IN THE COURT OF APPEAL OF BELIZE AD 2015

CIVIL APPEAL NO 14 OF 2014

BOARD OF TRUSTEES
UNIVERSITY OF BELIZE Appellant

v

DR ABIGAIL MCKAY Respondent

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BEFORE

The Hon Mr Justice Samuel Awich	Justice of Appeal
The Hon Madam Justice Minnet Hafiz-Bertram	Justice of Appeal
The Hon Mr Justice Christopher Blackman	Justice of Appeal

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D A Barrow SC for the appellant.
A Matura-Shepherd for the respondent.

October 6, 2015 and March 18, 2016.

AWICH JA

[1] I concur with the judgment prepared by Blackman JA, which judgment I read in draft form.

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AWICH JA

HAFIZ-BERTRAM JA

[2] I too concur with the judgment of Blackman JA which I have read in draft and have nothing to add.

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HAFIZ-BERTRAM JA

BLACKMAN JA

[3] At the close of the hearing of the appeal on October 6, 2015 by the appellant against the decision of **Abel J** dated 28 February, 2014 the appeal was allowed, and the order granting leave for judicial review was quashed. Costs in this Court and in the Court below were agreed in the sum of $10,000.00. We stated that the reasons for our decision will be given at a later date, and this we now do.

Background to the Appeal

[4] By an agreement made in October 2010, Dr. McKay (the respondent) was hired by the appellant for a period of thirty–six calendar (36) months, commencing October 1, 2010 to perform the duties of Dean of Faculty of Nursing, Allied Health and Social Work. The contract provided for an extension for an additional 2 years, subject to satisfactory performance.

[5] On May 29, 2013 the respondent wrote to the President of the University requesting that her contract be extended for a period of 2 years. In July 2013 the respondent was advised by email that her contract will be extended for a period of 3 months. On September 17, 2013 the respondent again wrote the President, querying the decision not to extend the contract for an additional term of 2 years. However, by

September 11, 2013 the President had already written to the respondent stating "*We regret that the University and you have been unable to reach an agreement on our offer to provide an extension of your contract up to 31st December, 2013. In light of this, your last day of employment will be 30th September, 2013 as per your current contract."*

[6] On December 18, 2013 Dr. McKay filed leave for judicial review which application was heard on February 6 and 21, 2014 by **Abel J**. With remarkable despatch, the learned judge delivered his decision on February 28, 2014 granting the application. The Order perfecting the grant stated (inter alia) that:

1. The permission to apply for judicial review was granted to the Applicant/ Claimant under Part 56.3 of the Supreme Court Rules 2005 in accordance with rules of the court and subject to the following conditions:
    a) That the Respondents/Defendants were only to be Dr. Carey Fraser and the University of Belize, the 2nd and 3rd Defendants respectively.
    b) That the application for judicial review (including appropriate declarations and orders of prohibition and certiorari) is of the decision of the 2nd and/or 3rd Respondents/Defendants dated July 2, 2013 and September 18 2013 ...
    g) That the Applicant/Claimant must make a claim for judicial review within 14 days of the receipt of the order granting permission.
    h) That the grant of permission shall operate as a stay of the proceedings to which the Application relates.
2. That all other grounds in the Applicant's/Claimant's application for leave to apply for Judicial Review are either out of time or unarguable.
3. That said permission granted is for the Applicant/Claimant to apply for judicial review in relation to a decision:
    a) taken by the President on or about July 2, 2013 to grant an extension of time of only 3 months instead of two years which the Applicant/Claimant alleges should have been granted, and

b) made on or about September 18, 2013 to terminate the Applicant/Claimant at the end of the 3 months extensions (September 30, 2013) instead of extending the time of the contract to make up the 2 additional years.

4. The said permission is granted to the Applicant/Claimant to specifically apply for the following reliefs:

a) For Certiorari to quash the decision allegedly taken by 2nd and/or 3rd Defendants/Respondents, to defeat the alleged legitimate expectations of the Applicant/Claimant not to extend the Applicant's/Claimant's contract beyond the 3 years granted by contract and to provide only a three months extension of the said contract and to thereafter terminate the services of the Applicant/Claimant.

b) For Certiorari to quash any decision taken by the Board of Trustees of the University, to recommend the termination of the Applicant/Claimant at the end of the 3 year contractual term granted;

c) For a Declaration that the Staff Handbook is the basis on which all contracts to Deans ought to be given and as such by which any extensions of contracts/appointments must be construed and interpreted as it outlines agreed policies of the University.

d) For a Declaration that the five year term of the appointment of a Dean is mandatory, and that the Applicant/Claimant had a legitimate expectation that she had a 5 year contract and that other than for a good and sufficient cause or resignation of the employee it ought not to be changed without consulting with the Applicant/Claimant in good faith and giving her an opportunity to be heard;

e) A Declaration that the letter of September 11, 2013 but delivered on September 18, 2013 to the Applicant/Claimant was indicative that no consideration was given by the Defendants/Defendants to the

request for reasons for the alleged unlawful termination by letter of September 17, 2013.

