In The Supreme Court of Bermuda

CIVIL JURISDICTION

2007: No. 42

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW
IN THE MATTER OF THE PUBLIC SERVICE COMMISSION REGULATIONS 2001
AND IN THE MATTER OF THE APPARENT DECISION OF THE GOVERNMENT OF BERMUDA TO TERMINATE THE EMPLOYMENT OF ULAMA FINN-HENDRICKSON, A TEACHER AT CEDARBRIDGE ACADEMY, WITHOUT NOTICE AND/OR TO SUSPEND THE SAID ULAMA FINN-HENDRICKSON WITHOUT PAY AND WITHOUT NOTICE

BETWEEN:

ULAMA FINN-HENDRICKSON

Applicant

-and-

THE MINISTER FOR EDUCATION

Respondent

JUDGMENT

Date of Hearing: February 4, 2008
Date of Judgment: February 15, 2008

Mr. Paul Harshaw, Lynda Milligan-Whyte & Associates, for the Applicant;
Mr. Martin Johnson, Attorney-General's Chambers, for the Respondent.

Introductory

1. The Applicant in this case was employed by the Ministry of Education under a three year contract for the period September 1, 2006 to August 31, 2009 as a Reading Teacher reassigned to Cedarbridge Academy ("CBA"). The Applicant is a public officer employed by the Permanent Secretary for Education under powers conferred on the Governor but delegated to the Permanent Secretary under section 83 of the Bermuda Constitution as read with paragraph 5 of the Schedule to the Public Service (Delegation of Powers) Regulations 2001.

2. The present action is in substance against the Crown but the Minister of Education has been named as the Defendant in compliance with the convention that civil servants are not personally named as defendants in proceedings against the Crown. Although some judicial review decisions seek to impugn decisions which are legally made by the Minister, this is not such a case. The appointment, removal and discipline of public officers such as the Applicant is not a matter in which Government Ministers have any legal role to play, so the named Respondent in the present action is merely a nominal respondent. This clarification seems justified because the Applicant's pleaded case and her counsel's oral arguments made reference to decisions by "*the Government*" while nothing in the evidence suggests that the Applicant's case was considered by anybody other than senior public servants.

3. It is also only fair to point out that the non-responsiveness of Ministry officials in the present case appears, on the evidence, not to reflect any systemic weaknesses on the Ministry's part. Correspondence from the Applicant's attorneys during the same time-frame on behalf at least one other CBA teacher was promptly answered by the Permanent Secretary, who referred the matter to the Attorney-General's Chambers, apparently resolving the issue without the need for court proceedings.

4. The salient and largely undisputed facts are as follows. CBA received a report from a company known as MSI dated July 28, 2006 advising that samples taken had found evidence of mould "*associated with potential health problems*" and air quality issues would "*not be eliminated overnight.*" According to medical evidence produced by the Applicant in these proceedings, she had been receiving treatment for allergy-related problems from her general practitioner since June 2005. On or about November 1, 2006, CBA was closed down as a result of health concerns surrounding the state of the building and students dispersed to various locations. The Applicant was assigned to teach at the Berkeley Institute but complained, in a November 22, 2006 lawyer's letter which she later said erroneously referred to the Seventh Day Adventist Centre, that she felt sick there. Medical certificates were obtained by the Applicant covering most of the remainder of the Christmas term, although it is unclear whether they were received by the Ministry. It seems more plausible that they were delivered to CBA but not forwarded to the Ministry because the school's normal administrative

processes had been impaired by the closure. Be that as it may, it sensibly was conceded at the hearing that the Applicant had good grounds for being absent until CBA reopened in January 2007.

5. On December 8, 2006, the Applicant's lawyer (who had already communicated with the Ministry in respect of the health concerns of other CBA teachers) wrote the Ministry advising that the Applicant would not return to work unless she received "*satisfactory evidence that the levels of aspergillus mould that has made our client sick have been remedied.*" On January 4, 2007, a chasing letter was sent by email to the Ministry (a) requesting a response to the December 8, 2006 letter, and (b) responding to a telephone call from CBA to the Applicant on the previous day querying why the Applicant had not returned to school.

6. In the meantime CBA and the Ministry had made significant progress in meeting what they considered to be the general health concerns. It seems obvious that closing down CBA and managing a dispersed student body at various locations was a Herculean task for all concerned. The Bermuda Union of Teachers ("BUT") was involved in representing the health concerns of teachers at CBA as well, and by letter dated November 28, 2006 requested that the Ministry bring in an independent assessor to verify that the CBA working environment was a "*healthy and safe*" one. On or about December 21, 2006, the Minister made an announcement that CBA would reopen in early January 2007 because the Ministry of Health "*has stated that CedarBridge Academy is fit to be reoccupied by its staff and students.*" As requested by the BUT, international specialists had also supported the Health Ministry's findings. The written version of the Announcement stated that two forms of aspergillus mould had been found but the "*vigorous clean up that has taken place has resulted in significantly reducing the levels of these moulds.*"

7. Armed with this information, the Ministry must have regarded her lawyer's demand for confirmation of the safety of the site as absurd. If they had received no medical certificates for the period after November 22, 2006 when the Applicant did not attend work, the behaviour of the Applicant might well have seemed provocative. Indeed, since other teachers had made earlier complaints of falling ill due to poor air quality at CBA, she may have been regarded as an opportunist jumping on a bandwagon. But there is no evidence that the mould-related portions of the announcement, those of greatest relevance to the Applicant's particular case, were ever reported in the media[1]. And it *was* reported that five female teacher clients of Mr. Paul Harshaw would not be returning because, according to their lawyer: "*My clients are not willing to accept the mere public statement of the Government that the building is safe.*"[2]

[1] Reports from the Royal Gazette of January 4, 2007 are at pages 8-12 of Exhibit 3 to the Acting Chief Education Officer's October 23, 2007 Affidavit.
[2] *Ibid*, page 9.

8. On January 9, 2007, the Ministry appears to have responded to the by then redundant November 22, 2006 letter about the temporary site, a letter the Applicant's attorneys swore they never received. For reasons that were never explained, the Ministry never did respond to the December 6, 2006 or the January 4, 2007 letters indicating that the Applicant would not return to work at CBA until satisfied it was safe. They did not require the Applicant in writing (nor orally) to report for work at CBA or at an alternative location. Nor did they warn her in writing (or orally) that if she failed to attend disciplinary action would be taken against her.

9. On or about January 31, 2007, the Applicant did not receive her pay. The December 8, 2006 and January 4, 2007 letters from her attorneys had met with deafening silence. On February 2, 2007, the Applicant's attorneys again wrote to the Ministry (copying the Attorney-General's Chambers) stating in material part as follows:

> "*We refer to our letters to you of 8 December 2006 and 4 January 2007, neither of which have received any reply.*
>
> *We are instructed that our client has not been paid for the month of January 2007. Unless our client receives her pay within 7 days of the date of this letter, she will have no option but to bring an action against the Government of Bermuda for unlawful termination. Our client can only assume that she has been terminated, as you have refused to communicate with us or our client in any way.*"

10. On February 14, 2007, under cover of a letter to the Court clearly not inspired by St. Valentine, the Applicant's attorneys filed an application for leave to seek judicial review of "*the apparent decision ...to terminate the employment of*" the Applicant "*and/or to suspend*" her "*without pay and without notice.*" On March 28, 2007, Wade-Miller J granted leave to the Applicant to pursue the present proceedings. There was by this date still, it seems, no response to the Applicant's said lawyer's letters.

