

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. P157 of 2023

CV 2021-00614

BETWEEN

BEATRICE BOUFOY-BASTICK

Appellant/Claimant

AND

THE UNIVERSITY OF THE WEST INDIES

Respondent/Defendant

PANEL:

Justice Gillian Lucky JA

Justice James C Aboud JA

Representation:

Robert-Jan Temmink KC and Catherine Doran instructed by Alana Bissessar for the Appellant

Ravindra Nanga instructed by Ms Gitanjali Gopeesingh for the Respondent

DATE: 18th September 2023

I have read the judgment of Justice James C Aboud JA. I concur with it and have nothing to add.

Justice Gillian Lucky JA

Judgment

Delivered by Justice James C Aboud JA

- [1] Beatrice Boufoyo-Bastick (“Mme Boufoyo-Bastick”) was a Professor of French at the St Augustine campus of the University of the West Indies (“UWI”). She filed a High Court claim against UWI and now appeals the trial judge’s decision to dismiss it. The respondent is UWI. Mme Boufoyo-Bastick was offered the post of Lecturer in French in the Department of Liberal Arts on 9 January 2007. She retired on 31 July 2018.
- [2] Some two and a half years after her retirement on 16 February 2021 she filed a Claim Form seeking, among other things, (a) declarations that certain documents were expressly incorporated into her 10 January 2007 contract of employment, and (b) that UWI breached the contract and that she is eligible for and entitled to the benefits of the scheme for the alleviation of superannuation hardship (“the benefits”) provided for in the documents that she claims are incorporated into her contract. She also sought an order for the payment of the benefits which were calculated in the Statement of Case at US\$23,500.17.
- [3] That is all that need be said about the claim because this procedural appeal has nothing to do with the determination of Mme Boufoyo-Bastick’s Claim in contract.
- [4] Upon being served with her claim, UWI’s attorneys entered an appearance and within the time limited for filing a defence it filed an application on 20 August 2021 to strike out the claim under Rule 9.7 CPR.

- [5] The basis of the application was that the court has no jurisdiction to determine her claim. It was contended that the sole and exclusive jurisdiction to determine this particular contractual dispute resided with UWI's Visitor ("the Visitor").
- [6] By a written decision dated 5 June 2023, the trial judge struck out Mme Boufoy-Bastick's Claim against UWI.
- [7] The issue to be decided in this procedural appeal is whether she was right to do so.
- [8] Before I embark on a discussion and resolution of the procedural dispute I should mention the footnote on page 2 of the Notice of Procedural Appeal. It was there drawn to the court's attention that while the Notice of Procedural Appeal constitutes a procedural appeal within the meaning of Rule 64.9 the decision was substantive in nature in that, in holding that the court had no jurisdiction, which appears to have been arrived at by oblique references to the contract documents, Mme Boufoy-Bastick's counsel, Mr Temmink KC, felt that, in bringing the claim to an end, that the decision might amount to a matter of substance rather than a matter of procedure. The footnote therefore indicated that Mme Boufoy-Bastick would have no objection to the Court of Appeal treating the procedural appeal as a civil appeal under Rule 64.1 [this appears to be a typographical error which was corrected in the written submissions to refer to Rule 64.5(b), which governs civil appeals].
- [9] Part 64 deals with all appeals to the Court of Appeal. Rule 64.1 appears under the rubric *Scope of this Part*. Sub-rule 1 says this: "This Part deals with any appeal to the Court of Appeal not being an appeal or application to the court for which other provision is made by these Rules nor appeals by way of case stated on a question of law for determination by the court." Sub-rule (2) includes a definition of "procedural appeal".
- [10] It may be that Mr Temmink was uncertain whether the decision amounted to a substantive decision by reason of the fact that the trial judge (a) obliquely considered the contract terms and other associated documents before her; and (b) that the

decision effectively brought the claim to an end leaving no residual reliefs in existence. The caution raised by Mr Temmink is understandable but not needed.

[11] Under Rule 64.1(2) a decision declining jurisdiction falls within the definition of a “procedural appeal” and this is so whether or not the decision brings an end to every relief in the claim. The trial judge did not make any determination of the substantive contractual issue in the claim, even though her decision brought it to an end. The panel felt that this was a procedural appeal *simpliciter*. Both Mr Temmink and Mr Ravindra Nanga, who appeared on behalf of UWI, dealt with this point in their written submissions and I therefore feel it necessary to address and dispose of this footnote in Mme Boufoy-Bastick’s Notice of Procedural Appeal.

