[2023] JMSC Civ 219

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2023 CV 01806

BETWEEN	**JOY PATRICIA HARRISON**	**APPLICANT**
AND	**THE COUNCIL OF THE CARIBBEAN MARITIME UNIVERSITY**	**RESPONDENT**

IN CHAMBERS

Mr Douglas Leys, KC instructed by Hay & Johnson for the Applicant

Mrs Symone Mayhew, KC and Ms. Lesley-Ann Stewart instructed by Mayhew Law for the Respondent

Heard: September 20 & November 16, 2023

Application for leave for judicial review –Nature of the application for leave– Burden of Proof– Standard of Proof– Whether private law contract being pursued as public law matter – Whether impugned decision amenable to judicial review - Who is a public officer – Private law right derived from statute distinct from private law right derived from contract - Leave refused application to be treated as ordinary claim

WINT-BLAIR, J

[1] This is an application for leave to apply for judicial review. The applicant applies pursuant to the Caribbean Maritime University Act, 2017 ("the CMU Act") and the Caribbean Maritime Institute Act, Regulations. The application seeks: -

(i) "A Declaration that the Respondent is entitled to anniversary increments and pecuniary benefits inclusive of traveling allowance pursuant to the provisions of the CMU Act and her contract of employment;

(ii) A Declaration that the Respondent is acting ultra vires the provisions of the Act in denying the Claimant her just entitlements under the provisions of the Act and her contract of employment;

(iii) An order of Certiorari quashing the decision of the Respondent that the Applicant is not entitled to anniversary increments and other pecuniary benefits by way of email correspondence dated March 6, 2023

(iv) Costs of this Application to the Applicant

(v) The Court on the grant of leave will give such other consequential directions as may be deemed appropriate."

[2] The amended grounds in support of the application for leave are in summary: -

"*Illegality*

(i) The Respondent acted in breach of the provisions of the Act and the Staff Orders for the Public Service 2004 (the Staff Orders) when it denied the Applicant the anniversary increments to which the Applicant was entitled as the Interim Treasurer by way of its decision under the hand of the President in an email addressed to her dated March 6, 2023.

Irrationality

(ii) The Respondents actions in denying the Applicant her just benefits under the Act were arbitrary and irrational as the Respondent has not provided any reasonable explanation why the Applicant should be denied the benefits attached to the post "Interim" Treasurer under the Act when other persons holding posts under the Act were granted their benefits and entitlements

Procedural Impropriety

(iii) The Applicant was denied her legitimate expectations under the Act and the Staff Orders, as prior to the decision of the Respondent the Applicant was not given an opportunity to make representations[sic] why she was entitled to the said benefits (despite the previous assurance by the Respondent that she was so entitled), as well as non-compliance with the provisions of the Staff Orders which sets out the procedure when an Applicant is to be denied anniversary increments."

The Evidence

[3] The applicant is a Chartered Accountant and a Fellow of the Institute of Chartered Accountants Jamaica and a Fellow of the Association of Chartered Certified Accountants in the United Kingdom. She is the retired Campus Bursar of the University of the West Indies, St. Augustine, Trinidad and Tobago.

[4] The applicant was employed on contract as Interim Treasurer of the Caribbean Maritime University, ("CMU") for the period May 5, 2020, to January 2023. She is aggrieved that she has not been paid her annual salary increments as well as a non-taxable travelling allowance for the period 2022 to 2023.

[5] The respondent is the Council of the Caribbean Maritime University established by the Caribbean Maritime University Act, 2017 ("the CMU Act"), which repealed the Caribbean Maritime Institute Act. The University is a body corporate providing specialised education in Jamaica.

[6] In her affidavit[1] she deposes that her employment on contract as Interim Treasurer was to allow CMU to identify a suitably qualified person to undertake the office by way of a five-year contract. She was initially engaged on contract for two years with continuous subsequent renewals to January 31, 2023. She has exhibited three contracts of employment and deposes that she was a full-time employee.

[7] Her role as Interim Treasurer, was to head the Treasury as the Chief Financial Officer of the CMU. She performed functions relating to finance and investments as determined by the Council to whom she reported.

[8] The Treasurer is described in the CMU Act as an officer of the CMU. Cabinet approved her appointment as a member of the CMU Council for a three-year term. That appointment comes to an end on November 29, 2023. She exhibits the letter of appointment from the Minister of Education.

[9] The affiant deposed that her expertise and skills were required on special committees including the Audit and Finance Committee, the Human Resources Committee, the Pension Committee, the Procurement Committee, the Academic Board and the CMU Management team.

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[1] Filed June 5, 2023

[10] During the period of her employment, she was not paid the annual salary increment for the year ending May 7, 2021, to May 7, 2022. The first contract commenced on May 8, 2020.[2]

[11] The affiant deposed that she pursued the matter of the non-payment of the annual increment with the Director of Human Resources and received an email response on July 19, 2022, which said that:

> "…*increments by government standard are only granted to permanently appointed staff in their appointed posts or contract officers in established [posts,] however I have observed that CMU runs contrary to that standard regarding the award of increment[sic] to contract officers in temporary posts. As indicated in our conversation, it would appear from my observation, that payment[sic] is made to contract officer[sic] in unestablished post[sic] However, at this time, it is not my intention to oppose this practice per se. However, as soon as the Ministry of Finance approves a compensation plan for the University with salary scale etc. we will have to operate according to the policy. Please allow me to follow up with Mrs. A. Harriott concerning how we move ahead to make this submission for the payment of your 2.5% increment for which you may be due based on practice."*

[12] The applicant states that at no time was she appointed to the temporarily approved post of Vice President on a contract/gratuity basis as such a post does not exist in the CMU structure.

[13] The applicant avers that she wrote to the Ministry of Finance and received no reply. She then raised the matter with the President of the CMU by letter dated December 12, 2022. The President responded in an email dated March 6, 2023, stating:

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[2] Paragraph 10 of the applicant's affidavit filed on June 5, 2023

> "[*the applicant] was appointed as Interim Treasurer in 2020. In 2017, when the transition took place, Mr Devon Gardner became the Treasurer as he had held the position of Director of Finance prior to that. The post of Director of Finance was an established position under the Caribbean Maritime Institute. This entitled Mr Gardner despite being on contract to all the benefits associated with the established post as under government guidelines the position he formerly held was aligned to an established post. When the transition was made, Mr Gardner's benefits under the post of Director of Finance remained as a benefit could not be removed without it being replaced with an equivalent benefit. The position of Interim Treasurer is independent of the position of Director of Finance, an established post, therefore the applicant was not entitled to any benefit tied to the post of Director of Finance.*"

[14] The email ended by stating that the applicant would not be entitled to an incremental increase however, she was entitled to the payment of an accessory allowance and any government increase in salary for 2022, then estimated at 10%.

