and the functions it has to perform make the board totally different from an appeal body created by a large commercial corporation to hear appeals by its employees against decisions by the management of such a corporation to discipline or dismiss its employees.

There is no contract between the individual civil servant and the board, whatever may be the position between the civil servant and the Crown. If the board refused to entertain an appeal by an individual civil servant, there is no private right on which the civil servant could rely to require the board to hear his appeal from, for example, a decision to dismiss him or a decision to refuse him permission to participate in political activity or a decision by the Treasury to forfeit his superannuation benefits.

All three of the board's functions....relate to the fair and proper administration of the civil service. In the case of each function the issue could go beyond a simple dispute between the individual civil servant and the ministry in which he works, and involve the public interest that the civil service should be administered in a way which is free of political bias or other improper motive.....

I have no doubt that in the overwhelming majority of cases of dismissal or premature retirement, no infringement of public law right will arise. The present case is one such case. In such cases the court can and will in its discretion refuse an application for judicial review, if such application is made, and leave the civil

servant to his other remedies. That does not mean that the existence of the supervisory jurisdiction of the court should be denied. The application of the *Wednesbury* principles (see *Associated Provincial Picture Houses v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223) will ensure that the court's functions in relation to the board will not involve the court in substituting its own views for those of the board but will be strictly supervisory."

- [36] Further, I take comfort from the judgment of Rawlins J in **Turnbull No.1**²¹. In that case, Mr. Turnbull (the present Applicant) was offered the position of General Manager of the Corporation on an acting basis for a period of one year. The Corporation decided to revert him to his substantive post of Deputy General Manager. Mr. Turnbull appealed the decision and the External Appeal Tribunal heard the appeal. The majority was of the view that Mr. Turnbull had been dismissed from the position of General Manager and that the dismissal was procedurally incorrect. No preliminary objection was taken. Rawlins J. (as he then was) held that *locus standi* was not in issue. The Corporation, a public body and a creature of statute, stands to be adversely affected by the decision of the External Appeal Tribunal. The decision is of a public nature and as such, it was amenable to judicial review.
- [37] While it is true that in **Turnbull No. 1**, the Corporation had no other way of addressing the issue, it is mind-boggling to see how in that case, the Court decided that the External Appeal Tribunal was amenable to judicial review and in the present case, this court should find that the same tribunal is not. However, the dissimilarity between **Turnbull No. 1** and the present case lies in the fact that the Applicant here, has the alternative remedy of suing for damages in private law.
- [38] The law is that if an applicant has another remedy in private law, the court can and will in its discretion refuse an application for judicial review and leave the applicant to his other remedies. There is a contract of employment between the Applicant and the Corporation.²² If the Corporation has breached any of the terms of that contract then the Applicant would have acquired certain private law rights and remedies in damages for wrongful dismissal, compensation for unfair dismissal and an order for reinstatement or re-engagement

²¹ *supra*

²² Tab 5 of the Trial Bundle Exhibit LA1

against the Corporation. A breach of this contract is not a matter of “public law” and gives no administrative law remedies in respect of the Corporation. The Applicant has also claimed in his Claim Form for declaratory relief that the decision of the General Manager to dismiss him was ultra vires and therefore all subsequent proceedings are null and void and of no effect. It is therefore clear that the Applicant has other remedies available to him. In the exercise of my discretionary powers, I will refuse the relief of judicial review. The Applicant is at liberty to pursue the other remedies in private law which are available to him.

Conclusion

[39] In the premises, the declarations sought in paragraphs 3 to 5 of the Claim Form are dismissed with costs. The Court is prepared to hear Counsel right now with respect to the declarations sought in paragraphs 1 and 2 of the Claim Form.

[40] The erudition of Counsel on both sides is greatly appreciated by the Court.

Indra Hariprashad-Charles
High Court Judge