Michaelmas Term
[2023] UKPC 44
Privy Council Appeal No 0013 of 2022

JUDGMENT

Harold Chang (Appellant) v The Hospital Administrator and 2 others (Respondents) (Trinidad and Tobago)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Hodge
Lord Briggs
Lord Burrows
Lady Rose
Lord Richards

JUDGMENT GIVEN ON
12 December 2023

Heard on 11 July 2023

Appellant
Khristendath Neebar
Keshav D. Ramnath
(Instructed by Haresh Ramnath (Trinidad))

Respondents
Rowan Pennington-Benton
Russell O. Warner
(Instructed by Charles Russell Speechlys LLP (London))

LORD HODGE:

1. This appeal has at its heart the assertion that a judge, who had heard a judicial review application, failed to exercise a discretion to bring in a new party to the legal process, although none of the parties had requested that he do so. The appellant ("Dr Chang") also submits that the judge failed to take other steps to arrange that a decision which was material to the outcome of the application be fully investigated at trial, although not requested to do so.

(1) Factual background

2. Dr Chang is a medical doctor who was initially appointed by the Public Service Commission ("PSC") and who at the relevant time held the post of Specialist Medical Officer (Anaesthetics) ("SMO") at the Port of Spain General Hospital. As a result of healthcare reforms in the 1990s the hospital came to be controlled and managed by the North West Regional Health Authority ("NWRHA"). Dr Chang on account of his post as SMO purportedly became responsible for the supervision of doctors who were employees of the NWRHA but he regarded that as inconsistent with the regulations which govern the post of SMO. A dispute arose as to whether Dr Chang was required to supervise such employees and he was suspended for a time. When he returned to work, he again refused to supervise NWRHA doctors and therefore could not be rostered to work at the hospital.

3. On 26 April 2002 Dr Chang applied to the PSC for early retirement purportedly under regulation 51(1)(c) of the Public Service Commission Regulations. He gave as his reasons for seeking early retirement his age, that his peace of mind had been disturbed by the events which had affected serving medical officers in public service in recent years and that his children had reached an age which required him to earn sufficient money to educate them. In a further letter dated 1 May 2002 Dr Chang amended his application to include the words "with effect from 1 May 2002" to give notice of when he wished his retirement to take effect.

4. Dr Chang stated in his letters of 26 April and 1 May 2002 that he had been assured by the hospital's Medical Chief of Staff that his application would receive favourable consideration. Steps were then taken by the respondents to process Dr Chang's request. By letter of 12 June 2002 the Ministry of Health requested Dr Chang to provide certain information to facilitate the processing of his entitlement to retirement benefits and he responded with the requested information. Dr Chang was absent from work from 1 May 2002 onwards. On 10 September 2002 he ceased to be paid his salary. On the same day, the Medical Chief of Staff at the hospital wrote to the Permanent Secretary at the Department of Health to enquire about the progress of Dr Chang's

application for early retirement as he had not been rostered for work in the hospital because he refused to supervise NWRHA doctors.

5. Dr Chang wrote to the PSC on 16 September 2002 stating that he had decided to withdraw his application for early retirement. He appears to have received no response. On 22 October 2002 Dr Chang wrote to the respondents to protest that payment of his salary had been stopped unlawfully and to request the resumption of its payment.

6. After further letters failed to resolve the issue, Dr Chang obtained leave to institute judicial review proceedings concerning the lawfulness of the withdrawal of his salary payments. It is not necessary to narrate all the procedural steps in those proceedings. The Board refers only to those steps which are germane to the challenge which Dr Chang now makes. On 11 August 2006 the respondents lodged an affidavit by Ms Shirley Belle which asserted that, in accordance with a circular issued by the PSC dated 5 December 2000, the proper practice for handling early retirements was for the relevant government department to process them. She asserted that the period from 1 May 2002 until 9 September 2002 was to be treated as Dr Chang's taking of vacation and pre-retirement leave consequent upon his application for early retirement. That application was still being processed on 9 September 2002. She explained that on 8 November 2002 the PSC submitted Dr Chang's letter of 16 September 2002 to the Ministry of Health asking for comments and recommendations. The second respondent (the Permanent Secretary at the Ministry of Health) responded in a memorandum of 11 March 2003 in which she informed the Director of Personnel Administration of the PSC that Dr Chang should be regarded as having relinquished his appointment when he failed to resume his duties after using up his vacation leave. She asserted that, in those circumstances, Dr Chang was not entitled to be paid any salary after 9 September 2002.

