[2019] SC (Bda) 67 Civ (9 October 2019)

In The Supreme Court of Bermuda

CIVIL JURISDICTION

2019: No. 187

BETWEEN:

TAWANNA WEDDERBURN

Applicant

-and-

THE BERMUDA HEALTH COUNCIL	**1st Respondent**
DR. ALICIA STOVELL-WASHINGTON	**2nd Respondent**
MINISTER OF HEALTH	**3rd Respondent**
PREMIER OF BERMUDA	**4th Respondent**

Before: **Hon. Assistant Justice Kessaram**

Appearances: **Mr. Eugene Johnston, Smith Bean & Co., for the Applicant**
Mrs. Julia Snelling, Canterbury Law Limited, for the 1st and 2nd Respondents
Mr. Charles Richardson, Compass Law Chambers, for the 3rd and 4th Respondents

Date of Hearing: **10 September 2019**

Date of Judgment: **9 October 2019**

JUDGMENT ON PRELIMINARY ISSUE

Section 9(1) Bermuda Health Council Act 2004 – Termination of Chief Executive Officer's employment – Amenability of Decision to Judicial Review

Introduction

1. This is the Court's decision on a preliminary issue regarding the termination of the Applicant's employment as Chief Executive Officer ("CEO") of the Bermuda Health Council ("BHC"). The question arises in the context of an application for judicial review commenced by the Applicant which, although mainly concerned with the loss of her employment, also seeks other relief not directly connected with the termination of such employment, e.g., a claim that the Minister of Health be ordered to "*consult with the Bermuda Health Council . . . and then make regulations pursuant to section 15 of the Bermuda Health Council Act 2004*"; and a claim (which presumably arises out of the decision to terminate the Applicant's employment, although not stated to be so) for damages for misfeasance in public office against the Premier, the Minister of Health, the Chairman of the Bermuda Health Council and/or the Bermuda Health Council.

2. The Applicant was appointed CEO of the Bermuda Health Council in January 2016 after serving in an acting capacity from July 2015. She had prior to that been working for the BHC since February 2007 as an ordinary staff member, at first on secondment on a part-time basis from the Bermuda Hospitals Board and since April 2008 as a full-time employee of the BHC. On the 7 December 2018 her employment was terminated with payment in lieu of notice.

3. The Applicant alleges that the termination of her employment was "*politically motivated*" and supports her claim with an affidavit describing in some degree of detail with supporting documents the events leading to her ousting.

The Bermuda Health Council

4. Before delving into the issues relating to her termination, it is important to understand the purpose and functions of the BHC. The Bermuda Health Council is a body corporate which may sue or be sued in its corporate name and which may enter into contracts and do all things necessary for the performance of its functions. It is a creature of an Act of the Legislature entitled the Bermuda Health

Council Act 2004. The BHC's general purpose is stated in the Act (s. 3) to be "*to regulate, coordinate and enhance the delivery of health services*".

5. The functions of the BHC with respect to healthcare in Bermuda are comprehensive and wide-ranging. They are stated in s. 5 of the Act. It is helpful if they are stated in their entirety. They are:

> *(a) to ensure the provision of essential health services and to promote and maintain the good health of the residents of Bermuda;*
> *(b) to exercise regulatory responsibilities with respect to health services and to ensure that health services are provided to the highest standards;*
> *(c) to regulate health service providers by monitoring licensing and certification, establishing fees in respect of the standard health benefit, and establishing standards and codes of practice;*
> *(d) to regulate health professionals by monitoring licensing, certification, standards and codes of practice;*
> *(e) to licence health insurers;*
> *(f) to identify and publish goals for the health care system, to coordinate and integrate the provision of health services, and make recommendations to the Minister on the prioritisation of initiatives with respect to health services;*
> *(g) to licence health service providers;*
> *(h) to regulate the price at which drugs are sold to the public;*
> *(i) to establish and promote wellness programmes;*
> *(j) to conduct research, collect, evaluate and disseminate to the public information on the incidence of illness and other relevant information necessary to support objective decision making with respect to public health and the optimal use of resources; and*
> *(k) to advise the Minister on any matter related to health services that may be referred to the Council by the Minister*.