UWI’S notice of application to strike out Mme Boufoy-Bastick’ claim

[12] UWI’s Notice of Application sought an order that the court has no jurisdiction to hear and determine Mme Boufoy-Bastick’s claim in the High Court.

[13] The material grounds of the application were that the dispute involves the interpretation and application of UWI’s Charter, Statutes, Ordinances, Regulations and other central instruments that govern the terms and conditions of Mme Boufoy-Bastick’s 2007 employment contract. Further, that the exclusive jurisdiction to determine such contractual matters resides with the Visitor.

[14] According to the Royal Charter of 25 August 1972 as amended on 7 November 2018, the Visitor has “visitorial jurisdiction over, *inter alia*, persons appointed in respect of teaching and other activities of [UWI] and such jurisdiction rests exclusively with the University Visitor”.

[15] Statute 2A of UWI’s statutes and ordinances was relied upon as one of the grounds of the application before the trial judge.

[16] Relevantly, UWI says this about Statute 2A in its grounds: “. . . the University Visitor has the authority to adjudicate on matters from, *inter alia*, staff on the interpretation

and application of [UWI's] Charter, Statutes, Ordinances, Regulations and other governing instruments which includes [Mme] Boufoyo-Bastick's terms of employment and [UWI's] Rules for Academic Staff, Senior Administrative Staff and Professional Staff ('the Blue Book').

[17] The application was supported by two affidavits. Camille Ramcharan is UWI's Campus Legal Officer. In her affidavit she annexed the pre-action letters that were exchanged between Mme Boufoyo-Bastick's former attorneys-at-law and herself.

[18] The first letter was dated 2 March 2018. It notified UWI of Mme Boufoyo-Bastick's intention to seek certain contractual reliefs in the High Court with respect to her retirement benefits. Ms Ramcharan wrote three letters in reply on 9 and 29 March 2018 and on 27 April 2018.

[19] The first two letters provided preliminary views on the validity of the proposed claim and sought extensions of time for a comprehensive legal response. The 27 April 2018 letter fully disputed Mme Boufoyo-Bastick's claim and, as in the earlier letters, explained that the jurisdiction in this contractual dispute lay with the Visitor and not with the High Court.

[20] It is important to note that at the time this correspondence was exchanged Mme Boufoyo-Bastick had not yet retired and was still a member of staff. Her previous attorneys-at-law appear to have later become uninvolved with her case and, after her retirement, her current attorneys-at-law filed the High Court claim. During the course of the oral hearing before us we were told from the bar table, without objection, that after her retirement Mme Boufoyo-Bastick returned to live in France. Indeed, she attended the hearing of the procedural appeal on a virtual link from that country.

[21] The second affidavit before the trial judge was sworn by Ms Dawn-Marie De-Four Gill, UWI's Campus Registrar.

[22] This affidavit provides informative historical background to the foundation of UWI's predecessor, University College of the West Indies, which was established by a Royal Charter as a college of London University under the Great Seal and assented to by His Majesty King George VI on 5 January 1949 ("the 1948 Charter").

[23] A Revised Charter was assented to by Her Majesty Queen Elizabeth II on 2 April 1962 and this is UWI's Charter ("the Original Charter").

[24] The Original Charter was further amended by a Royal Charter in 1972 ("the Amended Charter").

[25] On 7 November 2018, long after Trinidad and Tobago became a Republic, the Amended Charter was further amended by Her Majesty Queen Elizabeth II ("the Re-amended Charter"). It gave power to the Queen's Most Excellent Majesty in Council "the right to appoint a regional figure of high judicial office as Visitor of the University and upon the recommendation of the President of the Caribbean Court of Justice".

[26] Justice Rolston Nelson (retired) was appointed as the Visitor of UWI in May 2019, a position previously held by Her Majesty the Queen of England since UWI's inception. Mme Boufoy-Bastick retired on 31 July 2018.

[27] It appears from Ms Gill's affidavit that UWI is a body corporate with perpetual succession and with two campuses, one in St Augustine, Trinidad and one in Mona, Jamaica.