11. The Respondent's initial tactical response to the proceedings was to seek to set aside the March 28, 2007 Order on the grounds that (a) the Minister had not made the decisions complained of, and (b) no relief by way of judicial review could properly be sought. The second of these two complaints had considerable merit. The Chief Justice felt that the case for judicial review, as opposed to an ordinary claim for damages, was not adequately pleaded. But he declined to set aside the ex parte Order granting leave to pursue the present proceedings. He directed instead, on October 4, 2007, that the grounds on which relief were sought should be amended to clarify what public law relief was being relied upon (in particular, expressly referring to the Occupational Safety and Health Act 1982 ("OSHA")),

12. On May 21, 2007, the Respondent filed two affidavits which asserted that the Applicant had left her job of her own accord. These were supplemented by a third affidavit sworn on October 23, 2007. The main averments made in substantive response to the claim were as follows: (a) the Applicant was not entitled to rely on OSHA as a ground for not returning to work[3], (b) the Applicant "*was required to have made herself available for work by turning up at the office of the Ministry since the Ministry was her employer*"[4]; and (c) "[t]*he Applicant by failing to report for work on the 20th December 2006 until present time has self dismissed herself.*" Issue was also joined on whether the Applicant was entitled to rely on OSHA at all, in part because it ought to have been obvious to her from press reports that the health problems at CBA had been resolved. It was also suggested that numerous attempts to contact the Applicant had failed, although there was a paucity of documentary evidence in support of this claim.

13. Against this essentially undisputed background of primary facts, this Court is required to determine whether the Applicant is entitled to any public law relief because the Respondent has either terminated her employment or taken lesser disciplinary action in breach of any statutory provisions contained in OSHA and/or the Public Service Commission Regulations 2001 giving rise to more than private law rights. I was also invited to consider the wider statutory terms and conditions of the Applicant's contract of employment, but these legal provisions had not been pleaded, even by way of amendment.

14. By the end of the hearing it was reasonably clear that, assuming it was open to the Applicant to seek relief by way of judicial review, she would in principle be entitled to the relief she sought. The Respondent could not credibly contend that the disciplinary action taken, suspending her pay and treating her absence on legal advice as a resignation, without notice, was legally validly within the Public Service Commission Regulations 2001. It was seriously argued, however, that the appropriate remedy for the Applicant lay in the realm of ordinary employer/employee contractual claims, and outside of the scope of the present public law application. It is on this technical jurisdictional issue, rather than the merits of the Applicant's complaint about being required to return to work at CBA, that the present judgment mainly turns.

Statutory elements of employment relationship

15. The Respondent's main argument of substance, which was not finally determined by the Chief Justice on the application for leave to set aside, is that the relief sought in these proceedings ought not to be granted in respect of a mere employment dispute. It is therefore necessary to identify the statutory basis of her employment before considering whether this is an appropriate case for the discretionary relief sought being granted.

[3] Chief Education Officer's Affidavit, paragraphs 24-28.
[4] Paragraph 29.

16. Although the Applicant initially seemed to be formally seeking relief in large part under OSHA, it is now plain that she also relies on her status as a teacher employed by the Government under a special statutory scheme as a basis for seeking relief by way of judicial review instead of relying on the private law remedy of a claim for wrongful dismissal. In *Evans-v- Minister of Education* [2006] Bda LR 52, which was not appealed by the Crown, I concluded as follows in a case concerning another teacher who (as a spouse of a Bermudian) was employed under a limited term contract:

> "*21. Mr. Douglas for the Respondent made the broad submission that the Applicant raised no proper public law complaint. This submission is, in my view, sound as regards the relief sought for termination contrary to the Employment Act 2000, which applies to employees generally outside of the public sector. Counsel placed the case of R-v-East Berkshire Health Authority, ex parte Walsh [1984] 3 All ER 425 before the Court. The English Court of Appeal here reviewed various authorities concerning when dismissals gave rise to public law remedies as opposed to private law remedies, and concluded that judicial review was only available where "there was a special statutory provision bearing directly on the right of a public authority to dismiss the plaintiff."*[5]
>
> *22.The Employment Act 2000 applies to employees generally, and contains no special provisions relating to public sector employees in the position of the Applicant alone. Any breach of this Act by the Respondent raises no public law complaint which can be remedied in the present proceedings….*
>
> *29.The public law question which is properly before this Court is whether the termination of the Applicant's employment by the Respondent was lawful under the Public Service Commission Regulations 2001, as read with the Public Service (Delegation of Powers) Regulations 2001, subsidiary legislation enacted by the Governor under section 83(1) of the Bermuda Constitution. This legislation imposes particular restrictions on the way in which the employment of teachers may be terminated….*"

17. Although the Applicant was employed under a limited term contract which had not expired, that contract (clause 15) incorporated by reference to the Public Service Commission Regulations 2001, along with various other statutory provisions together with the Collective Agreement. Working out precisely what legal rules govern discipline and termination requires extensive legal analysis and reference to various legal instruments. The Collective Agreement contains some rules; the Public Service Commission Regulations 2001 contain other rules; and

[5] Sir John Donaldson MR, at page 430f.

the Code of Conduct made under the 2001 Regulations contains even more potentially relevant rules to the specific issues of termination and discipline. It is fairly obvious that nothing in the Children Act 1998 or the Education Act and Rules is central to this enquiry.

18. The length of notice the Applicant was entitled to receive a termination of her contract was, pursuant to clause 11, governed by the Collective Agreement, not statute. The 2001 Regulations are made by the Governor under section 84(5) of the Constitution. Section 82 of the Constitution vests the power to appoint and exercise control over public officers in the Governor acting on the recommendation of the Public Service Commission, and section 83 permits these powers to be delegated. As discussed in the *Evans* case, teachers are public officers and the power to terminate a teacher's employment has been delegated to the Permanent Secretary of Education. In that case, a termination decision purportedly made by the Chief Education Officer was held to be void. In this case, perhaps to avoid being caught by the principle in *Evans*, it is contended that no termination decision was made at all.

19. Nevertheless the Applicant's pleaded case seeks a declaration that any purported termination of her employment was unlawful. Assuming that she was a public officer, which does not seem to be in issue, the following provisions of the 2001 Regulation on termination appear to apply:

> "***Premature termination of contract***
> *33 Where an officer is serving under a contract which provides for termination by notice before the expiration of the period of service stipulated therein and the Head of Department considers that the contract should be so terminated, he shall report the matter in writing to the Secretary to the Cabinet who shall determine whether such course be taken.*"

20. The scheme of the Regulations appear to be to create a special regime in relation to the disciplinary control of public officers which gives them far greater protections than under the general law governing employment relationships. A statutory procedure for dealing with disciplinary matters is set out in the Schedules (as read with the Code of Conduct), under which an express right to be heard exists. A right of appeal exists against disciplinary penalties to the Public Service Commission. A gross misconduct penalty may be reversed on appeal by the Commission. Dismissal is the most severe penalty for a "*gross misconduct offence*" which can only be imposed by the Secretary to the Cabinet[6]: Code of Conduct, paragraph 7.5.2(e). Suspension without pay is a second-level punishment for gross misconduct under paragraph 7.5.2(b). Misconduct penalties include oral and written warnings. Misconduct penalties may be appealed to the

[6] Assuming the Public Service Commission Amendment Regulations 2003 apply by necessary implication to the Code as well.

