IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2016 HCV 03869

BETWEEN	**DR. O'NEIL LYNCH**	**APPLICANT**
AND	**MINISTER OF LABOUR AND SOCIAL SECURITY**	**RESPONDENT**

IN CHAMBERS

Mr. Nigel Jones & Ms. Liane Chung instructed by Nigel Jones & Company for the Applicant

Ms. Althea Jarrett instructed by The Director of State Proceedings for the Respondent

March 19, 2019 & May 31, 2019

JUDICIAL REVIEW – ROYAL CHARTER ESTABLISHING UNIVERSITY OF THE WESTINDIES-JURISDICTION OF THE VISITOR- TERMINATION OF EMPLOYMENT THE LABOUR RELATIONS & INDUSTRIAL DISPUTES ACT SECTION 11A(1)(a)(i)-

SIMONE WOLFE-REECE, J.

[1] On the 1st of December 2016 the Applicant Dr. O'Neil Lynch by way of an Exparte Notice of Application for Court Orders obtained leave to apply for Judicial Review.

[2] The Applicant filed an Amended Fixed Date Claim Form on May 18, 2017 against the Respondent seeking judicial review of the Respondent's decision and ultimately the following orders:

a) An order of Certiorari quashing the decision of the Respondent made on June 21, 2016 that the Ministry fulfilled its obligation in successfully bringing closure to

this industrial dispute and in the circumstances is not obliged to proceed any further;

b) An order of mandamus compelling the Respondent to refer the Applicant's case to the Industrial Disputes Tribunal for a determination;

c) Costs;

d) Such further and other relief as this Honourable Court may deem fit.

BACKGROUND

[3] The Applicant was employed as a lecturer by the University of the West Indies (UWI) by way of a fixed term contract from May 29, 2012 to August 31, 2015. The contract provided for termination by either party giving the other six months' notice in writing. By way of a letter dated July 14, 2014 the Applicant's employment was terminated with immediate effect from July 15, 2014 on the basis of what was described as ongoing challenges with his performance. In the termination letter, it was stated that the UWI would make payment in lieu of notice in addition to all entitlements arising from the contract.

[4] The Applicant contends that he was not given any clear and definitive reason for his termination, and that as such, he was unfairly dismissed and unduly prejudiced. He further contends that there has been a breach of natural justice in his termination as he was not given an opportunity to be heard by a fair and impartial tribunal.

[5] The Applicant's Attorney-at-Law by letter dated August 26, 2014, informed the University of the Applicant's position. In the said letter, counsel on behalf of the Applicant acknowledged the visitorial authority of Queen Elizabeth II, and her exclusive jurisdiction over decisions regarding internal disputes of the UWI. The Applicant's Attorney demanded that he be reinstated, and alternatively, that the matter be referred to the visitor within 14 days.

[6] However, by letter dated November 3, 2014, the Applicant's Attorney wrote to the Permanent Secretary of the Ministry of Labour and Social Security outlining what had transpired and suggested an alternative approach to referring the matter to the visitor, which was that the matter be referred to the Ministry's conciliation unit. It was proposed that in the event that the matter is not settled in that forum, it be referred to the Industrial Disputes Tribunal (IDT) pursuant to the **Labour Relations and Industrial Disputes Act** 1975 (LRIDA).

[7] The Ministry seemed to have taken up the Applicant's suggestion of an alternative approach and between November 2014 and June 2016 the Ministry sought to have the parties' resolve this dispute by using its voluntary conciliation process.

[8] The Applicant requested that he be compensated in the sum of $3,572,973.92 for the remainder of the contract, as well as reinstatement to his post. The Respondent however, was of the view that the Applicant was only entitled to $1,978,027.06 and the Respondent indicated that they were not prepared to reinstate the Applicant.

[9] Conciliatory meetings were held but to no avail, Counsel on behalf of the Applicant asked the Ministry to refer the matter to the IDT. However, in the last letter sent by the Ministry to the Applicant dated June 21, 2016, under the hand of Michael Kennedy, Permanent Secretary, the Applicant was advised that the Ministry had fulfilled its obligation in successfully bringing a closure to the dispute and in the circumstances is not obliged to proceed any further.

[10] It is this decision and conclusion by the Minister that the Applicant is asking the Court to review and make the orders as set out in his Amended Fixed Date Claim Form.