7. Those documents formed the initial battle lines of the parties. But matters became more complicated as a result of four letters ("the four letters") which, as explained below, gave rise to an assertion that the PSC had accepted Dr Chang's retirement as from 9 September 2002. The first letter was from the PSC to Dr Chang dated 13 October 2009, which responded to his letter of 16 September 2002 in which he had sought to withdraw his application for early retirement. In this letter the PSC stated tersely that it "had already retired you from the Public Service with effect from 9th September, 2002". Unsurprisingly, in the second letter, dated 21 December 2009, Dr Chang responded by asking to be informed of the date when the decision to retire him had been made. This in turn gave rise to the third letter, dated 26 January 2010, in which the PSC informed Dr Chang that the decision was made at a meeting on 1 October 2002. The fourth letter was a letter to Dr Chang from the second respondent dated 28 July 2011, in which the Permanent Secretary noted that the PSC had retired him with effect from 9 September 2002, informed Dr Chang that he qualified for a retirement pension from the age of 55, and requested documents to enable his retirement benefits to be processed.

8. In an application dated 4 March 2015, Dr Chang's legal team applied for leave to adduce as fresh evidence the four letters which, they said, "would have a material effect upon the decision of the court" in the determination of the judicial review application. In his supporting affidavit, Dr Chang stated that he had been advised that the letters were material evidence for the proper determination of whether the respondents had wrongly stopped the payment of his salary with effect from 10 September 2002. Ironically, in view of the way matters progressed in the judicial review hearing, the respondents opposed the admission of the four letters into evidence. Rampersad J in a decision dated 17 April 2015, at the outset of the hearing on the judicial review application, allowed the four letters to be adduced as fresh evidence. The hearing consisted of the cross-examination of Dr Chang. Thereafter, Rampersad J ordered the parties to file and exchange written submissions by 1 July 2015 and any reply submissions by 15 July 2015.

9. In the written submissions on behalf of Dr Chang, which were lodged on 1 July 2015, his legal team argued, among other things, that the Permanent Secretary of the Department of Health (and not the PSC) was empowered to give permission to retire early. In those submissions Dr Chang's lawyers referred to the first three of the four letters set out in para 7 above and stated (para 29 of the submission):

> "This issue requires consideration of these letters. A perusal of these would reveal the obvious falsity contained in the DPA's letter of 13th October, 2009. This letter was written to the Applicant over 7 years post the withdrawal of his application. It, together with other information (below), reveals the PS [ie Permanent Secretary] and Ms. Belle's involvement in a plot to cover their inefficiencies, or, to 'set up' the Applicant for abandonment of his job."

10. The submission stated that the suggestion that the PSC had retired Dr Chang before his letter of withdrawal of 16 September was false because the third letter (dated 16 January 2010) disclosed that the PSC's decision was taken on 1 October 2002, after the letter of withdrawal. The suggestion was also inconsistent with the memorandum of 11 March 2003 (para 6 above) which stated that Dr Chang had relinquished his post. It is material to this appeal to quote para 35 of Dr Chang's submission:

> "It is submitted that the PSC's decision to grant permission to the Applicant was made without jurisdiction and is null void and of no effect. As the PSC is the Applicant's employer the court is *invited to quash the decision even though the PSC is not a party in this matter*." (Emphasis added)

This passage makes clear that Dr Chang's legal team were well aware that they had to have the PSC's purported decision to accept Dr Chang's retirement as at 9 September 2002 set aside, and that they sought to do so without making the PSC a party to the application.

11. The respondents' written submission dated 7 July 2015, which appears to have been lodged on 8 July 2015, did not seek to argue that Dr Chang had relinquished his office. Instead, the respondents grasped with both hands the letters which they had sought to exclude from the evidence, and argued that the PSC's decision to treat Dr Chang's service as a public officer as having been determined on 9 September 2002 by voluntary retirement was lawful and had been properly carried out. It is sufficient to quote the conclusion of the submission which stated:

> "In Conclusion, the applicant is not entitled to the reliefs sought at paragraph 2 (a) (c) and (e). The declaration sought at 2 (g) [ie a declaration that Dr Chang remained in office as a SMO] is not available to the Applicant primarily because it is a challenge to the decision of the Public Service Commission dated 1st October, 2002, which decision has not been challenged. …"

12. Neither party lodged a reply submission or applied to the court to reopen the hearing by joining the PSC as a party to the proceedings. The applicant had ample time to do so as Rampersad J did not hand down his judgment until 1 December 2015.