[15] The affiant deposes that all staff in established posts were new recruits after the transition and the old staff were all paid in increments. CMU sought permission from the Ministry of Finance and the Public Service to make the payments which were made. The payment of the increment is pursuant to established policies and regulations set by the Ministry of Finance and the Public Service and is paid across the board in the public sector. She deposes that on the repeal of the Caribbean Maritime Institute Act, all officers on the establishment were transitioned to the CMU to hold like offices and employment with the same tenure as far as was practicable. One Hundred and Thirty-nine posts (139) were transitioned to CMU, and all are entitled to salary increments.

[16] At the material time, the office of the Director of Finance and Accounts, an established post under the Caribbean Maritime Institute transitioned to the office of Treasurer. That post received annual salary increments.

[17] The affiant indicates that she is adversely affected by the decision of the President of CMU which is ultra vires and in violation of the provisions of the CMU Act and its repealed predecessor as well as all prescribed policies, standards, regulations, orders and rules applicable to the Ministry of Education as established by the Ministry of Finance.

[18] The applicant complains that she has not been paid annual increments of salary for May 7, 2021, and May 7, 2022. She further deposes that the respondent has breached the terms and conditions of her contract of employment by failing to pay the annual increments and the non-taxable travelling allowance for 2022-2023, the government-negotiated trade union increase estimated at ten percent of basic salary and any adjustment arising from the restructure of CMU and the new compensation plan.

[19] Finally, the affiant deposes that judicial review is the more cost-effective remedy, that the order for certiorari is the most appropriate remedy and that she has brought the application within time.

Submissions

The applicant

[20] Mr Leys, KC submitted that the test for judicial review was set out in the case of **Jamaica Public Service Co. Ltd v the Industrial Disputes Tribunal**[3] which is whether the applicant has an arguable case on its merits. There has been no undue delay and the applicant has locus standi. Mr Leys, KC further relies on **Cable and Wireless Jamaica Limited (t/a LIME) v Golding (Prime Minister and Minister for Information, Telecommunications and Special Projects) and the Fair**

[3] 2003 HCV 01742; October 27, 2003, per Sinclair-Haynes, J (as she then was)

Trading Commission,[4] R v Secretary of State for the Home Department ex parte Cheblak,[5] N(A Minor), Re an Application for Judicial Review[6] and Sharma v Brown-Antoine et al[7]

[21] Kings Counsel submits that the applicant's rights have been denied. The nomenclature being used to describe her post cannot be used to deny her the benefits to which she is entitled under the CMU Act. The central issue in this case is not the interpretation of the employment contract but whether or not the applicant was appointed as Treasurer within the meaning of the CMU Act. The employment contract is not the starting point in the analysis as it cannot determine her status under the Act and the rights associated with that status.

Illegality

[22] Mr Leys, KC submits that in arriving at his decision, the President misconstrued the provisions of the statute. A proper construction of section 6 of the CMU Act reveals that the power to appoint and employ persons on certain terms and conditions is vested in the Council of the University. This includes the power to appoint officers to the post of Treasurer, which is defined as an officer by section 2. The Treasurer, whether interim or otherwise enjoys a special status under the statute, in contradistinction to the other categories to which the typical master servant relationship applies. The post is established in section 5 of the First Schedule to the CMU Act. The Treasurer is an important functionary and is statutorily protected.

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[4] JM 2011 SC 119

[5] [1991] W.L.R.890

[6] [2004] NIQB 65

[7] (2006) 69 WIR 379

Once the applicant occupies that post then she is entitled to the protections afforded by the statute.

[23] The applicant was employed in the post of Treasurer for two years in what was a clear vacancy. It is submitted that there cannot be two standards, one for a Treasurer and another for an Interim Treasurer, as such an interpretation would lead to the creation of an underclass of Treasurers performing the function envisaged by the statute but who are compensated less than the prescribed salary. It is submitted that section 36 of the Interpretation Act, specifically section 36(2) applies.

[24] The court has to determine the power of the respondent under the statute to appoint someone to the post of Interim Treasurer. The applicant has been told that she never occupied the post of Treasurer and now needs certainty as to her status under the CMU Act.

[25] In determining the central issue which is the power of Council to make the appointment, the statement of the respondent that the applicant was engaged on contract and in a different post from the post of Treasurer is inconsistent with the post itself. As it is not in dispute that the applicant carried out the functions of Treasurer, the applicant contends that she could not have been acting in any other capacity. If she purported to act in another capacity as suggested by the respondent, then her appointment was ultra vires the statute. The use and abuse of power attracts the ultra vires doctrine in judicial review. King's Counsel relies on **Anisminic v Foreign Compensation Commission**[8] and **R v Hull University ex parte Page.**[9]

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[8] [1969] 2 A.C. 147

[9] [1991] 4 All E.R. 747

[26] It was submitted that before an examination and interpretation of the contract is conducted, its validity must first be established. The vires which brought the contract into being requires examination by the court which is a public law function, this underscores the need for judicial review and the declarations sought. If the contract is found to be valid then its terms will require interpretation. However, it is not the interpretation of the contract that is up for review, but the ability of CMU, a statutory corporation to enter into the contract that comes up for scrutiny.

[27] In the case of **Swann v The Attorney General of the Turks and Caicos Islands,**[10] Lord Neuberger said:

> *"There may be cases where it may be appropriate to permit public law issues to be raised essentially in what is a private law claim, but they are relatively exceptional. These occasions would normally be where the public law issues are of particular importance to the applicant or where they are or should be aired in the public interest. However there is no suggestion of either of those exceptional factors applying in this case."*

[28] The public law issues are of particular importance to the applicant and this is a matter that should be aired in the public interest given the nature of the respondent's operations. In purporting to act as it did by employing the applicant as Interim Treasurer, but failing to recognize her as the Treasurer by paying her entitlements as dictated by the CMU Act, was an abuse of its powers and illegal. On the evidence and on a proper construction of the Act, the respondent did not have the authority to withhold the increments and travelling allowance attached to the post of Treasurer which was lawfully occupied by the applicant.

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[10] [2009] UKPC 22

Irrationality

[29] The applicant relies on the previous submissions made in relation to the Act as evidence of the arbitrary nature of the respondent's actions. She relies on De Smith, Woolf and Jowell in Judicial Review of Administrative Action[11] for the principle that the rule of law above all, rests on the principle of legal certainty, along with the principle of equality or equal treatment without discrimination.

[30] The applicant contends that other employees were entitled to and received their annual increments. The Interim President and herself were denied these benefits. Her contract and all employee contracts are silent as to these increments. The basis for denial of the benefit was that she was not appointed as Treasurer. This was discriminatory given that she carried out the functions of the office under the CMU Act. She could not therefore be classified as "interim" as she was at all material times, the duly appointed Treasurer. Therefore, the classification interim is an irrelevant consideration and cannot be relied on to deny her the benefits due. In addition, the respondent has provided no reasonable explanation why the applicant should be denied the benefits attached to the post of Interim Treasurer under the CMU Act when other persons holding posts under the Act were granted their benefits. The reliance on her contract is wholly misconceived.