Head of the Civil Service. These matters were considered in the *Evans* case on which the Applicant relied. None of these protections appear to apply to "*temporary officers*", who is seemingly liable to be dismissed for any disciplinary offence (Code of conduct, paragraph 7.5.4).

21. Terms and conditions of employment relating to "*salaries, method of payment,, leave emoluments, sickness benefits and other conditions of employment*" are governed by the Collective Agreement (article 2(a)).But article 5(b) of the Collective Agreement explicitly states: "*Disciplinary powers over Teachers in maintained schools, including dismissals, are governed by the Public Service Commission Regulations…*". The Respondent relied upon Schedule 2 paragraph (2)(k) of the Collective Agreement which provides as follows:

> "*Teachers absenting themselves without leave will be liable to forfeiture of pay for the period of absence, as well as for loss of increments in the subsequent year, and may be liable to disciplinary action.*"

22. Section 7.5.5 of the Code of Conduct, which was not referred to in argument, provides as follows:

> "*An officer who is absent from duty without permission or without reasonable cause renders himself/herself liable to disciplinary action. The onus will rest on the officer to show that the circumstances do not justify such action being taken. Where an officer is absent from duty without leave or reasonable excuse for a period exceeding five working days, the officer shall be deemed to have resigned.*"

23. The Respondent relied on common law principles analogous to this statutory rule which is incorporated (via the 2001 Regulations) into the Applicant's contract with the Respondent in support of the argument that the Applicant had resigned rather than been dismissed. However it is clear that although the Governor under the Public Service (Delegation of Powers) Regulations 2001 delegated his powers in respect of teachers and other public officers, the Regulations as a whole still apply as a matter of statutory law :

> ***"Delegation of powers***
>
> *3 The powers vested in the Governor by section 82 of the Constitution in relation to the offices specified in Column 1 of the Schedule are delegated to the public officer specified in Column 2 of the Schedule to the extent set out in Column 3 of the Schedule and subject to the conditions set out in Column 4 of the Schedule.*
>
> ***Delegated powers to be exercised in accordance with Public Service Commission Regulations***
>
> *4 The public officer to whom powers are delegated under these Regulations shall, in exercising those powers, act in accordance with the Public Service Commission Regulations 2001 as if*

references in those Regulations to the Commission were references to the public officer."

24. Paragraph 5 of the Schedule to the Delegation Regulations does not, as does paragraph 3 in relation to prison officers, apply an alternative disciplinary code to the discipline of teachers. Paragraph 5 simply provides:

"

5. The office of deputy principal, teacher and teacher in a post of special responsibility	*Head of Department*	*All the powers of the Governor*"

25. It is against this wider statutory background, that the question of whether the Applicant is entitled to obtain judicial review in respect her pleaded reliance on OSHA, or should be left to her private law remedies for breach of contract falls to be considered.

The Applicant's pleaded case

26. The Applicant originally (by her February 14, 2007 Notice of Application for Leave) sought relief in respect of the "*apparent decision to terminate without notice or suspend*" the Applicant, namely an order of certiorari quashing the apparent decision and an order that the Applicant continued to be employed. The grounds relied upon were that she (and others) had become sick at Cedarbridge because of high levels of aspergillus mould. By letter dated December 8, 2006, the Applicant informed the Respondent of this. Neither that letter nor a subsequent one on January 4, 2007 was responded to. She discovered that she had not been paid on February 1, 2007 and after enquiry was told that her sick leave had expired. The Applicant as a result could only assume that she had been either terminated or suspended because no real attempt had been made by the Respondent to contact her to either (a) satisfy her that it was safe to return to CBA or (b) to re-assign the Applicant to a different school with a safe environment. It appeared that the Respondent, having failed to provide a reasonably safe work environment, was punishing the Applicant for being ill.

27. This skimpy pleading bore all the hallmarks of a low-budget bare bones pleading prepared by an enthusiastic plaintiff's lawyer, filed in mid-February on behalf of an Applicant who had not been paid at the end of January. In essence, the claim sought to quash any purported termination of the Applicant's employment on the grounds that any such decision was invalid and also a declaration that she

continued to be employed by the Respondent. The factual grounds of the application were briefly pleaded but not the statutory provisions said to have been breached. However, according to the notes of the leave hearing before Justice Norma Wade-Miller on March 28, 2007, the Applicant's counsel referred Her Ladyship to both certain provisions of OSHA subsequently pleaded and the Public Service Commission Regulations said to "*speak to circumstances in which a person can be disciplined.*" In any event, paragraph 6 "*GROUNDS ON WHICH RELIEF IS SOUGHT*" were eventually amended and now significantly state in material part as follows:

> "*...The Government of Bermuda is punishing the Applicant by withholding her pay and/or terminating her employment and /or suspending her from duty without pay and without notice contrary to the Occupational Safety and Health at Work Act 1982 and/or the Public Service Commission Regulations 2001 as amended.*"

28. And Mr. Harshaw in his written reply submissions (filed on February 1, 2008) and in his opening oral submissions on February 4, 2008 relied on the statutory framework governing termination and discipline, which was considered in the *Evans* case both (a) as an answer to the jurisdictional objection and (b) as an alternative fall-back ground for relief even if the claim for breach of OSHA failed.

Factual findings: the Respondent's decision

29. The Respondent essentially admits that a decision was taken by a person or persons unknown in the Ministry to stop the Applicant's pay because she was absent from work without leave and had terminated her own employment, notwithstanding the fact that (a) she had through her lawyers advised that she would not return to CBA unless satisfied it was safe, and (b) she had neither been requested to attend an alternative work site nor in any indicated that she was otherwise unavailable for work.

30. It is neither necessary nor possible to determine on the affidavits precisely when the Ministry formed the view that the Applicant had effectively resigned by failing to report to work without any reasonable excuse. It is clear that on or before January 31, 2007, a decision was taken to discipline the Applicant by stopping her pay as a punishment for being absent from work without any reasonable excuse, an offence which (if proved) could under the Code of Conduct result in the Applicant being deemed to have resigned. However, this penalty was clearly imposed without prior notice contrary to the statutory scheme for disciplining public officers under the Public Service Commission Regulations 2001, and the Code of Conduct made thereunder.

31. It is not open to this Court to determine on the basis of conflicting affidavit evidence alone that a decision to actually (as opposed to constructively) terminate

the employment was ever made by the Respondent, although this inference could arguably be drawn from the failure to respond to the third lawyer's letter of February 2, 2007, which explicitly stated that the Respondent's silence would be construed as an admission that a termination decision had been made. Rather, it is clear based on this correspondence and the Respondent's own evidence, that on a date uncertain on or after February 2, 2007 and before May 21, 2007 (when evidence was filed on behalf of the Ministry asserting that the Applicant was considered to have resigned), the Respondent explicitly or implicitly decided to treat the Applicant's absence as a resignation.