(2) The judgment of Rampersad J

13. Rampersad J rejected the assertion, which the respondents did not press in their closing submissions, that Dr Chang had relinquished his office by refusing to supervise NWRHA doctors thereby in effect making it impossible to include him in the hospital shift roster. Rampersad J stated that the established procedure for applying for early retirement was to apply to the second respondent. The application to retire early had not been approved by 9 September and there was no basis for treating Dr Chang as being on pre-retirement leave as from May 2002. The decision to stop his salary on 10 September 2009 was unlawful because it was in breach of natural justice as there had been no communication to him to determine his final day at work. In turning to consider the remedies which were available, Rampersad J stated (para 65) that some of the remedies which Dr Chang sought touched and concerned the PSC's decision to approve his application for early retirement. He noted that no application had been made to have the PSC be made a party to the proceedings and that Dr Chang had not separately raised judicial review proceedings against the PSC in relation to the first letter (of 13 October

2009). Rampersad J referred to case law which establishes that the court has discretion in relation to the relief which it may grant by way of judicial review.

14. Rampersad J held (para 69):

> "Despite the inconsistencies in the correspondence and the suspicious timelines for such, given that the PSC has not been joined to answer the allegations against it and the presumption of regularity in relation to public bodies, the court is not minded to grant some of the reliefs sought which touch upon the decision made by the PSC, specifically, the reinstatement of the applicant or any declaration that he continued to hold the specified office or enjoy those benefits from September 10th 2002 to date. Consequently, *the decision to retire the applicant stands because it has not been effectively challenged at all*. This obviously affected the applicant's relief for reinstatement negatively." (Emphasis added)

15. Rampersad J ordered that Dr Chang be paid 90 days' salary for vacation leave to which he was still entitled and interest thereon. He refused to give other relief.

16. Dr Chang appealed this decision.

(3) The Court of Appeal's judgment

17. On 27 July 2021 the Court of Appeal (Mendonça, Kokaram and Boodoosingh JJA) issued a unanimous judgment dismissing Dr Chang's appeal. In short, the Court of Appeal rejected the challenge that the judge should not have relied on the four letters which Dr Chang's legal team had successfully introduced into the process as fresh evidence. The Court of Appeal held that the judge could not ignore the content of those letters which had an impact on the relief to which Dr Chang was entitled and noted that Dr Chang had not sought to make the PSC a party to the proceedings.

18. The Court of Appeal referred to regulation 51(1)(c) of the Public Service Commission Regulations and to section 15(1) of the Pensions Act (chap 23:52) and suggested that their combined effect appeared to be that the PSC was the proper body to approve an application for early retirement, notwithstanding the PSC's circular to the contrary on which Ms Belle had relied in her affidavit (para 6 above). But the court declined to reach a definitive conclusion on that matter without having had the benefit of submissions from the PSC. The court stated (para 61) that it had been open to Dr Chang to challenge the PSC's decision to retire him when he became aware of it but that

he could not treat it as a nullity unless it was declared to be so and that could not be done unless the PSC were a party to the proceedings. The court accepted the "core rationale" for the judge's order which was that relief could not be granted in respect of the PSC's decision in the absence of the PSC to answer a specific challenge to the decision (paras 66 and 67).

(4) The Board's reasons for dismissing the appeal

19. The essence of Dr Chang's appeal to the Board is that it was incumbent on the trial judge to exercise his powers under the Civil Proceedings Rules 1998 ("CPR"), which were implemented in 2005, to bring about a fair and just determination of the dispute by adding the PSC to the proceedings. The court had the power to do so under rule 19.2(3) and rule 19.5(1) of the CPR.

20. The Board disagrees that the learned judge was required to do so in the circumstances before him in this application. The Board also disagrees with the submission that Dr Chang had proved his case that he was entitled to the continuation of the payment of his salary and that it was for the respondents to establish the validity of the PSC's decision. While the respondents' initial position may have been that Dr Chang had relinquished his post much earlier, by the time they lodged their closing submissions on 7 July 2015 they had switched horses and founded their case on the PSC's acceptance of the application for early retirement. Dr Chang's legal team were aware of the purported PSC decision and, as the Board has shown (para 10 above), sought to have the decision declared null and void in para 35 of Dr Chang's closing submissions in order to support a claim for lost salary after 9 September 2002.

21. The judgment of Kokaram J in *Dookeran v Dookeran (executor of the Last Will and Testament of Clyde Dookeran, deceased)* (Claim no CV 2008-00287) (unreported) 15 April 2010, on which Dr Chang relies, was a case which concerned an application by parties who were beneficiaries under the deceased's Will to be joined in the proceedings in which the claimant sought to increase her provision (and reduce the provision to the other beneficiaries) under the Will on the ground that reasonable provision for her had not been made. It is in this context of the application by parties to be joined that one must read the judge's references to having regard to the overriding objective and the considerations set out in Part 1 CPR, to identifying the main issues in dispute and to deciding whether the joining of a party would assist the court in determining those issues. The case is not an authority for the proposition that a judge must join a party on those grounds of his or her own volition.