Procedural Impropriety

[31] The applicant contends that she was deprived of her legitimate expectation under the Act. In Wade & Forsyth on Administrative Law,[12] it states: *"Procedural expectations are protected simply by requiring that the promised procedure be followed. If the decision maker has promised to follow a particular procedure it will*

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[11] 5th ed. At para 13-025

[12] 10th ed, page 454

be held to that save in very exceptional circumstances – for instance where national security justifies a departure from the expected procedure."

Legitimate Expectations

[32] In the instant case, the applicant is seeking judicial review to protect her legitimate substantive and procedural expectations on the principle of **Council of Civil Service Unions v Minister for the Civil Service**[13] and **R v Devon CC ex parte Baker.**[14]

[33] It is submitted that her legitimate expectations were defeated by the respondent as demonstrated in the email from the Director of Human Resources which shows that the respondent was prepared to pay the applicant the annual increment. This was confirmed to be consistent with the practice at CMU. The figures were calculated and the increment was to be paid to the applicant as soon as the Ministry of Finance approved the compensation plan for the respondent. This practice aroused a legitimate expectation on the part of the applicant.

[34] The expectations held by the applicant were dashed when the Director of Human Resources reversed the decision that increments would not be paid. This position was reinforced by the President in his email response. The applicant was not given an opportunity to make representations on this issue before the decision was reversed in breach of her legitimate expectations.

[35] There are no alternate means of redress, judicial review is the most expeditious, just and appropriate remedy and is sought to declare the rights of the applicant under the Act. The applicant will suffer prejudice and loss if the remedy is not granted. The time limit for making the application has not been exceeded. There is

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[13] [1985] A.C. 374 at 408-409

[14] [1995] 1 All E.R. 3 at 88-89

no issue as to locus standi as the applicant is directly affected and has suffered loss and damage.

Submissions

Respondent

[36] It was submitted by Mrs Mayhew, KC that an applicant for leave must comply with Part 56 of the Civil Procedure Rules ("CPR") as well as pass the test of an arguable ground with a real prospect of success. The respondent relies on **Tyndall et al v Carey et al**[15]

[37] Kings Counsel for the respondent argues that the claim is not fit for judicial review as it is a thinly disguised attempt to negotiate a contract of employment after the fact with the aim of securing a salary increase with additional benefits which were neither negotiated nor agreed. The dispute between the parties is therefore one in contract law and not public law.

[38] Kings Counsel contends that it is well established that matters of salary for officers in the public service or statutory bodies are generally matters sounding in contract and are not appropriate for judicial review. The fact that a party may be a public officer does not necessarily mean that issues about remuneration become issues of public law subjecting the matter to judicial review. She relies on the case of **Swann v Attorney General of the Turks & Caicos Islands and Sykes v the Minister of National Security and Justice and the Attorney General of Jamaica**[16], **Sykes v Minister of National Security and Others**[17] as well as

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[15] Claim No. HCV00474 (unrep); February 12, 2010 at para 9

[16] (1993) 30 JLR 76

[17] Privy Council Appeals 25 and 26; October 26, 2000

Regina v Principal of the Norman Manley Law School ex parte Janet Mignott[18] **and Minister of National Security, & The Attorney General v Herbert Hamilton.**[19]

[39] Mrs Mayhew, KC submits that the instant case is even clearer than the facts set out in the authorities as the applicant is relying expressly on her contract and is therefore asserting a private law right while seeking a remedy by way of judicial review.

[40] The provisions of the CMU Act make the position of the applicant plain, in that section 6(1) provides that the Council shall appoint and employ inter alia at such remuneration and on such terms and conditions as it thinks fit. The First Schedule to the Act sets out the Charter of the University and the Second Schedule sets out the Statutes. Section 5 of the Charter provides that there shall be a Treasurer who shall be the Chief Financial Officer of the University. Statute IV provides that the Council shall appoint the Treasurer and that the terms of the office and its functions are as determined by the Council.

[41] The applicant like all staff, was engaged pursuant to section 6 of the Act on terms the Council deemed fit. Statute IV (3) makes it plain that the Treasurer is engaged on such terms as the Council deems fit.

[42] The status of the applicant as Interim Treasurer was meant to be a temporary appointment based on the inclusion of the word “interim” in the position at the time she was hired. This is also demonstrated by the short-term nature of the contracts.

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[18] Suit No. M-9 of 2002; May 17, 2002, Daye, J(Ag.) (as he then was)

[19] [2015] JMCA Civ 54

In the applicant's own affidavit, she admits that she was not intended to fill the post of Treasurer as she stated:[20]

> *"I was employed to CMU as interim treasurer allowing CMU to identify a suitably qualified person to undertake the office by way of a five year contract. I was engaged by way of an initial contract for a period of two years and continuous subsequent renewals to January 31 2023."*

[43] The applicant was not appointed to the post of Treasurer and accordingly the terms and conditions on which she was appointed as Interim Treasurer would have been deliberate and as the council deemed fit in the circumstances. One must therefore have regard to her contract for these terms.

[44] The express terms of the applicant's contract are clearly set out in the letters of employment which were signed by her indicating her acceptance and agreement of the terms therein. These letters make no reference to any benefits attaching to a post on the government establishment or a post on the establishment of the University's predecessor, the Caribbean Maritime Institute but instead set out in very clear terms the conditions of employment for the contract as Interim Treasurer. This was done in each case when the contract was extended, and the remuneration was as expressly stated in each letter to the applicant.

[45] This matter therefore is one in simple contract there is no public law issue arising and like the **Swann** and **Sykes** cases, leave to apply for judicial review should be denied. If there is a genuine dispute regarding the non-payment of remuneration in accordance with her contract of employment this matter should be by way of a private law claim.

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[20] At para 6 of the affidavit of the applicant

No merit in the alleged grounds for judicial review

[46] It is further contended that even if this were a case sounding in public law, there is no merit in the case so as to meet the threshold of a good and arguable case. The applicant states that there is a misunderstanding in respect of her entitlement to annual salary increments and other benefits. She bases this contention on the reasoning of the Director of Human Resources that she was not entitled to annual increments and other benefits as she was engaged on a contract /gratuity basis in a temporarily approved post. The applicant seeks to challenge this in her affidavit whereas this is in fact the case. She was engaged on a contract/gratuity basis in a different post from the post of Treasurer.

[47] Further, as the president sought to advise the applicant in his communication to her dated March 6, 2023:

> *"Your contract was approved by the Ministry of Finance and Public Service along with the contract for the Interim President. The position of Interim Treasurer is independent of the position of Director of Finance, an established position, so you would not have been entitled to any benefit tied to this position. Had Mr. Gardner joined the university in the position of Treasurer, he too would NOT have been entitled to incremental increases. It is by virtue of his initially held post, why his benefits carried forward when he transitioned to Treasurer."*

[48] The reasoning of the president is unassailable and is not irrational. The applicant was seeking annual salary increments and benefits based on what was paid to the person who held the post of Treasurer but who was also originally employed in the post of Director of Finance by the University's predecessor, the Caribbean Maritime Institute. When the Institute became the University, the positions, salaries and benefits paid to the then employees of the Institute were saved further to transitional provisions in section 20 of the CMU Act.