[7] Pursuant to that leave, the respondent on March 13, 2014, supported by affidavits, filed a fixed date claim form for judicial review. The Orders sought and the grounds of the Application were as follows:

1. Order of Certiorari to quash a decision taken by the 1st and/or 2nd Defendant to defeat the legitimate expectation of the Applicant to have her contract extended beyond the initial three years and more than the three months offered, after which the services of the Applicant would be terminated.
2. Order of Certiorari to quash any decisions taken by the 2nd Defendant, to recommend the termination of the Applicant at the end of the three year contractual term and to only provide a three month extension instead of a two-year extension.
3. A Declaration that the Faculty and Staff Handbook, Rule 4.1.2(E) is the basis on which all contracts to Deans are given and as such all contracts/appointments must be constructed and interpreted along the vain of the handbook, which outlines agreed policies of the University of Belize since its review and adoption by the Board of Trustees July 31, 2015.
4. A Declaration that the five year term for the appointment of Dean is mandatory and that the Applicant had a legitimate expectation that she had a five-year contract and, that other than for a good and sufficient cause or resignation of the employee, it ought not to be changed without consulting with the Applicant in good faith and giving her an opportunity to be heard.
5. A Declaration that the letter of September 11, 2013, but delivered until September 18,2013 to the Claimant was indicative that no consideration

was given by the Defendants to the Applicant's request by letter of September 17, 2013, for reasons for the unlawful termination.

6. Damages.

The grounds of the Application were:

1. The decision was made by the Defendants who are regulated by the University of Belize Act Chapter 37 of the Substantive Laws of Belize and is also a grant-in-aid school of the Government of Belize and was therefore subject to judicial review.
2. That by Section 27 of the University of Belize Act Chapter 37 The President may appoint and employ, with the approval of the Board, such members of professional, administrative, supporting and ancillary staff as he may deem necessary for the efficient management of the University, on such terms and conditions of service as may be generally established by the Board. The Claimant being a member of both the professional and administrative staff as she held the post of Dean of Faculty of Nursing, Allied Health & Social Work legitimately expected her contract to be extended to the mandatory five years.
3. That by Section 31 of the University of Belize Act Chapter 37 the Board is empowered to make rules that provide the terms and conditions of service of its employees, the appointment, dismissal and disciplinary control over employees of the University and like matters, which was done and embodied in the Faculty and Staff Handbook dated July 31, 2005 and as such had to be complied with.
4. That the preamble to the handbook explained under what authority it was created stating that "The University of Belize Act of 2000," gives the UB Board the legal authority to enact policies for the: management, maintenance and development" of UB and in the face of it the rules, regulations and policy embodied in the Faculty and staff handbook was

enacted by the Board of Trustees, July 31, 2015 and as such could only be changed by the Board and no such changes were (sic) since done.

5. That the Defendants denied the Claimant's legitimate expectation to be employed as Dean, Faculty of Nursing, Allied Health & Social Work for a mandatory five-year term as stated in Rule 4.1.2(E) of the Faculty & Staff Handbook July 31, 2005, when the 1st and/or 2nd Defendants(s) declined to extend her contract to complete the mandatory five year term.
6. That the 3rd Defendant acted unreasonably and/or improperly to the detriment of the Applicant in seeking to get the Applicant to agree to a three month employment contract extension up to December 31, 2013, knowing there is a mandatory five-year appointment which cannot be unilaterally changed and despite knowing the Claimant's written and expressed desire to remain in the University's employment.
7. That the Claimant had a right to be heard on the issue of the denial of her remaining two year contract to complete her mandatory five year term and failure to hear the Applicant by the Defendants denied them the opportunity to be appraised of the reasons why their decisions not to extend the contract should not be made final as the hearing would have provided them with the opportunity to learn of relevant factors and material considerations to be taken into account when making their decision.
8. The Defendants, individually or collectively acted irrationally and or took into account irrelevant and or immaterial considerations and or failed to take account of relevant consideration when deciding not to allow the Claimant to remain employed as Dean of Faculty of Nursing, Allied Health & Social Work, despite the Claimant's good performance and contribution to the development of the institution.
9. The Defendants have acted in a procedurally improper manner and/or in bad faith in refusing to have the Applicant heard and subsequently refusing to provide reasons or grounds for refusing to have the contract run its full five year term.