6. The Bermuda Health Council is a body of persons comprised of the Chief Medical Officer, the Chief Executive Officer (the Applicant, prior to her dismissal), the Permanent Secretary of the Ministry of Health and Family Services, the Financial

Secretary (all of whom are *ex officio* members); and not less than nine nor more than eleven other "*ordinary members*" appointed by the Minister.

7. The appointment, remuneration etc. of the Chief Executive Officer of the Council are fixed by the Council with the approval of the Minister. Section 9 of the Act states:

> "*9(1) There shall be a Chief Executive Officer of the Council who shall be appointed by the Council with the approval of the Minister and whose services shall not be terminated by the Council except with the like approval.*
> *(2) The remuneration, emoluments, terms and conditions and period of service of the Chief Executive Officer shall be fixed by the Council with the approval of the Minister and shall not be altered except with the like approval*".

Events Leading to Termination of the Applicant

8. According to the Applicant, the lead up to her termination began with a decision of the BHC to institute new fees for Magnetic Resonance Imaging (MRI) and Computerized Tomography (CT) Scans which were to take effect on 1 June 2017. The only provider of such services in Bermuda at the time were (a) Bermuda HealthCare Services ("Bermuda Healthcare"), which was founded by the former Premier of Bermuda, Dr. Ewart Brown (referred to herein as "Dr. Brown"), who remained at all relevant times its Executive Chairman; and (b) the King Edward VII Memorial Hospital ("the Hospital"), which is managed and administered by the Bermuda Hospitals Board, a statutory corporation established under the Bermuda Hospitals Board Act 1970, the majority of whose members are appointed by the Minister of Health.

9. Standard Health Benefits (SHB), which every employer in Bermuda is obliged to provide insurance coverage for at the cost of the employer and employee, include outpatient diagnostic imaging services (DI) provided by diagnostic facilities and at rates which have been approved by the Council: Regulation 3(1)(xiv) Health

Insurance (Standard Health Benefit) Regulations 1971. Bermuda Healthcare was approved by the Council as a health services provider of DI at the same rates charged by the Hospital.

10. Although the Council has the power to regulate the fees for standard health benefits charged by health service providers directly, no regulations (which the Minister has the power to make under s. 15 of the Act) have yet been passed.

11. The Hospital's fees for medical services are fixed by regulations made under the Bermuda Hospitals Board Act 1970 by the BHB with the approval of the Minister. In 2017 the Minister became obliged to consult with the Council before approving fees charged by the Hospital for services within the SHB.

12. In 2017 the Council recommended to the Minister and the Minister approved new rates for medical services within the SHB (including DI) provided by the Hospital. The new rates are stated in the evidence to be based on an internationally recognized model of relative value units known as the Resource Based Relative Value Scale (RBRVS). The new fees for the Hospital were to come into effect on 1 June 2017. The rates for DI were significantly less than what the Hospital previously charged. Because Bermuda Healthcare's approved rates for DI were tied to what the Hospital charged, its reimbursement rates would, therefore, automatically be reduced on 1 June 2017 so that they stayed in line with the Hospital's rates approved by the Minister.

13. Dr. Brown in his capacity as Executive Chairman of Bermuda Healthcare wrote to the then Premier of Bermuda, the Hon. Michael Dunkley, by letter dated 30 May 2017 complaining *inter alia* that "*the Government with the assistance of the BHeC* [the Council] *concocted a methodology that unfairly, grossly and negatively affects the only other provider of such services in Bermuda: my clinics. It is difficult to see any basis for such methodology that does not lead one to conclude that its sole aim and effect was target my clinic: that is also illegal*". The letter was copied to the Leader of the Opposition, the Minister of Health, the Shadow Minister of Health, the Permanent Secretary of Health, the Applicant as

CEO of the Council and to Bermuda Healthcare's lawyers. The letter threatened a legal challenge to the validity of the reduction of Bermuda Healthcare's DI fees.

