In The Supreme Court of Bermuda

CIVIL JURISDICTION

Civ. 2010 No. 257

IN THE MATTER OF THE ADMINISTRATION OF JUSTICE (PREROGATIVE WRITS) ACT 1978

AND IN THE MATTER OF THE PUBLIC SERVICE COMMISSION REGULATIONS 2001

AND IN THE MATTER OF THE PURPORTED TERMINATION OF EMPLOYMENT OF DRAGANA DAMLJANOVIC ON OR ABOUT 18 MAY 2010 AND OTHER ADMINISTRATIVE ACTIONS BY THE MINISTRY OF EDUCATION

BETWEEN:

DRAGANA DAMLJANOVIC

Applicant

- and -

THE MINISTER FOR EDUCATION

Respondent

Date of Hearing: 23rd September 2010
Date of Judgment: 5th October 2010

The Applicant in person

JUDGMENT

Introduction

1. This is an application for leave to bring proceedings for judicial review. It is the latest stage in what has been the prolonged and unhappy saga of the applicant's employment as a teacher in Bermuda. For the reasons given below I refuse leave.

2. The applicant is a non-Bermudian, and a national of Serbia. She was recruited from overseas and employed by the Ministry of Education under a three-year contract dated 5th October 2008. That contract is terminable on notice, although I accept that the employer's ability to do that is constrained by procedural safeguards[1]. The contract provided that her initial place of employment would be the Sandys Secondary Middle School, but it also provided that "the Permanent Secretary reserves the right to transfer teachers to meet the needs of the system."

3. The applicant arrived in Bermuda on 4th February 2009 and began teaching at the Sandys school on 16th February 2009, but there were difficulties and by mid May 2009 the question of her termination had arisen, and she had been suspended on full pay. On 21st September 2009 she applied for leave to bring judicial review proceedings. I refused that leave on 28th September, on the grounds that the disciplinary proceedings against her had not concluded and that there was no reviewable decision. However, the applicant renewed her application to another Judge, who, on 30th September 2009, granted it and stayed "any further action in respect of purported disciplinary proceedings against the Applicant" until further order. Those proceedings (Civ. 2009 No. 314) were disposed of on 18th May 2010 when the respondent confirmed to the court "that no lawful or valid disciplinary action, suspension or termination of employment was taken against, imposed on or, as the case may be, given effect in relation to the employment of the Applicant as a teacher at Sandys Secondary Middle School." On that basis Kawaley J dismissed the application and discharged the orders of 30th September. He reserved costs, but later made an award in the applicant's favour, and that gave rise to taxation proceedings which are still ongoing in the form of the applicant's application for a Review of the Registrar's decision.

4. In the meantime, although it is not disclosed in the evidence in support of the current application, there was an attempt to reinstate her at Sandys. On 1st October the Permanent Secretary wrote[2]:

[1] The B.U.T. Collective Agreement provides for a hearing: see Art. 7(4)(b). Moreover, the PSC Regulations require that the decision can only be made by the Head of the Civil Service: see reg. 33.
[2] A copy of the letter was exhibited by the applicant to her third affidavit in 2009/314, and is also to be found as exhibit KM 10 to the first affidavit of the Permanent Secretary, Mr. Monkman.

> "The Department of Education and the Principal want to do everything possible to ensure that your future at the school is successful. As a result we have arranged for an external mediator to meet with yourself and the management of the school to ensure that your return is as smooth as possible and to ensure that the performance expectations are clear and reasonable."

However, that attempt failed when it was rejected by her lawyer in a letter of 7th October on a number of grounds, including the fact of the proceedings by then underway to challenge her purported dismissal.

5. The applicant was then re-assigned to another school. By letter of 12th November 2009 the Permanent Secretary at the Ministry of Education had written to her stating *inter alia*:

> "1. You are still employed by the Ministry of Education, fully paid up to date and you are entitled to all the benefits under your contract of employment. For the sake of clarity we set out the following instructions.
>
> 2. In respect of allegations made against you by Sandys Secondary Middle School, the Ministry arrives at a decision and officially notifies you that all actions or proposed actions against you have been discontinued.
> . . .
> 6. You are ordered to report to the Principal of T. N. Tatem Middle School at 8.30 a.m. on 23rd November, 2009 to perform your duties as a Social Studies Teacher.
>
> 7. If you should fail to attend at the time and place stated above, you will commit a disciplinary offence for which actions would be taken against you."

6. The applicant did attend on the day and time stated, but on discovering from the Principal that the position was to be as a substitute teacher for a staff member who was going on maternity leave in January, she left and did not return. She contends that the position was "in actuality a demotion and was in reality disciplinary in its very nature". She therefore argues that the Ministry was in breach of the Order of 30th September 2009.

7. On 18th May 2010, the same day that Kawaley J concluded the previous judicial review proceedings, the Commissioner of Education wrote to the applicant pointing out that paragraph 4.5.5 of the Terms and Conditions of Service provided that –

> "An officer who is absent from duty without leave or reasonable explanation for a period exceeding five working days shall be deemed to have resigned."

The letter went on to state that, based on her failure to return to the T. N. Tatem Middle School –

> "The Department of Education is of the view that you have resigned from your employment with the Department with effect from 1st December 2009."

8. The letter then asserted that in these circumstances the applicant was not entitled to any further salary, but acknowledged that the Department had contractual obligations towards her at the conclusion of her employment, and invited her to contact the Senior HR manager to arrange a meeting to discuss and agree "the next steps".