10. The Defendants acted irrationally and unreasonable when the 2nd Defendant, despite not wanting to grant the two year contract continuation, offered the Claimant a three-month extension which is indicative of the Claimant's ability and value to the University in her post as Dean and the lack of good cause to have her removed.
11. The Claimant had a legitimate expectation to believe that her appointment was indeed for a full five year period and that the 1st and/or 2nd Defendant(s) could not make and/nor enforce a unilateral decision to terminate her service as that would be in violation to Rule 4.1. of the Faculty and Staff Policy Handbook.
12. The Claimant had a legitimate expectation that the Human Resource Director, whom she had met with seeking her intervention, would guide the 1st and 2nd Defendants on matters of the implementation of the Faculty and Staff Handbook and advise as to the act of bad faith and illegality the termination of service without due cause, would constitute.
13. The Claimant provided the Defendants ample opportunity and reasons to seek to remedy the wrong done to her before turning to the courts to seek redress.
14. There is no alternative method of redress available to the Applicant because the decision was made by a public body and the relief sought id in the realm of Public Law.
15. This Application is made within the time limit stipulated in Rule 56.5(3) of the Civil Procedures Rules in which to make the Application.

[8] On March 31, 2014 the appellant appealed the decision of **Abel J** granting leave to apply for judicial review on the grounds that:

i. The learned judge, having correctly found that the applicant's grounds for applying for permission to bring a claim for judicial review arose on July 2, 2013 and that, therefore, the application filed on December 18, 2013 was out of the three months' time limit, erred in law, acted on a wrong principle

and misdirected himself in exercising his discretion to extend time by considering the issue whether to extend time and concluding that he should extend time by reference only to the premises that "it would cause substantial hardship and prejudice to the Applicant and would be detrimental to good administration" (Judgement [94]).

ii. The learned judge misdirected himself in fact and in law in concluding that the President, having communicated to the applicant by letter dated July 2, 2013 the offer of an extension of employment for three (3) months, to September 30, 2013, by thereafter communicating to the Applicant by letter dated September 11, 2013 that the three months extension would expire on September 30, 2013 had thereby taken a "decision" "to terminate the Applicant" (Judgment [95]).

The Appeal

[9] At the start of the appeal, the presiding judge **Awich JA** enquired of Counsel for the appellant, Mr. Denys Barrow S.C. whether the issue for determination fell into the realm of public law, or was in the area of the private law of contract. In reply, Mr. Barrow stated that from the outset of the hearing in the court below, he had submitted that the court had no jurisdiction to entertain the application on two bases: First, the proceedings were contrary to section 19 of the University of Belize Act, Chapter 37 of the Laws of Belize, and second, the issue in dispute related to a contract of employment and consequently, was not subject to judicial review.

[10] Mr. Barrow further submitted that the respondent's reliance on the Faculty Handbook of the University, was a device to bring a claim in judicial review proceedings in that the handbook was considered to have the force of regulations made by the University of Belize under its regulatory making powers. Mr. Barrow further noted that while the Order of the court granting permission to apply for judicial review had stated at paragraph 1(d) "That only the Board of Trustees on the recommendation of the President could have terminated the services of the Applicant/Claimant and that this

was not done" yet paragraph 3 of the said Order provided "That said permission granted is for the Applicant/Claimant to apply for judicial review in relation to a decision:

c) taken by the President on or about July 2, 2013 to grant an extension of time of only 3 months instead of two years which the Applicant/Claimant alleges should have been granted, and

d) made on or about September 18, 2013 to terminate the Applicant/Claimant at the end of the 3 months extensions (September 30, 2013) instead of extending the time of the contract to make up the 2 additional years."

Mr. Barrow classified the giving of permission to challenge a decision which had been ruled as not having been made, as a classic non-sequitur and highly illogical.

