[2021] JMSC Civ. 01

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2020CV 01405

IN THE MATTER OF the University of the West Indies Charter, Statutes, and Ordinances.

AND

IN THE MATTER OF the University of the West Indies- UWI School for Graduate Studies and Research Regulations for Graduate Diplomas and Degrees.

AND

IN THE MATTER OF Section 16(2) Charter of Fundamental Rights and Freedoms, 2011.

BETWEEN	**DEBORAH CHEN**	**CLAIMANT**
AND	**THE UNIVERSITY OF THE WEST INDIES**	**DEFENDANT**

IN CHAMBERS

Georgia Gibson-Henlin Q.C. and Stephanie Williams instructed by Henlin Gibson Henlin for the Claimant

Christopher Kelman and Yakum Fitz-Henley instructed by Myers Fletcher and Gordon for the Defendant

JULY 22, 2020 & JANUARY 8, 2021

APPLICATION TO STRIKE OUT CLAIMANT'S STATEMENT OF CASE - UNIVERSITY OF THE WEST INDIES (UWI) CHARTER, STATUTES AND ORDINANCES - APPEAL REJECTION OF PH. D THESIS- VISITOR'S JURISDICTION - DELAY IN EXERCISING JURISDICTION - BREACH OF CONSTITUTIONAL RIGHT TO A FAIR HEARING WITHIN A REASONABLE TIME BEFORE AN INDEPENDENT AND IMPARTIAL TRIBUNAL - JURISDICTION OF COURT TO HEAR MATTERS WITHIN VISITOR'S JURISDICTION - AVAILABILITY OF ALTERNATIVE REMEDY TO CLAIMANT - CIVIL PROCEDURE RULES PART 56.

HENRY-MCKENZIE, J

BACKGROUND

[1] The claimant was a Doctor of Philosophy (PH.D) candidate at the University of the West Indies (the defendant) Mona Campus in the Department of Community Health and Psychiatry. By letter dated April 7, 2014 from the Office of the Campus Registrar, the claimant was informed that she would not be awarded the PH. D degree on the basis that the examiners found that her PH.D thesis did not meet the required standard to grant such an award. However, a recommendation was made for her to correct the thesis for the award of the Master of Philosophy (MPhil) degree.

[2] She disputed the defendant's decision and wrote to the Chair of the Board of Graduate Studies and Research requesting that the decision be revisited. The Chair of the Board, after gathering the necessary information from the relevant personnel, decided not to overturn the decision of the examiners and renewed the earlier recommendation to correct the thesis.

[3] The claimant, not being satisfied with that decision, instructed her attorneys to write to the Vice Chancellor to initiate the process of having the Senate review the decision. Her attorneys were, however, informed by the university, that the claimant had exhausted all internal avenues to appeal the decision and was advised that at her option, she could refer her matter to the visitor.

[4] Clause 6 of the Royal Charter of the University of the West Indies establishes the visitorial jurisdiction of the visitor. The Charter vests in the visitor the power to administer the domestic laws of the university, which includes the power to hear and determine disputes which arise under its domestic laws.

[5] The claimant initiated this process as advised by the defendant on July 28, 2014, by writing a letter to the Lord Chancellor of Great Britain, the Right Honourable Chris Grayling, MP. However, at all stages she was met with delays and obstacle after obstacle. The claimant describes it as being sent on a series of excursions from the United Kingdom, to the Bahamas, then back to the United Kingdom, then to the Governor General of Jamaica, then to the United Kingdom once again and again the Governor General of Jamaica.

[6] Finally, on August 14, 2017, in email correspondence with the Governor General's Office, she was informed that a visitor was appointed in the person of Mr Justice Paul Harrison O.J., retired President of the Court of Appeal of Jamaica, which from all indications, given the correspondence exhibited before this court , was accepted by him. The claimant thought she would begin to see progress in her matter being resolved, but to date her matter has not been heard by the visitor, nor has she been informed when the hearing will take place. In fact, she was only informed that the visitor had several matters to be heard and so her matter will be heard in sequence, with no time frame being given.

[7] With that background, by way of an Amended Fixed Date Claim Form filed on July 2, 2020, the claimant is seeking declarations as well as damages, that the defendant has breached her right of access to the courts and to a fair hearing and/or a fair hearing within a reasonable time, pursuant to section 16(2) of the Charter of Fundamental Rights and Freedoms.

THE APPLICATION

[8] Consequently, the defendant filed an application for court orders seeking the following orders:

I. That the court does not have jurisdiction to grant the relief sought by the claimant as the claim is properly heard by the visitor of the defendant.