32. Accordingly, and that the operative decisions upon which the present application turns are (a) the Respondent's admitted explicit decision on or before January 31, 2007 to punish the Applicant for being absent without leave while failing to afford her any prior notice of the investigation and penalty which was imposed and (b) the Respondent's explicit or implicit decision on or after February 2, 2007 and before May 21, 2007 to regard the Applicant's absence as having terminated the Applicant's employment. Both decisions, in general terms, formed part of the Applicant's pleaded case which is summarised above.

Findings: legality of punishment imposed for absence without leave as a matter of public law

33. Mr. Johnson correctly pointed out that the Collective Agreement expressly permits the deduction of pay for absence without leave. Schedule 2 paragraph (k) is reproduced above. Despite the phraseology of paragraph (k), it seems clear that forfeiture of pay is an agreed form of disciplinary penalty which could only be imposed after a proper finding that leave without absence took place. It was conceded orally at the hearing that it is now clear that the Applicant was entitled to take sick leave for most of the November 22, 2006 period, so that the absence in question relates to the January 3, 2007 period onwards after CBA reopened and when she did not return to work at CBA on legal advice.

34. The private law position under the Collective Agreement is that Schedule 5 prescribes a three-step process of informal advice and warning, formal warning and written warning by the Principal before any penalty is imposed. These disciplinary procedures were clearly not followed before the salary deduction took place. But this is not a matter for judicial review, and is a matter which may entitle the Applicant to seek compensation in damages for in a private action commenced by Writ.

35. The provisions of the Collective Agreement are essentially private law contractual terms. The statutory provisions which potentially entitle the Applicant to public law relief have been alluded to above, and are particularly relevant bearing in mind that the Applicant was in legal and factual terms employed by the Ministry and dealing with the Ministry in relation to her ability to work at CBA. It is admittedly unclear how precisely the provisions of the Collective Agreement,

which deals with the discipline of teachers within aided and maintained schools, are intended to interface with the provisions of the Public Service Commission Regulations 2001 and Code of Conduct made under it. For the purposes of the present proceedings, it is the latter provisions which are of primary concern, and there is no suggestion that it is legally possible to contract out of the statutory regime which ultimately derives from the Bermuda Constitution.

36. The Public Service (Delegation of Powers) Regulations 2001 were made by the Governor under section 83(1) of the Constitution. Under paragraph 5 of the Schedule, all the Governor's powers in respect of the "*office of deputy principal, teacher and teacher in a post of special responsibility*" are delegated to the "*Head of Department*". The term "Head of Department" is defined in Regulation 2 of the Delegation of Powers Regulations as meaning "*the officer who manages and supervises a Department*". "'Department' means a department of the Government and includes any other organ of or branch of the Government": Regulation 2. In the *Evans* case I held that the effect of this delegation was that the power to control and discipline teachers was vested in the Permanent Secretary, and could not be validly sub-delegated.

37. Schedule 5 of the Collective Agreement is stated to be "*without prejudice to the authority of the Permanent Secretary for Education who may initiate disciplinary proceedings for gross misconduct under the authority of the Public Service Commission Regulations…*", but the Permanent Secretary is also empowered to initiate disciplinary proceedings for misconduct not amounting to gross misconduct under those Regulations. The contractual position becomes somewhat clearer when one notes that at the end of Step 4 ("Penalties") of the maintained schools segment of Schedule 5, the following statement appears:

> "*This procedure does not replace and is without prejudice to General Orders for Teachers 1974, Section 33 Discipline Offenses*[sic]*: Penalties; or the Public Service Commission Regulations 1968 as applicable to teachers.*"

38. The legal position must be that ultimate disciplinary control over teachers is exercised in respect of all forms of misconduct by the Permanent Secretary of Education under the Public Service Commission Regulations, subject to any necessary modifications which flow from the delegation which has taken place of the Governor's original powers under the Regulations. The disciplinary jurisdiction exercised by Principals over teachers hired by the Ministry operates alongside and subject to the Permanent Secretaries' statutory powers. On the facts of the present case, there is no suggestion that any disciplinary action was taken against the Applicant by the Principal of CBA under the Collective Agreement prior to the commencement of these proceedings. Rather it appears that the Respondent, her employer (and with whom her lawyers were in correspondence), decided to discipline her for being absent without leave and to treat her absence as a resignation.

39. The main focus of the Respondent's submissions was on the argument that judicial review was inappropriate because the Applicant's private law rights alone had been infringed and she had alternative private law relief. Mr. Johnson placed various authorities before this Court which served to illustrate both that (a) only in exceptional cases will judicial review be available in the employment context, even where public officers are involved, and (b) courts everywhere have struggled with deciding where the line ought properly to be drawn between public law and private law relief. The consistent reasoning which appears to emerge from the authorities cited is that because of the legal policy that the courts will not at common law grant orders for specific performance of private contracts of employment, the same position should ordinarily exist in relation to contracts involving public officers. The remedy for wrongful termination at common law is damages and, apart from a statutory remedy of reinstatement for unfair dismissal which is available to public and private employees alike[7], the Court should not make orders which set aside the termination of a public employee's employment in the context of a judicial review application unless some breach of public law has occurred. "Public law" in this context means more than the breach of an ordinary statutory provision which applies to public and private employees alike.

40. In my judgment, the procedural propriety of a judicial review application in relation to public officers such as teachers will almost always be subject to potential challenge where the relevant Government Department has instituted disciplinary proceedings under the Public Service Commission Regulations 2001, whether resulting in termination or otherwise, and giving rise to appeal rights under those Regulations (including the Code of Conduct). The merits of disciplinary application and/or penalties, even under those statutory provisions in relation to public officers, are essentially a private law matter between employer and employee. Even if a complaint about disciplinary matters arises out of a statutory scheme which potentially engages public law remedies, such remedies will only properly be available if the Crown has acted unlawfully in breach of the statutory scheme. It is only where a respondent can be shown to have stepped outside the statutory scheme altogether in relation to public officers who are afforded special statutory mechanisms to protect their security of tenure that any possibility of judicial review exists. A complaint about a breach of OSHA alone, therefore, will usually in my judgment constitute a purely private law matter unless the breach is linked in a material way with a breach of the public protections for the employment of a public officer.

41. In the *Evans* case, on which Mr. Harshaw heavily relied, I opined that the question of alternative remedies (a) did not arise on the facts, and (b) should ordinarily be resolved at the interlocutory stage of an application to set aside leave:

[7] Section 40(1)(a) of the Employment Act 2000.

"*79. In the present case, it is suggested by the Crown that judicial review ought to be refused because the Applicant had a statutory appeal to the Secretary of the Cabinet which she could have pursued under the 2001 Regulations. I would hold that no such remedy was available (in the sense of being either open to the Applicant and/or more convenient or suitable) in respect of the complaint that the decision was made by the wrong person, because only a court of competent jurisdiction could unarguably quash a decision on the grounds of a breach of the rule against sub-delegation*[8]*.The Secretary to the Cabinet could not have declared the dismissal to be ultra vires and invalid, as in my view the 2001 Regulations cannot be construed as conferring on this public officer the power to rule on jurisdictional points of this nature. Even if this conclusion were to be wrong, I would not in the exercise of my discretion refuse relief on alternative remedies grounds in light of the following observations in De Smith, Woolf & Jowell*[9]*:*

> *"Questions as to whether an applicant should have resorted to another procedure will normally arise on the application for leave and not after the hearing on the merits. Once the court has heard the merits there is little purpose in requiring the parties to resort to some other tribunal.*"

42. In *Evans-v- Minister of Education* [2006] Bda LR 52, I dealt with the no public law test rather pithily and concentrated on the public law nature of the statutory power to determine the appointment of a teacher. Although it seems obvious that the same reasoning applies to the power to discipline a teacher by (a) stopping her salary, and (b) treating her absence without leave as a resignation, in deference to Crown Counsel's researches I will revisit the appropriate test for determining when a public law question is raised in the employment context in more detail below. The most important question is not so much what the test is, but how one applies it to determine which side of the public law-private law demarcation line a particular case falls. The cases relied upon by the Respondent will now be considered.