9. The applicant responded to that protesting that "your position represents a breach of contract as well as a breach of regulations related to the employment and dismissal of public servants". She said that she had never been absent from duty without leave or reasonable explanation, and asserted that she had refused to substitute at the T. N. Tatem Middle School as she was not a substitute teacher. She insisted that the Ministry had a legal obligation to pay her salary until 31st August 2012, and to reassign her to a new full-time teaching position.

10. The applicant's response did not resolve the position, and the Ministry stopped paying the applicant. Indeed, it appears that they may have issued proceedings to reclaim the salary paid to her, but those proceedings were never served and went nowhere. However, the applicant complains that the existence of those proceedings was used to deter the Labour Department from intervening, and she produces a memorandum from the Permanent Secretary of the Ministry of Education to the Director of Labour Relations of 29th June 2010, which appears to bear that out. In the meantime the immigration authorities also became involved, and eventually a deportation order was made, although I eventually

quashed that on the basis that it misstated the grounds on which it was alleged she was liable to deportation.

The Relief Sought

11. The applicant puts this in different ways in different parts of the documentation. However, in its most straightforward form it can be found in her form 86A:

> **"Judgment, order, decision or other proceedings in respect of which relief is sought:**
> The apparent decision of the Ministry of Education made on or about 18 May 2010 to summarily terminate my employment; and the apparent decision of the Ministry of Education made on or about 18 May 2010 to suspend my pay and benefits; and the apparent judgment made by the Ministry of Education in the May or early June 2010 that I, Dragana Damljanovic, an unassigned Social Studies teacher, have remained in Bermuda unemployed since 23 November 2009 and have made no effort to regularize my position in Bermuda.
>
> **Relief Sought:**
> An Order quashing the said apparent decisions; and an Order declaring that I am and have at all material times been an employee of the Government of Bermuda and that I am entitled to all pay and benefits which have been withheld from me since May 2010; and a declaration that I have never been lawfully terminated from my employment; and an Order restraining the Government of Bermuda from starting any disciplinary proceedings against me until further order of this court; and an Order declaring that I am entitled to be employed by the Ministry of Education until the end of my employment contract ending 31 August 2012, or an Order declaring that I am entitle to a full pay off amount which would include all my pay for the entire remaining duration of my employment contract, from May 2010 through August 2012; and an Order declaring that the Government of Bermuda is obliged to reinstate my employment to a further position appropriate to my qualifications only at a grade not lower than the position which I held when I commenced my employment for the Ministry of Education and an Order declaring my demotion to be unlawful; and damages, further or other relief and costs."

12. Much of that is reiterated in her affidavit, which also states, at paragraph 1(7), that she is seeking:

> "(7) an Order declaring that I am entitled to be employed by the Ministry of Education until the end of my employment contract which expires on 31st August 2010, or, if the Ministry of Education, for whatever reason, does not wish to

reinstate my employment, an Order declaring that I am entitled to a full pay-off amount which would include all my pay for the entire remaining duration of my employment contract, from May 2010 through August 2012"

Conclusions

13. Against that background I refuse leave to bring proceedings for Judicial Review. I do not think that any principles of public law are engaged. The employer is purporting to exercise a contractual right, and if it is to be said that that is done in breach of contract, then the remedy lies in damages for wrongful dismissal.

14. More fundamentally, I think it important to step back and look at the overall position. I do not think that these proceedings can, or should, be viewed in isolation from the earlier proceedings in Civ. 2009 No. 314. The employment relationship appears to have completely broken down. It has been broken down since the applicant's suspension on or about 6th May 2009. She has not worked in the public school system since then, although her salary continued until the end of April 2010.

15. It may well be that there were irregularities in the attempts to terminate her employment in 2009, but the Court's involvement in all of that came to an end with the Order of 18th May 2010. On that first application there was a lot of material relating to the breakdown of relations at the Sandys Secondary Middle School. It is not the function of the court in judicial review proceedings to determine who, if anyone, was at fault in respect of all that, or whether the attempted disciplinary proceedings were justified or not. The court is concerned with procedural fairness and compliance with the statutory framework, and not with the merits of the underlying dispute. The applicant will not, therefore, obtain any vindication in respect of her conduct as a teacher by pursuing these proceedings.

16. As it is, the Ministry recognized the procedural errors and offered re-instatement. However, the applicant relied upon the existence of proceedings to refuse that. Indeed, the effect of the first application and the Order obtained by the applicant of 30th September 2009 was to deny the Ministry any opportunity to remedy the existing procedural defects in relation to the then disciplinary proceedings, while compelling it to litigate a decision it

claimed it had never made. It therefore locked in a stalemate, postponing and ultimately avoiding the application to the applicant of any form of disciplinary procedure, with the result that she spent many months on full salary while declining the offer of reinstatement at Sandys, and then the temporary position at the T. N. Tatem Middle School.

17. Judicial Review is a discretionary remedy. It is concerned with compliance with procedures and procedural fairness, not with the resolution of substantive disputes. It should be used sparingly, and not where the applicant has other remedies. In my judgment, the point has been reached where the applicant should be left to her common law remedies, if any, and should not be allowed to prolong her enforced employment by recourse to judicial review. As she herself makes plain in her affidavit, she wants to be paid off until the end of her contract as if it had run its full course. Whether, if she can establish liability, that is an appropriate measure of damages should be left to an action on that contract.

Dated this 5th day of October 2010

Richard Ground
Chief Justice