[28] Ms Gill says this in her affidavit:

"11. By clause 6 of the Amended Charter, the Heirs and Successors of Her Royal Highness Queen Elizabeth the Second declared that they were Visitors of the Defendant and retained the power to exercise Visitorial Authority from time to time. One of the matters over which the Queen exercises Visitorial authority is the administration of examinations,

teaching and other activities of the Defendant. Based on the Amendment, Retired Justice Rolston Nelson currently enjoys Visitorial Jurisdiction over the Defendant.

12. I am familiar with the manner in which academic staff such as the Claimant, are appointed. The power of the Defendant to appoint academic staff can be found at clause 3(1) of the Amended Charter. In addition, there are a number of Statutes and Regulations of the Defendant that govern such appointments and prescribe the manner in which the employment relationship is governed, and further set out the terms and conditions of employment of, inter alia, academic staff.

13. I have read the Claimant's Statement of Case, and her claim is in respect of retirement benefits based on a certain Regulations—the Rules for Academic Staff, Senior Administrative Staff and Professional Staff known as "the Blue Book", which has been amended from time to time. By paragraph 7 of the Statement of Case, which has been certified by the Claimant, she accepts that the terms of her appointment were subjected (sic) to the Charter, Statutes and Ordinances, Rules and Regulations of the Defendant . . .

14. The Claimant retired in July 2018 and is now questioning her retirement benefits in accordance with the Blue Book. Based on the Charter, the interpretation of the Claimant's contract of employment, and in particular, the Blue Book, the authority to hear and determine this matter rests with the Visitor of the University.

The issue to be decided

[29] The issue to be decided on this procedural appeal is whether the judge was plainly wrong to hold that Mme Boufoy-Bastick's claim should be struck out because the jurisdiction to determine it rested solely with the Visitor and not the courts.

[30] In *Patel v University of Bradford Senate* [1978] 1 WLR 1488 (“*Patel*”) Megarry V-C (at first instance) proposed that a court should adopt a three-stage test:

- (a) Does the respondent have a Visitor?
- (b) Are the issues raised by the appellant within the jurisdiction of the Visitor?
and
- (c) Is the appellant within the jurisdiction of the Visitor notwithstanding his or her non-membership of the respondent?

[31] The trial judge did not say whether she accepted this three-stage approach to jurisdiction but each stage was nonetheless addressed in her judgment. Mr Temmick conceded on appeal that Mr Nelson was, at the time the Claim was filed, the Visitor of UWI, a point contested in the court below. It is now immaterial.

[32] The facts of *Patel* are summarised in its headnote. Bradford University was established by a Royal Charter with terms similar to those that established UWI. Mr Patel was a student at the university. He twice failed his end-of-year final examinations. He was refused re-admission to the university until he could provide proof of greater academic ability. He sued the University for a series of declarations to challenge the decision. The university took a preliminary objection to the jurisdiction of the court to hear and determine Mr Patel’s claim, not unlike the objections taken before the trial judge.

[33] Megarry V-C scrupulously examined the law on this point in his judgment. After considering the effect of much earlier judgments, for example, *Phillips v Bury*, (1694) Skin. 447, 448, per Holt CJ (in a dissenting judgment that was later upheld in the House of Lords) and *Thompson v University of London* (1864) 33 LJ Ch. 625, 634, he said this at p 1493 at letter D:

“ . . . the Visitor exercises a special jurisdiction to decide private disputes within the corporation according to the special statutes and code of law governing the corporation . . . In determining the extent of the visitor’s jurisdiction, it may be a matter of considerable importance

to determine whether or not those concerned in the dispute are truly members of the corporation.

[34] Megarry V-C drew a sharp distinction between a dispute between fellows of a college and a dispute between a college and a stranger (p 1495 letter A). He examined the cases of expelled students and members of the teaching staff who were dismissed and had sought court declarations that their expulsion or dismissal was unjust.

[35] In the cases that he cited the standing of the members or former members to sue in the courts can rightfully be described as disputes between members of the corporation and the corporation. These disputes do not involve a dispute between a University and strangers. The status, standing, or right of the dismissed member of staff or the expelled member of the student body to reverse their dismissal or expulsion is the subject of the dispute.

