

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

Claim No. BVIHCV 2023/0278

BETWEEN

IAN ROCK

CLAIMANT/RESPONDENT

AND

**(1) THE CONVOCAION OF THE MISSIONARY DIOCESE OF THE VIRGIN ISLANDS
(2) RAFAEL MORALES MALDONADO
(3) LIONEL S RYMER**

DEFENDANTS/APPLICANTS

Appearances: Mr. Lewis Hunte, KC for the Claimant
Ms. Marie Lou Creque with Ms. Nia Belgrave

2024: July 10th

DECISION

[1] **YOUNG J:** This is a decision on an application by the first Defendant for a declaration that the Court has no jurisdiction to hear this matter and an order striking out the claim for judicial review. The Claimant was the Rector of the Episcopal Church of St. George, in Road Town, Tortola. This Church is within the Missionary Diocese of the Virgin Islands which comprises both the United States Virgin Islands and the British Virgin Islands.

[2] The Claimant says he received two letters signed by the Second Defendant as Bishop for Title IV Matters, Diocese of the Virgin Islands, which purported to charge, convict and sanction him by relieving him of his duties, privileges, home as rector and access to his place of public worship.

- [3] He was not made aware of his accusers, given proper disclosure of the charges against him or an opportunity to be heard or to defend himself all in violation of his constitutional and public law rights. Furthermore, he received no severance and suffered humiliation and distress. He sought certiorari to quash the decision, damages in the total sum of \$73,595.37. He did not believe he would be treated fairly even if he were to use the appellate process offered internally.
- [4] The First Defendant contended that it is not a public body, it exercises no public law functions or functions with public law consequences. It is therefore not subject to judicial review. Since the dispute involves questions relating to the internal laws of the Diocese, it falls within its exclusive jurisdiction and should be reviewed in accordance with the Canons and Constitution of the Diocese.
- [5] In any event, the relationship between the Claimant and the First Defendant is derived from the Claimant's voluntary submission as a member of the clergy. He is also engaged by virtue of an agreement with an entity other than the Applicant. There are, therefore, private law remedies available to the Claimant for any breach of his employment agreement. Judicial review is not the proper remedy.
- [6] In opposition, the Claimant was adamant that there was a real issue to be tried as his claim was grounded on the fact that the Defendants' decisions resulted in public law consequences rendering them amenable to judicial review.

The Issues as the Court finds them:

1. Is the First Defendant the correct party to these proceedings
2. Whether the disciplinary proceedings of the first Defendant is amenable to judicial review
3. Is there an alternate private law remedy

Is the First Defendant the correct party to these proceedings:

- [7] The First Defendant says although it is a body corporate it was only established by statute to hold property. It did not derive its power to do other things from that statute.

- [8] The Court found this objection to be wholly without merit. It would appear that the very Constitution and Canons 2012, Canon 9.1 particularly, recognizes that there would be one diocese, the Episcopal Diocese of the Virgin Islands (the Diocese). It is incorporated in the US Virgin Islands and the British Virgin Islands separately. For legal and secular purposes the Diocese in the British Virgin Island is incorporated under the Virgin Islands Missionary Diocese Incorporation Ordinance, Cap 253.
- [9] That Ordinance itself constituted the body corporate by the style and title of The Convocation of the Missionary Diocese of the Virgin Islands. It states specifically that that is the name under which the Diocese is to sue and be sued. There was no limitation that the Diocese could only sue or be sued in relation to property which is what the first Defendant seems to be asserting.
- [10] While there is admittedly a Disciplinary Board under the Constitution and Canons, it simply forms part of the structure of the Diocese. Even the very letterhead on which the various letters were sent to the Claimant bears the name of the Diocese and is signed by a Bishop of the Diocese. There is no reference to the Disciplinary Board or any other body for that matter.
- [11] The Applicant in their final submissions presented the case of **Church of God Seventh Day Incorporated v Hector Mathurin, Gabriel Goolaman, Philip McLauren, Bernard Augustine and Mount Zion Church of God Seventh Day Incorporated**¹ (Church of God) on another point but this Court finds it quite useful here. There, the Court rejected a preliminary objection that the Applicant/Claimant lacked locus standi as it was not a juristic creature, reminding that the statute provided that the Corporation had the power to sue and be sued in its name.
- [12] For all these reasons this ground fails.

