



[2016] JMSC CIV 83

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL

CLAIM NO. 2005 HCV 05369

BETWEEN	LOANA CARTY	CLAIMANT
AND	THE CHAIRMAN, PENWOOD HIGH SCHOOL'S BOARD OF MANAGEMENT C/O THE PRINCIPAL	1ST DEFENDANT
AND	THE ATTORNEY GENERAL	2ND DEFENDANT

IN OPEN COURT

**Mrs Angela Cousins-Robinson instructed by Mesdames Robinson & Clarke for
the Claimant**

**Ms Marlene Chisholm, Ms Lisa White and Mr Andre Moulton instructed by the
Director of State Proceedings for the 1st and 2nd Defendants**

January 12th, 13th and 14th 2015, May 24th 2016

**Employment Law – Labour law – Termination – Wrongful Dismissal – Can a
public servant seek private law remedies – Education Regulations – Employment
Contract**

PUSEY J

[1] Loana Carty (“Mrs. Carty”) made a living by moulding young minds at the Penwood High School (“Penwood”), a role that she had for almost three decades prior to 2004. Following particular incidents Mrs. Carty filed a number of court actions including this one. The previous actions include a criminal action in the

Resident Magistrate's Court, an application for an injunction, an application for judicial review and proceedings in the Court of Appeal.

- [2] According to Mrs. Carty's account it all began in 2001 when Austin Burrell ("Mr. Burrell"), the then Penwood principal, instituted a "stagger" system at the school. Mrs. Carty asserts that this system meant she worked many more hours than she normally would (up to nine contact hours instead of five). She complained about this system and sought advice from the Ministry of Education and the Jamaica Teacher's Association. At a meeting of January 24th 2002 certain concessions were made. It was agreed *inter alia* that Mr. Burrell needed to change his leadership style and Mrs. Carty agreed to work with the current time-table, at least for the duration of that school year if no change was possible before then.
- [3] Between 2001 and 2004, Mrs. Carty alleges that she discovered that several correspondence were placed on her file without her knowledge and in a manner which did not comply with the Code of Regulations. She wrote to Mr. Alden Brown, the Chairman of the Board, requesting a meeting to discuss the very matter. However, when the meeting was scheduled, and she made efforts to attend, she was told that her presence was not needed.
- [4] Matters came to a head on October 25th 2004 when, according to Ms Carty's account, she had an altercation with Mr Burrell about a meeting that he proposed to have with the Science teachers. The kerfuffle got out of hand and Mr. Burrell grabbed the Science lab keys out of her hand, shook her and brought her hands up to her neck, causing some contusion to her left arm and right hand. This incident was the subject of proceedings in the Magistrate's court, which has now been resolved and have no bearing on the claim herein.
- [5] The situation did not improve and Mrs Carty succesfully sought an injunction from this honourable court that restrained the Defendants from taking any action against her for ten (10) days. Mrs Carty exhibited a letter that she received dated February 9, 2007 from the then Chairman of the Board indicating that the

principal recommended that all charges against her be dropped and that she resume her duties.

[6] Thereafter, two meetings of the Board were held and the matter of Mrs. Carty's termination arose. At the June 18th 2007 meeting, the Board voted not to accept the recommendation of the personnel committee to dismiss Mrs Carty. The personnel committee later made a similar recommendation at a meeting held on December 3, 2007. At the Board meeting of January 14, 2008 the result was the opposite. The Board voted to accept the later recommendation of the personnel committee to terminate Mrs. Carty.

[7] Mrs. Carty alleges several breaches of the entire process. She claims that she was not invited to the first personnel committee meeting or meeting of the Board. She further alleges that where the second Board meeting is concerned, she was informed of this meeting only the day before, which is a breach of regulations and that she was not able to attend. She also alleges that there were issues with the voting process at this second meeting.

[8] Where the Defendant's are concerned, several letters have been exhibited (dating back to 1982) that have been written to Mrs. Carty complaining about her unpunctuality, absence and general conduct. In this regard they resist the claims that there was some conspiracy to terminate Mrs. Carty out of malice.

