



[2025] JMSC Civ 16

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION – VIA ZOOM

CLAIM NO. SU2023CV0374

BETWEEN	LISSA-MARIE COCHRANE	CLAIMANT
AND	ALETA BARTLEY	DEFENDANT

IN CHAMBERS

Mr. Hugh Wildman and with him a Law Student instructed by Hugh Wildman and Company for the Applicant.

Miss C. Larmond KC and with her Miss Gisselle Campbell Instructed by Messrs. Patterson Mair and Hamilton for the Respondent.

Mr. Philbert Smith Legal Officer for PICA present.

HEARD: September 18, 2024 and February 14, 2025

Judicial Review – Certiorari – Decision Made By Ultra Vires.

CORAM: J. PUSEY, J,

[1] By Notice of Application for Leave to apply for Judicial Review filed on the 29th of September 2023 the Applicant seeks the following Relief:

- i. A Declaration that the Respondent is not empowered by law to lay charges against the Applicant with a view to dismissal pursuant to Section 18 (1) (b) of the Executive Agencies Act, Section 7(1), section 7(2) and Section 7(3) and section 7(4) (vii) of the Executive Agencies (General Regulations 2010: section 12.4.6 of the Passport Immigration and Citizenship Agency Human

Resource Manual 2014 and section 4.3 of the Staff Orders for the Public Service.

- ii. A declaration that under the Proclamation Rules and Regulations. The Delegation of Functions (Public Service) Order, 2007 only the Chief Executive Officer of PICA is empowered by virtue of the said proclamation to lay charges against the Applicant.
- iii. A declaration that no steps have been taken by the Chief Executive Officer of PICA to lay charges against and Applicant pursuant to the said Proclamation Rules and Regulations 2007.
- iv. A declaration that the decision by the respondent to lay charges against the Applicant with a view to dismissal on the 12th day of September 2023 is irrational.
- v. A declaration that the decision by the Respondent to lay charges against the Applicant with a view to dismissal is procedurally improper.
- vi. A declaration that the Chief Executive Officer of PICA is not empowered by law to delegate the functions delegated to him pursuant to Proclamation Rules and Regulations, the delegation to the Respondent to lay charges against the Applicant.
- vii. An order of certiorari quashing the decision of the Respondent to lay charges against the Applicant with a view of dismissal.

BACKGROUND

- [2]** The Applicant is temporarily employed to the Passport Immigration and Citizenship Agency (PICA) as at August 3, 2021 as an Information Security Specialist (Level 7) in the Information Communication and Technology Services Unit (ITC).

- [3] In March 2022 she was favourably assessed for the period February 2021 to March 2022 but concerns were raised with her regarding staff interactions within her unit and the wider PICA community, which she acknowledged and signed the assessment documents.
- [4] Thereafter, there were other troubling reports concerning her behaviour and interaction with the staff. Her temporary employment was extended effective February 3, 2022 and subsequently she was reassigned to the Investigation and Surveillance Unit (ISU) effective August 18, 2022 at the direction of the Chief Executive Officer. The Applicant objected to this reassignment, maintains that she is employed in the ITC Unit and has failed to carry out tasks assigned to her by the head of the ISU.
- [5] On the 22nd December 2022 PICA wrote to the Applicant outlining their concerns with her actions and requesting a response, which came in an email which in their view did not address the issues raised by them. As a result of the response, PICA initiated their investigative process pursuant to its Human Resource Policies and Procedure Manual. The Applicant engaged counsel who attended a meeting with the Respondent and PICA's in-house counsel as part of the investigation process. A report on the investigation was generated and forwarded to the CEO of PICA who by memorandum dated June 23, 2023 instructed the Director Human Resources, Mrs. Joan Guy Walker to:

'Please proceed with the disciplinary process as per the Agency's HR Manual.'

In keeping with this directive, a letter dated September 8, 2023 (the charge letter), which advised the Applicant of charges laid against her and solicited a response, was prepared by the Respondent herein and signed,

'Yours truly,

Aleta Bartley (Ms)

For Chief Executive Officer'

This letter is the subject matter of this application for Judicial Review.