14. The Applicant describes in detail what occurred after this letter was received. The allegations are of what would be, if true, alarming attempts of political pressure being put on and political interference in the functions of the Council by the new Government following the General Election on 18 July 2017.

15. The Applicant recites that she became aware from the Council's lawyers that the Government was "*thinking about offering Brown's businesses $730,000 to settle his claims*"; that the Council was asked "*by the Ministry and Attorney General's Chambers to vote on whether the Council should support paying a settlement to Brown's businesses*"; which proposal was unanimously rejected by the Council.

16. She recites the fact that Dr. Brown gave a press conference on 17 January 2018 with a Cabinet Minister and other Members of the Government *et al* present at which his lawyer spoke about the need for Bermuda Healthcare to close as a result of the Council's decision "*to cut fees for CT scanning and MRIs by a very significant amount, making it, effectively uncommercial to operate*" and accused the Council of targeting Bermuda Healthcare and The Brown-Darrel Clinic, another of Dr. Brown's healthcare facilities (BDC).

17. The Applicant recites being told by the Permanent Secretary prior to the press conference that she (the Permanent Secretary) had been summoned to a meeting with the Premier at which "*they were both able to develop a narrative that explained why Brown was entitled to a payout*" and that the narrative was "*an outright lie*" and how it was the same narrative that "*Brown's lawyer*" gave at the press conference.

18. She also speaks about how she was named at the press conference by Dr. Brown as one of several people whose names he asked his listeners to remember and how she was outraged that she was being accused publicly of being part of a conspiracy to destroy him and his businesses. She also speaks about raising the

issue of the press conference and her concern about the damage to the reputation of the Council it would cause if the comments were not responded to in a public statement by the Council; and the Council's refusal to do so.

19. The Applicant describes being told by the Chairman of the Council on 24 January 2018 that "*people want* [her] *out of* [her] *job*" and that she had been asked to find a reason to terminate her employment; that she had been asked to provide a copy of her contract to the Ministry and that the Chairman "*was concerned about this*".

20. She describes being informed by Ministry officials on 14 February 2018 at a regular monthly meeting at the Ministry of the cut in the Council's Government grant of $100,000 and the "*distinct hint in the meeting . . . that the reason these reductions were being made was because the Council did not approve the earlier payments to Brown*".

21. On 10 August 2018, the Applicant states she was called by the Minister and told that "*CT reimbursement rates were not high enough to permit Brown to re-open his clinics*". She says she was told by the Minister that "*the Premier wanted to meet to discuss reimbursement rates*" and that she referred the Minister to the person who would be the Acting CEO in her absence as she was planning to be on vacation. Before she left she recalls overhearing a conversation between the Premier and the Acting CEO in which the Premier asked that he explain the spreadsheet used to calculate reimbursement rates.

22. While she was on vacation, she recounts receiving a phone call from the Chairman of the Board advising her that "*Brown's clinics would be allowed to "de-couple" from the BHB's reimbursement rates*" contrary to what had been decided at an earlier meeting of the Council. She says she was told by the Chairman that the Premier "*was leading the discussion with Brown about decoupling*" and that when she returned to Bermuda she "*saw multiple things to confirm this including an e-mail exchange between the Premier and Braithwaite*" which had been forwarded to her.

23. The list of incidents and events does not end there. There is evidence of direct involvement by the Premier in fixing the rates of reimbursement that would be applied to Bermuda Healthcare and BDC "*to achieve an outcome that would be perceived by Brown to be favourable*". She states that "*The reimbursement rates proposed by the Premier appeared to be worked out using whatever the Premier thought should happen to get Brown to de-couple his businesses' reimbursement rates from hospital fees*". According to the Applicant, the Board decided, however, not to follow the Premier's demands and "*set lower reimbursement rates for MRIs and CTs than were demanded by the Premier*".

24. This appears from the Applicant's evidence (which she states was based on what she was told by the Chairman) to have caused anger on the part of the Premier and the Minister that "*the Board made a decision contrary to what the Premier had negotiated with Brown*". She states that she told the Chairman that "*the operating costs provided to the Council by Brown included items that other healthcare providers would not include such as having a dinner for physicians every financial quarter paid for from health insurance premiums paid by the public*".