43. It is clear that where teachers are employed by a university which is itself established by statute under "ordinary contracts of employment", judicial review ought not to be granted: *Vidyodaya University of Ceylon and others-v-Silva* [1964] 3 All ER 865 (PC). The Privy Council in that case, however, contrasted the situation where there "*was a statutory scheme which gave a number of rights and imposed a number of obligations going far beyond any ordinary contract of*

[8] The position, in light of the modern approach, might perhaps be different if the relevant right of appeal lay to a court of competent jurisdiction. It is possible that an appeal to this Court against such a decision, if combined with merits grounds of appeal, might properly be entertained to avoid the need for separate public law proceedings, and that an appeal to this Court might constitute a convenient alternative remedy in an appropriate case.

[9] '*Judicial Review of Administrative Action*' 5th edition, paragraph 20-020.

service." It is also clear that where a declaration is sought that a "*contract of service*" was invalidly terminated in respect of a clerk employed by a local government authority on terms which did not entail any statutory security of tenure protections, that such relief will be refused: *Francis-v- Municipal Councillors of Kuala Lumpur[1962]*3 All ER 633 (a private law case in any event). Neither of these cases sought to define a test for deciding when the courts could or could not declare a purported termination of a contract of employment to be invalid. The relevant test was considered extensively by the northern Ireland Court of Appeal in *In re Malone's Application* [1988] NI 67 where the court held that a clerical officer dismissed by Queens University Belfast was not entitled to obtain judicial review. After reviewing various English authorities on the availability of public law remedies in the non-employment context, Kelly LJ held[10]:

> "*It is when the issue of "public law" versus "private law" rights arises in this context of master and servant employment that a different approach from any of the foregoing may be necessary to determine it. The nature of the contract of employment and the source and nature of the employer's exercise of power under it giving rise to rights may have to be considered and this may give rise to competing public law and private law elements. There will not, however, be such competing elements where the whole context is a "pure" or "ordinary" employer/employee relationship and where the power or function exercised by the employer infringing rights, comes entirely from the contract of employment. In these circumstances only "private law" rights are involved and proceedings by way of judicial review are not competent. As Woolf J said in Reg v BBC Ex parte Lavelle [1983] 1 WLR 23, 30*
>
> > *'An application for judicial review has not and should not be extended to a pure employment situation.'*
>
> *Lord Wilberforce said in Malloch v Aberdeen Corporation [1971] 1 WLR 1578, 1595*
>
> > *'The argument that, once it is shown that the relevant relationship is that of master and servant, this is sufficient to exclude the requirements of natural justice is often found, in one form or another, in reported cases. There are two reasons behind it. The first is that, in master and servant cases, one is normally in the field of common law of contract inter partes, so that principles of administrative law, including those of natural justice, have no part to play. The second relates to the remedy: it is that in pure master and servant cases, the most that can be obtained is damages, if the dismissal is wrongful: no order of re-instatement can be made, so*

[10] Lexis Transcript, pages 8-9 (pages 10-11 of the transcript in the Respondent's bundle of authorities).

no room exists for such remedies as administrative law may grant, such as a declaration that the dismissal is void.'

Although radical changes since this speech have taken place in Employment protection law and now an Industrial Tribunal can order re-instatement of an employee the essential point in the passage remains.

Whenever the employer is also a public authority this fact injects a public law element. But it does not necessarily follow, as I have earlier observed and sought to illustrate by the dicta of Sir John Donaldson MR in the East Berkshire case at page 164 and Lord Wilberforce in Davy's case at pages 276 and 279, that public law rights thereby arise. If the power exercised by the statutory authority or public body arises solely from the contract of employment then private law rights alone are involved.

On the other hand, if the power exercised by the public body derives wholly from statute or partly from statute and contract then whether public law rights arise, depends on the nature of the statutory element or control and in some cases also whether the appropriate remedies are 'public law' remedies. This statutory element or intervention into the contractual relationship of employer/employee is well illustrated in the East Berkshire case where the Master of Rolls described it as a situation whether "Parliament can underpin the position of public authority employees by directly restricting the freedom of the public authority to dismiss, thus giving the employee 'public law' rights. Alternatively it can require the authority to contract with its employees on specified terms with a view to the employee acquiring 'private law' rights under the terms of the contract of employment." The East Berkshire case was an example of statutory control over the terms of the applicants' employment but not of such degree as to raise "public law" rights in the circumstances of his dismissal. On the other hand, in Vine v National Dock Labour Board [1957] AC 488 the statutory scheme under which the plaintiff, a dock labourer, was employed gave him, in the words of Jenkins LJ in the Court of Appeal [1956] 1 QB 658, 674, 'a number of rights and imposed a number of obligations going far beyond any contract of service.' The statutory scheme of his employment was such that it created, in the words of Lord Kilmuir ' . . . an entirely different situation from the ordinary master and servant case; . . .'

The nature of his employment was described by Lord Keith at page 507 in this way:

> *'This is not a straightforward relationship of master and servant. Normally, and apart from the intervention of statute, there would never be a nullity in terminating an ordinary contract of master*

and servant. Dismissal might be in breach of contract and so unlawful but could only sound in damages.

Here we are concerned with a statutory scheme of employment. One of its objects was to do away with the evils of casual employment at the docks. Another was to secure the regular supply of labour for the shipping and unshipping of merchandise.'

This decision although pre-dating judicial review procedure, shows that the statutory intervention gave the plaintiff an extra status to that of an ordinary employee and it was such that it acquired for him rights that justified a declaratory judgment.

Yet another pre judicial review decision is helpful in illustrating that statutory intervention touching on a contract of employment may not give rise to public law rights. In University Council of Vidyadaya University of Ceylon v Silva [1965] 1 WLR 77, the University, which was given statutory powers, inter alia, to dismiss officers teachers and other persons in their employment on the grounds of incapacity or unfitness terminated Mr de Silva's appointment as a lecturer. He sought certiorari, contending that he had not been informed of the accusations against him and he had not been given an opportunity of being heard. The Board held that certiorari did not lie in the circumstances. The relationship between him and the University was the ordinary relationship of master and servant. Lord Morris of Borth-y-Gest said at page 90:

'This circumstances that the University was established by statute and is regulated by the statutory enactments contained in the Act does not involve that contracts of employment which are made with teachers and which are subject to the provisions of section 18(e) are other than ordinary contracts of master and servant. Comparison may be made with the case of Barber v Manchester Regional Hospital Board. In his judgment in that case Barry J said 'Here, despite the strong statutory flavour attaching to the plaintiff's contract, I have reached the conclusion that in essence it was an ordinary contract between master and servant and nothing more.'