APPLICANT'S SUBMISSION

- [6] The Applicant contends that disciplinary control of public servants vests in the Governor General of Jamaica by virtue of section 127 of the Constitution of Jamaica. In **The Delegation of Functions (Public Service) Order 2007**, the Governor General delegated this authority in relation to PICA to the CEO of PICA exclusively. The Regulations does not provide for the CEO to further sub-delegate this function to anyone.
- [7] The Applicant argue that the decision by the Respondent to prepare the charge letter is outside of her jurisdiction as this is the exclusive function of the CEO. Further, the fact that the Respondent signed the charge letter 'for the CEO' does not make the charge letter the action of the CEO of PICA as she is the author of the document and is not competent to do so. The charge letter is therefore null and void and of no effect.
- [8] The Applicant relies on the decision of the House of Lords in **Vine v National Dock Labour Board** [1957] HL 488 which relied on the decision of the Court of Appeal in **Bernard v National Dock Labour Board and another** [1953] CA 113, as well as the decision of this court in **Webb v Stanberry** [2019] JMSC Civ 100 to support her contention that the actions of the Respondent is ultra vires, null and void and of not effect therefore the Applicant is entitled to the declarations and remedy sought. In all the cases cited employment was terminated by an unauthorized person and the action was overturned.

THE RESPONDENT'S SUBMISSIONS

- [9] The Respondent submits that the Applicant is not entitled to the relief sought.

Firstly, relying on the decision of the Full Court in **Gorstew Ltd. V Her Hon. Mrs. Lorna Shelly-Williams sitting as Corporate Area Resident Magistrate (Criminal) holden at the Half-Way-Tree and Patrick Lynch et al** [2016] JMISC Full 8, they argue that the Declarations sought do not require the leave of the court and should not be considered in this application. The only issue for consideration is whether relief for judicial review regard, Certiorari should be granted.

- [10] Secondly, they argue that certiorari should not be given to quash the actions of the Respondent in preparing the Charge Letter as the test for granting judicial review enunciated in **Sharma v Brown-Antione** [2007] 1WLR 780 that is, that there should be a realistic prospect of success in the claim and that there are no discretionary bar operating, is not satisfied in the circumstances of this case.
- [11] The crux of this case, it is argued, is the complaint that in levelling the charges against the Applicant, the Respondent acted outside her authority in breach of the Delegation of Functions (Public Service) Order 2007 as the power of disciplinary control delegated by the Governor General to the CEO of PICA cannot be exercised by the Respondent. It was urged that Harris JA in **Llandoverly Investments Ltd. The Commissioner of Taxpayer of Appeals (Income Tax)** [2012] JMCA Civ 19 having considered the decisions in **Vine v National Dock LabourBoard and Bernard v National Dock Labour Board and another** as well as **Jefferies v New Zealand Dairy Production and Marketing Board** found that administrative function, as opposed to judicial or quasi-judicial function can be carried out by a functionary in an organization. The Respondent submits that the actions of the Respondent in preparing the Charge Letter emanated from a directive of the CEO of PICA in memorandum dated June 23, 2023 to the Director of Human Resources to commence the disciplinary process which would ultimately enable the CEO to exercise his delegated authority of disciplinary control in due course.

- [12] Regarding whether the CEO should himself have signed the Charge Letter, reference was made to section 13.4.6 (v) of the Human Resource Manual of PICA which, following the completion of the investigative process on the basis that there is a triable issue, provides;

“(v) The CEO shall cause the officer to be notified in writing of the charge against them and officer is to be called upon to state in writing within 14 days any grounds upon which he relies to exculpate himself.”

The language, it was urged, is plain requiring the CEO to ‘cause’ the officer to be notified and not necessarily personally notifying the officer.

