

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 224/2017

**BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MISS JUSTICE PHILLIPS JA
THE HON MISS JUSTICE WILLIAMS JA**

**BETWEEN CAREY BROWN APPLICANT
AND BOARD OF DIRECTORS OF JAMAICA ANTI-
DOPING COMMISSION (JADCO) RESPONDENT**

Hugh Wildman instructed by Hugh Wildman & Co for the applicant

Miss Althea Jarrett instructed by the Director of State Proceedings for the respondent

15 and 18 January 2018

MORRISON P

[1] On 15 December 2017, Anderson J ('the judge') denied the applicant permission to apply for judicial review to quash the respondent's decision to terminate his engagement as Executive Director. The judge also refused the applicant leave to appeal against his decision. The applicant therefore renews his application for leave to appeal in this court. In addition, the applicant seeks an injunction restraining the respondent from taking any steps to remove him as the duly appointed Executive Director pending the determination of the appeal.

[2] The applicant contends that, as a public officer appointed under section 125 of the Constitution of Jamaica ('the Constitution'), he can only be removed from office by the Governor-General on the recommendation of the Public Service Commission ('PSC') after a properly constituted hearing. The applicant also contends that the respondent's letter dated 11 September 2017 ('the termination letter') purporting to terminate his services is in breach of section 10(6) of the Anti-Doping in Sport Act, 2014 ('the Act') and is therefore null and void.

[3] Before the judge, as he also does before this court, the respondent maintained that the termination letter has not affected the applicant's status as a public officer and that, accordingly, no issue of public law arises on the application. The respondent therefore submits that the application does not reveal an arguable ground for judicial review with a realistic prospect of success.¹

[4] In order to understand how the rival contentions arise, it is necessary to give a brief history, based on the affidavits of the applicant², Mr Wildman³, Miss Jarrett⁴ and Mr Alexander Williams⁵, the respondent's chairman ('the chairman').

[5] By letter dated 19 April 2013, the Ministry of Youth and Culture ('the ministry') advised the applicant of his appointment to the position of Director, Corporate Planning

¹ It is common ground between the parties that this is the threshold test for the grant of permission to apply for judicial review: **Sharma v Brown-Antoine** [2006] UKPC 57.

² Sworn to on 8 January 2018 and filed in this court on 9 January 2018, exhibiting the affidavit of the applicant in support of the application for judicial review, which was sworn to on 29 September 2017

³ Sworn to and filed in this court on 18 December 2017

⁴ Sworn to and filed in this court on 19 December 2017

⁵ Sworn to and filed in the court below on 25 October 2017

and Performance Monitoring in the Strategic Policy and Monitoring Division of the ministry. The effective date of this appointment was 1 March 2013.

[6] By letter dated 22 November 2013, the applicant was advised by the ministry that approval had been granted for him to be seconded to the respondent as Executive Director for a period of one year in the first instance, with effect from 1 November 2013. The applicant duly took up this assignment.

[7] By email dated 18 November 2014, the then chairman of the respondent invited the ministry's cooperation with regard to the appointment of the applicant as Executive Director of the respondent. This invitation elicited an immediate response from the Permanent Secretary in the following terms:

"...

The request is received and noted. However ... [the applicant's] substantive post as Corporate Planner needs to be filled soonest as the Ministry is required to respond to continuing and emerging planning and performance reporting imperatives.

In addition, we are currently 'tying up' a post in another Ministry from which the person acting as Corporate Planner has come. As you may be aware, no appointment can be made to the post of Corporate Planner until [the applicant] is no longer attached to the post. This creates a recruitment and a retention challenge.

The MYC urgently needs a Corporate Planner on board and must begin the recruitment process. Whilst we understand the situation JADCO is seeking to address, the Ministry has to manage its needs. Consequently, I am unable to agree to any further extension of [the applicant's] secondment beyond January 31, 2015."

[8] By letter dated 4 December 2014, obviously following on from the Permanent Secretary's email, the then chairman of the respondent advised the applicant that his engagement as Executive Director would be extended for a further period of three months, that is, to 31 January 2015.

[9] By letter dated 26 January 2015, the respondent offered the applicant temporary employment as its Executive Director, with effect from 1 February 2015 until further notice. His temporary employment was stated to be terminable by one month's notice on either side. This offer was followed by a letter dated 12 March 2015, which advised the applicant that approval had been given for him to be appointed as Executive Director with effect from 1 February 2015.

[10] Next, in an email sent to the ministry on 11 June 2015, the respondent's Director, Human Resource Management & Administration urged the ministry to "expedite the necessary action to have [the applicant's] services transferred ... to allow for the continuation of his pensions [sic] rights".

[11] And, finally in this series of correspondence on the applicant's employment status, by letter dated 24 July 2015, the Chief Personnel Officer ('CPO') in the Office of the Services Commissions advised the Permanent Secretary in the ministry as follows:

"Please refer to your memorandum No. P/B 0033 dated 23rd March 2015, regarding the appointment of [the applicant], Director, Corporate Planning and Performance Management (GMG/SEG 3), Ministry of Youth and Culture, as Executive

Director (GMG/SEG 6) in the Jamaica Anti-Doping Commission, with effect from the **1st February 2015**.