25. After that she recounts being instructed between 16 and 27 October 2018 to provide to the Chairman the meeting packs for monthly meetings of the Board before they were sent out to the other Board members so that the Chairman could vet them. She says she was told by the Chairman that "*she wanted to ensure that matters, such as the setting of reimbursement rates for Brown's clinics, would come to her attention first*". This would enable the Chairman (so she told the Applicant) "*to strategize with the Ministry, and give advice, before the remainder of the Board was made privy to issues*". She concludes from this that "*Stovell-Washington's alignment with the Minister was clear and obvious*".

26. In the following paragraphs of the Applicant's affidavit she recounts events leading up to the Board meeting on 6 December 2018 at which the decision was made to terminate her employment and her notification of the decision on 7 December 2018. She says she was told by the Chairman that the Council "*had*

decided the statutory corporation required new leadership; and it required that new leadership because it was going in a new strategic direction".

27. It is on the basis of these facts *inter alia* sworn in her affidavit that the Applicant concluded that her termination was "*politically motivated*".

28. The Respondents submit that the decision to terminate the Applicant's employment is not amenable to judicial review and have sought a ruling on this preliminary issue. The argument proceeds on the basis (which is common ground) that the Applicant was in an employer-employee relationship with the BHC. That is to say that she was not a public servant or the holder of a public office and, therefore, not subject to the Public Service Commission Regulations 2001. Nor was she a servant of the Crown. Her employment was governed by the terms of her contract of employment (which had to be approved by the Minister) and the Employment Act 2000. It is accepted that her employment could not be terminated without the approval of the Minister (see s. 9(1) of the Act). The significance of this approval figured greatly in the debate as to the amenability of the decision to judicial review.

Discussion

29. For the purposes of determining the preliminary issue, I propose to accept as accurate the Applicant's allegations of fact (most of which have been summarized above). It should be emphasized that the allegations that have been made by the Applicant against the Respondents have not been the subject of discovery or cross-examination and I make no findings one way or the other as to their veracity. If they are true, they would raise very serious questions as to whether the statutory purpose of the Council was being undermined by political pressure from members of Cabinet for questionable reasons. The procedure I have adopted of treating the allegations as true is in accordance with the handling of preliminary objections to the grant of judicial review in cases similar to this: see for example the practice adopted in *R v East Berkshire Health Authority, ex parte Walsh* [1985

1 QB 152[1] and *R v Derbyshire County Council ex parte Noble* [1990] ICR 809[2], where the Court stated that at the stage of considering whether the matter of the Applicant's complaint could appropriately be dealt with on an application for judicial review the Court was not concerned with the merits of the judicial review application.

30. The question whether the termination of a person's employment by a public authority is reviewable under RSC Order 53 is not a new issue. The question has been the subject of UK and Bermuda decisions going back to the 1980s. In this case it is not in dispute that the Applicant was at all material times an employee of the Council (as opposed to a public servant or a public officer) and that the Council is a public body carrying out public functions. The question at issue is whether there was a public element to the Applicant's employment that entitles her to public law remedies for the breach of her contract of employment or whether the Applicant's complaints raise only private law issues.

31. In *Walsh* Woolf LJ observed that "*there is no universal test which will be applicable to all circumstances which will indicate clearly and beyond peradventure as to when judicial review is or is not available*[3]*"*. Since 1985 when *Walsh* was decided there have been numerous cases on this issue as a result of which it is possible to say with greater confidence on which side of the line a particular cases lies.

