



[2020] JMSC Civ.227

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2020CV03170

BETWEEN	LATOYA HARRIOTT	APPLICANT
AND	UNIVERSITY OF TECHNOLOGY	RESPONDENT

IN CHAMBERS

Mr. Lemar Neale instructed by NealLex for the Applicant

Mr. Matthew Royal instructed by Myers Fletcher and Gordon for the Respondent

October 13, 2020 and November 13, 2020.

**Leave to apply for Judicial Review – Is there a realistic prospect of success –
Mandamus - Is inaction tantamount to a refusal**

CARR , J (AG)

Introduction

[1] The applicant filed an amended notice of application for court orders on the 30th of September 2020 seeking the following orders:

- a) Leave to apply for judicial review of the Respondent's refusal to refer the dispute between the Applicant and the Respondent concerning the wrongful withholding of the Applicant's degree of Masters of Business Administration,

to the Respondent's Visitor, His Excellency the Most Honourable Sir Patrick Allen, Governor General of Jamaica by way of:

- i) An order of Certiorari to remove into this Honourable Court and quash the refusal of the Respondent to refer the dispute between the Applicant and the Respondent concerning the wrongful withholding of the Applicant's degree of Masters of Business Administration, to the Respondent's Visitor, His Excellency the Most Honourable Sir Patrick Allen, Governor General of Jamaica.
- ii) An order of Mandamus directing the Respondent to refer the dispute between the Applicant and the Respondent concerning the wrongful withholding of the Applicant's degree of Masters of Business Administration, to the Respondent's Visitor, His Excellency the Most Honourable Sir Patrick Allen, Governor General.

Background

[2] The application involves a dispute between Ms. Harriott and the University of Technology (the University) about their failure to confer or award her a degree of Masters of Business Administration. Her affidavit outlines that she was a student of the University of Technology enrolled in a two year programme that commenced in September 2012. Despite completing her programme and paying the requisite tuition fees she has been unable to obtain her degree from the University.

[3] Through her attorneys, letters were sent to the University seeking an explanation for this. In correspondence received she was advised that there were outstanding sums due as a result of late payments made on her tuition, nevertheless they indicated that they would be investigating the matter. No further communication was received.

[4] Counsel for Ms. Harriott wrote to the University again, this time requesting that the matter be referred to the Visitor. Some nine months later this request was more forcefully

made by way of a demand letter giving the University fourteen days to respond. Having not received a response to their demand Counsel filed this application before the court.

Submissions

On behalf of the Applicant

[5] Mr. Lemar Neale argued that this is a matter which can only be resolved by reference to the Visitor and he referred to Section 5 of the University of Technology Jamaica Act. He indicated that Ms. Harriott has no other form of redress as the case law has shown that matters involving disputes as to the internal policies and laws of the University are entirely matters within the sole jurisdiction of the Visitor.

On behalf of the Respondent

[6] The University did not file any affidavits in response to the application. Mr. Matthew Royal on their behalf made submissions solely on the legal principles. It was argued that the matter was a contractual one and therefore did not fall within the jurisdiction of the Visitor. It was simply about whether or not the applicant had fulfilled her obligations under the agreement with the University in respect of her fees. The jurisdiction of the Visitor was to be invoked when dealing with interpretation of statutes and ordinances.

[7] He brought the courts attention to the first letter sent by counsel for the applicant to the University. In that letter counsel outlined the issue as one of contract law. Mr. Royal argued that this was an accurate description of the situation. He contended that the applicant had an alternative remedy and therefore was not entitled to leave in the circumstances.

Analysis and Discussion

[8] Rule 56.3 (1) of the Supreme Court Civil Procedure rules 2002 provides that a person wishing to apply for judicial review must first obtain leave.

[9] Rule 56.6 (1) states that an application for leave to apply for judicial review must be made promptly and in any event within three months from the date when grounds for the application first arose.

[10] Rule 56.2 (1) outlines that an application for judicial review may be made by any person, group or body which has sufficient interest in the subject matter of the application.