APPLICANT'S SUBMISSIONS

[11] In written submissions on behalf of the Applicant counsel Mr. Nigel Jones submitted that the Court will generally not interfere with the exercise of power or discretion by a public body unless that body has acted unlawfully in the sense that

it has breached one of the relevant principles of public law developed by the Courts to ensure that public bodies do not exceed or abuse its powers. To support this submission, he cited Albert Fiadjoe in Commonwealth Caribbean Public Law (3rd Edition) who stated:

> *"Judicial review allows a person to challenge the acts or omissions of a public authority for legality. Such challenge may be mounted on the basis of the grounds for review which the Courts have developed over time, and which Lord Diplock has compresses into ' illegality, irrationality and procedural impropriety"*

[12] It was Counsel's submission that the Respondent has breached all three grounds of judicial review as established by Lord Diplock - illegality, irrationality and procedural impropriety.

[13] He further contends that the Minister has the authority to comply with the Applicants request and refer the matter to IDT. He cited the **Labour Relations and Industrial Dispute Act** (LRIDA) which provides that:

> *"11(1) Subject to the provisions of subsection (2) and sections 9 and 10 the Minister may, at the request in writing of all of the parties to any industrial dispute, refer such dispute to the Tribunal for settlement.*
>
> *11A-(1) Notwithstanding the provisions of sections 9, 10 and 11, where the Minister is satisfied that an industrial dispute exists in any undertaking, he may on his own initiative–*
>
> *(a) refer the dispute to the Tribunal for settlement*
>
> *(i) if he is satisfied that attempts were made, without success, to settle the dispute by such other means as were available to the parties; or*
>
> *(ii) if, in his opinion, all the circumstances surrounding the dispute constitute such an urgent or exceptional situation that it would be expedient so to do;"*

[14] Mr. Jones referred the court to the case of **R v. Commissioner of Income Tax, Ex parte Donald Panton** [1990] 27 JLR 68 in which Panton J stated:

> *"the courts need to keep a conscious watch on the actions of statutory bodies including the Commissioner to ensure that those powers entrusted*

> *to them are exercised in a manner which are kept within the limits that parliament intended. Where those powers are exercised unreasonably or there is a failure to comply with the procedural requirements of the Act then such actions are open to review and the appropriate relief by way of the prerogative orders is then brought into operation to keep such actions within the proper bounds."*

[15] Relying on the above sections of the LRIDA, and the **Commissioner of Income Tax** case, counsel submitted that the Respondent acted unreasonably in failing to refer the matter to the IDT, while failing to comply with the procedural requirement of the LRIDA. It was further submitted that the Respondent failed to consider the Applicant being compensated for the unfair dismissal, the fact that he desired to be re-engaged by UWI, the history of the matter, and the fact that they (the Applicant and his attorney) have asked the matter to be referred to the IDT on numerous occasions, and that the Applicant was not willing to accept the proposed settlement put forward by UWI.

[16] On the 21st of June 2016 the Respondent, by way of a letter, indicated that the Ministry has fulfilled its obligation in successfully bringing closure to the industrial dispute between the Applicant and the UWI, and in the circumstances is not obliged to proceed any further. However, it was submitted on behalf of the Applicant that the Respondent has failed to explain how it has fulfilled its obligation in successfully bringing closure to the matter.

[17] It was further submitted that the position of Mr. Michael Kennedy as postulated in paragraph 19 of his Affidavit in Answer filed on the 30th of June 2017, that while the Ministry sought to resolve the dispute between the Applicant and the UWI by way of a conciliation process, he believes that the IDT does not have jurisdiction to hear and determine the Applicant's dispute having regard to the jurisdiction of the visitor. The Applicant's position is that the matter is before the Respondent, and therefore, based on Section 11A (1) and (2) the Respondent has the authority to refer the matter to the IDT which is a part of the procedure once the matter cannot be settled at that level.

[18] It was the submission of counsel on behalf of the Applicant that the Respondent's decision was irrational as it was neither logical nor reasonable. He averred that the rational and logical approach that a reasonable Minister would take is to refer the matter to the IDT. He also stated that the Respondent did not fulfil its obligation as it acted irrationally and unjust by refusing to refer the matter to the IDT and only considered UWI's position in the matter referred to the IDT for determination.