32. The distinction is of importance since the remedies available in judicial review proceedings differ from those available in ordinary civil actions such as for breach of contract. Moreover, bringing a claim for judicial review against a public body requires (unlike the case for private actions) that the applicant first obtain the leave of the court, a requirement intended to filter out frivolous or vexatious

[1] See for example the Judgment of May LJ at p. 167D where he said "*I respectfully agree with Sir John Donaldson MR that we must decide this appeal on the basis that the applicant's allegations of fact are accurate and his complaints against the authority are valid, and that the latter can only succeed if, nevertheless, the original application under RSC Ord. 53 was misconceived and an abuse of the process of the court*".
[2] Woolf LJ at p. 813A.
[3] p. 814F.

cases, and to ensure that an applicant is only allowed to proceed to a substantive hearing if the Court is satisfied that there is a case fit for further investigation.

33. Under the common law in the ordinary case of a claim by the employee for breach of an employment contract, the employee would only be entitled to damages for wrongful dismissal. As a result of statutory intervention in the employer-employee relationship (Employment Act 2000), the employee may also be entitled to damages for unfair dismissal and/or reinstatement or re-engagement. Kawaley J (as he then was) described the position in his judgment in some detail in *Finn-Hendrickson v Minister of Education* [2008] Bda LR 4 at [43].

34. The analysis of the rights and remedies of the employee does not change simply by reason of the fact that the employer happens to be a public body such as the Council. The ordinary incidents of the employer-employee relationship within the public law sphere may, however, be altered by primary or secondary legislation or by the status of the claimant as a public servant subject to a different regime of rules and regulations governing his or her rights and obligations. For example, the right of the public authority to dismiss the employee may be circumscribed by statute or be made subject to specific regulatory procedures such as the findings of a disciplinary tribunal.

35. In the case at hand, the Bermuda Health Council Act 2004 requires that the CEO's employment can only be terminated with the approval of the Minister of Health: s. 9(1) of the Act. The failure of the public authority to follow the prescribed procedure or otherwise comply with statutory requirements for termination will normally entitle the employee to remedies available in judicial review proceedings, e.g. a declaration that the decision to terminate is null and void or certiorari to quash the decision. However, where no breach by the employer of any public duties in connection with the termination of the contract of service or appointment exists, it will not normally be the case that judicial review will be available to challenge the termination.

36. In this case, the Applicant relies upon the statutory requirements that the terms and conditions of her employment, the term of her employment, her remuneration and particularly the termination of her employment be approved by the Minister under s. 9(1) of the Act. These aspects of her employment she says provides the public element which makes the decision to terminate her employment reviewable. Her complaint, however, is not that the Minister did not give his approval to her termination. The evidence is that it clearly was given. The complaint is that the decision to terminate by the Council and the decision to approve the termination were made in bad faith or motivated by improper political purposes.

37. I am inclined to find that, if what the Applicant alleges is true, she would have a compelling case that the Council and the Minister acted for improper purposes and in bad faith towards her as CEO of the Council. But is that enough to give rise to a right of judicial review of the decisions that resulted in her dismissal? In this regard, it is relevant to look at the relief that the Applicant is claiming in these proceedings.

38. It should first be observed that the Applicant's analysis of the facts leading to her firing does not in my view conform with the legislation, i.e., the Act of 2004. The Applicant says that the Council's duty was to "*recommend*" to the Minister that she be fired; the suggestion being that it was the Minister who made the decision to terminate the CEO's employment. This does not seem to me to be a correct analysis. The words of s. 9(1) make it clear that the Council did what the Act requires it to do, i.e. to make the decision to terminate. That in my view is the only possible interpretation of the words of the section ". . . *shall not be terminated by the Council* . . .". Likewise, the requirement of the Act that the Minister give his or her "*approval*" is inconsistent with an interpretation of the Act that requires the Minister to make the decision to terminate.

39. What is remarkable about the relief claimed is what is not sought. There is no relief sought in the way of damages for wrongful dismissal; or for an order for reinstatement in her position as CEO; or a declaration that her employment

continues until properly terminated in accordance with the Act and her contract[4]. Damages are sought; not for compensation for loss arising out of any breach of her contract of employment; but against the Premier, the Minister of Health, the Chairman of the Council and the Council for misfeasance in public office, a tort.