The Claim

[9] After several amendments, the claim before the court, in addition to interest, costs and attorneys costs is as follows:

1. *A Declaration that the Defendants have breached the Claimant's Contract of Employment.*
2. *Damages for wrongful dismissal*
3. *Unpaid Salary and Emoluments from February 2008 to present.*

4. Exemplary Damages

Legal Background

- [10] Throughout the progression of this matter it has been the position of the crown that this claim ought to have been properly brought by way of Judicial Review. As outlined above, this point was made on several occasions, and the matter even brought before the Court of Appeal for that very reason. The appellate tribunal held a disparate view.
- [11] The appellate court applied the principle in **Roy v Kensington and Chelsea and Westminster Family Practitioner Committee** [1992] 1 All ER 705, which at the headnote held in part:

Although an issue which depended exclusively on the existence of a purely public law right should as a general rule be determined in judicial review proceedings and not otherwise, a litigant asserting his entitlement to a subsisting private law right, whether by way of claim or defence was not barred from seeking to establish that right by action by the circumstance that the existence and extent of the private right asserted could incidentally involve the examination of a public law issue...

In his conclusion Brooks JA held:

The public law issues involved in Ms Carty's claim, based on her invoking the provisions of the Education Regulations, are very closely connected with her claim for damages for breach of contract. In the circumstances, her claim may fairly be said to fall within the exception to the rule that cases involving public law issues must be adjudicated upon in the context of judicial review. The appellants' Complaint about that aspect of Ms Carty's claim must, therefore, fail.

It is without doubt then that this matter may be properly adjudicated through private law, though Judicial Review is the usual avenue for these types of actions. The fact that this Court may properly adjudicate on the matter does not, of course, mean that Mrs Carty has a contract of employment that has been

breached. Instead it means that this Court may properly decide on this and other matters.

Central Issue

[12] There is really one main issue for consideration, which all else will turn on. This is whether Mrs Carty has an employment contract that makes her amenable to remedies under private law,(and notably where termination is concerned) or whether as a public servant, only public law remedies are appropriate in this context. Of course if it is found that Mrs Carty does not have such a contract, the claim must fail.

The Contract Issue

[13] A contract, undoubtedly, depends on the presence of certain elements. These include offer, acceptance, consideration (payment or benefit), an intention to create legal relations and the presence of contracting parties. It is also generally the case where employment contracts are concerned that there is a contract period.

[14] The Claimant submits that though she had never received what can be described as a written contract, there is, nevertheless, evidence of one. There are two documents in particular being relied on; firstly one titled “Penwood High School Job Description – Mrs Loana Carty,” secondly the Claimant’s pay slip from The Ministry of Education Youth and Culture. The Claimant also relies on The Education Act and the Teacher Appointment Form at Schedule C of the Act.

[15] If we examine the first document in question, the job description, it is immediately and clearly apparent that this document does not contain the elements of a contract. This document merely outlines the specific responsibilities that are delegated to the head of the science and mathematics department. It does not speak to the offer and acceptance of any position, nor to the other elements that

would be essential in forming a contract. The presence of the signatures of Mrs Carty, Mr Burrell and Mr Brown is irrelevant.

- [16] Reliance on the second document, the pay slip, does not take the case for a contract any further. The fact that one party is being paid by another or that there is good consideration does not *ipso facto* mean there is a contract. The presence of the other elements of a contract is still necessary.
- [17] The other document the Claimant relies on to ground a contract is the teacher appointment form found at Schedule C of The Education Act. This form, likewise, does not outline the elements of the purported contract. Instead it asks for information from the teacher to be appointed and tells how and when the salary is to be paid (the salary amount is not specified). It also points out that the appointment, and notably matters such as salary, discipline and termination are to be governed by the Regulations under the Education Act.
- [18] By virtue of these facts it is clear that the agreement between teachers and the government is not one of a private contractual nature but instead by operation of statute, and governed by statute.
- [19] Statutory appointment does not mean there can't also be a contract. It has been shown that a public servant can be employed under a private law contract. In **Alfred McPherson v The Minister of Land and Environment Claim No. HCV 1334 OF 2006 (unreported)**, Mr McPherson as a public servant by virtue of statutory appointment and also under contract. Through statutory appointment Mr McPherson was employed as Registrar of Titles, while at the same time his role as Director, Land Titles was contractual.

By contract dated July 7, 2003, the appellant, an attorney-at-law, was appointed Director, Land Titles in the National Land Agency (NLA) for a period of three years with effect from July 21, 2003... The appellant was subsequently appointed Registrar of Titles by warrant of the Governor General pursuant to section 4 of the

Registration of Titles Act (the RTA) with effect from July 21, 2003.(see para 2 and 3)

[20] Mrs Carty has not shown that her employment as a teacher was anything other than the usual teacher appointment governed by The Education Act and under the education regulations. The corollary being that like Mr McPherson, Mrs Carty held a statutory appointment yet unlike him, she did not also hold a contract position.

