

In The Supreme Court of Bermuda

CIVIL JURISDICTION

2018: No. 303

BETWEEN:

PETER FURBERT

Applicant

-and-

**(1) THE DEPARTMENT OF HUMAN RESOURCES
(2) INFORMATION COMMISSIONER**

Respondents

Before:

Hon. Chief Justice Hargun

Appearances:

Mr Peter Furbert, Applicant in Person
Mr Gregory Howard, Attorney General's Chambers, for the
1st Respondent
Mr Peter Sanderson, Benedek Lewin, for the 2nd
Respondent

Date/s of Hearing:

25 February 2019

Date of Judgment:

15 March 2019

RULING

Introductory

1. By these judicial review proceedings Mr Peter Furbert, the Applicant, seeks the following relief against the Department of Human Resources ("DHR") and the Information Commissioner ("IC"), the Respondents:

“I am seeking relief from a PATI Decision made by Gitanjali Gutierrez, Information Commissioner in reference to Decision notice 2/2018

1. The Information Commissioner wrote in the report that she “did not find any evidence to support the view that DHR engaged in fabrication, concealment, collusion or any other act of bad faith”. The DHR authority did violate Sections 63, 64, 65 of the Pati Act 2010, namely Carlita O’Brien and Cherri Whitter.

2. On August 1, 2018 the Information Commissioner wrote that she “can confirm that I have received evidence that the DHR has complied with the Order of the Information Commissioner dated 28 February 2018 that accompanied her Decision Notice 02/2018.” This would mean that the Information Commissioner agreed that DHR conducted a substantive search.

3. A ruling that DHR authority provided records that were falsely generated and consistent to an employer engaging in an attempt of constructive dismissal.”

2. This is an application by the IC to strike out paragraph 1 and the DHR to strike out paragraph 3 of the relief sought above in Form 86A on the basis that (1) the relief sought does not relate to the relevant decision of the IC having regard to (a) the decision itself; and (b) the statutory function and jurisdiction of the IC under the Public Access to Information Act 2010 (the “PATI Act”) and; (2) the relief sought is not the proper subject matter of the judicial review proceedings.

Factual background

3. The factual background to these proceedings is taken from the summary given by the IC in the Decision Notice of 28 February 2018.

4. The IC explains that the DHR was asked for personnel records related to the Applicant's referral to Benedict Associates Ltd (BAL). DHR denied the Applicant access to the responsive records under the exemption in section 23(3) of the PATI Act on the basis that the disclosure of the Applicant's personal information might prejudice his physical and mental health. During the IC's investigation, DHR abandoned its reliance on section 23(3), and did not invoke any further exemptions to withhold the responsive records. The Applicant challenged whether records in the possession of BAL were deemed to be "*held by*" DHR, and whether DHR conducted a reasonable search for records.
5. The IC reversed DHR's decision to deny access to the records. The IC found that DHR failed to conduct a reasonable search for responsive records, in accordance with section 12(2) of the PATI Act. The IC required DHR to conduct a reasonable search for responsive records, except for those in the possession of BAL, and to issue a revised review decision. The IC further found that any records in the possession of BAL related to the Applicant's formal disciplinary referral to BAL are deemed to be held by DHR, in accordance with section 3(4) of the PATI Act. The Applicant was given until 16 April 2018, to notify DHR to request and process any responsive records in the possession of BAL.
6. The decision of the IC is in fact contained in an Order made by the IC on 28 February 2018. The Order provides:

"IT IS HEREBY ORDERED that Department of Human Resources, shall:

**Conduct searches for records, except those in the possession of The Benedict Associates Ltd (BAL), responsive to the Applicant's request filed with the Department of Human Resources on 17 April 2015 in accordance with the Public Access to Information (PATI) Act 2010;*

**Issue a revised review decision on or before 11th day of April 2018 to the Applicant, with a copy to the Information Commissioner;*

**Process responsive records, if any, in the possession of BAL and issue a review decision in accordance with the PATI Act, with a copy to the Information Commissioner, within six weeks of receiving notification from the Applicant in the form accompanying Decision 02/2018, on or before 16 April 2018, that the Applicant requires the Department of Human Resources to process such records; and*