[11] There is no dispute that the application was made promptly and that Ms. Harriott is a person with sufficient interest in the matter before the court.

[12] The central issue is whether or not there is a realistic prospect of success.

[13] In the seminal case of **Sharma v. Brown-Antoine and others** [2007] WLR 780 at page 787 it was said:

“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..”

[14] The Privy Council defined realistic prospect of success as simply being one that is not fanciful. If the Applicant has an alternative remedy then this should be pursued before coming to the courts for judicial review.

[15] Ms. Harriott seeks two remedies for what was considered by her as the failure of the University to refer the dispute to the Visitor. The orders are for certiorari and mandamus. The burden of proof lies with her and she must satisfy the court on a balance of probabilities that there was in fact a decision made by the University that is open to review.

[16] The question which must first be answered is whether the inaction of the University in the face of the demand letter is sufficient to establish a refusal on their part. In the decision of **Milton Llewellyn Baker v. The Commissioner of Finsac Commission of Enquiry Warwick Bogle and Anor.** [2013] JMSC 137, McDonald Bishop, J (as she then

was) explored in detail the writ of mandamus and the principles to be used in its application.

[17] In reference to Halsburys Laws of England she quoted:

“Although a mere withholding of compliance with the demand is not sufficient ground for a mandamus, yet it is not necessary that there should have been a refusal in as many words. All that is necessary in order that a mandamus may issue is to satisfy the Court that the party complained of has distinctly determined not to do what is demanded.”

[18] Further at paragraph 90 of the judgment she opined:

“Furthermore, even if Mr. Levy’s letter could be taken as a distinct demand, there is no evidence of a refusal on the part of the Commission to perform it. A failure to perform does not necessarily constitute a refusal to perform. There must be shown, by the evidence, that the Commissioners have ‘distinctly determined not to do what is demanded.’”

[19] In the case of the **Independent Commission of Investigations v. Everton Tabannah and Worrel Latchman** [2019] JMCA Civ. 15 there was a clear decision made that the court found was open to review. At Paragraphs 30 and 31 of the judgment it was stated:

“The learned judge identified that the issue in dispute arose from Indecom’s refusal to give disclosure to the respondents. He said at paragraph [14]: “Thus it is this decision embodied in [Indecom’s] letter that has sparked the application for leave to apply for judicial review. The relevant part of Indecom’s letter in issue states: “As regards your request that you be furnished with certain documents from our Investigation File; please be advised that having regard to Section 28 of the [Act], we do not disclose statements received pursuant to our investigations unless to further an investigative purpose, or by way of disclosure after charges have been laid.””

[20] The first letter to the University by counsel for the applicant dated June 20, 2019 was not met with a refusal to enquire into the matter. Although pointing out Ms. Harriott's indebtedness the Attorney indicated that they would proceed to investigate her claim. Counsel's letter of demand dated June 5, 2020 has not evoked a response. The failure to respond cannot be construed as a determination not to refer the matter to the Visitor.

[21] Prior to the commencement of the hearing of this application Mr. Royal indicated that although he was prepared to proceed he had not yet taken fulsome instructions from his client. He therefore did not have an opportunity to file affidavits in response to the application. Mr. Neale insisted that the matter be heard nonetheless as his client would have been severely prejudiced by an adjournment.

[22] An affidavit outlining the position of the University as it relates to the dispute would have assisted in determining the position of the institution in regards to referring the matter to the Visitor.

[23] I am hard pressed to find, based on the Affidavit of Ms. Harriott in support of this application, that there was in fact a refusal on the part of the University as described in the principles as set out in Halsbury's Laws and the cases referred to previously. The non-responsiveness of the University is insufficient to establish that they have refused to do what has been requested of them. Ms. Harriott still has the option of engaging the University in further discussions in respect of this matter.

[24] In the circumstances there is no evidence before the court upon which a finding can be made that there was in fact a refusal on the part of the University to trigger a Writ of Mandamus. I am therefore not of the view that Ms. Harriott has a real prospect of success.

Order:

1. The application for leave to apply for judicial review is refused.
2. Costs to the Respondent to be agreed or taxed.