II. The claimant's statement of case stands struck out.

III. Alternatively, that the court declines to exercise its jurisdiction in this claim.

IV. The claim is stayed,

V. Costs to the defendant to be taxed if not agreed.

It is this application that is presently before the court for consideration.

THE DEFENDANT'S SUBMISSIONS

[9] The defendant's application is rooted in the widely accepted position that the visitor has exclusive jurisdiction to resolve matters that involve questions having to do with the internal or domestic laws of the university and the rights and duties that have been derived from those laws. The defendant submitted, that the substantive dispute between the parties, that is, the rejection of the claimant's PH.D thesis, for which the claimant seeks to have a fair hearing, is one such matter that falls within the province of the visitor's exclusive jurisdiction. It is he alone who can provide her with a remedy. The court does not have the jurisdiction to provide her with a remedy and therefore the claimant's right to a fair hearing is more adequately redressed by the visitor, than by way of the claim brought before the court for constitutional relief.

[10] The defendant has relied on a line of established authorities emanating from England and from this jurisdiction, which all appear to be in unison on the exclusive jurisdiction of the visitor. I will focus on the cases from this jurisdiction as they have referred to a plethora of English authorities, including those relied on by the defendant. The first of the cases relied on, is ***Matt Myrie v UWI*** *Claim No 2007 HCV 04736*. This was a case of a student who was excluded from sitting his exam. Fearing the same fate would befall him in his other examinations, Mr. Myrie filed a claim and moved the court for an injunction to prevent the UWI from barring him from future examinations. After a thorough review of the visitorial jurisdiction, Brooks J, (as he then was) concluded that the application to the court was inappropriate as the Charter provided for a visitor who is the authority which has jurisdiction to decide such domestic disputes.

[11] Another case relied on by the defendant is ***Vanessa Mason v UWI*** *Civ. App No. 7/2009,* a case where an undergraduate sought to challenge the decision of the university authorities to expel her from the hall of residence. At first instance, R. Anderson J upheld the university's preliminary point that because the matter fell within the jurisdiction of the visitor, the court lacked jurisdiction to hear the claimant's application for an injunction. The Court of Appeal upheld this decision and dismissed the claimant's appeal.

[12] In ***Duke Foote v University of Technology*** *[2015] JMCA App 27,* the claimant who was a student at the defendant university, was barred from sitting his examination due to his failure to pay the university's fees in full. He commenced an action against the university seeking a declaration and an injunction to prevent them from barring him from accessing the resources to which he is entitled as a student. At first instance, the court ruled that the matter relating to academic or pastoral judgement fell within the jurisdiction of the visitor. The Court of Appeal upheld the decision of the judge at first instance and ruled that Mr. Foote must invoke the university procedures for handling of student complaints by escalating it to the visitor.

[13] Finally, in the series of cases is ***Suzette Curtello v University of the West Indies*** *[2015] JMSC Civ. 223*. In ***Suzette Curtello*** the Court dealt with a similar rejection of a PH. D dissertation. The court held that such a dispute is to be resolved by the visitor who has exclusive jurisdiction.

[14] The defendant having acknowledged the exclusive jurisdiction of the visitor, also pointed out, that in ***Curtello***, in keeping with longstanding English authorities and the binding Court of Appeal decision of ***Duke Foote,*** the jurisdiction of the Visitor, though exclusive, is subject to judicial review and consequently, the court can exercise its prerogative powers to issue a writ of mandamus to command the visitor to act. Further, that this remedy is an adequate alternative, which was available to the claimant and which the claimant did not pursue, and has proferred no explanation for not so doing. The defendant argued, that by its very nature, the writ would bring to a halt the very state of affairs of which the claimant is complaining, and as such, there was no need to resort to constitutional redress.

[15] The defendant rehashed the caution of the Privy Council in ***Attorney General v Ramanoop*** *[2005] UKPC 15,* of keeping constitutional claims within their proper bounds and also made reference to the warnings of Lord Diplock in ***Harrikissoon v AG of Trinidad and Tobago*** *(1979) 31 WIR 348 "… against applications for constitutional relief being used as a general substitute for the normal procedure for invoking judicial control of administrative action"* The defendant emphasised the point made by the Board in ***Ramanoop,*** that permitting the use of such applications for constitutional redress would only diminish the value of the safeguard such applications are intended to have. Therefore, where an adequate parallel remedy exists, constitutional relief should not be sought, unless the circumstances of the complaint include some special feature, making that course appropriate. The defendant submitted that no evidence has been adduced by the claimant to suggest that any special feature exists in this matter, and as such, instituting a constitutional claim against the defendant is inappropriate.