**If the Applicant's notification is not received on or before 16 April 2018 requiring the Department of Human Resources to process responsive records, if any, in the possession of BAL, this Order does not require the Department to take any further action”.*

7. What has perhaps caused confusion in the mind of the Applicant is a passage in the Decision dealing with certain background matters. In particular, the Applicant has focused on what is said in paragraph 100 of the Decision. The relevant passage is:

“100. The Applicant urges the Information Commissioner to sanction individuals at DHR under sections 64 and 65 of the PATI ACT because DHR's failures to meet its PATI Act obligations are indicative of fabrication, concealment, collusion, fraud, and bad faith. The Information Commissioner does not share the Applicant's view. In reviewing the withheld materials, the Information Commissioner did not find evidence that records provided to the ICO were falsified”.

The statutory framework

8. In order to appreciate the proper ambit of the jurisdiction of the IC, it is of course essential to review the relevant statutory provisions contained in the PATI Act. The relevant provisions are as follows.

9. The purpose of the PATI Act is set out in section 2 which provides:

“(a) give the public the right to obtain access to information held by public authorities to the greatest extent possible, subject to exceptions that are in the public interest or for the protection of the rights of others;

(b) increase transparency, and eliminate unnecessary secrecy, with regard to information held by public authorities;

(c) increase the accountability of public authorities;

(d) inform the public about the activities of public authorities, including the manner in which they make decisions; and

(e) have more information placed in the public domain as a matter of routine.”

10. The basic right of access to records which the PATI Act seeks to bestow on every resident of Bermuda is set out in section 12 which provides:

“(1) Subject to this Act, every person who is a Bermudian or a resident of Bermuda has a right to and shall, on request, be given access to any record that is held by a public authority, other than an exempt record.

(2) Public authorities shall make every reasonable effort to—

(a) assist persons in connection with requests; and

(b) respond to requests completely, accurately and in a timely manner.

(3) A requester is not required to give any reasons for making a request.

(4) The identity of a requester shall be kept confidential and, except with the consent of the requester, may not be disclosed to any person other than a person who is required to deal with the request under this Act.”

11. The manner in which the public authority is to give access to its records is set out in section 17 provides:

“ (1) A public authority shall give access to a record under this Act by providing the requester with the information in the record in any of the following forms or manners that it considers appropriate—

(a) a reasonable opportunity to inspect the record;

(b) a copy of the record;

(c) a transcript of the information;

(d) an electronic machine-readable device or other electronic device that contains the information;

(e) a reasonable opportunity to hear or view the record, where the record is of sound or visual images;

(f) a decoded copy of the information, where the information is in shorthand or another code;

(g) such other means as may be determined by the public authority.”

12. The role of the IC is set out in sections 45 - 49 of the PATI Act. Section 45 provides for an application for a review by the IC and provides a person may apply in writing to the IC for a review of any decision made by the head of a public authority under section 43, within six weeks after being notified that decision.

13. The jurisdiction in relation to any review carried out by the IC is set out in section 48 which provides:

*“(1)The Commissioner may make a decision to—
(a) affirm, vary or reverse the decision of a public authority that is the subject of review by the Commissioner; or
(b) make such other order, in accordance with this Act, as the Commissioner considers appropriate.*

(2) A decision of the Commissioner shall, where appropriate, specify the period within which effect shall be given to the decision”

14. Finally, section 49 provides for the review made by the IC. It provides that:

“(1) Any person (including any public authority) aggrieved by a decision of the Commissioner under this Act may apply to the Supreme Court for a review of the decision and the Court, after considering the application, may confirm, vary, remit or set aside the decision”.

Discussion on striking out

15. Counsel for the DHR refers the Court to RSC order 18, r19 and argues that as far as paragraphs 1 and 3 of the relief sought are concerned that they do not disclose a reasonable cause of action; they are scandalous, frivolous or vexatious; or otherwise an abuse of process of the Court. It is uncontroversial that it is only in

plain and obvious cases that the recourse should be had summary process of striking out pleading under this rule.