¹ Claim No. SLUHCV 2011/1201

Whether the disciplinary proceedings of the first Defendant is amenable to judicial review

- [13] Both Parties agreed that the First Defendant was not a public body whose decisions are normally subject to judicial review. Unsurprisingly, they both commenced their divergent arguments with **R v Panel on Take-overs and Mergers, Ex parte Datafin plc and another**².
- [14] Counsel for the Applicant looked at the function of the Diocese and concluded that since it was not executing a public function or one which formed any part of a government operated scheme to regulate any aspect of public life, it could not be amenable to judicial review. He postured that it was purely private and ecclesiastical in nature so the rules of the governing religious body should apply. He relied on **R v Chancellor of St Edmundsbury and Ipswich Diocese, Ex parte White**³ and insisted that the court ought not to interfere in a dispute between a religious organization and its clergy; moreso, when the Respondent failed to exhaust all available internal avenues of appeal.
- [15] Counsel also determined that the relationship between the Claimant and the Diocese was in fact purely contractual so the consequence test would not be applicable and the court could not, therefore, invoke its prerogative jurisdiction.
- [16] King's Counsel for the Claimant reminded that the source of power test, though often decisive, was not the only available test in determining whether the court had jurisdiction to intervene. He urged the Court to look instead at the consequences of the functions being exercised and opined that the Court would only be able to determine whether the consequences test had been met by a trial of the matter.
- [17] He added that in recent times the Courts have also changed its approach to its intervention in matters of the clergy. He presented **Percy (AP) (Appellant) v Church of Scotland Board of National Mission (Respondent) (Scotland)**⁴ as indicative of this, as well as, perhaps the use of the consequences test in Datafin although it did not so state.

² [1987] 1 ALL ER 564 (Datafin)

³ [1948] 1KB 195, CA

⁴ [2005] UKHL 73 (Percy)

Court's Consideration:

- [18] The Claimant seeks to quash the decision of the First Defendant in the exercise of its disciplinary function. The issue as this Court understands it is whether the Diocese is amenable to judicial review. Particularly, whether the Diocese in the performance of its disciplinary function, the act of which the Claimant complains, is a private or public act.
- [19] Now Datafin considered whether a private body, the Panel on Take-Overs and Mergers, could be subject of a judicial review. The Court of Appeal discussed the two extremes, those where the source of power was derived from statute or subordinate legislation (clearly amenable to judicial review) and those where the source of power was purely contractual (not amenable). However, there were also those bodies which lay between the two, where one needed to look beyond the source of power and consider instead the function being exercised and whether the function had public law consequences.
- [20] The First Defendant did not derive its power from any Act or subsidiary legislation but from its Constitution and Canons which also provide for the discipline of the clergy. There is no public function whatsoever in the exercise of this disciplinary power and the Claimant accepts this to be so. But he insists there are public law consequences which could only be determined at and not before trial.

Court's historical reluctance to intervene and eventual marginal intervention:

- [21] There is no doubt that historically Courts have been reluctant to intervene in church affairs. Although the legal systems discussed below are different, there is something to learn from the approach they have taken.

- [22] As early as 1948 the English court refused to issue a writ of certiorari against a disciplinary body which had a purely religious function - **R v Chancellor of St Edmundsbury and Ipswich Diocese, Ex parte White**⁵.
- [23] More recently the **European Court of Human Rights in Case of Svyato-Mykhaylivska Parafiya v Ukraine**⁶ recognised and applied the autonomy principle confirming the unfettered freedom of religious organizations to determine how to deal with its members.
- [24] On an appeal to the Scottish Inner House in **Forbes v Ewan**⁷ Lord Cowan stated:
- “I cannot but regard it as an entire novelty to ask courts of law to determine whether the ruling judicatory of a voluntary Church acted within its powers in matters so purely and exclusively relating to the government of the body as a Church, its doctrines and discipline ... When the ecclesiastical governing body has recognised changes either in doctrinal matters, or in the rights [sic] and ceremonies of the church, dissentient laymen may leave its communion. Their remedy cannot be to bring the resolutions of the church judicatory into a court of law, as a court of review. Some civil wrong justifying a demand for redress, or some patrimonial injury entitling the party to claim damages, must be alleged and instructed, ere the civil court entertain and adjudicate in such cases. This is the principle which pervades the whole of the cases of this class.”
- [25] But times are changing. Percy (ibid) showed the English House of Lords’ willingness to intervene in an employment dispute between the clergy and the church. An allegation of sexual misconduct had been leveled against Ms. Percy, an ordained associate Minister of the Church of Scotland. She was suspended and preparations for the hearing of a disciplinary charge begun. During mediation proceedings organised by the church Ms. Percy was advised to resign which she did and her resignation was accepted.
- [26] She claimed to have been constructively dismissed and alleged unfair dismissal and discrimination, contending that in similar circumstances male ministers had not had similar action taken against them. The question which arose was whether as a minister she was an office holder because of the essentially religious nature of her employment or an employee.