One must point out that Lord Wilberforce in Malloch's case (supra) at page 1596 said he would not follow the decision in de Silva on the grounds that the statutory provisions on which Mr de Silva's employment rested tended to show that his employment as a university professor was of a sufficiently public character and sufficiently in the nature of an office as to attract appropriate remedies of administrative law. Nevertheless, that criticism does not appear to me to go to the case of a University employee of lesser rank, such as a clerical officer or computer clerk, the occupation of the appellant.

> ***The foregoing authorities suggest to me that there is no single key that unlocks to reveal either "public law" or "private law" rights in any given case. It is not possible to define comprehensively these rights or to circumscribe their scope. The best that one can do is follow the broad guidelines of approach clearly apparent in these leading authorities and to ask as the ultimate question, whether the public law element is so dominant in the proceedings as to point to a prerogative and public law remedy as appropriate.***" [emphasis added]

44. As there can be no doubt that the Permanent Secretary of the Respondent's Ministry is constitutionally empowered to appoint, remove and exercise disciplinary control over teachers, the central reasoning in *R-v- Statutory Visitors to St. Lawrence's Hospital, Cateram ex parte Pritchard* [1953] 2 All ER 766 does not apply. In *Williams-v- Public Service Commission[2005]* Bda LR 6, Bell J held (at pages 8-9) that the constitutional and delegated statutory provisions relating to the discipline of police officers raised "*public law issues which are appropriately the subject of judicial review proceedings.*" Finally on this topic, Mr. Johnson relied upon the following passage from *R-v-East Berkshire Health Authority ex parte Walsh* [1985] QB 152 at 170A-B :

> "*In my opinion the courts should not be astute to hold that any particular dispute is appropriate for consideration under the judicial review procedure provided for by R.S.C., Ord. 53. Employment disputes not infrequently have political or ideological overtones, or raise what are often described as "matters of principle": these are generally best considered not by the Divisional Court but by an industrial tribunal to the members of which, both lay and legally qualified, such overtones or matters of principle are common currency.*"

45. This passage speaks more to the question of alternative remedies than it does to the issue of whether an employment issue is or is not a public law question. More instructive, for present purposes, are later *dicta* by the same judge to the effect that judicial review was inappropriate because the "*fundamental issues are whether the authority had grounds to dismiss the applicant summarily and whether they did so in accordance with his detailed terms and conditions of service.*"[11] However, there was no suggestion in *Walsh* that the terms and conditions of the applicant's employment (or, in particular, the power to discipline him) were derived directly from statute. Instead, the Secretary of State under subsidiary legislation approved contractual terms proposed by a negotiating body. Lord Donaldson, delivering the leading judgment in the same case, more accurately formulated what I find to be a highly persuasive test for determining when judicial review is potentially available in relation to applications concerning the employment status of public officers:

[11] At 170H.

> "*Parliament can underpin the position of public authority employees by directly restricting the freedom of the public authority to dismiss, thus giving the employee "public law" rights and at least making him a potential candidate for administrative law remedies. Alternatively it can require the authority to contract with its employees on specified terms with a view to the employee acquiring 'private law' rights under the terms of the contract of employment. If the authority fails or refuses to thus create "private law" rights for the employee, the employee will have "public law" rights to compel compliance, the remedy being mandamus requiring the authority so to contract or a declaration that the employee has those rights. If, however, the authority gives the employee the required contractual protection, a breach of that contract is not a matter of "public law" and gives rise to no administrative law remedies.*"[12]

46. In the present case there can be no real doubt that the Applicant is potentially a candidate for judicial review because the freedom to dismiss her, as well as discipline her, is restricted by the Public Service Commission Regulations. It follows, that the decisions to (a) stop the Applicant's pay without notice on or about January 31, 2007, and (b) find, between on or about February 2, 2007 and May 21, 2007 that she had resigned by being absent without lawful excuse, without any notice that the Ministry considered her absence on legal advice constituted a disciplinary offence, were unlawful as a matter of public law because they were reached in breach of the statutory disciplinary regime, and not simply in breach of private contractual obligations. That regime, contained in the Public Service Commission Regulations 2001 as read with the Code of Conduct, explicitly and/or implicitly mandates that prior notice of disciplinary action be given, that disciplinary decisions are communicated to the public officer affected so that appeal rights may be exercised. It matters not, on the facts of the present case, whether the alleged misconduct was considered at any material time to be simple or gross misconduct as the same basic rules of natural justice (albeit in statutory form) apply.

47. The Applicant's case, in my judgment, falls on the public law side of the line, in terms of the appropriateness of the present application as opposed to alternative forms of relief, primarily because the Ministry has, by accident or design, bypassed the private law regime altogether. It is understandable that, in the upheaval caused by the closure and re-opening of CBA, stress levels must have been high and normal administrative communication lines interrupted. It seems highly probable that the sick notes obtained by the Applicant in November and December 2006 were delivered to CBA but never reached the Ministry. But there is no suggestion that the Ministry did not receive the Applicant's attorneys' letters of December 8, 2006 and January 4, 2007, not to mention the February 2, 2007 letter. As far as the period covered by the sick notes is concerned, assuming this

12

absence formed the basis of the decision to stop the Applicant's pay at the end of January, the Applicant had an explanation for her absence. Not only was she not given an opportunity to explain her absence during the period in question, but after normality returned in January, 2007, she was neither asked for an explanation, told disciplinary proceedings were pending, nor given prior notice of the penalty.

48. As far as the period between January 3, 2007 and February 2, 2007 is concerned, there was no mystery about the reason for the Applicant's absence. What is shrouded in mystery is why the Ministry, assuming they viewed her lawyers' letters as mischievous (as was first asserted in an October 23, 2007 Affidavit sworn after the Applicant's reliance on OSHA was belatedly explicitly pleaded) did not simply respond to the December 8 and January 4 letters "rubbishing" them. If the Applicant had been warned that her absence was regarded as unauthorized and that she would be treated as having resigned if she did not return by a specific date, the ordinary disciplinary processes might have been engaged. Instead, by failing to respond to the February 2, 2007 letter, which essentially said that no response would be construed as actual or constructive dismissal, the Applicant was entitled to assume that the Respondent had already taken the ultimate disciplinary action against her without any hearing or prior warning, in circumstances where she was merely attempting, on legal advice, to assert her statutory rights under OSHA. Although the Respondent, in response to these proceedings, would later contend that the Applicant had failed to make herself available for work by reporting to the Ministry, there is no evidential indication that she was ever requested to attend any alternative school while the legal dispute was being resolved.

Findings: the significance of OSHA and did the Applicant resign?

49. It is not necessary in these circumstances for the Court to determine whether or not the Applicant's rights under OSHA were substantively infringed. The Respondent's counsel contention that these rights are private law rights, the breach of which does not entitle even a public officer to seek judicial review, is fundamentally sound. What does entail a breach of public law is for the public employer of a public officer whose employment has special statutory protections to (in contravention of the statutory disciplinary code) (a) simply ignore lawyers letters seeking confirmation that the employee's place of work is safe for her to return to in circumstances where the premises have been evacuated on health grounds and the employee has individualized health concerns, which may not apply to those who elected to return to work, and (b) to treat her absence from work as deliberate misconduct, without any form of notice or warning that disciplinary penalties are likely to be imposed, in circumstances where the employer is well aware that the relevant absence is based on legal advice and the employer's own non-responsiveness to a series of straightforward letters.