40. Most of the relief claimed is for declarations relating to the Premier's, the Minister's and the Chairman's alleged interference in "*the functioning and day-to-day management of the Council*". In relation to the termination of the Applicant's contract of employment, declarations are sought of the alleged unlawfulness of the "*recommendation*" of the Council that the contract be terminated and the alleged unlawfulness of the Minister's decision to approve the recommendation. Certiorari is sought quashing the recommendation and the approval by the Minister and the termination itself. But, as noted, no claim is made for a declaration that the employment continues.

41. It is common ground that the Applicant is not a public servant or the holder of a public office. The terms of her employment are not regulated by statute or by regulations. Yet it is argued on her behalf that there is a public law element to her employment, i.e. the statutory requirement for the Minister's approval of the decision to terminate her contract. It is said that this fact makes the decision to terminate amenable to judicial review. I do not agree. The requirement for the Minister's approval of the terms of her employment, etc. and her firing would be relevant if in fact the Minister had not approved the Council's decision. In those circumstances, judicial review would have been available to challenge any refusal of the Council to recognize the continuation of the Applicant's employment until such time as the contract was lawfully brought to an end.

42. I make no finding as to the lawfulness of the termination of the Applicant's contract of employment. It may very well be the case that the decision of the Council and the decision of the Minister were made in bad faith and for improper

[4] The only reference to the Employment Act is in paragraph 19 of the Notice of Application under the heading "Relief Sought". There one finds a claim for a declaration that "*it was unlawful to terminate . . . pursuant to section 18(1)(b) of the Employment Act 2000*".

purposes. Those are issues which, if they are to be decided in these proceedings, can only be decided after hearing the evidence. But the supposed unlawfulness of the termination does not mean that the termination was not nonetheless effective. This is a reflection of the principle that courts rarely grant specific enforcement of a contract of service. A corollary of this principle is found in the statement of Lord Morris in *Francis v Municipal Councillors of Kuala Lumpur* [1962] 3 All ER 63, that ". . . *when there has been a purported termination of a contract of service a declaration to the effect that a contract of service still subsists will rarely be made*" [637H].

43. The decision of the Council to terminate may very well have impacted how the Council carried out its statutory function of regulating etc. the delivery of healthcare services, but it was a decision affecting the means of fulfilling its purpose and not the actual performance of its statutory functions. In so finding I adopt the observations of Purchas LJ in *Walsh* when he said [p. 176B]:

> *There is a danger of confusing the rights with their appropriate remedies enjoyed by an employee arising out of a private contract of employment with the performance by a public body of the duties imposed upon it as part of the statutory terms under which it exercises its powers. The former are appropriate for private remedies inter partes whether by action in the High Court or in the appropriate statutory tribunal, whilst the latter are subject to the supervisory powers of the court under R.S.C. Ord.,* 53".

44. The termination was effected in accordance with the terms of the contract of employment. The fact that the decision may have been made without a valid reason connected with the Applicant's ability, performance or conduct or for reasons unconnected with the operational requirements of the Council (as required by the Employment Act 2000) (as to which I express no concluded view), would only mean that termination of the contract was wrongful or that the Council repudiated the contract. Any such unlawfulness in the decision to terminate would not (as noted above) mean that the termination was ineffective to bring the

contract to an end: see *McLaughlin v The Governor of the Cayman Islands* [2007] UKPC 50 at [17] and *Francis v Municipal Councillors of Kuala Lumpur*.

45. Looking at the matter from a different angle, the power of the Council to terminate the employment of the CEO is not a statutory power. The power is the ordinary common law power of an employer. The Act simply imposes a requirement that the Minister's approval be obtained before the exercise of the common law power can be said to be valid. The requirement for such approval does not make the Council's decision to terminate the employment the exercise of a statutory power. In my view there is no public law element to the termination.

Conclusion

46. For the reasons stated above, I find that the termination of the Applicant's employment is not amenable to judicial review. I would invite the parties to collaborate with each other to determine what effect this finding has on the claims for relief made in the Notice of Application and generally with regard to the further conduct of the action.

Dated 9 October 2019

DAVID KESSARAM
ASSISTANT JUSTICE