- [13] Further, relying on the decision in **The Bank of Jamaica v the Industrial Disputes Tribunal and the Bustamante Industrial Trade Union** [2017] JMSC Civ 173, where it was successfully argued that the decision maker should not carry out multiple roles in the disciplinary process e.g. Prosecutor, investigator and adjudicator in breach of the rules of natural justice. Therefore, the Respondent was carrying out an investigative, administrative function in preparing the charge letter. Consequently, the Respondent urged that the application is devoid of merit and should be refused.

THE LAW

- [14] It is settled law that the principles enunciated in **Sharma v Brown-Antoine** concerning applications for judicial review must be adhered to for those applications to succeed. The principles are that there should be a realistic prospect of success in the proposed claim and there is no discretionary bar available to the Applicant rendering the application unnecessary. The views of Lords Bingham and Walker delivering the judgment are worthy of repetition.

The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review

*having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy; see **R v Legal Aid Board Ex p Huges** [1992] 5 Admin LR 623, 628 and **Fordham, Judicial Review Handbook**, 4th Edition (2004), p 426. But argueability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application. As the English Court of Appeal recently said with reference to the civil standard of proof in **R (N) v Mental Health Review Tribunal (Northern Region)** [2005] EWCA. 71605 in a passage applicable, mutatis mutandis, to argueability.*

.....The more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities.

Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities.

*It is not enough that a case is potentially arguable: an applicant cannot plead potential argueability to “justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory process of the court may strengthen”. **Matalulu v Director of Public Prosecutions**, [2003] 4 LRC, 712.733.*

- [15] It has not been argued that there are any discretionary bars that could prevent the grant of leave in this matter. The thrust of the argument is that there is a reasonable prospect of success in the prospective claim.
- [16] PICA is an Executive Agency governed by the Executive Agencies Act. This Act provides for the establishment of a management scheme for the operation of the

Agency encapsulated in a Framework Document pursuant to The Schedule to the Act.

- [17] The Schedule sets out what is to be included in the Framework Document including:

The arrangements for the management of the Agency, including the powers of the Chief Executive Officer relating to appointment, dismissal and disciplinary control of employees.

- [18] In addition, section 11 of the Act empowers the CEO of PICA to from time to time, in accordance with an instrument of delegation issued under section 127 of the Constitution of Jamaica appoint such other officers and employees as the Chief Executive Officer thinks necessary for the efficient exercise of the functions of the Executive Agency and remove from office or exercise disciplinary control over any such officer or employee.

- [19] Both parties to this application were employed pursuant to these provisions and do not operate independently but under the direction and control of the CEO circumscribed by their respective duties.

- [20] The employees of PICA are public servants, disciplinary control of whom is vested in the Governor General under section 125 of the Constitution of Jamaica which states,

Subject to the provisions of this Constitution, power to make appointments to public offices and to remove and to exercise disciplinary control over persons holding or acting in any such offices is hereby vested in the Governor General acting on the advice of the Public Service Commission.

- [21] In addition to the powers conferred on the CEO regarding disciplinary control pursuant to the Executive Agencies Act, by the Delegation of Function (Public Service) Order 2007 the Governor General delegated control of the staff of PICA to the CEO of PICA.

- [22] The issue raised by this application is whether the Respondent in proffering the charges against the Applicant in the Charge Letter of September 8, 2023, was usurping the functions of the CEO and therefore the charges are ultra vires, null and void.
- [23] In **Bernard v National Dock Labour Board** by the enabling statute governing the employment of the plaintiffs a National Dock Labour Board was established which had disciplinary control over workers, which was not delegable. The secretary of the Board, who was also the Port Manager employing the workers, purported to suspend the plaintiffs for disobeying a order to work. It was argued successfully that he acted outside his authority as there was no provision in the statute allowing the Board to delegate disciplinary control to anyone. Lord Denning described the Port Manager as a usurper stating that *'he has assumed a mantle which was not his, but that of another'*. Lord Denning made the distinction between administrative functions which are delegable and judicial functions which are not. He argued that the provisions of the Act placed the Board in a judicial position between the workers and the employer to adjudicate on disciplinary issues, so an employer could not exercise that power.
- [24] In **Vine v National Dock Labour Board** the decision in **Bernard v National Dock Labour Board** was applied. The House of Lords went further to say that because the judicial function was such that its exercise could result in the dismissal of a worker, it should only be exercised by the office holder and not-delegated to functionaries.
- [25] The maxim *delegatus non potest delegare*, which means that where a power has been delegated to another, that power can only be exercised by the delegate, is at the root of this case. The Court of Appeal Per Harris JA in **Llandoverly Investments Ltd. V The Commissioner of Taxpayer Appeals (Income Tax)**, after examining the **Vine v National Dock Labour Board**, **Bernard v National Dock Labour Board**, **Allingham v Minister of Agriculture and Fisheries** [1948] 1 ALL ER 780, a decision from **New Zealand in Jeffs v**