[16] The defendant further argued, that the claim is even more inappropriate, as the defendant is not responsible for the delay, but rather, the responsibility should be placed on the visitor, which is an independent authority. The visitor, the defendant submitted, is not a member of the university in keeping with its Charter, and as such, the time frame within which appeals are determined are solely decided by the visitor. Further, that the only act for which the defendant is responsible, is maintaining the exclusivity of the visitorial jurisdiction in their Charter. The defendant relied on the case of ***Duke Foote*** to reinforce the point that the mere maintenance of a visitorial jurisdiction does not derogate from the claimant's constitutional right to a fair hearing by an independent and impartial tribunal. As such, it was submitted, the defendant is not liable for any constitutional breach and any relief in relation to the delay experienced in the appeal process, should be sought against the visitor.

THE CLAIMANT'S SUBMISSIONS

[17] The claimant opposed the defendant's application to strike out her claim and submitted that the application should be dismissed and her claim be allowed to proceed. Firstly, the claimant has indicated that she is not challenging the exclusive jurisdiction of the visitor, and that is evident, as she submitted herself to this authority by commencing the process for her matter to be heard by the visitor. She argued further, that the matter does not concern the interpretation or enforcement of the internal laws of the university that govern the authority of the visitor, or the internal powers or discretions that derive from those laws. She is also not asking the court to consider the substance of her appeal to the visitor. Instead, she pointed out, that this Court is being asked to consider whether:

i. the defendant university by maintaining, directing and requiring the claimant to have her dispute heard by an authority that it knew was fraught with delay, expense and based on a system that was non-functioning or failed, deprived her of her right to a fair hearing under

section 16(2) of the Charter of Fundamental Rights and Freedoms, 2011;

ii. on the facts of the case, the defendant university deprived the claimant of her right to a fair hearing within a reasonable time;

iii. on the facts of the case, the defendant university deprived the claimant of her right of access to the courts or an independent and impartial authority established by law.

[18] Putting it more succinctly, the subject of these proceedings is to consider whether the delay in the visitor exercising his jurisdiction, constitutes a breach of the claimant's constitutional right to a fair hearing within a reasonable time, by an independent and impartial authority, pursuant to section 16(2) of the Charter of Fundamental Rights and Freedoms, 2011. This being a claim for breaches of her constitutional rights, the claimant, therefore, submitted that the matter cannot rightly fall within the jurisdiction of the visitor, but instead, the Supreme Court has original jurisdiction to deal with such claims. She relied on the case of ***Chen Young v Eagle Merchant Bank*** (2018) JMCA App7 and argued that in that case, the Court of Appeal affirmed that section 19(3) of the Constitution has assigned original jurisdiction to the Supreme Court in respect of alleged breaches of human rights. Notably however, the original jurisdiction of the Supreme Court to hear constitutional claims is not being challenged by the defendant.

[19] The claimant in looking at the scope or content of the rights in section16(2) of the Charter as it relates to the rights she is asserting were infringed, conceded that it is difficult to find cases relating to civil proceedings or the Royal Charter to support her position. She therefore relied on two main cases which were decided in the criminal context. The first is ***Mervin Cameron v The Attorney General of Jamaica*** (2018) JMFC FULL 1 and secondly, the Privy Council decision of ***Bell v The Director of Public Prosecutions*** (1985) 1 AC 937. Both cases concern the

right to a fair trial within a reasonable time. The claimant pointed out that ***Cameron*** affirms the position in ***Bell,*** which considered section 20 of the former Bill of Rights clause in the Jamaican Constitution and confirmed three distinct rights, the right to a fair trial, within a reasonable time, before an independent and impartial tribunal.

[20] The claimant further argued, that the authorities relied on by the defendant are distinguishable from this case as:

i. this case is about the failure of the domestic tribunal to give effect to the rights and obligations of the claimant as protected by section 16 (2) of the Charter of Fundamental Rights and Freedoms.

ii. the respective claimants in those cases commenced claims in the Supreme Court prior to petitioning the visitor. The claimant commenced her petition to the visitor since 2014, without it being considered.

iii. the source of the right that was being enforced before those courts was the university's internal statutes and ordinances, while in this case it is the Charter of Fundamental Rights and Freedoms.