[49] The applicant was employed after the CMU Act was enacted. The transitional positions under the CMU Act therefore have no relevance to the disposal of this matter or the determination of the salary and benefits payable to her. She was

employed as Interim Treasurer, which is not the same as Treasurer, at a different time and on specific terms as determined by the Council which it evidenced by the letters of employment. The salary entitlement must therefore be as per contract with the CMU which made no reference to increments or other benefits that may have attached to a post and so these other benefits have not been agreed and cannot be employed by virtue of the functions which the applicant carried out.

[50] It was contended by Kings Counsel that the fallacy in the applicant's argument that she is entitled to additional benefits to include annual salary increments is demonstrated by the fact that for one of the years that she is claiming an increment, a fixed-term contract was concluded between herself and the University for a new, increased salary at the same time the alleged annual increment would have been payable namely May 2022. The contention is simply irrational.

[51] In summary, there is no basis in administrative law to look behind the contracts between the parties to determine the benefits that were paid to the applicant.

[52] In relation to the alleged procedural impropriety, there is none. The applicant did not lose any benefits during her contract. This is not a case where she was being denied something that she was entitled to at the start of her contract. As such, there is no issue of a right to be heard or other procedural irregularity before being denied a benefit.

[53] There is also no issue of any legitimate expectation. An issue can only arise where there has been some established policy or practice and a public authority is required to follow and apply that policy. In **Legal Officers Staff Association and Others v Attorney General and Minister of Finance and Planning**[21]**,** the court had occasion to consider the doctrine of legitimate expectation in the context of a

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[21] [2015] JMFC 3

dispute between legal officers employed to the government who were challenging a change in policy in determining their salary. In that case, the court determined that the legal officers had a legitimate expectation that their salaries would have been calculated by reference to the salary of the judiciary based on established policy and that there was no consultation before the policy change or justification for breaching the policy. The **LOSA** Case is plainly distinguishable from the present case.

[54] It is submitted that in the instant case there was a specific contract between the parties and so there can be no reliance on policy. In the **LOSA** case, the court made the observation that the legal officers did not have a contract for some time. Unlike those legal officers, the rights of the applicant must be determined based on her contract and cannot be based on policy. Further, the evidence discloses no promises made to the applicant upon which a legitimate expectation could arise. In these premises, it is submitted that the application for leave to apply for judicial review should be refused with costs to the respondent.

Issues

[55] The following issues arise for determination by the court

1. Whether the decision of the President of CMU is amenable to judicial review.

2. If the answer to issue number one is no, how should the court treat the matter before it.

Agreed Facts

[56] The applicant was employed on contract for a period of two years effective May 5, 2020. The contract was extended for three months from May 8, 2022, by letter dated May 16, 2022. The letter provided that the salary payable would be Ten Million Three Hundred and Ninety-Nine Thousand Nine Hundred and Ninety-Nine

Dollars ($10,399,999.00) per annum payable in equal monthly instalments. There was provision for a gratuity of 10% payable on the calculated salary subject to satisfactory job performance and evaluation.

[57] The contract was further extended for the period August 7, 2022 to January 31, 2023 by letter dated August 12, 2022. The remuneration payable was Ten Million Four Hundred Thousand Dollars ($10,400,000.00) per annum payable in instalments with the said gratuity.

[58] In all instances, the applicant signed the letter of employment confirming her agreement to the terms and conditions set out in them. There is no mention in any of these contracts of the applicant being appointed to a post in the public service.

[59] In denying the request for annual increments, the President of CMU indicated to the applicant that her contract was approved by the Ministry of Finance and the Public Service and that the position of Interim Treasurer was independent of the post of Director of Finance. The post of Director of Finance was an established position and she would not be entitled to benefits tied to that post. The applicant disputes this. She contends that she is entitled to the benefits accorded to the former post of Director of Finance whose post transitioned to that of Treasurer to include the annual salary increments and the travelling allowance payable to the holder of the post.

Judicial Review

[60] In **Tyndall et al v Carey**, Mangatal, J (as she then was) said:

> *"Judicial review is the process by which the courts exercise a supervisory jurisdiction in relation to inferior bodies or tribunals exercising judicial or quasi-judicial functions or certain administrative powers which affect the public. This is the process that allows the private citizen to approach the courts seeking redress against ultra vires or unlawful acts or conduct of the State, by public officers or authorities. By this process the courts have a discretion as to whether to uphold a challenge to decisions or proceedings of such bodies on the basis, broadly speaking of what may be termed grounds of illegality, irrationality and procedural impropriety. The court is*

> *not engaged on an analysis of the merits of the decisions themselves but rather is concerned with the process by which the proceedings were conducted and by which his decisions were arrived at."*

The nature of the application for leave

[61] Mangatal, J (as she then was) in the same case, made the following statement in relation to the nature of the application for leave which I adopt:

> *"It is important to have an understanding of the nature of the application for leave, which is what is before the court at this time. This is not an application that can determine the substantive issues raised by the applicant[s]. This application is simply one that seeks the court's permission [f]or[sic] leave to apply for judicial review. If that permission is granted, it is mandatory for the court to direct whether the grant of leave shall operate as a stay of the proceedings being challenged."*

[62] The learned judge set out this passage on the purpose of the requiring applicants to obtain leave:[22]

> *"The purpose of the requirement for permission is to eliminate at an early stage claims which are hopeless, frivolous or vexatious and to ensure that a claim only proceeds to a substantive hearing if the court is satisfied that there is a case fit for further consideration…Permission will be granted only where the court is satisfied that the papers disclose that there is an arguable case that a ground in seeking judicial review exists which merits full investigation at a full oral hearing with all the parties and all the relevant evidence."*

The test for leave

[63] The Privy Council case of **Sharma v Brown-Antoine[23]** sets out the test for leave which is that the court is to be satisfied that there is an arguable ground for judicial review having a realistic prospect of success not subject to a discretionary bar such

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[22] White Book, Civil Procedure 2007, paragraph 54.4.2 at page 1657

[23] (2006) WIR 379

as delay nor an alternative remedy. The court is to consider the nature and gravity of the issues to be argued. The test is to be applied with flexibility, which means that each case has to be determined on its own merit.

[64] The assessment of the court at the permission stage is not a trial and therefore does not require an in depth examination of the grounds, rather it requires that the court satisfy itself that there are grounds supported by evidence which demonstrates that there are arguable grounds for judicial review which have a realistic prospect of success. A case which does not meet these criteria is not one which would merit a substantive hearing.