New Zealand Dairy Production and Marketing Board [1967] 1 AC 551 among other cases, observed that courts in considering the application of *maxim delegatus non potest delegare* should not treat it as an inflexible maxim, rather in interpreting its application must seek to achieve a result which does not operate manifestly excessive. Where a power is delegated the holder has the right to determine the procedure to be adopted in treating with any issue requiring the exercise of the power. Therefore, while he cannot delegate the decision making power he can delegate preliminary acts or procedural steps to someone else. In that case the Commissioner of Taxpayer Appeal had rendered a decision in an appeal without conducting the hearing himself but in reliance on information provided by the Taxpayer Appeals Department which had held hearing and collected evidence from their investigations and submitted a report to him. The court found that in carrying out these steps preparatory to the determination of the issue by the Commissioner, the Taxpayer Appeals Department had not usurped the power of the Commissioner, and the Commissioner could use their report and all material they gathered to make his decision. In the case the Taxpayer Appeals Department had not furnished the Commissioner with the statements they had gathered and so his decision was struck down. What is clear from the decision is that the delegate can determine the procedure to be adopted preparatory to him making his decision but the power to make the ultimate decision cannot be delegated.

[26] **In Bank of Jamaica v The Industrial Disputes Tribunal and The Bustamante Industrial Trade Union** E. Brown J (as he then was) found that the principles of natural justice ought to be applied in making decisions, and not in that case, where the decision maker was also the investigator and chaired the hearing.

DISCUSSION

[27] I am grateful to counsel on both sides for their reasoned submissions and authorities in this matter.

- [28]** The maxim delegatus non potest delegare (the maxim) is enshrined in our laws in section 34(2) of the Interpretation Act which stipulates:

Where an Act confers a power or imposes a duty on the holder of an office, as such, then, unless the contrary intention appears, the power may be exercised and the duty shall be performed by the holder for the time being of the office or by a person appointed to act for him.

In the case at Bar the Applicant, seeking leave for Judicial Review of the decision by the Respondent, Ms. Aleta Bartley, to proffer charges against her in the Charge Letter dated the 8th September 2023 for misconduct by the Applicant, relies on the maxim and the Interpretation Act. She argues that the power to exercise disciplinary control over her, a public servant employed by PICA, is vested in the CEO of PICA by the Governor General of Jamaica and not the HR Manager.

- [29]** PICA is an Executive Agency pursuant to the Executive Agencies Act which stipulates that a Framework Document conforming to the Schedule to the Act must be in place for the management of PICA. This Framework Document must set out tenets for the management of all aspects of PICA including Human Resource Management circumscribed by the Public Service Regulations.

- [30]** In conformity with this PICA has generated a Human Resource Policies and Procedures Manual which includes a grievance procedure to be followed when issues arise. When a decision regarding disciplinary control is to be made it is the CEO who is the proper officer to make that decision.