[11] In support of his submission that the issue in dispute related to a contract of employment and consequently was not subject to judicial review, Counsel cited the English Court of Appeal decision of ***R (on the application of West) v Lloyd's of London*** [2004] 3 All ER 251. In that case **Brooke LJ** at page 262, noted that while Lloyd's corporate arrangements were underpinned by a private Act of Parliament and not by the Companies Acts did not make it in any way unique, "*the decisions under challenge were concerned solely with the commercial relationship between Dr. West and the relevant managing agents….those decisions were of a private, not a public, nature."* **Brooke LJ** adopted with approval the observations made by **Leggatt LJ** in ***R v Lloyd's of London ex p Briggs*** [1993] 1 Lloyd's Rep 176 at page 185 that "*It does not help to refer to the respondents as Regulators or to describe the system administered by the Corporation of Lloyds as a regulatory regime as is done in the form 86 in these proceedings. The fact is that even if the Corporation of Lloyd's does perform public functions, for example, for the protection of policy holders, the rights relied on in these proceedings relate exclusively to the contract governing the relationship between Names and their members' agents.. We do not consider that that involves public law. That is consonant with Mr. Justice Saville's conclusion that a Name was not entitled to*

disregard a cash call made in good faith by the members' agents. We accordingly endorse [counsel for Lloyd's'] submission that "all of the powers which are the subject of complaint in the present application are exercised by Lloyd's over its members solely by virtue of the contractual agreement of the members of the Society to be bound by the decisions and directions of the Council and those acting on its behalf. Lloyd's is not a public law body which regulates the insurance market. As [counsel for Lloyd's] remarked, the Department of Trade and Industry does that. Lloyd's operates within one section of the market. Its powers are derived from a private Act which does not extend to any persons in the insurance business other than those who wish to operate in the section of the market governed by Lloyd's and who, in order to do so, have to commit themselves by entering into the uniform contract prescribed by Lloyd's. In our judgment, neither the evidence nor the submissions in this case suggest that there is such a public law element about the relationship between Lloyd's and the Names as places it within the public domain and so renders it susceptible to judicial review."

[12] In rebuttal, Mrs. Matura-Shepherd submitted that the respondent's contract with the appellant should be considered in the context of the enabling Statute creating the University of Belize and the Faculty and Staff Handbook, particularly Rule 4.1.2. (E). and was therefore a matter fit for judicial review. She urged that the respondent had a legitimate expectation that based on the policy in the Faculty and Staff Handbook, the contractual term would be 5 years, and that if the term was not extended, she was entitled to a reason. Her client had sought that reason by letter dated September 17, 2013, and had never been provided an explanation. Moreover, the University had not carried out the performance review provided for in the contract so as to determine the issue of satisfactory performance as a condition precedent to the consideration for an extension for the additional 2 years.

[13] In support of her contention, Mrs. Shepherd in her written submissions cited the English Administrative Court decision of ***R (on the application of Albert Court Residents Association and others) v Corporation of the Hall of Arts and Sciences [2010] EWHC 393 (Admin)*** where the Court ruled that the City Council had failed to

follow its own published notification procedure by not notifying local residents of a licensing variation application when it had done so in the past, thereby giving rise to a legitimate expectation on behalf of the residents of the association that they would be notified of any future variation applications and the council had failed to do so.

[14] In Counsel's view, this situation was analogous to the instant matter in that the Faculty Handbook gave Dr. McKay the right to a mandatory 5 year term of employment, as reflected in the decision of **Abel J** at paragraph 99 where he stated: "*I do not accept the submission of learned Counsel for the Defendants that the Handbook is not a statute or regulation made pursuant to any law. I do accept therefore that it may be arguable, and that it was therefore susceptible to judicial review. It is certainly arguable that the Handbook is a regulation because the Contract says it is and also, the Handbook on its face states that it was made by the Board*."

[15] Counsel for the respondent urged the Court to affirm the decision of the judge granting permission for judicial review.

[16] The issue for determination was as articulated by the learned presiding judge at the start of this appeal: Was the dispute between the parties one that fell in the realm of public law or was it in the private law area of contract.

[17] In the seminal work on **Judicial Remedies in Public Law** (2000) by Clive Lewis at paragraphs 2-003 and 2-004, Lewis noted that Judicial review now is only available against a public body in a public law matter. *"In essence, two requirements need to be satisfied. First, the body under challenge must be a public body whose activities can be controlled by judicial review. Secondly, the subject-matter of the challenge must involve claims based on public law principles not the enforcement of private law rights. In the past, the courts focused primarily on the source of the power in determining whether a body was a public one subject to judicial review. Bodies created by statute or exercising powers derived from the prerogative were seen as public bodies amenable to judicial review. Now, however, the modern approach is to consider whether the exercise of a*

power, or performance of a duty, involves a "public element, which can take many different forms, and the exclusion from the jurisdiction of bodies whose sole source of power is a consensual submission to its jurisdiction". The source of a power or duty remains an important indication of the public law nature of a body and bodies created by statute or acting under powers derived from the prerogative will usually be public law bodies for the purposes of judicial review. Other non-statutory bodies may, however, be performing public functions and may be subject to judicial review. Other factors such as the nature of the function, the extent to which there is any statutory recognition or underpinning of the body or the function in question and the extent to which the body has been interwoven into a system of governmental regulation may indicate that the body performs public functions and is, in principle, subject to judicial review. The principal exclusion from the scope of judicial review now is bodies who acquire jurisdiction over individuals by virtue of contract. These are seen as private not public bodies.