⁵ [1948] 1KB 195, CA

⁶ (Application No. 77703/01, 14 June 2007)

⁷ (1865) 4M.143 at 163

- [27] The House of Lords considered and distinguished a number of decisions throughout the years and eventually overturned the Tribunal and the Appeal Court decisions. They found that notwithstanding the spiritual nature of the work she was to provide she had entered into a contract for service and as such statutory rights attached to that contract which was not a spiritual matter. Discrimination was certainly not a spiritual matter either.
- [28] So while the Court again accepted that it could not intervene in matters of a spiritual nature it did not consider a sex discrimination claim a spiritual matter.
- [29] The Court also asked the Parties to consider **President of the Methodist Conference v Preston**⁸. Here too the issue arose as to whether Mr. Preston, a Methodist Minister was an employee so as to enjoy the right of not being unfairly dismissed. Mr. Preston had no contract, could not unilaterally resign but had a lifelong commitment to the church.
- [30] The Court scrutinized the church's Constitution and Standing Orders before concluding that there were no contractual arrangements or intention. This too is an indication that not only would the court be willing to intervene in church affairs where statutory rights are enjoyed but that not all clerical appointments are to be considered as employment.
- [31] Just after the Civil War, the American justice system applied the church autonomy principle in **Watson v. Jones**⁹. This was a matter dealing with whether slavery was authorized or prohibited by scriptures. On appeal, the Supreme Court refused to adjudicate the 'property dispute' stating at page 708: "[W]henever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of [the] church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding. . . ."

⁸ [2013] UKSC 29

⁹ 80 U.S. (13 Wall.) 679 (1872)

[32] At page 728 of its judgment, the Supreme Court recognised that matters of church discipline and ecclesiastical rule were not for civil courts to decide when it stated:

“The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government But it would be a vain consent and would lead to the total subversion of such religious bodies if anyone aggrieved by one of their decisions could appeal to the secular courts and have them reversed.”

[33] There is a long line of Supreme Court cases which follow the church autonomy principle or non intervention with decisions made by religious bodies. In **Serbian Orthodox Diocese v. Milivojevic**,¹⁰ the Church removed and defrocked one of its bishops. The bishop brought action alleging that the proper procedure had not been followed. The US Supreme Court ruled that it was for the church, not the court, to decide on issues relating to its ministers' employment and internal religious disputes as they were “ecclesiastical in nature.”

[34] But there are those which also recognise a court's marginal right to intervene or a party's right to bring an action against decisions purportedly made in accordance with the internal rules. For example in **Guinn v. Church of Christ**,¹¹ the Oklahoma Supreme Court allowed an action where a member had been disciplined after she had already withdrawn from the religious body. The religious body asserted that their tenets did not include a right to withdraw.

[35] At page 779, the Court explained that “By its very nature, ecclesiastical discipline involves both church and member. It is a means of religious expression as well as a means of ecclesiastically judging one who transgresses a church law which one has consented to obey. The right to express dissatisfaction with the disobedience of those who have promised to adhere to doctrinal precepts and to take ecclesiastically-mandated measures to bring wayward members back within the bounds of accepted behavior, are forms of religious expression and association which the First Amendment's

¹⁰ 426 U.S. 696 (1976)

¹¹ 775 P.2d 766 (Okla. 1989)

free exercise clause was designed to protect and preserve. And yet the constitutionally protected freedom to impose even the most deeply felt, spiritually-inspired disciplinary measure is forfeited when the object of “benevolent” concern is one who has terminated voluntary submission to another’s supervision and command. While the First Amendment requires that citizens be tolerant of religious views different from and offensive to their own, it surely does not require that those like this parishioner, who choose not to submit to the authority of a religious association, be tolerant of that group’s attempts to govern them. Only those who “unite themselves” in a religious association impliedly consent to its authority over them and are bound “to submit to it.”

- [36] Even though the Supreme Court was willing to intervene, it maintained that the church could impose its will on those who had voluntarily subjected themselves to it.
- [37] For a moment, the Canadian Courts seemed to take perhaps a more liberal view **Hart v Roman Catholic Episcopal Corporation of the Diocese of Kingston, in Canada**,¹²; **Sandhu v Siri Guru Nanak Sikh Gurdwara of Alberta**,¹³ where the court showed a willingness to intervene in certain circumstances. **Lutz v Faith Lutheran Church of Kelowna**,¹⁴ may be an example of the court’s willingness to intervene in a religious organisation’s decision to expel a member even where no breach of civil or infringement of property rights was alleged. However, the case turned on the organisation’s failure to comply with its own bylaws.
- [38] However **Highwood Congregation of Jehovah’s Witnesses (Judicial Committee) v. Wall**,¹⁵ confirmed religious groups’ autonomy. Wall, a Jehovah witness, had been disfellowshipped and consequently shunned by the congregation. He claimed that he had not only lost his place of worship and his church community but also income from his real estate business. The Court of Appeal upheld the first instance decision that judicial review remedies were available against religious bodies. There was the majority acceptance that there could be intervention where a breach of natural justice was alleged or the internal appeal mechanism had been exhausted.