50. On these highly unusual facts, it is sufficient for the Applicant to demonstrate that her OSHA rights were arguably infringed to rebut the case of the Respondent that

the Ministry was entitled to stop her pay and regard her absence without leave as a resignation or "*self dismissal*". The Respondent's counsel contended that resignation had taken place by reference to English cases that appear to espouse common law principles which are reflected in the operative provisions of the Code of Conduct, although these provisions are probably somewhat more favourable to the employer in terms of onus of proof. The provisions of paragraph 7.5.5 are worth setting out again:

> *"An officer who is absent from duty without permission or without reasonable cause renders himself/herself liable to disciplinary action. The onus will rest on the officer to show that the circumstances do not justify such action being taken. Where an officer is absent from duty without leave or reasonable excuse for a period exceeding five working days, the officer shall be deemed to have resigned."*

51. This provision was not referred to in argument, the Respondent's counsel preferring to refer to the somewhat milder provisions of the Collective Agreement which suggested that this was merely a private contractual matter. But this provision may fairly be construed consistently with the cases on which Mr. Johnson relied as indicating that where an officer is absent without permission for more than five days without any reasonable excuse, they may be deemed to have resigned. However this rule also makes plain what would otherwise be obvious. Absence without leave or reasonable excuse is conduct which gives rise to a liability to disciplinary action. Implicitly, disciplinary action pursuant to the Public Service Commission Regulations and Code of Conduct made under it must be instigated before a disciplinary penalty may be imposed, be it docking of pay or a determination that the officer concerned "*shall be deemed to have resigned.*" Resignation does not occur simply by proof of absence: the absentee must first be given an opportunity to prove that there is no "*reasonable excuse*" for his absence. Whether or not a particular excuse, such as acting on legal advice, is or is not reasonable should be determined in disciplinary proceedings in which the officer's statutory rights to be heard are recognized. The merits of such an issue is a private law matter; the failure by the public employer to engage the disciplinary process at all before imposing disciplinary penalties is a public law matter amenable to judicial review.

52. That even as a matter of common law principles, the Applicant cannot properly be regarded as having resigned on the facts of the present case may be illustrated through a review of the cases which the Respondent placed before the Court . In *London Transport Executive-v- Clarke*[1981] ICR 355, the Court of Appeal majority held that where an employee with a poor work record went to Jamaica on holiday without permission having been refused unpaid leave, his contract of employment was terminated not by his own breach of contract, but by the employer's acceptance of such breach as having brought the contract to an end. Interestingly, the employer wrote a letter to his English address twice, the second time indicating unless he replied within 14 days they would assume he no longer

wished to work for them. His wife asked for leniency within the 14 days, but the employer gave notice that he had been taken off their books. The Court of Appeal majority upheld the industrial tribunal decision that his dismissal was unfair because no consideration was given to the wife's plea for leniency.

53. This case illustrates that the common law position is similar to that under paragraph 7.7.7 of the Code of Conduct in that what brings the contract of employment of an absent worker to an end is not the mere absence of the employee without permission and or reasonable excuse, but the decision of the employer, following a disciplinary process, to treat that absence as having terminated the employment relationship. The *Clarke* case was cited with implicit approval by the Employment Appeal tribunal in *Casciano-v-Eternit Products Ltd*., EAT 197/81, a case concerning an employee who overstayed on a holiday in Italy. There, an express agreement had been signed to the effect that in certain circumstances his position would be treated as vacant if he did not return. *Clarke* was expressly approved in *Norris-v-Southampton City Council* [1982] ICR 177 where the fact that the employee failed to return to work due to his own incarceration was held (on appeal) not to have automatically terminated his employment. It constituted a repudiation of the contract which was accepted by the employer giving rise to the need to determine whether such acceptance was reasonable.In *Tracey-v-Zest Equipment Co Ltd* [1982] ICR 481, it was held that very clear words would be required for an agreement that failure to return to work would automatically result in termination to be effective. *Heerah and John Laing Services Ltd*., EAT 600/80 (the employee had returned to Mauritius), merely illustrates that before an employer terminates for unauthorized absences, they must give prior notice of such decision.

54. The only case on which the Respondent positively relied in oral argument was *Miles-v-Wakefield* [1987] AC 539, a case which concerned the right of the employer to deduct pay in respect of periods during which the employee failed to perform Saturday weddings as part of a union-sanctioned campaign of industrial action. But the facts there were that "*by refusing to conduct weddings on a Saturday, the plaintiff, as he now frankly concedes, acted in breach of his duties as superintendent registrar*"[13]. Moreover, the industrial action lasted for over a year, and the deductions were seemingly not made until, roughly two months into the strike, the employer gave notice that unless the employees returned to work on Saturday and performed their duties in full, they would not be paid. The issue in the present case, by way of contrast, is not whether the power to stop pay for an absent worker exists at all. The question is whether as a matter of public law it is permissible to stop pay without prior notice in circumstances where a public officer is absent on legal advice while purporting to exercise statutory health and safety at work rights.

55. In *Brown-v-Tomlinson et al*, EAT/186/01, on the facts it was found that the applicant had acted unreasonably in refusing to return to work and that the

[13] Per Lord Templeman, at page 554 D-E.

employer had been entitled to accept that non-attendance as bringing the contract to an end. The following extracts from the industrial tribunal decision (which were approved by the Employment Appeal Tribunal at paragraph 6 of its decision) illustrate the circumstances in which an employee may be held to have acted unreasonably in not returning to work and an employer to have acted reasonably in characterizing the refusal to attend as a resignation:

> "*19. The applicant's letter of 13 September 1999 is inconsistent with the evidence that he gave to the Tribunal. The letter of 13 September 1999 clearly indicates that the applicant considered that his employment had been terminated on that date. Yet, in the evidence given to the Tribunal, the applicant clearly indicates that he agreed to take a holiday and that he would go back to the respondents to discuss the matter further.*
>
> *20 The respondents make it clear in their letters to the applicant that he has not been dismissed and that they wished to discuss the matter with him. The applicant, for reasons best known to himself, but which are not convincing to the Tribunal, adamantly and steadfastly refused to go back to the respondents to discuss the matter.*
>
> *21 In the respondents letter of 15 September 1999, they say to the applicant:-"You should report to work and we could then at least discuss the situation directly." The applicant refused and neglected to return to work, thus forcing the respondents to write their letter of 23 September 1999.*
>
> *22 The majority consider that the applicant repudiated his contract of employment by refusing to return to work. The respondents accepted that repudiation. By so doing, the respondents terminated the contract of employment.*
>
> *23 The respondents had absolutely no choice. They did their utmost to reassure the applicant, tried to accommodate him by discussing a possible alternative job, urged him to come back to work, to none of which the applicant responded reasonably at all. The majority of the Tribunal consider that the respondents had no choice. They had to continue to run their business. The majority consider that the respondents acted reasonably in treating the repudiatory conduct as sufficient reason for determining the contract.*
>
> *24 In reaching this decision, the majority of Members have found considerable help in the guidance given by the Court of Appeal in the case of London Transport Executive v Clarke [1981] ICR 355.*"

56. So the private law position and the public law position in Bermuda are essentially the same and, absent unusual facts, a Bermudian court might

reasonably be expected to decline to grant public law relief on discretionary grounds in cases where judicial review was potentially available. The most obvious alternative remedy would be the appeals process under the Public Service Commission Regulations 2001 where that process has been engaged, or indeed the Collective Agreement for disputes at the School level. Cases involving termination of employment altogether would most likely fall to be determined by the Permanent Secretary under the 2001 Regulations and Code. And the case law cited by Crown Counsel would be helpful persuasive authority in determining whether disciplinary action was justified under paragraph 7.5.5 of the Code of Conduct. They certainly illustrate how employers can reasonably be expected to respond to an unauthorized absence.