[36] Until it is resolved by the Visitor of a university the status of the expelled or dismissed member *qua* member is basically up in the air. Their status as a member is therefore undetermined until the decision of the Visitor. Their re-instatement as a member is obviously a matter for the Visitor to decide. It cannot be said that they are strangers, since their status as members is able to be reversed by the Visitor. In that sense, until the expulsion or dismissal decision is reversed or endorsed by the Visitor they are treated in these line of cases as members of the corporation, thus preserving the exclusive jurisdiction of the Visitor.

[37] In *Patel*, Megarry V-C also said this at p 1497, Letter B:

“ . . . The resolution of disputes among members is another undoubted part of those functions. Viewed in that setting, it is as much the function of a visitor to determine what persons lawfully have or ought to have become members of the corporation as it is to determine whether a member has or has not lawfully been removed. In each case there is disputed membership, and a matter which is internal to the corporation. It is only if too much emphasis is placed on the function of the visitor being to resolve disputes among members that the difference between a non-member seeking to become a member and a member seeking to invalidate an motion may appear, misleadingly, to have any significance *quoad* the visitor's

jurisdiction. The rule that the visitor has no jurisdiction over non-members has not been allowed to exclude jurisdiction where it is membership itself that is in dispute, for to do so would beg the question.

I must add a caveat. I am far from saying that every dispute between a university and an expelled member or non-member is outside the jurisdiction of the courts. I am speaking only of disputes where the issue is whether or not the person concerned is entitled to be reinstated or admitted.”

[38] The second and third questions posed by Megarry V-C in *Patel* (the first having been abandoned on appeal) will be addressed conjointly: (a) were the issues raised in Mme Boufoy-Bastick’s claim within the jurisdiction of the Visitor and, (b) is she within the jurisdiction of the Visitor notwithstanding her current non-membership of UWI?

[39] It is clear to me that that Mme Boufoy-Bastick was not a member of UWI when her claim was filed and UWI’s non-jurisdiction application was heard before the trial judge. She was, and is now, a retired professor, unlike the expelled students and dismissed members of staff that populate the decided cases.

[40] It is not relevant that, at the time of her former Attorney’s pre-action letters she was then a member of staff. Her delay in filing her claim during the pre-action correspondence stage, when she was a member, was raised by Mr Nanga on the appeal.

[41] Certainly, she had a right and was bound by the exclusive Visitorial jurisdiction when she was still a member of UWI. The reasons for her delay (if relevant to determining the High Court dispute) are matters for a trial, after pleadings are closed and witness statements are exchanged. It is not a matter for the Court of Appeal in a procedural appeal. A Defence and Reply has not yet been filed, so I do not know what can be made of Mr Nanga’s argument on this point.

[42] I do not know why she delayed in filing her Claim when she was still a member of UWI. Any number of speculative reasons involving her personal circumstances can be advanced. Mme Boufoy-Bastick was not asked to explain them to the trial judge, according to the Record of Appeal. This procedural appeal is concerned only with

one question, as the trial judge found, namely, that the Visitor had exclusive jurisdiction to determine her High Court claim, and, in so finding, whether she was plainly wrong to have so held.

[43] The meaning of Statute 2 of UWI's statutes is not in dispute. Clause 1(g) clearly provides that members of UWI include "the members of the academic staff". Clause 2 is also uncontroversial: "Membership of the University shall continue so long as one at least of the qualifications above enumerated shall continue to be possessed by the individual member". The enumerated qualifications do not include past members or strangers. UWI's Statute 2 undoubtably concerns the standing of members of the corporation.

[44] There is no disputing the fact that Mme Boufoy-Bastick was not a member of the academic staff when she filed her High Court Claim. There is nothing artificial about this fact, as Mr Nanga contended in the court below. It is as plain as day that she was not then (or now) a member of staff. As Mr Temmick correctly submitted, staff and students are not forever deprived of the court's protection merely by virtue of having once been members of UWI.

[45] The third question posed by Megarry V-C in *Patel* (is the appellant within the jurisdiction of the Visitor notwithstanding her non-membership in the corporation?) dovetails with the second question.