[65] In the decision of **R v IDT ex parte Wray and Nephew Ltd**[24], Sykes J said:

> *"The point then is that leave for application for judicial review is no longer a perfunctory exercise which turns back hopeless cases alone. Cases without a realistic prospect of success are also turned away. The judges, regardless of the opinion of litigants, are required to make an assessment of whether leave should be granted in light of the new stated approach… (This) also means that an application cannot simply be dressed up in the correct formulation and hope to get by. An application cannot cast about expressions such as "ultra vires", "null and void", "erroneous in law", "unreasonable" without adducing in the required affidavit evidence making these conclusions arguable with a realistic prospect of success. These expressions are really conclusions."*

Burden of proof

[66] It is the applicant who bears the burden of demonstrating that she has filed the required grounds which demonstrate an arguable case with a realistic prospect of success.[25] The respondent has filed no affidavits in answer, and at this stage, it does not

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[24] 2009 HCV 04798 delivered on October 23, 2009, at paragraph 58

[25] Sharma v Brown-Antoine et al (2006) 69 WIR 379

have to disclose its entire case as it would at a substantive hearing. There can be no assumption on the part of the court that the facts or allegations put forward by the applicant are true, in order to decide whether there are arguable grounds with a realistic prospect of success.

The standard of proof

[67] The standard of proof in relation to arguability was set out by the English Court of Appeal in **R (on the application of AN v Mental Health Review Tribunal (Northern Region) and Others.**[26]

> *"… the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities."*
>
> *…*
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> *It is not enough that a case is potentially arguable; an applicant cannot plead potential arguability to justify the grant of leave to issue proceedings upon a speculative basis. Which it is hoped, the interlocutory processes of the court may strengthen. Matalulu v Director of Public Prosecutions [2003] 4 LRC 712 at 733.]*

Sufficient Interest

[68] I am satisfied that the criterion of sufficient interest has been met as the applicant is directly affected by the decision of the first respondent.

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[26] [2005] EWCA Civ 1605 at paragraph 62

Delay

[69] This application fulfils the requirements of Rule 56.6(1) of the CPR, in that has been made promptly, and in any event, within three months of the date when grounds for the application first arose.

The Legislative Framework

[70] The CMU Act was enacted on May 30, 2017. It repealed the Caribbean Maritime Institute Act and established and incorporated the CMU by way of section 3. Section 28 of the Interpretation Act applies to the University.

> *28.-(1) Subject to subsection (2) where an Act passed after the 1st April, 1968, contains words establishing, or providing for the establishment of, a body corporate and applying this section to that body those words shall operate*
>
> > *(a) to vest in that body when established-*
> >
> > > *(i) the power to sue in its corporate name;*
> > > *(ii) the power to enter into contracts in its corporate name, and to do so that, as regards third parties, the body shall be deemed to have the same power to make contracts as an individual has;*
> > > *(iii)…*
> > > *(iv)…*
> > > *(v) the right to regulate its own procedure and business; and*
> > > *(vi) the right to employ such staff as may be found necessary for the performance of its functions;*
> > >
> > > *(b) to make that body liable to be sued in its corporate name;*
> > > *(c)…*
> > > *(d)…*
> > > *(e)…*

[71] Section 4(2) of the CMU Act provides that the provisions of the University's Charter shall have effect as to the objects and functions respectively of the University to include its main offices, its members and its constituent parts.

[72] The Council of the University is established under the article 7 of its Charter. Pursuant to section 6 (1) of the CMU Act, the Council shall appoint and employ or may authorise the appointment and employment at such remuneration and on such terms and conditions as it thinks fit, all officers, academic administrative, technical ancillary and other staff of the University as it deems necessary for its purposes.

[73] Section 20 of the CMU Act contains the transitional provisions; the Caribbean Maritime Institute Act having been repealed by section 19. Under section 20 all employees holding office or serving under the former Caribbean Maritime Institute immediately before Charter Day shall from and after that day hold under the University the like respective offices and employment by the same tenure as far as is practicable on similar terms.

Discussion

[74] There is no evidence before this court that the applicant was an employee holding office or serving under the former Caribbean Maritime Institute immediately before or on Charter Day. The transitional provisions therefore do not apply to her. The applicant accepts that the transitional provisions apply to the post of Director of Finance and has set out in her affidavit, that her capacity was that of a full-time employee.

[75] It was raised in the email from the President that despite the former Director of Finance being employed as Treasurer on contract, he had occupied a post on the establishment and this meant that his benefits could not be removed.

[76] The President distinguished the two positions. The applicant was employed on contract and was not appointed to the public service. This is plainly different than the former Director of Finance who was so appointed. She would therefore not be entitled to the benefits of a public officer. She has failed to show the nexus between the post of Director of Finance, a public office, on the establishment of the former Institute in the government service which transitioned to the office of Treasurer and the post of Interim Treasurer established by way of a fixed term contract; where the

entitlements enjoyed by members of the public service are concerned. It has not been shown how the performance of the role or job function can marry the two, given this divergence. The contract does not contain terms to the effect that the post of Interim Treasurer will attract the benefits of the former post of Director of Finance. This failure to establish by evidence that which has been submitted to be an equivalence in the posts is made even more apparent given the clear words of section 6(3) of the CMU Act which provides:

> *"6-(3) The Governor General may, on the recommendation of the Public Services Commission, and subject to such conditions as the Public Service Commission may recommend, approve the appointment of any public officer in the service of the Government to any office within the University, and any public officer so appointed shall, while so employed, in relation to any pension, gratuity or other allowance and in relation to any other rights as a public officer, be treated as continuing in the service of the Government."*

[77] The applicant was not formerly employed within the public service such that she could have been appointed to the office of Treasurer and be treated as continuing in the public service and while so employed, maintain the benefits of being in the public office. Her case is therefore distinct from that of the Director of Finance.

[78] The applicant has sought to equate, the post of Interim Treasurer with the office of Treasurer by use of the word Treasurer. She argues that 1) the court has to determine the power of the respondent to appoint someone to the post of Interim Treasurer. 2) She needs certainty as to her status under the Act. 3) She could not have occupied a post classified as "interim" as she was at all material times, the duly appointed Treasurer. Therefore, the classification "interim" is an irrelevant consideration and cannot be relied on to deny her the benefits due to her.

[79] The applicant agreed to accept the position she now contends is without legal foundation with the understanding as outlined in her affidavit, the salient part of which is reproduced below:

> "*I was employed[sic] to (CMU) as* ***Interim Treasurer, allowing CMU to identify a suitably qualified person to undertake the office by way of a***

> ***five- year contract.*** *I was engaged by way of an initial contract for a period of two years and continuous subsequent renewals to January 31st, [sic]2023. At all times I was a full-time employee."* (Emphasis added.)

[80] The applicant, by her own evidence, accepted the position of Interim Treasurer on a short-term contract, with the understanding that the University would be seeking to do two things: first, to recruit a candidate for the office; second, the suitably qualified individual would be employed and hold the office by way of a five- year contract (the statutory term).