In this connection, I am to advise that if [the applicant] is to be transferred to the Jamaica Anti-Doping Commission, the following must be taken into consideration:

- i. There must be provision in the Act for the transfer of a public officer to the organization by the Governor-General;
- ii. The officer must request that he be transferred under the terms of the Act;
- iii. The organization must be willing to recommend that he be transferred under the terms of the Act.

Additionally, recommendation for transfer should be submitted for consideration of the Public Service Commission.

Kindly indicate as to whether any further action will be taken in this matter."

[12] There is nothing in the papers with which we have been provided which indicates that any further action, as contemplated by the CPO's letter, was ever taken. However, it is clear that the applicant continued to function as Executive Director of the respondent right up to the date of the termination letter in late 2017. From time to time during this period, disputes arose between the applicant and the respondent's board of directors, in particular the chairman. It appears that it is these disputes which ultimately led to the respondent's issuing of the letter of termination.

[13] It seems to me that if, on the one hand, the letter of termination can be read as a purported termination of the applicant's appointment as a public officer, then cases

such as **Alfred McPherson v The Minister of Land and Environment**⁶ will unquestionably apply. That case makes it clear that, once a public servant is appointed by the Governor-General acting on the advice of the PSC under section 125(1) of the Constitution, that person can only be removed from office by the Governor-General acting on the advice of the PSC after due process has been followed. A failure to adhere to the constitutional procedures will in such circumstances give rise to an issue of public law, amenable to judicial review.⁷

[14] But if, on the other hand, the letter of termination falls to be interpreted as doing no more than bringing the applicant's relationship with the respondent to an end, then it is to cases such as **Charles Ganga-Singh v The Betting, Gaming and Lotteries Commission**⁸ that one must look for an answer. That case demonstrates that, in the case of a purely contractual relationship between employee and an employer, albeit one with a public sector connection, a purported dismissal will give rise to no issue of public law.

[15] In my view, this case plainly falls into the latter category. It is clear from the brief history which I have recited that the applicant remains the holder of a substantive

⁶ (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 85/2007, judgment delivered 18 December 2009; See also, among other authorities, **Fraser v Judicial & Legal Services Commission** [2008] UKPC 25, (2008) 73 WIR 175, **Panday v Judicial and Legal Services Commission** [2008] UKPC 52 and **Inniss v Attorney General of Saint Christopher and Nevis** [2008] UKPC 42, (2008) 73 WIR 187.

⁷ As was held in **Ministry of Finance and Planning and the Public Service et al v Viralee Latibeaudiere** [2014] JMCA Civ 22

⁸ Suit No M156/2002, judgment delivered 11 January 2005; see also **Eugennie Ebanks v Betting, Gaming and Lotteries Commission**, (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 97/2003, judgment delivered 20 December 2005.

appointment in the public service as Director, Corporate Planning and Performance Management in the ministry. The attempts to effect his transfer from the ministry to permanent employment with the respondent foundered in the wake of the indication by the CPO in her 24 July 2015 letter of the necessary preconditions to such a transfer. As it seems to me, the applicant's status as a public officer has in no wise been affected by the termination letter since, given the context in which it was written, that letter relates solely to the applicant's relationship with the respondent.

[16] This conclusion remains, in my view, completely unaffected by section 10(6) of the Act, upon which Mr Wildman placed heavy reliance. That subsection provides as follows:

"The Governor-General may, subject to such conditions as he may impose, approve the appointment of any officer in the service of the Government to any office with the Commission and any officer so appointed or while so employed, shall in relation to other rights as a public officer be treated as continuing in the service of the Government."

[17] There is absolutely nothing in this case to suggest that the Governor-General has at any time approved the appointment of the applicant to any office with the respondent. Indeed, as I have attempted to demonstrate, the evidence is to the contrary effect.

[18] In my view, therefore, the applicant has not shown enough to raise an arguable ground for judicial review with a realistic prospect of success. While it would obviously have been desirable for the judge to have provided even brief reasons in writing for his

decision, it is clear that the only issue before him was the one squarely placed before us on this application. That is, did the letter of termination purport to remove the applicant from his position as a public servant, as Mr Wildman contends, or was it limited in its reach to his position as Executive Director of the respondent, as Miss Jarrett submitted. It seems to me that, in these circumstances, given Miss Jarrett's statement on affidavit⁹ (supported by the applicant himself in his affidavit¹⁰), that the judge said, in refusing the application, that he accepted the respondent's submissions, there can be no room for doubt as to what were the reasons for the decision.

[19] I would therefore refuse the application for leave to appeal against the judge's decision. On the question of costs, by analogy to rule 56.15(5) of the Civil Procedure Rules 2002, which provides that, in general, "no order for costs may be made against an applicant for an administrative order unless the court considers that the applicant has acted unreasonably in making the application or in the conduct of the application", I would make no order as to costs.

PHILLIPS JA

[20] I have read in draft the judgment of the learned President. I agree with his reasoning and conclusion and have nothing further to add.

⁹ At para. 5

¹⁰ At para. 5 of the affidavit sworn to on 8 January 2018

P WILLIAMS JA

[21] I too have read the draft judgment of the learned President and agree with his reasoning and conclusion.

MORRISON P

ORDER

Application for leave to appeal refused. No order as to costs.