RESPONDENT'S SUBMISSIONS

[19] The Respondent also filed written submissions and authorities on the 9th of July 2018. In the submissions they opposed the orders of certiorari and mandamus sought by the Applicant. They contend that there was no dispute within the meaning of the LRIDA for them to refer to the IDT.

[20] The Respondents contend that the University of the West Indies (UWI) was established by Royal Charter in 1962, and a subsequent Royal Charter was issued in 1972 which governs the University. The Royal Charter provides that there be a Visitor who exercises Visitorial Authority and has exclusive jurisdiction to resolve the dispute between the Applicant and UWI.

[21] Accordingly, Ms. Althea Jarrett submitted on their behalf that it would have been an improper exercise by the Minister of her discretion under section 11A(1)(a)(i) of LRIDA to refer the dispute to the IDT. It was further submitted that this court in the exercise of its jurisdiction cannot therefore compel the Minister by an order of mandamus to refer the dispute to the IDT.

[22] The Respondent relied on the cases of **Thomas v University of Bradford** [1987] 1 All ER 834 and **Duke St. John Paul Foote v University of Technology (UTECH)** [2015] JMCA App 27A to establish that the visitor has an exclusive jurisdiction, and that the court has no concurrent jurisdiction. They also relied on the case of **Okuonghae v University of Technology, Jamaica** [2014] JMSC Civ. 138 to reinforce the point that where there is an issue of unfair dismissal of an

employee from a university which has provisions for a visitor, such an issue it is to be determined by the visitor.

[23] Counsel submitted that such a dispute is not an industrial dispute within the meaning of the LRIDA that can be referred to the IDT for settlement. Accordingly, the Respondent's submission is that the Applicant cannot have the dispute between himself and the UWI settled by the IDT by way of an "alternative approach" to the visitor's exclusive jurisdiction, as is being suggested by counsel on behalf of the Applicant.

[24] Miss Jarrett raised further for the Court to consider that even if the court were to find that the IDT has concurrent jurisdiction with the UWI visitor to settle the dispute between the parties, the failure of the Applicant to invoke the visitor's jurisdiction would have prevented the Minister of Labour from exercising her jurisdiction under section 11A (1)(a)(i) of the LRIDA as she would not have met the statutory requirement for the exercise of her discretion under the section, that is the Minister could not have been satisfied that the parties had availed themselves of "such other means as were available" to them to resolve the dispute

ISSUES TO BE DETERMINED

[25] The issues that need to be determined are:

(a) whether the court has jurisdiction to refer the dispute between the Applicant and the UWI to the IDT in light of the power of the visitor provided for in the Royal charter.

(b) If the court has jurisdiction, whether Dr. Lynch's application for judicial review of the Respondent's decision should be granted and the orders as set out in the Amended Fixed Date Claim Form be made.

THE JURISDICTION OF THE VISITOR

[26] The UWI was established by the Royal Charter issued by Queen Elizabeth II in 1962. Clause 6 of the said Charter entrusts a visitor/visitors with the authority to "inspect the University College, it's buildings, laboratories and general work, equipment, and also the examination, teaching and other activities of the University College by such person or persons as may be appointed in that behalf." A visitorial power stems from an eleemosynary corporation, founded for the purpose of distributing the founder's bounty to such persons as the founder has directed (**Halsbury's Laws of England**, 5th Ed. Volume 8). The principle behind the office of the visitor is that the founder of the eleemosynary corporation is entitled to establish laws to govern the object of his bounty (Brooks J in **Myrie v University of the West Indies and others** CLAIM No. 2007 HCV 04736 relying on **Tudor on Charities** 8th Ed. Page 371). The founder is also entitled to be the sole judge, or to appoint a visitor to be the sole judge of the interpretation and application of those laws.