2-004 *The second requirement is that the subject-matter of the claim being pursued in the judicial review application involves matters of public law not private law. Public bodies (like private bodies) may enter into contracts or commit torts. Individuals may only be seeking to enforce essentially private law rights. Judicial review is not available to enforce purely private law rights."*

[18] Lewis's statement that judicial review was only available against a public body in a public law matter followed the dicta of Sir John Donaldson M.R. in R. v. East Berkshire Health Authority, ex p. Walsh [1985] Q.B. 152 at 162 that "*the remedy of judicial review is only available where an issue of "public law" is involved*".

[19] The learned trial judge as noted at paragraph 12 above concluded that "*I do not accept ... that the Handbook is not a statute or regulation made pursuant to any law ... It is certainly arguable that the Handbook is a regulation because the Contract says it is and also, the Handbook on its face states that it was made by the Board*."

[20] The Contract between the University of Belize and Dr. McKay is recorded between pages 150 and page 154 of the Record of Appeal. It provided at paragraph 1(a), for the 36 month period of engagement. Paragraph 1(b) provided that subject to satisfactory performance, the contract may be extended for an additional 2 years. Paragraphs 2 to 8, and 10 to 13 related to issues such as the duties of the employee, probationary period, salary, ill-health, sick leave, dismissal/termination, liability, leave of absence, benefits and allowances, and private work. The two paragraphs of some material significance, paragraph 9 relating to **Performance Evaluation** and paragraph 14, which speak to **Other Conditions** are reproduced in light of what we conclude in the determination of this appeal.

PERFORMANCE EVALUATION

[21] "9.(a) The University will administer a performance evaluation at the end of the first six months. If the performance evaluation is unsatisfactory, the University reserves the right to terminate the contract based on such unsatisfactory performance.

(b) The University will administer a performance evaluation at the end of the first year. If the performance evaluation is unsatisfactory, the University reserves the right to terminate the contract based on such unsatisfactory performance.

(c) The University will thereafter administer a performance evaluation at the end of each year. If at the end of the term of this contract the performance of the person engaged is satisfactory, the University may extend the contract period for an additional two (2) years."

[22] Paragraph 14, on page 154 under the heading **Other Conditions** stated that "*Unless otherwise provided for in this contract, the person engaged shall be subject to the University of Belize Regulations as stipulated in the Faculty Handbook of the University and any other regulations which may be issued from time to time by the Board of Trustees of the University of Belize."*

[23] A careful examination of the contract reveals that paragraph 14 is the only place where the Handbook is mentioned, and the purpose was as a sweep up provision for matters not provided in the contract. In those circumstances, it is not clear upon what basis it could be held that the contract deemed the handbook to be a regulation.

[24] As noted in ***Lloyd's of London*** cited at paragraph 9 above, where Lloyd's powers were derived from a private Act of Parliament, the mere fact that the University of Belize was created by an Act of the Belize Parliament (Chapter 37 of the Substantive Laws of Belize), did not make it subject to judicial review.

[25] It was against the foregoing that we agreed with Counsel for the appellant that the issue in dispute was not amenable to judicial review, and consequently allowed the appeal.

[26] However, this is not the end of the matter. The Court undertook to give some guidance on matters of this kind and this we now do. Mrs. Shepherd in her written submissions noted that the University had not carried out the performance review provided for in the contract so as to determine the issue of satisfactory performance as a condition precedent to the consideration for an extension for the additional 2 years. We agree with that submission. The appellant did not follow its own procedures and requirements of the contractual terms in relation to the issue of **Performance Evaluation** which required that: "***The University will thereafter administer a performance evaluation at the end of each year. If at the end of the term of this contract the performance of the person engaged is satisfactory, the University may extend the contract period for an additional two (2) years."***

[27] As a consequence, as a basic minimum, it seems to us that the respondent had a right to be informed of the reasons for the decision not to extend the contract, a breach of which right could be ventilated in appropriate legal proceedings. However, as **Brookes LJ** noted at paragraph 41 in ***West,*** if the respondent wishes to pursue a

private law remedy against the University, the case must be entirely reshaped so as to identify the private law cause of action on which she may seek to rely.

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BLACKMAN JA