22. Dr Chang also refers to the judgment of the Board in *Super Industrial Services Ltd v National Gas Company of Trinidad and Tobago Ltd* [2018] UKPC 17. In particular, he founds on the Board's recognition, in para 22 of its judgment, of the

radical departure from the previous civil procedure which the adoption of the CPR in 2005 entailed. It is unquestionable that the introduction of the CPR, with its case flow management and active judicial case management, was designed to reduce delay, cost and complexity. It requires the court to further the overriding objective by identifying the issues at an early stage and deciding promptly which issues need full investigation and trial: see CPR Part 25 rule 25.1. Control of the pace and shape of litigation by such active case management is focussed on the case management conference, at which the court fixes a trial date and lays down a timetable of the preparatory steps toward the trial. Those new powers are designed to promote the overriding objective and serve the needs of justice. It is not however the task of the judge to suggest to a legally represented party who should be joined as defendants in an action and far less to direct of his own volition that a party be joined as a new defendant. The joinder of a new defendant involves the parties in costs and has the potential to expose them, and in particular the claimant, to the risk of an adverse costs order. Nor is it the role of the judge in adversarial proceedings to advise one party how to conduct his case against another party. It is important to recall the statement of Lord Wilberforce in *Air Canada v Secretary of State for Trade* [1983] 2 AC 394, 438:

> "In a contest purely between one litigant and another … the task of the court is to do, and be seen to be doing, justice between the parties … There is no higher or additional duty to ascertain some independent truth. It often happens, from the imperfection of evidence, or the withholding of it, sometimes by the party in whose favour it would tell if presented, that an adjudication has to be made which is not, and is known not to be, the whole truth of the matter: yet if the decision has been in accordance with the available evidence and with the law, justice will have been fairly done."

23. The essence of the appellant's case is that, once it was clear to the court that the PSC's purported acceptance of Dr Chang's request for early retirement was material to Dr Chang's claim for continued loss of salary, it was the judge's duty to take those steps. The judge was under no such duty. It is clear from Dr Chang's closing submissions (see paras 9 and 10 above) that his legal team had appreciated that the PSC's purported acceptance of his request was an obstacle to his claim for continuing loss of salary which they had to circumvent. The legal team decided to do so not by seeking to bring the PSC into the action to answer the challenges which they advanced against its purported decision but by seeking to have the court treat the PSC's decision as a nullity notwithstanding the absence of the PSC from the proceedings.

24. There is no question of any procedural unfairness caused by the respondents' reliance on the PSC's purported acceptance of Dr Chang's request. The documents on which the respondents relied were admitted into evidence at the request of Dr Chang's legal team and there is no basis for challenging the judge's decision to admit them. The

respondents stated their case clearly in their written submission from which the Board has quoted in para 11 above. Dr Chang's legal team could have lodged a reply submission and sought to persuade the court that it was necessary in the interests of justice that the PSC be joined as a party to the proceedings. Had Dr Chang been able to persuade the court that he be allowed to do so, he could have investigated the obvious questions such as why the procedure in the circular of 5 December 2000 (para 6 above) had not been followed, why there had been the delay of many years before the PSC intimated its decision, how the assertion that the decision was taken on 1 October 2002 could be reconciled with the PSC's letter of 8 November 2002 in which it sought advice on the withdrawal of the request, and how acceptance of the request for early retirement could be effective when it post-dated the intimation of the withdrawal of the request. It is clear from the judge's reference in para 69 of his judgment to "inconsistencies in the correspondence and the suspicious timelines for such", that he was well aware that there were questions which might need to be addressed if the PSC were a party to the proceedings. But the PSC was not.

25. In the absence of the PSC, those questions, which impugned the actions of the PSC, could not properly be addressed. Rampersad J was not only entitled but was correct to conclude that the PSC's decision to retire Dr Chang had not been effectively challenged and that that decision therefore stood. The judge then exercised his discretion as to remedy by confining his award for the unlawful termination of Dr Chang's salary to the payment of the 90 days' salary of which he had been deprived. The Board is satisfied that there is no basis for challenging his decision to do so.

(5) The production of speaking notes

26. Mr Neebar produced a document which he described as "speaking notes" and which comprised 17 pages of further legal submissions. The Board confirms that it does not find the production of such a document helpful and considers that it may cause unfairness if it is provided to an opposing party at short notice. This is so particularly when the document amounts not to a note of counsel's intended oral submissions but to further legal and factual submissions, not foreshadowed in his written case, on some of which counsel draws in his oral submissions. Even if a document were properly a party's speaking notes, the Board would not find it helpful. A party's written case should be supplemented by his or her counsel's oral submissions. If counsel finds it necessary to make oral submissions which are at variance with the written case, a brief note of enumerated propositions of law might assist the Board. Beyond that, counsel should rely on the written case and oral submissions unless otherwise requested.

(6) Conclusion

27. The Board dismisses the appeal.