[27] The extent of the visitor's power is set out in the corporation's founding documents and the supporting statutes, ordinances and regulations. However, in the instant case very little guidance on the duties and authority of the visitor is provided in the Charter. Brooks J (as he then was) addressed this concern in **Myrie v The University of the West Indies (supra)**, when he said

> *"However, except for an express intention to inspect, neither of the Charters nor any of the statutes established there under provide any further guidance as to the duties or the authority of the visitor. It is therefore to the common law that we are obliged to look for enlightenment on the role of the visitor."*

[28] In concluding his decision, the learned Judge said:

> *"The UWI's Charter having provided for a visitor, the visitor is the authority which has the jurisdiction to decide the disputes arising under the domestic law of the institution. That jurisdiction is defined in the common law and the court decline jurisdiction in such circumstances. Dr. Myrie, being a member of the UWI was obliged to follow its domestic procedures for applying for relief. His application to the court is therefore inappropriate."*

[29] The role of the UWI visitor is not limited to the inspection of buildings, laboratories, examination and teaching as may be gleaned from a first look at the Charter. "Inspect" in the context of clause 6 extends to examining the operation of the university generally, and ensuring that it is being operated in the manner intended by the Charter and its statutes (As per Sykes J (as he then was) in **Suzette Curtello v University of the West Indies** [2015] JMSC Civ. 223). The visitorial power 'enables the visitor to settle disputes between the members of the corporation, to inspect and regulate their actions and behaviour, and generally to correct all abuses and irregularities in the administration of the charity' (**Halsbury's Laws of England** 2nd Ed. Volume 8).

[30] In **Hines v Birbeck College** [1985] 3 All ER 156 at 161, Hoffman J stated that

> *"The jurisdictions of the courts on the one hand and of university or college visitors on the other hand are mutually exclusive, the jurisdiction of university or college visitors being dependent entirely on the domesticity of the dispute. A dispute had the necessary domesticity to be the subject of the exclusive jurisdiction of a visitor if it involved members of the university or college and concerned the interpretation or application of internal rules, customs or procedures….Accordingly, since the matters in dispute involved, inter alia, complaints of defective procedure, lack of a fair hearing, and questions of membership of a college, they were domestic disputes and were within the exclusive jurisdiction of the college visitor".*

[31] An examination of the authorities relied on by counsel on behalf of the Respondent makes it clear the exclusivity of the jurisdiction of the visitor. The leading modern authority on this issue is the case of **Thomas v University of Bradford** [1987] A.C. 795. The case concerns a lecturer from the University of Bradford who alleged she was unfairly dismissed from the institution, and that the council's failure to observe the proper procedure in arriving at a decision for her dismissal, amounted to a breach of natural justice. The House of Lords was then left to consider the issue of whether the dispute fell within the jurisdiction of the court or the jurisdiction of the visitor. It was held that the visitor has exclusive jurisdiction to hear matters concerning internal disputes within the UWI, and that the courts of law did not have a concurrent jurisdiction. As Lord Griffiths eloquently stated, "the courts of law will not trespass upon the matters that lie within the jurisdiction of the visitor."

[32] In **Duke St. John-Paul Foote v University of Technology (UTECH) and Elaine Wallace** [2015] JMCA App 27A the Applicant, Duke was delisted from his program of study at UTECH, and barred from sitting his exams after failing to pay the full sum of his tuition within the given time. The following semester he was allowed to sit 3 non legal courses, but prevented from registering for 4 legal modules as he would not have satisfied the prerequisite requirements from the previous semester. The Applicant sought and obtained an interim injunction restraining the university from preventing him from confirming his choice of 4 legal modules for the 2nd semester. After the hearing Lindo, J upheld a preliminary objection filed by the Respondent, on the ground that the Applicant's claim falls within the exclusive jurisdiction of the visitor of the university. On appeal, Morrison J (as he then was) examined a number of cases and arrived at the following conclusion:

> 1. *"The authority and jurisdiction of the visitor are derived from longstanding principles of the common law.*
>
> 2. *At common law, the jurisdiction of the visitor is exclusive.*
>
> 3. *At common law, disputes (irrespective of how they are characterised) between students or members of staff and their university which centre on the interpretation, application and administration of the statute, ordinances and internal regulations of the university, are matters falling within the jurisdiction of the visitor and not the courts of law.*
>
> 4. *In jurisdictions, such as England and Wales, where the exclusive jurisdiction of the visitor has been qualified or abrogated by statute, a distinction may still fall to be drawn between issues involving a student's treatment at university, which are capable of being decided by the court, and those relating to academic or pastoral judgment, which are not.*
>
> 5. *In other jurisdictions, as* ***Norrie v Senate of the University of Auckland*** *demonstrates, it may be open to the courts to take a different approach to the question of the visitor's exclusive jurisdiction, although recognising, again, that some kinds of dispute will remain better suited to determination by the visitor.*
>
> 6. *In Jamaica, both at first instance and in this court, there has been a uniform application, based on the authority of* ***Thomas v University of Bradford****, of the common law principles stated at sub-paragraphs 2 and 3 above."*

[33] Accordingly, Morrison J advised the Applicant to formally invoke the university's procedures for handling student complaints, with a view to escalating his grievance to the level of the council and ultimately to the visitor.