- [31]** In the case at Bar, the conduct of the Applicant was concerning and pursuant to its procedures the Respondent, the HR Director having received a complaint, communicated to the Applicant in her assessment exercise the concerns raised. The Applicant was transferred to another department within PICA at the instance of the CEO. The Applicant contends that the transfer was unlawful and refused to carry out any duties in the department to which she was reassigned. She

engaged the services of an attorney. The HR Department wrote to her concerning her conduct and she replied to the letter by e-mail failing to treat with the concerns raised. Consequently, and in accordance with PICA's Human Resource Policies and Procedures Manual an investigation was launched and by letter dated 13th April 2023 and Applicant was invited to an investigating meeting.

[32] At the conclusion of this exercise the Respondent made a report to the CEO who by memorandum dated the 23rd June 2023 directed the HR Director to 'proceed with the disciplinary process'. Consequently, the Charge Letter was prepared by the Respondent and given to the Applicant who seeks judicial review of the decision of the Respondent, whose substantial post is Human Resource Manager, Staffing, Recruitment, Compensation and Benefits, to prepare charges. Further she argues, that by signing the letter on behalf of the CEO the Respondent has usurped the authority of the CEO, therefore the Charge Letter is null and void and of no effect. It is important to recognize that the Respondent is a Manager in the Human Resource Department who would deal with Human Resource issues. She would receive complaints on human resource issues and is experienced in dealing with these issues. In addition, based on the history that resulted in the preparation of the Charge Letter, she would be seized of the matters. So unlike the CEO she was well placed to prepare the Charge Letter.

[33] The power that was conferred by the Delegation of Functions (Public Service) Order 2007 is unquestionably the power to decide the outcome of disciplinary issues. All the cases referred to by both parties which deal with similar provisions, deal with the exercise of that power, after communicating an allegation to the worker, some investigation and collection of evidence and the worker given an opportunity to explain his actions. The case at Bar is somewhat different as it questions the procedure used by the CEO in laying the charges and collecting information from the worker.

[34] In **Bernard v National Dock Labour Board Lord Denning** highlighted that there are two aspects to the exercise of the power of disciplinary control an

administrative function and a judicial function. The administrative function is delegable and distinct from the judicial function, which is not delegable, particularly because it embodies the power to make the decision.

[35] In **Vine v National Dock Labour Board** the House of Lords while embracing the decision in the Bernard case added that the impact of the outcome of the exercise of the power delegated on the employee was so significant that the decision making power should not be delegated to functionary.

[36] The administrative function encompasses the gathering of evidence, what Lord Denning called on the Bernard case, the prosecutorial function of proffering charges, the holding of meetings and the preparation and submission of reports. These acts are necessary for the decision maker to be have sufficient information before him to make an informed decision. In the **Llandovery Investments Limited** case Harris JA relying on the New Zealand decision in **Jeffs v New Zealand Dairy Production and Marketing Board** said in paragraph 21:

It is perfectly permissible for a public functionary to delegate certain preparatory acts necessary for the execution of the functionary's duty.....

[37] In the instant case PICA in its Human Resource Policies and Procedures Manual has a procedure to deal with disciplinary control. The Memo dated June 23, 2023 from the CEO to the Director of Human Resource recognized that procedure and instructed the Director to initiate the process. The Manager acting on the instruction prepared the Charge Letter and sought to elicit a response to the charges, to gather information that could assist the exercise of the judicial function by the CEO later.

[38] Contrary to what the Applicant has urged, the Respondent did not act on her own initiative, although the Applicant may not have been aware of this memo of June 23, 2023 from the CEO, the Respondent's action in preparing the Charge Letter was done at the instance of the CEO who initiated the disciplinary process. No decision was made by the Respondent by proffering the charges. It was more

akin to a prosecutorial function synonymous to a prosecutor in a criminal case. The Investigator collects information, the prosecutor proffers the charge/indictment and the Judge makes the decision on the case from evidence collected by the prosecutor and the defence. Further, the actions of the Respondent were consistent with the established procedure set out in the Manual. If the Respondent had gone further and after compiling the evidence and information made a decision on the matter, she would have usurped the power exercisable by the CEO and her actions would be reviewable by the court.