57. In the present case it is not disputed that the Applicant refused to return to CBA until she had received confirmation that it was safe for her, as a person with a mould allergy, to return. There is no suggestion that she refused to return to work having been told that she would be treated as having repudiated her contract if she did not do so, nor that she was requested to report for reassignment to another site while her concerns about CBA were resolved. She was not even told that her absence was regarded as unauthorized, after her lawyer wrote two letters indicating the reason why she was not reporting to her assigned school. When her pay was deducted without notice and a third letter was written stating that she was forced to conclude that the Respondent had terminated her employment in the absence of any contrary explanation, the Ministry still did not explain what its position was. It is impossible, having regard to the authorities placed before this Court and the undisputed facts, to conclude that (a) the Applicant repudiated her contract of employment, and (b) the Respondent merely accepted this repudiation.

58. Such a conclusion would most likely have been open to this Court if the Respondent had responded to the December 8, 2006 and January 4, 2007 letters (a) setting out the results of the independent testing and indicating (if this was the case) that this satisfied the Ministry that even persons with allergic vulnerabilities could safely return to CBA, and (b) notifying the Applicant that if she failed to report for duty at CBA and remained absent for more than five days, disciplinary action would be instituted against her for breach of paragraph 7.5.5 of the Code of Conduct which might result in a determination that she had resigned. If the Permanent Secretary found that her absence was unreasonable and this finding was upheld on appeal, this Court would have no basis for interfering which such a finding on its merits, unless the disciplinary process itself was flawed.

59. Fact patterns might also occur where no need to institute disciplinary proceedings arise at all. The public officer's conduct might be so obvious a repudiation of the contract, that all that was required was a letter indicating that if she did not return by a certain date, her employment would be regarded as at an end. This might suffice in cases where the officer was abroad and made no attempt to communicate with management.

60. On the facts which do exist however, it is obvious that no resignation occurred and, in my judgment, OSHA has only a subsidiary significance to the entitlement of the Applicant to the relief she seeks. Whether or not she had a valid OSHA complaint, and whether or not the Respondent breached its statutory obligations, is essentially a private law matter which may give rise to a remedy in damages. The existence of statutory provisions potentially entitling the Applicant to refuse to return to CBA unless satisfied it was a safe environment for her to work in (irrespective of the position of others), combined with her documented mould allergy and the admitted closure of CBA due to high mold levels, merely serves to highlight that the Applicant's absence from work while awaiting a response to her lawyers' letters was not so patently unreasonable that it justified (without further enquiry) the summary penalties imposed in breach of the statutory disciplinary code.

61. Mr. Johnson has succeeded in establishing, however, that health and safety disputes and alleged breaches of OSHA alone will not normally provide a proper basis for public law relief.

Discretion to grant relief

62. The above findings alone would not justify judicial review in respect of every disciplinary dispute, otherwise the statutory regime would be defeated. The disciplinary framework provided for, which envisages finality when appeal rights have been exhausted, would be defeated if this Court were to entertain every judicial review application where no disciplinary proceedings have yet taken place. The position of public officers under Bermuda law is not too different in substance from the position of the public officers in *R-v-East Berkshire Health Authority ex parte Walsh* [1985] QB 152. The Public Service Commission Regulations in effect provide that where certain public officers are appointed, the provisions of the Regulations must form part of the contract of employment.

63. So where the statutory regime has been honoured, or can potentially be complied with, this Court would most likely refuse leave to pursue a public law remedy on the grounds that an alternative remedy exists. The only sort of complaint which would seem obviously to fall outside of the scope of the statutory disciplinary regime would be a complaint of improper delegation (as in *Evans*) or some other complaint which did not relate primarily to the merits of a disciplinary decision made substantially within the parameters of the statutory scheme. Applicants would ordinarily have to exhaust their remedies under the statutory disciplinary scheme before seeking to contend that discretionary public law relief is required, not reverse a decision on the merits (irrationality apart) but to remedy any invalidity in the disciplinary process.

64. When a public employer, whose employee's tenure is protected by a comprehensive statutory disciplinary regime, gives that statutory regime such a wide berth in circumstances which involve the contention that the relevant

employment relationship is at an end, public law relief is clearly required. This is clearly the case where the history of this particular dispute makes it highly unrealistic to suggest that the question of whether or not the Applicant resigned, which has been fully argued before this Court, should be remitted for investigation by the Permanent Secretary, putting off even longer the resolution of the important question of whether or not the Applicant is or is not still employed. I would not in the exercise of my discretion decline to grant relief on the grounds that she has any other more appropriate remedy because of the unusual conduct of the Respondent in refusing to explain why the Applicant's pay was stopped until evidence was filed on or about May 21, 2007, some three months after the commencement of the present proceedings, which evidence asserted that she had voluntarily left her employment. Even then, it was essentially denied that any disciplinary action had been taken at all.

65. In addition, having regard to the fact that the Chief Justice declined to set aside leave and the alternative remedies argument was seemingly not raised at all at that stage[14], the Overriding Objective also mitigates against declining to determine the present application on its merits even if an alternative remedy could or should have been pursued. It seems to me that the question of whether alternative remedies ought to be pursued should normally be raised and determined substantively at an interlocutory stage to avoid wasting both costs and time. Whether or not the Applicant is entitled to relief at all on the merits of the judicial review application should only be determined finally at an application to set aside leave in clear cases, as the chief Justice ruled in the instant case.

Conclusion

66. For the above reasons, I would exercise my discretion in favour of granting the Order of Certiorari the Applicant seeks quashing the purported decisions of the Respondent to (a) stop the Applicants pay on or about January 31, 2007, and (b) accept the Applicant's absence from work as a repudiation of her contract of employment, made on a date unknown between February 2, 2007 and May 21, 2007. I also grant the declaration sought that she continues to be employed by the Ministry of Education as a teacher under her 2006 contract of employment.

67. However, I decline to grant any relief in respect of the claims that the Respondent breached the Applicant's rights under the Occupational and Safety and Health at Work Act 1982 as these complaints raise no discrete

[14] The Chief Justice's Ruling suggests that the alternative remedies point was not taken at all, and that the only objection was that no public law remedy was being sought. The Respondent's skeleton argument at the interlocutory hearing makes no reference to the alternative remedies issue at all

issues qualifying for relief by way of judicial review. The public law complaints which have been upheld are that disciplinary action was taken against the Applicant, including a decision to purportedly accept her absence from work under legal advice as a resignation, outside of the parameters of the disciplinary code applicable to the Applicant under the Public Service Commission Regulations 2001.

68. I will hear counsel as to costs.

Dated this 15th day of February, 2008

_____

KAWALEY J.