[34] The seminal case of **Suzette Curtello v University of the West Indies** [2015] JMSC Civ. 223 is also instructive on the current status of the visitor's jurisdiction as against the jurisdiction of the court. In that case Ms. Curtello, a PhD student had completed her dissertation but upon review of said dissertation, one examiner was of the view that she had met the standard to be awarded the degree, and the other felt otherwise. Ms. Curtello believed that another person with whom she had a difficult relationship was the 3rd examiner whose decision influenced the determination that her dissertation was insufficient for the award of her degree. She wanted to know who the examiners were in order to determine whether the decision was an unfair one, influenced by improper consideration or malice, rather than an objective examination of her dissertation. The university's response was that Supreme Court has no jurisdiction to hear and decide the matter.

[35] Sykes J,(as he then was) guided by the decision in **Thomas v. University of Bradford**, concluded that in light of the well established principle surrounding the exclusive jurisdiction of the visitor, the remedy for commencing a claim when the visitorial jurisdiction is still available is to strike out the claim. He then proceeded to strike out the claim form and set aside the leave to apply for judicial review. He also reinforced the fact that the visitor's decision is subject to judicial review.

[36] In **Dr. Matt Myrie v University of the West Indies and others** CLAIM No. 2007 HCV 04736 Brooks J cited the case of **Regina v Lord President of the Privy Council Ex parte Page** [1993] AC 682 which clarified the position in **Thomas v University of Bradford** [1987] A.C. 795 that the court had no jurisdiction to entertain such disputes which must be decided by the visitor. In **Ex Parte Page**, Lord Browne-Wilkinson explained at page 696B that:

> *"the Thomas case was concerned with the question whether the court's and the visitor had concurrent jurisdictions over such disputes. In that*

context alone it was decided that the visitor's jurisdiction is "exclusive". Thomas does not decide that the visitor's jurisdiction excludes the supervisory jurisdiction of the courts by way of judicial review."

APPLICATION TO THE PRESENT CASE

[37] The topic of the visitor has sparked much debate in recent years regarding its relevance and antiquity. Some authors have described it as being a remnant of ancient anachronism. A recent article from the Jamaica Gleaner also indicated that UWI is pushing for the replacement of Queen Elizabeth II as its Visitor. However, regardless of these sentiments, this is our present reality, and until changes are made to this deep rooted procedure of referring disputes concerning the UWI and its members to the visitor, we are forced to live with the consequences, inconveniences and/or benefits that come with the enactment of the Charter.

[38] The first question is whether Dr. Lynch is a person over whom the visitor of the UWI can have jurisdiction. The simple answer is yes. In **Myrie v UWI**, Brooks J (as he then was) held that "Dr. Myrie, being a member of the UWI was obliged to follow its domestic procedures for applying for relief." In the instant case, by virtue of Dr. Lynch's appointment as lecturer at the faculty of Medical Sciences, Dr. Lynch is a member of the university over whom the visitor has jurisdiction.

[39] Counsel for Dr. Lynch seemed to have acknowledged the jurisdiction of the visitor in a letter dated November 3, 2014 when he requested that the Applicant be reinstated, or in the alternative, that the matter be referred to the visitor in 14 days. However, counsel then retracted the initial alternative suggestion and instead requested that an alternative approach to the visitor's jurisdiction be observed, namely, referring the matter to the IDT. In suggesting an "alternative approach" to the visitor's jurisdiction, counsel failed to appreciate the extent of the visitor's power, as well as the exclusivity of her jurisdiction.