- [39] The fact that the Respondent signed the Charge Letter on behalf of the CEO can be better appreciated in this context. It is an affirmation that the Charge Letter is done not only with the knowledge and approval of the CEO but on his behalf as part of the disciplinary process. In fact, the Respondent could have executed the Charge Letter in her own right as it is purely an administrative function to gather information to be utilized by the CEO when adjudication on the issues.
- [40] This procedure is consistent with the decision of Evan Brown J in **Bank of Jamaica v The Industrial Disputes Tribunal and the Bustamante Industrial Trade Union** that in all judicial proceedings the principles of natural justice should be followed so that the decision maker is not also the investigator and prosecutor in the proceedings. The power delegated to the CEO is a judicial function and the principle is applicable his adjudication.
- [41] It seems clear to me that what was delegated by the 2007 Proclamation was the power to make the decision in disciplinary control activities. The procedure to be adopted leading to the decision making was developed pursuant to Executive Agencies Act in accordance with the Framework Document manifested in the Human Resource Policies and Procedures Manual. If the Governor General himself was the decision maker, he would have been reliant on these preparatory steps being taken and a file presented to him, or a hearing conducted by him. Surely it was not envisaged that he would prepare the Charge Letter and conduct the investigation leading to his decision himself.

[42] As mentioned earlier one of the bases for leave to seek judicial review is that there must be a reasonable prospect for success in the substantive claim. As I have sought to establish, the actions of the Respondent were administrative and not judicial and therefore cannot be impugned as in breach of section 54 of the Interpretation Act or the maxim *delegatus non protest delegare*. On that basis leave cannot be granted.

[43] In the application at Bar besides seeking leave for Judicial Review, the Applicant seeks several Declarations. The Respondent has taken issue with this. The crux of counsel's argument is that they are distinct claims with different requirements as set out in Part 56 of the Civil Procedure Rules (CPR). She relies substantially on dictum of Thompson-James J in **Gorstew Ltd. V Her Hon. Mrs. Lorna Shelly Williams sitting as Corporate Area Resident Magistrate (Criminal) holden at Half-Way-Tree and Patrick Lynch et al** Supra. I agree with this submission and cannot improve on the recitation of the law by my sister Thompson-James J in these terms beginning at paragraph 16 et seq of the judgment of the Full Court;

I am in full agreement with Ms Larmond's submission that the present proceedings ought to be restricted to the hearing of the application for leave to pursue the order for certiorari since leave is not required for declaratory relief., it is clear from the way in which the rules in part 56 of the Civil Procedure Rules are framed that declarations are to be treated as a type of relief separate and apart from that of judicial review and as such are to be treated differently.

CPR 5.1 lists declaratory relief separately from the relief of judicial review and CPR 56.1(1) lists them as separate applications for administrative orders. It is also noted that CPR 56.1(3) restricts the remedies that judicial review includes to certiorari, prohibition and mandamus.

CPR 56.3 and 56.4 outline the procedure in applying for leave to apply for judicial review, whilst CPR 56.9(1) treats with how an application for an administrative order is to be made, and specifically, the procedure in relation to applying for a declaration. CPR 56.3 makes it clear that leave is required for judicial review but nowhere in the CPR does it similarly require leave to apply for a declaration.

Further, CPR 56.11 which deals with the service of a claim form for an administrative order makes specific mention of a copy of the application for leave being served where leave has been given in respect of judicial review. There is no such requirement in respect of other forms of administrative orders.

*I am fortified in my view by the words of Brooks JA in **Carlton Smith v Lascelles Taylor, Commissioner of Police and the Attorney General** [2015] JMCA Civ 58, wherein he noted at paragraph [21] that “it is clear from the rules that orders for judicial review and declarations are separate administrative orders available to a claimant and as such the rules do not place on applications for declarations the restrictions they place on applications by judicial review”.*

[44] For these reasons only the application for judicial review was considered by this Court.

ORDER

[45] The following order is made:
Leave to apply for judicial review is refused.

Judith Pusey
Puisne Judge