[81] The applicant also raises the question of the legality of the post of Interim Treasurer. The Council is empowered by the section 6(1) to make employ and make appointments on such terms and conditions as it thinks fit *"as the Council considers necessary for the purposes of the University."* This applies to all members of staff and by extension to all positions those staff members occupy. Her employment as Interim Treasurer is based on the terms of the contract negotiated between the parties as the Council deemed fit and with which she agreed.

[82] The applicant raises the issue of fairness, in that, she performed the same function as the Treasurer and is being unfairly treated by being denied the entitlements of that post. The answer to the issue of fairness is that it is trite that it depends upon the circumstances of the particular case.[27] The respondent is entitled to make management decisions involving its staff and the running of the University. The impugned decision relates to the applicant personally, salaries and contracts are part of the operations of a University. Relating the contract in the instant case to the contracts of all other employees at the University does not provide the necessary evidence that there was unfairness. In any event, there was no other contract before

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[27] R v Secretary of State for the Home Department Ex p Doody [1994] 1 AC 531, 560.

the court for any position similar to that of the applicant. Bad faith was not being alleged and reasons were provided to the applicant in the email from the President.

[83] The test to be applied by a court to determine whether a function involving a contract is susceptible to judicial review is first to *assume that the fact that the source of a public authority's power is statutory is in and of itself* ***insufficient*** *to make a dispute about a contract susceptible to judicial review; the court therefore goes on to consider whether there is some additional "sufficient public element, flavour or character" to the situation.*[28] *(Emphasis added)*

The source of the power

[84] In the case at bar, the source of the power is statutory, the court will look at the circumstances for the public element of flavour.

[85] It was submitted by Mr Leys, KC that the CMU, being governed by statute, is a public body and therefore the source of the power to govern and to make decisions concerning the applicant's emoluments is based on the many statutes which govern the administration of the public service, to wit, the provisions of the CMU Act and its repealed predecessor as well as all prescribed policies, standards, regulations, orders, rules applicable to the Ministry of Education as established by the Ministry of Finance and the Staff Orders. This brings me to the question of the administration of the public service as raised in the submissions of Kings Counsel.

Who is a public officer

[86] Section 1(1) of the Jamaica (Constitution) Order in Council, 1962 ("the Constitution") defines "public office" as any office in the public service and a "public officer" as the holder of any public office and includes any person appointed to act

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[28] De Smith's Judicial Review, 6th ed, para 3-060

in any such office. Section 125(1) provides that the power to make appointments to public office is vested in the Governor-General acting on the advice of the Public Service Commission. Section 125(3) provides that the right of a public officer be subject to the principles of natural justice.

[87] The Staff Orders of the public service of Jamaica in its introduction states that it governs the conditions of service for public officers. It is relevant to public officers, public employees, officers and employees and refers to persons employed in the central government service in accordance with the Public Service Regulations. The Public Service Regulations, 1961 were specifically preserved by Section 2 of the Constitution. The regulations govern the functions of the Public Service Commission and are directed at public officers.

[88] Appointments to the public service are by way of the Governor General acting on the recommendation of the Public Service Commission. The CMU Act prescribes its officers within the meaning of that Act. It is the council who determines, employs and appoints officers to offices within the university. The staff orders do not apply to the applicant nor do the Public Service Regulations as she is not a public officer, nor was she acting for the holder of such an office.

[89] **In R v Panel on Takeovers and Mergers, ex p Datafin Plc**[29] , Sir John Donaldson MR said:

> *"This test of a "public element which can take many forms" is expressed in very general terms, and of itself provides no real guidance. A similar formulation of the general test has been propounded in two recent decisions of this court as to the meaning of "public authority" in section 6 of the 1998 Act to which I shall refer in more detail shortly. In Poplar Housing*

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[29] [1987] 1 QB 815 at page 838E

Association Ltd v Donoghue [2001] EWCA Civ 595, [2002] QB 48, Lord Woolf CJ said that what could make an act "which would otherwise be private, public is a feature or a combination of features which impose a public character or stamp on the act". In R (Heather) v Leonard Cheshire Foundation and another [2002] EWCA Civ 366, [2002] 2 All ER 936, Lord Woolf referred to the lack of "evidence of there being a public flavour to the functions [of the body]".

[90] The University undoubtedly performs a public function. How it exercises its functions is not necessarily so. There has to be some evidence to demonstrate that the act or function being complained of warrants the supervisory jurisdiction of the court, as the feature or combination of features of the act that bring it under the rubric of an act which is public in character. The conflation of the actions of the public body with actions of the office of Treasurer does not assist to determine this question.There is simply no evidence before the court that the functions of the Treasurer have a feature or a combination of features which give rise to this public element. In other words, there is no material presented by the applicant upon which the court can make such a finding. The applicant did not distinguish whether she was appointed by the Minister to sit on several committees as a result of her expertise in the field of accounting or whether it was a function of the role of Interim Treasurer. She did not state what were the objects and purposes of these committees. The court cannot speculate as to the purpose of these appointments. It is concluded then, that the test for determining whether a function involving a contract is susceptible to judicial review has not been passed.

Is the impugned decision reviewable

[91] There is no contest that the University which is established by statute is as a body amenable to judicial review. This does not mean all decisions made by that body are reviewable. I find support in the dictum of Campbell J in **Rural Transit**

Association Limited v Jamaica Urban Transit Company Ltd, Commissioner of Police and Office of Utilities Regulation.[30] In which he said:

> "*A finding that JUTC, as a body is amenable to judicial review, does not make all its decisions reviewable, A public body often times achieves its statutory objectives by contractual or private arrangements or means; therefore not every activity of a public body will be amenable to review."*

[92] The test was set out by Lord Diplock in Council of **Civil Service Unions and Others v Minister for the Civil Service**[31] where he said:

> *"For a decision to be susceptible to judicial review the decision maker must be empowered by public law (and not merely, as in arbitration, by agreement between private parties) to make decisions that, if validly made, will lead to administrative action or abstention from action by an authority endowed by law with executive powers…"*

[93] In applying the test to the case at bar, the applicant asserts in these proceedings that the terms of her contract have been breached. The CMU operates as a body corporate by virtue of section 28 of the Interpretation Act.

[94] In the case of **Wendal Swann v Attorney General Turks and Caicos Islands**[32] cited by Mrs Mayhew, KC, the appellant was appointed to the post of Chairman of the Public Service Commission of the Turks and Caicos Islands. The post was part-time and was remunerated by way of an allowance rather than a salary. The post became full-time when the new Constitution came into force and the appellant was entitled to an increased rate of remuneration of $90,000 a year. He was paid thereafter $8,640 for the months of August to November inclusive and this

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[30] [2014] JMSC Civ. 123 at para 52

[31] [1984] 3 All ER 935, [1985] AC 374 at pages 949-950

[32] [2009] UKPC 22

represented remuneration of $90,000 a year. A decision was taken at a meeting of Cabinet, presided over by the Governor, to reduce the remuneration payable to the appellant to $30,000 a year.