ANALYSIS

[21] The critical question in this hearing is whether, in the circumstances of this case, the dispute brought before this court by the claimant should be entertained. In dealing with this issue, I will consider the matter under the following heads:

Jurisdiction of the Visitor vs. Jurisdiction of the Court

[22] It is incontestable that, as established by the authorities, the visitorial capacity embraces all aspects of governance which fall to be considered under the domestic laws of the university. There can also be no doubt, that where the visitorial jurisdiction exists; it is an exclusive jurisdiction which cannot run concurrent with the court's jurisdiction. These propositions are all established by

the decision of the House in ***Thomas v University of Bradford*** *[1987] 1 All ER 834,* which held that, *"the jurisdiction of a university visitor, which was based on his position as the sole judge of the internal and domestic laws of the university, was exclusive and was not concurrent with the court's jurisdiction."* This position was also affirmed by the Court of Appeal of Jamaica in ***Duke Foote***.

[23] The University of the West Indies by clause 6 of its Royal Charter, provides for the authority of the visitor to decide disputes arising under the internal laws of the university. Article 6 states:

> *We, Our Heirs and Successors, shall be and remain the Visitor and Visitors of the University and* ***in the exercise of the Visitorial Authority from time to time and in such manner as We or They shall think fit may inspect the University****, its buildings, laboratories and general work, equipment, and also the examination, teaching and other activities of the University by such person or persons as may be appointed in that behalf. (Emphasis mine)*

[24] In previous cases, it was argued that the university's Charter limits the role of the visitor to inspecting buildings, laboratories and the like. However, in ***Matt Myrie*** and ***Suzette Curtello,*** this argument was rejected, and it was acknowledged that the visitor's powers are not limited to examination of the physical plant, but that a wider interpretation is to be taken of *"inspect the University,"* to include examining the operations of the university generally, that is, whether it is being operated in accordance with the Charter and its statutes.

[25] In ***Thomas v The University of Bradford,*** the court underscored the need for the visitorial jurisdiction to assume whatever breadth and character that best enables the visitor to discharge his function as the sole judge of the internal laws. The position is well recognized that the visitor must enjoy untrammelled jurisdiction to ensure that the internal rules are properly interpreted, applied and

observed and ought to be vested with the authority to investigate and correct wrongs done in the administration of the internal laws and redress grievances.

[26] The defendant in his submissions, has graciously provided the court with numerous examples of the different circumstances where it has been held by the courts that the visitor has exclusive jurisdiction. The cases range from the rejection of a PH. D thesis[1], to the expulsion of a student from a hall of residence[2] and the university[3] respectively, to the dismissal of a lecturer[4] and even a challenge to the grade assigned in an examination[5]. The visitorial jurisdiction, therefore, can be exercised in an almost infinite variety of situations.

[27] The next question therefore, is whether the claim is one of those grievances which ought to be addressed by the visitor. The defendant argued that the claim falls to be decided under the internal laws of the university and is outside of the reach of this court.

[28] An examination of the claimant's statement of case, shows that the claimant's dispute with the university stems from the rejection of her PH. D thesis by the examiners. This court has recognized that such a situation is within the jurisdiction of the visitor to resolve. The claimant herself has shown that this is the position she holds, as she had commenced proceedings to bring the dispute before the visitor by writing to the different authorities whom she considers to have the power to appoint a visitor, for her matter to be heard. She has also acknowledged the jurisdiction of the visitor over that dispute in her response to this application.

[29] The issue lies in the fact that there is significant delay in the visitor exercising the authority to which the claimant has subjected herself. According to the claimant,

---

[1] ***Suzette Curtello v University of the West Indies*** *[2015] JMSC Civ 223*
[2] ***Vanessa Mason v UWI*** *Civ App No. 7/2009*
[3] ***Patel v University of Bradford Senate and another*** *[1978] 3 All ER 841*
[4] ***Thomas v University of Bradford*** *[1987] 1 All ER 834*
[5] ***Thorne v University of London*** *[1966] 2 All ER 338*

her petition to the visitor has been floating in the system since 2014, with the petition not being considered to date and with no end in sight. This is rather unfortunate and unsatisfactory. It is this delay that brings her to this court to seek redress. The essence of the complaint is therefore not to have the court determine if the university had been wrong in rejecting her thesis, which is within the visitor's jurisdiction, but rather, if the six years' delay in accessing the visitor to have that issue determined, has breached her constitutional right to a fair hearing within a reasonable time before an independent and impartial tribunal. The claimant has brought a constitutional claim and is as such applying the *"general law of the land"* and not the internal laws of the university. The visitor is therefore not empowered with the jurisdiction to decide such a dispute, but the Supreme Court is. This has long been recognised by our jurisprudence under the Constitution.[6]

[30] I will turn my attention briefly to the cases cited by the defendant and add that although they were helpful in relation to the exclusive jurisdiction of the visitor, one glaring distinguishing feature of those cases from this case, is that those claimants all sought to rely on the internal laws of the university in bringing their claim before the court, but the claimant in this case, relies on the Constitution, which is within the scope of the Court's jurisdiction.