16. Having considered the statutory framework relating to the statutory jurisdiction of the IC, I have come to the view that it is plain and obvious that paragraphs 1 and 3 are bound to fail in the context of judicial review proceedings. I have made the determination for the following reasons.
17. First, the jurisdiction of the IC under the PATI Act is to review the decision made by the head of a public authority and if appropriate to order the production of documents which come within the scope of the PATI Act. It is a limited jurisdiction and does not extend to the IC making judgments in relation to whether the contents of the document are accurate. It is beyond the jurisdiction of the IC under the PATI Act to make a determination whether the documents ordered to be produced “*were falsely generated*” or to make a determination whether the documents produced are “*consistent with an employer engaging in an attempt constructive dismissal*”. There is no scope within the PATI Act for the IC to make such determinations.
18. Indeed the statutory limitations on the competence of the IC are explained in the IC’s Decision at paragraphs 104 – 105:

“104. The mandate and jurisdiction of the Information Commissioner is established in the PATI Act. It focuses on enforcing the right to access public records. The questioning of the content of those records is not within the Information Commissioner’s authority, nor is it appropriate for a neutral oversight body to speak to the content of the public records.

105. Instead, the Information Commissioner strives to safeguard the right to access public records, and to strengthen good governance and democratic engagement. Once public records are in the hands of the public, the assessment of and accountability

for the content of those records rests in the hands of the individuals such as the Applicant and other members of the public”.

19. It is of course open to the Applicant to make a determination whether DHR engaged in fabrication, concealment, collusion or any other act of bad faith and if there is any evidential basis for such allegations to take the appropriate action against the relevant parties.

20. Second, the allegations made in paragraph 1 relating to whether DHR engaged in concealment, collusion or any other act of bad faith and the allegation in paragraph 3 that the documents produced are consistent with an employer engaging in an attempted constructive dismissal, are not an appropriate subject matter of judicial review proceedings. First, these are controversial fact sensitive allegations, the determination of which may require extensive evidence by a number of witnesses. Ordinarily, when the facts are in dispute, the judicial review procedure is not the most appropriate procedure to deal with such issues. Second, these are serious allegations made against a number of senior civil servants who are not party to these proceedings. It is not possible for this Court to make findings of serious misconduct in circumstances where the parties against whom such conduct is alleged are not before the court. This again demonstrates that if the Applicant wishes to pursue these proceedings he should do so in ordinary civil proceedings and name all the affected parties as defendants to those proceedings. As it is open to the Applicant to pursue these claims in ordinary civil proceedings and seek the appropriate relief, these judicial review proceedings are again inappropriate.

21. This is demonstrated by the decision of Coulson J. in *Sher and Others v Chief Constable of Greater Manchester Police* [2011] 2 All ER 364, where the three claimants, who were Pakistani nationals in the United Kingdom on student visas, were arrested under the Terrorism Act 2000. They were detained without charge and search warrants were granted in respect of certain addresses connected with them. Subsequently, they were released without charge. Before their subsequent

return to Pakistan, the claimants instigated judicial review proceedings seeking to challenge the legality of the arrest and detention, the width of the search warrants granted and the decision to extend the detention. The Divisional Court held that the claims for judicial review of the claimants' arrest and detention would not be permitted as there was a pre-existing private law remedy available to the claimants for wrongful arrest and unlawful imprisonment and the claims involve potentially complex disputes of fact which were wholly inappropriate for judicial review proceedings. Judicial review proceedings did not exist in order for the claimants to circumvent the usual rules relating to civil litigation and the funding and costs thereof. The proceedings, accordingly, should be addressed in the ordinary civil action.

22. In my judgment reasoning set out in the *Sher* case applies equally to the facts and claims made in the judicial proceedings. Accordingly, I order that paragraphs 1 and 3 of the Applicant's relief sought in Form 86A be struck out.

23. I shall hear the parties in relation to the issue of costs, if they so wish.

Dated the 15 day of March 2019.

NARINDER K HARGUN
Chief Justice