[46] The trial judge held, or appeared to hold, (at para 25 of her judgment) that Mme Boufoy-Bastick was, or should be treated as a current member of UWI. With respect, this certainly cannot be right. Mme Boufoy-Bastick, since her retirement, is "a stranger" to the corporation, and not "a fellow" of it, to borrow Megarry V-C's language in *Patel*.

[47] She is now, in law, a private individual. Her claim is purely contractual. Her High Court Claim is directly concerned with the interpretation of the terms and conditions of her contract of employment and the benefits to which she was allegedly entitled in 2007 and after her contract came to an end by effluxion of time. Her actions or inactions

when she was a member are not material to the determination of the procedural appeal.

[48] In *Thomas v University of Bradford* [1987] 1 AC 795 ("*Thomas*") it was held that non-members only fall within the jurisdiction of the Visitor where the issue is admission or dismissal from employment or membership. *Thomas* concerned the dismissal of Brenda Thomas, a lecturer in sociology at that university. She contested her dismissal in the High Court of England. In the House of Lords, Lord Griffiths said this at p 81, Letter H:

"The explanation for the visitor's jurisdiction extending in cases of admission and removal from office (amotion) to those who are not corporators lies in the basis of his jurisdiction, namely, as the judge of the internal or domestic laws of the foundation. It is because those laws invariably provide for the conditions governing admission to and removal from membership of the foundation and sometimes of offices on the foundation short of membership that jurisdiction in such matters lies with the visitor.

It is a mistake to consider that the visitor's jurisdiction derives from the status of membership, as Fox L. J. said in the course of judgment in the Court of Appeal. That is, with respect, putting the cart before the horse. The jurisdiction derives from the visitor's position as a judge of the internal laws of the foundation, and he has jurisdiction over questions of status because it is upon those laws that status depends."

[49] The status of Mme Boufoy-Bastick as a member is not in dispute. She is a retired professor who claims to have certain contractual rights under her contract of employment, which she now seeks to enforce. The Visitor certainly cannot now deem her to be a member and thus exercise jurisdiction over her purely contractual dispute. If the provisions of her 2007 contract incorporated terms found in UWI's Charter, Statutes, Ordinances, Regulations and other governing instruments, no mysterious or enigmatic Visitorial jurisdiction or expertise can be invoked by that fact alone.

[50] If the determination of a contractual claim by a stranger involves an interpretation of the contractually incorporated words found in UWI's Charter, Statutes, Ordinances, Regulations and other governing instruments there is no special or

exclusive Visitorial aptitude in doing so. It is a straightforward question of determining contractual rights between a stranger and the corporation based on the plain meaning of the contract documents.

[51] In *Thomas*, Lord Griffiths, at p 817, Letter F, approved this passage of the judgment of Kelly LJ in *In re Wislang's Application* [1984] NI 63, at pp. 80-81:

"If the matters in dispute under his contract of employment related to purely common law or statutory rights and not to private or special rights of the university, then of course visitorial jurisdiction could not determine them and Dr Wislang's remedies would be in the ordinary courts or the appropriate statutory tribunals. This must follow from the nature of visitorial jurisdiction itself as analysed and explained in the case-law, as well as the relationship between the university and the lecturer and who by his contract of employment becomes a member of the university and submits himself to its internal rules on matters touching his standing and progress at the university." (Emphases added)

[52] Mme Boufoy-Bastick's current standing cannot now be reversed. She is not a member. The issues before the trial judge involved purely common law rights. What contractual rights does she, as a non-member, possess? If the answer lies in an interpretation of UWI's Charter, Statutes, and Regulations that were incorporated into her contract of employment the Visitor has no exclusive jurisdiction to determine their meaning.

[53] The trial judge was therefore plainly wrong to have dismissed Mme Boufoy-Bastick's contractual claim.

[54] The Procedural Appeal is allowed. The claim is therefore reinstated and remitted to the trial judge for determination.

[55] The parties are directed to file and exchange written submissions on the issue of the costs of the procedural appeal within 14 days of the electronic issuance of this judgment, should there be any dispute that the costs of the procedural appeal should not follow the event. The panel will thereafter make its costs order in chambers within seven days of the receipt of those submissions (if filed). If the parties come to

an agreement on costs they should jointly notify the court within seven days of the issuance of this judgment and the costs order will thereafter be made in Chambers.

James C Aboud JA