[95] The appellant sought judicial review to quash the decision to reduce his remuneration to $30,000 a year. The application for leave came before the Chief Justice who found the issue to be whether the appellant had an arguable case as a public law rather than a private law matter and whether in any event judicial review was appropriate if he had an alternate remedy, in addition to the question of whether he had a sufficient interest to continue with his application.

[96] The Chief Justice refused leave reasoning that the appellant's essential claim was for damages as a result of an alleged breach of an agreement as it related to his salary which would be enforceable as an ordinary action; that judicial review was neither necessary nor appropriate and that even if it was arguable that there was a collateral public law issue and the appellant had sufficient interest for it, he would exercise his discretion to refuse leave.

[97] On appeal, the Board decided the appeal on whether the Chief Justice was right or at any rate was entitled to refuse the appellant leave to seek redress by way of judicial review and to issue a writ if he saw fit.

[98] The Board said at paragraph 10 of the judgment that the appellant's complaint was that he was wrongly deprived of his remuneration of $90,000 a year for a period of three months (thereabouts) during which he was only paid at the rate of $30,000 a year. In order to found a legal claim on that complaint, the appellant would have to establish that he had an enforceable right to be remunerated at the rate of $90,000 a year as chairman of the PSC.

[99] In the view of the Board, the only basis for advancing such a right on the evidence presented, arose out of conversations which the appellant in his affidavit said that he had with the governor and chief secretary in which they invited him to continue in the office of chairman on a full-time basis and the base salary was to be $90,000

per annum which he accepted. The fact that the budget approved by the legislature was arrived at on the basis that the appellant was to be paid at that rate did not give him an enforceable right to be so paid.

[100] Further, his contention that cabinet was not entitled to overrule the governor's agreement to remunerate him at the rate of $90,000 a year was irrelevant. If he had an enforceable commitment by the governor to pay him that rate then, even if the cabinet had the right to reverse the governor's decision such a reversal would not undermine the appellant's ability to enforce that commitment.

[101] The Board found that the appellant's complaint amounted to a straightforward private law claim for about $15,000 being the difference over a period of about three months between $90,000 a year the rate of remuneration to which he claims to have been entitled and $30,000 a year the rate at which he was actually paid. The basis of his entitlement is a conversation or a series of conversations described in his affidavit. His claim is in contract although it could be founded on an estoppel if made out in oral evidence.

[102] It was clear to the Board that the appellant should not have sought to bring his claim by way of judicial review and should have issued a writ primarily because his claim is a classic private law claim based on breach of contract or conceivably estoppel. Proceeding by writ would be the more convenient course given that a properly particularised pleaded case would be appropriate. The Board said that the appellant may conceivably be able to mount an argument on the public law ground of legitimate expectation but this would be a fallback contention based on the same evidence and would be an alternative to his primary argument in a contract claim. The possibility of such a contention being advanced could not justify the claim being brought by way of judicial review. Even if this contention could justify the appellant's claim being brought by way of judicial review, determining whether to permit it to proceed as such is a case management decision with which an appellate court should be slow to interfere. In this case, the Chief Justice's decision was found to be unassailable.

[103] Finally, the Board said that there are occasions where it may be appropriate to permit public law issues to be raised in what is essentially a private law claim but they are relatively exceptional. Those occasions would normally be where the public law issues are of particular importance to the applicant or where they should be aired in the public interest.

[104] In the instant case, there was no suggestion of either of those exceptional factors in the case of **Swann**. In the case at bar, no exceptional factors have been shown to arise on the evidence and the principles set down in **Swann** are directly applicable to the instant applicant. There is no public law element to the contract.

Private law right derived from statute as distinct from private law right derived from contract

[105] There being no public law element to the contract, this court relies on the judgement of Morrison, P held in the case of **Minister of National Security** which states:

> *"…if a case turns exclusively on a purely public law right, then the only remedy will in general be by way of judicial review, pursuant to Part 56 of the CPR; and secondly, if the case involves the assertion of a private law right, the fact that the existence of that right might incidentally involve the examination of a public law issue does not prevent a claimant from proceeding by way of ordinary action outside of Part 56. In this regard, it will not matter whether the claimant is asserting a private law right based on contract or derived from statute. (See, Judicial Review Proceedings – a Practitioners Guide, 3rd edn, by Jonathan Manning, Sarah Salmon and Robert Brown, paras 3.9-3.68.)*

[106] In the case of **Bryan Sykes v The Minister Of National Security and Justice and the Attorney General Legal Officers Staff Association v The Minister Of**

National Security and Justice and the Attorney General,[33] the appellant was crown counsel in the office of the Director of Public Prosecutions. He appealed on his own behalf and on behalf of an unincorporated body, the Legal Officers Staff Association (LOSA) against an order of the Full Court refusing an order of certiorari to quash the decision of the Ministry of National security and Justice ("the ministry") which decided to withhold the salaries of legal officers in the public service involved in industrial action. The Full Court had also refused to issue an order of prohibition to compel any other paymaster of the executive from taking a similar decision. The court said:

> *"It is settled law that the remedies by way of prerogative orders are discretionary. Leave has to be sought to institute proceedings. By such provisions, the common law provides effective means of challenging public authorities while at the same time recognizing that, for the executive to function properly, the law must provide some protection. No such protection need be accorded to the executive when there is a claim for salaries for services rendered pursuant to a contract of employment. Such a claim is governed by the ordinary common law and the provisions of the Crown Proceedings Act."… Roy v. Kensington & Chelsea & Westminster Family Practitioner Committee [1992] 2 W.L.R. 239 illustrates the principle that, where there is a claim for salary withheld by a public authority, then such a claim seeks to enforce a private right and the appropriate proceeding is by an ordinary action. By parity of reasoning therefore, to seek a remedy by way of the prerogative order would be inappropriate and to use stronger language, it would be a misuse and abuse of process.*

[107] It is to be noted that the **LOSA** case concerns public officers employed in central government which is not the status of the instant applicant. Those public officers

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[33] (1993) 30 JLR 76

were said to have a private law right derived from statute which was enforceable in contract law.

[108] The provisions of section 28 of the Interpretation Act, were set out in the applicant's contract. That section has given the Council the authority to contract as would an individual. The legislation does not direct nor mandate the incorporation of statutory terms in a contract outside of the five-year period for which a Treasurer must hold the office. All other terms and conditions were to be set by the Council. It has not been shown that any particular statutory terms had been incorporated into the contract, while the source of the power may be statutory, the nature and exercise of the power is not. In my view, the applicant asserts a private law right derived from contract rather than from statute.