[40] The visitor's jurisdiction is not a mere alternative that members of the UWI can pursue, but it is a cross road the Applicant must traverse before seeking redress from the court. Sykes J made it clear in the case of **Suzette Curtello** that it is only

after the visitor's jurisdiction has been utilized, that the court may intervene in the dispute. He further recognized a similar position in the judgment of Sir John Romilly MR in **Attorney General v. The Governors of the Free Grammar School of Queen Elizabeth of Dedham** 53 ER 138 in which Sir John Romilly MR explained that the courts will intervene in the operation of a charity if it finds that the intention of the founder is not being carried out, and remedy that defect by carrying into effect the wishes and views of the original founder. The House of Lords in **Thomas** also maintained this position.

[41] The question that follows is whether this dispute has the relevant domesticity to fall within the jurisdiction of the visitor?

[42] The crux of the Applicant's case is that he was unfairly dismissed and prejudiced by the procedure used to invoke his dismissal. He was not given an opportunity to be heard by a fair and impartial tribunal prior to his dismissal. Several requests were made to have the matter referred to the IDT after failed meetings with the UWI and with the Respondent. Counsel for the Applicant argued that the Respondent failed to observe the procedure as laid down in the LRIDA by failing to refer the matter to the IDT. To my mind, this falls squarely within the jurisdiction of the visitor.

[43] In **The Industrial Disputes Tribunal v. University of Technology Anors and Others** [2012] JMCA Civ. 46 Brooks J.A. proffered and accepted the definition of judicial review of the authors of, The Caribbean Civil Court Practice at page 431 who stated;

> *"….it is concerned with the lawfulness rather that with the merits of the decision in question, with the **jurisdiction of the decision maker** and the fairness of the decision making process rather than the correctness." [emphasis mine]*

[44] I cannot accept the Applicant's position that since the matter is already before the Respondent, the Respondent therefore has jurisdiction to refer the matter to the IDT. As per Hoffmann J in **Hines v Birbeck College,** the jurisdiction of the visitor

depends entirely on the domesticity of the dispute. The dispute in question involves Dr. Lynch, who is a member of the university, and the issues raised by him concerns the interpretation and application of the internal procedure for dismissal. Similar to the case of **Hines v Birbeck College**,the present matter in dispute involves, inter alia, complaints of improper procedure, lack of a fair hearing, and questions of reinstatement, the issues raised have the necessary domesticity and are within the exclusive jurisdiction of the visitor. Dr. Lynch should invoke that jurisdiction which is still available to him.

[45] Further, it is only until he brings the issue before the visitor, and the visitor acts ultra vires that the court will intervene. I am not of the view that having engaged the Ministers voluntary conciliation process that it ousts the jurisdiction of the visitor pursuant to the Royal Charter.

[46] I must agree that based on the affidavit evidence it is clear that the issues in dispute were not resolved by the conciliatory process. The conciliatory process is in essence best described as a mediating process between two disputing groups. The parties meet and seek to come to some mutual agreement. It is when this mediatory approach fails that the Minister may refer dispute to the Tribunal for settlement.

[47] Section 11A(1) of the LRIDA, notes that the Minister has a discretion to refer an industrial dispute to the IDT for settlement if he is satisfied that attempts were made, without success, to settle the dispute by such other means as were available to the parties. As aforementioned, the visitor's jurisdiction is still available to Dr. Lynch, which means he has not yet exhausted all other options available to him. Therefore, he cannot be granted the order of mandamus compelling the Respondent to refer his case to the IDT.

[48] The visitor authority encompasses adjudicating on issues that arise and that may be in breach of the internal laws. The visitor has the responsibility to ensure that the internal rules and ordnances are complied with.

[49] The court suggests that Dr. Lynch ought to invoke the Visitor's Authority to resolve his dispute with the university. If that fails as indicated by Sykes J, in **Suzette Curtello**, the court can intervene to bar the visitor from doing that which is outside its jurisdiction and not in accordance with the founder's intention, or can be compelled to undergo a particular conduct.

DISPOSITION

[50] ORDERS:

(a) An order of Certiorari quashing the decision of the Respondent made on June 21, 2016 that the Ministry fulfilled its obligation in successfully bringing closure to this industrial dispute and in the circumstances is not obliged to proceed any further is refused.

(b) An order of mandamus compelling the Respondent to refer the Applicant's case to the Industrial Disputes Tribunal for a determination is refused.