Wrongful Dismissal

[21] According to Halsburys's Laws of England, volume 16, 4th edition at paragraph 451:

A wrongful dismissal is a dismissal in breach of the relevant provision in the contract of employment relating to expiration of the term for which the employee is engaged. To entitle the employee to sue for damages two conditions must normally be fulfilled, namely:

- 1. The employee must have been engaged for a fixed period or for a period terminable by notice and dismissed either before the expiration of that fixed period or without the requisite notice, as the case may be; and*
- 2. His dismissal must have been wrongful, i.e. to say without sufficient cause to permit his employer to dismiss him summarily.*

[22] The importance of the presence of a contract of employment and the adherence to its terms was highlighted in **Lindon Brown v Jamaica Flour Mills Ltd. Claim No. CL2000/B199**

There may be cases where the contract of employment limits the grounds on which the employee may be dismissed or makes dismissal subject to a contractual condition of observing a particular procedure, in which case it may be argued that, on a proper construction of the contract, a dismissal for any extraneous reason or without observance of the procedure is a wrongful dismissal on that ground.

The theme here is that a wrongful dismissal is a breach of contract terms and does not apply in every employment arrangement, where other remedies may be prescribed.

[23] In **The Attorney General v Keith Lewis SCCA NO: 73/05**, the appellate court heard an appeal against an award of damages for wrongful dismissal granted to a crown servant. Panton JA asserted the following at paragraphs 22 and 23:

22. Now, it is settled beyond controversy that the Crown can terminate at pleasure the employment of any person in the public service unless in special cases where it is otherwise provided by law. See Inland Revenue Commissioners v Hambrook [1956] All ER 807. In the instant case, the Police Services Regulations (1961) sets out the procedure for dismissal. The Respondent was advised by Notice from the Commissioner of Police that he had seven (7) days within which to challenge the termination of his services but he failed to respond. In my view, he could have challenged the Commissioner's decision to dismiss him by instituting judicial review proceedings pursuant to the provisions of The Judicature (Civil Procedure Code) Law (Judicial Review) Rules, of 1998. In the circumstances, he would have been obliged to seek such a review within three (3) months of the date that he was effectively dismissed but he chose not to go by this route. In my judgment, he cannot circumvent the process by recourse to the common law.

23. The East Berkshire's case relied on by Mr. Equiano, is clearly distinguishable from the respondent's case. In that case the remedies sought by the applicant under judicial review arose solely out of a private right in contract between the applicant and the authority, and not upon some breach of public duty placed upon the authority under a statute.

[24] The ruling by the appellate court is quite instructive as it puts matters into perspective. While it is clear that a public servant may properly access private law remedies if it arises (such as if a tortious claim is made or if there are proper private law claims), this access is not wholesale. In the **Keith Lewis** case there

were other remedies that were more appropriate as the Public Services Regulations (1961) set out the procedure for dismissal. In Mrs Carty's case the procedure is set out in the Education Regulations.

The Education Regulations

[25] The remedies claimed by Mrs Carty seem to depend on a sort of hybrid approach. On one hand she requires private law remedies through wrongful dismissal and on the other had she wishes the Regulations (though they are statutory provisions), to be read by the court as the terms of her contract with the government. Though the court does not find favour with this approach, it is quite useful, in our ventilation of the matter, to highlight the applicable provisions in the Regulation as they highlight the avenue through which these sorts of issues are generally dealt.

[26] The matter of termination is dealt with at Sections 54 and 56 to 59 of the Education Regulations.

Section 54:

(1) Subject to paragraph (2). the employment of a teacher in a educational institution may be terminated-

(a) in the case of a teacher who holds a temporary, acting or provisional

appointment, by one month's notice given by either

the teacher or the Board and, where the employment is terminated

by the Board stating the reasons for the termination.

or by a payment to the teacher of a sum equal to one month's

salary in lieu of notice by the Board and such payment shall

be accompanied by a statement by the Board of the reasons

for the termination; and

*(b) in any other case by three months' notice given by either the
or teacher or the Board or by the payment to the teacher of a
sum equal to three months' salary in lieu of notice by the
Board.*

*(2) where the Board of any public educational institution intends
to terminate the employment of any teacher in that institution
other than a teacher employed on a provisional, temporary or
acting
basis for less than one year, the termination shall not have effect
unless
the procedure set out in regulations 56 to 59 are followed.*

*(3) The employment of a teacher may be terminated by the
Board or the teacher at any time without notice or payment of
salary,
as the case may be. if there is an agreement in writing between the
teacher and the Board to that effect.*

(4) A teacher-

*(a) who unilaterally terminates his appointment without due notice
to. or the consent of, the Board of a public educational institution;*

*(b) who fails to take up duty in a public educational institution in
violation of a written agreement, and without the consent of
the Board,*

shall be liable to be charged with professional misconduct.