[109] Having decided this, the applicant alleges a breach of contract, the determination of which is not for the public law. In the case of **Kingsley Chin v Andrews Memorial Hospital Limited**[34] E. Brown, JA writing for the Court of Appeal in a case regarding dismissal, stated that:

> *[101] However, in this jurisdiction, a breach of contract by itself does not give rise to remedies in public law. For the breach of contract to endow the injured party with public law rights, the contract or terms of employment must be regulated or be established by statute, … Or, as Albert Fiadjoe in Commonwealth Caribbean Public Law 3rd edition, at page 86, expressed it: "The crucial element is whether the dispute has a sufficient public law element. If it has, public law would prevail even if there was a contract of employment". The appellant's contract with AMH was neither regulated nor established by statute. Consequently, there is no public law element in his dispute with AMH. The appellant is merely seeking to enforce a private right, arising from a contract which is entirely governed by common law principles. So premised, the appellant would not be entitled to the grant of a quashing order.*

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[34] [2022] JMCA Civ. 22

[102] An appeal to the rules of natural justice does not improve the appellant's position. The inclusion of grievance procedures such as the right to be given notice of the charges, a hearing before an impartial tribunal, to be represented and an appeal facility, into an employment contract, does not imbue that contract with public law rights. Relief would still be claimable on the basis of a breach of contract. As Purchas LJ opined in ex parte Walsh, the importation of natural justice rules into a private contract sounds in the vein of the parties' rights and duties in the performance of the contract, not the conferment of public law rights (see para. [74] above). Therefore, the appellant's complaint that AMH failed to discharge its duty to act fairly, cannot matriculate his private law claim into an entitlement to public law remedies.[35]

[110] In my judgment, it would be quite inappropriate for the court to exercise its supervisory jurisdiction or its discretion over an operational decision of this kind. There is, no public law element to it. The Council is capable of making management decisions in order to run the operations of the University and this was one such. In the circumstances of this case at bar, the impugned decision is not amenable to judicial review as the applicant's contract with the University was neither regulated nor established by statute.

Certiorari

[111] Further, in light of the foregoing, this application is not one which merits the grant of an order of certiorari. Carberry JA in **R V Dr A Binger, Nj Vaughan, And Scientific Research Council, Ex Parte Chris Bobo Squire** (1984) 21 JLR 118, at page 150 stated that:

'…unless there is present the 'public element' certiorari will not issue, and the appropriate remedy if any is the action for a declaration… They will not

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[35] Kingsley Chin v Andrews Memorial

be made in a simple case of master and servant; nor in a case where office is held at pleasure; but may be made where the person is an 'officer' or the holder of public office… To decide whether a servant or employee is the holder of 'public office' in the sense in which that term is used in this context, as distinct from being a servant in a simple master and servant relationship, there must be some element of a public nature that marks out the office…'

[112] The express terms of the applicant's contract are clearly set out in the letters of employment which were signed by her indicating her acceptance and agreement of the terms therein. These letters make no reference to any benefits attached to a post on the government establishment and they set out the terms and conditions of employment for the contract for the post of Interim Treasurer. This was done in each case when the contract was extended, with the remuneration stated in each letter to the applicant.

[113] The applicant was appointed by the respondent and not by the Governor General acting on the advice of the Public Services Commission. She was not a public officer nor did she hold a public office. Her employment was based on an ordinary contract of employment and she was subject to its terms and conditions. It therefore follows that since the terms of employment were based on ordinary contract, the relationship between the applicant and the respondent was that of master and servant. The grant of certiorari is not available as a remedy in such a case.

Legitimate Expectation

[114] There is also no issue of any legitimate expectation. This issue arises where there has been some established policy or practice and a public authority is required to follow and apply that policy. The rights of the applicant must be determined based on her contract and cannot be based on a practice which the Director of Human Resources admitted was one which was inconsistent with policy. The CMU Act does not provide for the payment of an increment to the Treasurer nor does the contract signed by the applicant. Further, the evidence discloses no promises made to the applicant on which any legitimate expectation could arise. The

communication from the Director of Human Resources was her opinion which she admitted required approval from the Ministry of Finance. There was no evidence that this opinion was ever so approved. If there was a practice that should not have existed, it cannot be seriously suggested that this Supreme Court of Judicature, a court, of law, should make a favourable decision under this head on a practice that is without legal foundation or was inconsistent with the financial regulations of the public service as was the evidence.

[115] The respondent's decision is not subject to judicial review because: (i) the applicant was not appointed to the civil service; (ii) there was no legislative underpinning of her employment; and (iii) there was no statutory restriction on the terms on which the applicant's employment may be founded, save for the length of time. As a consequence, the relationship between the parties was that of master and servant.

How should the court treat the claim

[116] The applicant is alleging a breach of contract which is ordinarily an action brought in contract as a matter of private law. The applicant's case is for loss of remuneration arising out of an alleged breach of the contract brought about by the non-payment of the annual increment. The applicant cannot seek reinstatement, she can only assert, this private law right. The fact that she also seeks, incidentally, to pray in aid the provisions of the Act in support of her position to be entitled to be paid cannot prevent her, in my view, from proceeding by way of an action commenced by ordinary claim. The appropriate remedy is in private law in a claim for breach of contract.

[117] The court has the discretion to order a claim to continue as if it had not been commenced under part 56 of the CPR. Rule 56.10(3) states:

> *"The court may however at any stage – a) direct that any claim for other relief be dealt with separately from the claim for an administrative order; or b) direct that the whole application be dealt with as a claim and give appropriate directions under Parts 26 and 27; and c) in either case, make*

> *any order it considers just as to costs that have been wasted because of the unreasonable use of the procedure under this Part."*

[118] This court is empowered by rule 56.10(3) of the CPR to direct that a claim for other relief can be dealt with separately from this claim for an administrative order. It is the exercise of a discretion. The power under rule 56.10(3) of the CPR to convert the claim into one in contract was not argued by Kings' Counsel, therefore the orders below will stand pending further submissions on any proposed variation in terms regarding the exercise of the power granted by the rule.[36]

[119] In my view, it will be a matter for a trial judge at the trial of the claim to say whether expressed or implied terms of the applicant's employment contract were breached and whether she is entitled to additional damages or other civil law remedies.

Costs

[120] Rule 64.6(1) of the CPR states:

> *"If the court decides to make an order about costs of any proceedings, the general rule is it must order the unsuccessful party to pay the costs of the successful party."*

[121] Pursuant to rule 64.6(1), in an ordinary claim, the successful party in a claim is awarded costs against the unsuccessful party. In rule 56.15, the successful party is entitled to all his costs unless the circumstances warrant otherwise. The unsuccessful party on an application for leave to apply for judicial review is in the same position as the unsuccessful litigant in an ordinary claim against whom rule 64.6 would be applied. The court now makes the following orders:

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[36] Rule 26.2

[122] Orders:

1. The declarations sought by the applicant are refused.

2. The order for certiorari sought by the applicant is refused.

3. The application for leave is refused.

4. The application is ordered to be dealt with as a claim.

5. A Case Management Conference is to be fixed by the Registrar of the Supreme Court as soon as is practicable.

6. Costs of the application are awarded to the respondent to be taxed if not agreed.