[31] I must indicate at this juncture however, that I agree with the defendant, that the cases of ***Cameron*** and ***Bell*** cited by the claimant in support of her contention, are not very helpful in the court's determination of this matter. These cases are criminal cases which are distinguishable on their facts and circumstances from the instant case which is rooted in civil law. In the case of ***Cameron***, he spent approximately four and a half years in custody without a preliminary enquiry being held. He brought an action pursuant to sections 14(3) and 16(1) of the

---

[6] *See:* section 19(3) of the Constitution has assigned original jurisdiction to the Supreme Court and section 19(5) an appellate jurisdiction to the Court of Appeal in respect of alleged beaches of fundamental rights.

Charter of Fundamental Rights and Freedoms, which address the situation where persons have been arrested or detained or charged with criminal offences and have been denied the right to a fair hearing within a reasonable time. In this case, this is a constitutional claim brought pursuant to section 16(2) of the Charter which speaks to a determination of the civil rights of a person. Different considerations therefore apply in dealing with these matters.

Constitutional Relief vs. Alternative Remedy in Judicial Review

[32] The question which however arises is this. Whether the proceedings under the Constitution ought really to be invoked in the case where there is an obvious available recourse at common law. The defendant has premised this application on the position that there is an adequate alternative remedy available to the claimant, and so the court should decline jurisdiction to hear the claim. The claimant has relied to a large extent on section 19(4) of the Charter of Fundamental Rights and Freedoms in support of this contention. It states:

> ***"Where any application is made for redress under this Chapter, the Supreme Court may decline to exercise its powers and may remit the matter to the appropriate court, tribunal or authority if satisfied that adequate means of redress for the contravention alleged are available to the person concerned under any other law"***

[33] Although the right to apply to the Supreme Court for redress when a human right has been, or is likely to be contravened, is an important safeguard of those rights, the notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law signifies the contravention of some human right guaranteed to individuals, is fallacious. Lord Diplock in ***Harrikissoon*** observed that the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the Constitution. He pointed out that it was an abuse of the process of the court to summon this jurisdiction when it is being used to avoid the necessity of

applying in the normal way for the appropriate judicial remedy for unlawful administrative action.

[34] In other words, Lord Diplock warned against the use of constitutional claims where there is a parallel remedy to invoke judicial control of administrative action. In ***Ramanoop,*** the Board also expressed the same view, in that, where a parallel remedy exists, constitutional relief should not be sought unless the circumstances include some special features. They described a typical special feature as one which involves the arbitrary use of state power, but indicated that this was not an exclusive list. Although ***Ramanoop*** and ***Harrikissoon*** were decided prior to the Charter of the Fundamental Rights and Freedoms, the dicta in both are still apposite.

[35] There is no evidence before me to rule that this case is one such special case. There is also no doubt that an adequate alternative remedy was available to the claimant. In fact, it has been affirmed by the Court of Appeal that the exercise of this exclusive visitorial jurisdiction is always itself subject to judicial review. The claimant therefore has an adequate remedy in judicial review, which gives the court the authority to exercise its prerogative powers of issuing writs of certiorari, prohibition and, of relevance here, mandamus to compel the visitor to exercise his authority. The claimant's grievances could therefore be properly addressed in judicial review. There was no need for her to proceed by way of a constitutional motion when there is available an adequate alternative that is more than capable of dealing with her complaints of delay. As was pointed out by the court in ***Ramanoop***, an alternative remedy is not inadequate merely because it is slower or more costly than constitutional proceedings. A constitutional remedy is one of last resort and not to be used when there is available an adequate alternative remedy.

Who is the Appropriate Defendant?

[36] The visitorial authority is independent of and separate from that of the defendant. This is substantiated by the authorities which were highlighted which speak to the exclusive jurisdiction of the visitor. The defendant is not the visitor, nor is the visitor a member of the defendant university as listed in Statute 2 of the Charter. That said, I agree with the defendant that the appropriate party the matter should proceed against is the visitor. It is this Office that has perpetrated the delay, despite the fact that the university by its Charter maintained this visitorial jurisdiction.

CONCLUSION

[37] For the reasons stated above, I am inclined to agree with the defendant that this court, though having jurisdiction to hear constitutional motions, should not entertain the claimant's motion. She has an available adequate remedy in judicial review.

[38] I therefore make the following orders:

1. The claimant's statement of case stands struck out.

2. Costs to the defendant to be taxed if not agreed.

…………………………………..
Hon. G. Henry-McKenzie, J.