Section 56:

Where the Board of a public educational institution receives a complaint in writing that the conduct of a teacher employed by the Board is of such that disciplinary action ought to be taken against the teacher, it shall, as soon as possible, refer the matter to its personnel committee for consideration pursuant to regulation 85.

Section 57:

(1) The personnel committee shall consider the complaint referred to it under regulation 56 and-

(a) if it finds that the complaint is trivial and that a hearing is unnecessary, report such finding to the Board forthwith; or

(b) if it finds that a hearing should be held, notify the complainant in writing of the date, time and place of the hearing and give written notice within a period of not less than fourteen days before such date to the person complained against of-

(i) the charge or charges in respect of which the hearing is proposed to be held;

(ii) the date, time and place of the hearing:

(iii) the penalties that may be imposed under the Regulations if the charges are proven against such person; and

(iv) the right of the person complained against and a friend or his attorney to appear and make representations to the committee at the hearing.

(2) A person complained against who intends to be represented at the hearing by an attorney-at-law, shall give written notice of such intention to the chairman or secretary of the Board, not less than

seven days before the date of the hearing, and the Board shall inform the complainant.

(3) If a person complained against fails to appear at the hearing and the committee is satisfied that notice of the hearing was given to that person in accordance with paragraph (1) (b), the Committee may, if it sees fit, conduct the hearing in the absence of that person.

(4) At the hearing-

(a) both parties shall be heard and be given opportunity to make representations;

(b) any party may call witnesses and produce documents in support of his case;

(c) the committee may, at the instance of any party or, if it sees fit, order that any documents in the possession of the other party be produced for the information of the committee;

(d) notes shall be taken of such representations as may be made or such evidence as may be given.

(5) The personnel committee shall report in writing to the Board not later than fourteen days after the date of the enquiry-

(a) that the allegations against the teacher have not been proved;

or

(b) that the charges against the teacher have been proved and may recommend-

(i) that he be admonished or censured; or

(ii) in the case of charges relating to a second or sub-sequent breach of discipline, that, subject to the approval of the Minister, a sum not exceeding fifty dollars be deducted from his salary; or

(iii) that he be demoted if he holds a post of special responsibility; or

(iv) that his appointment as a teacher with that public educational institution be terminated,

and the Board shall act on the recommendation as received from the personnel committee, or as varied and agreed at the discretion of the Board.

(6) The Board shall, within fourteen days after it has received the report of the personnel committee, give written notice containing details of its decision to the Minister and the teacher.

Section 58:

If a complaint about a teacher's conduct is not heard and a decision handed down within nine months of the lodging of the complaint the matter of the complaint shall lapse at the expiration of the period of nine months aforesaid.

Section 59:

Where on the completion of a hearing into the conduct of a teacher, the Board decides to terminate the appointment of such teacher, the Board shall as soon as possible thereafter submit to the

Ministry the minutes of the meeting at which the decision was taken together with a copy of the notice of termination of employment of the teacher.

Conclusion

[27] Mrs. Carty's employment as a teacher was not through a contractual arrangement but instead as a regular public servant. For this reason her contract could not have been breached as none existed. She also does not meet the requirements for wrongful dismissal, as she was not employed for a fixed period, neither was she terminable through notice. In order for Mrs. Carty to be

terminated the Education Regulations would have to be followed, to the extent that they are highlighted above. If they were not followed she would be required to seek the remedies provided by the Regulations and if necessary proceed to Judicial Review. It follows of course that if she does not have a private contract and was not wrongfully dismissed then her claim must fail. The duty of this court unlike a Judicial Review court is not to judge whether the procedure followed was according to the Regulations, but to see if the Claimant has proved her claim, and in this case she has failed to do so.

[28] This case is unfortunate as there may have been grounds to seek judicial review in the circumstances. The court cannot, however, take unto itself the judicial review powers especially in circumstances where opportunities for that avenue to be pursued have been refused.

Orders

The orders sought by the Claimant are refused.

Judgment for the Defendant with Costs to be taxed if not agreed.