¹² 2011 ONCA 728 (CanLII)

¹³ 2015 ABCA 101

¹⁴ 2009 BCSC 59 (CanLII)

¹⁵ 2018 SCC 26

- [39] The Supreme Court wasted no time reversing that decision concluding that the court could not adjudicate on religious matters. Those matters should be left to the religious bodies themselves. Moreover, there was no “freestanding right to procedural fairness with respect to decisions taken by voluntary organisations” (para 24).
- [40] Turning towards this region, Kings Counsel for the Respondent produced **Gatherer v Gomez**¹⁶ where an ordained priest of the Anglican Church in Barbados had been ousted before his 65th birthday, he claimed this was unlawful and sought compensation. He was, however, considered a public officer by statute, the affairs of the church was governed in part by legislation so there is no issue as to why the court had no reluctance to intervene. That is certainly not the case of this Claimant.
- [41] The Applicant, through new counsel presented **Church of God Seventh Day Incorporated v Hector Mathurin, Gabriel Goolaman, Philip McLauren, Bernard Augustine and Mount Zion Church of God Seventh Day Incorporated**¹⁷. This dealt with an application for injunctive relief for the Respondents to cease interfering with its property and purporting to act as its representatives. The court refused the invitation to determine the locus standing of the Applicant as that ought to be left for testing at trial.
- [42] Counsel for the Applicant distinguished this case on grounds that this Court is not called to act in its equitable jurisdiction. Instead she urged the Court to adopt the approach of Thom JA in **Rajiv Guinness v St. George’s University Limited et al**¹⁸. There the Court struck out a university student’s claim for breach of contract and negligence relating to a disciplinary dispute as misconceived. It was found to be a matter within the University’s internal management and exclusive jurisdiction, which the court had no jurisdiction to hear.

¹⁶ [1992] 1 WLR 727

¹⁷ Claim No. SLUHCV 2011/1201

¹⁸ GDACVAP2016/0040

- [43] The sparcity of decisions in the region may be indicative of a strong acknowledgment of the separation of church and state or a recognition of the need to protect both the freedom of religion and association. Membership in a religious organization is the exercise of a constitutional right. But the members of that religious organization must also have a constitutional right of whom they wish to associate with.
- [44] The disciplinary action taken against the Claimant is said to be religiously motivated. By agreeing to the contract and accepting appointment the Claimant consented to undergo ecclesiastical discipline. The court's intervention in the decision of the religious tribunal seems to be an encroachment on the constitutional freedom of the organization and the structure it has chosen for its own regulation.
- [45] The Claimant here is not simply a member, he was clergy and there would seem to be a broad authority given to discipline a member of this ilk. He is also aware of the process provided by the Constitution and Canons for appealing the decision made against him. He chose not to avail himself of it but to approach the court for judicial review instead.
- [46] The law of judicial review is forever evolving and must be given a chance to do so without unnecessary, premature and underdeveloped limitations. But there is nothing presented which compels this Court to a view that there is a sufficient public element for the purpose of obtaining judicial review in this case. This makes for a difficult position when coupled with considerations of church autonomy.
- [47] Make no mistake though, the fact that a dispute has some religious aspect does not render it non justiciable, neither should the fact that there was a voluntary submission by the complainant. The theme that seems to run through is that on matters spiritual or purely theological courts remain reluctant to intervene, understanding that they are not the best or most proper body to do so. This court takes no divergent view.
- [48] This clearly demonstrates that there is certain merit to religious autonomy but there may also be merit to limits. There ought to be nothing to preclude the Claimant from pursuing a private action for any unfairness in his dismissal.

Is there an alternate private law remedy

- [49] The alternate private remedy must not only be available it must be adequate. The Claimant was engaged under a contract of service. It takes the form of a Letter of Agreement between the Claimant and a congregation which is a constituent church of the first Defendant. It is signed by the Wardens and Vestry of St George's Episcopal (Anglican) Church and the Claimant.
- [50] The Agreement was made subject to the Constitution and Canons of the Diocese. The entire Constitution and Canons formed no part of the evidence placed before the Court but was strangely only a part of both parties' submissions. But I digress. There can be no determination of whether the Claimant holds an ecclesiastical office or has a service contract without a full consideration of the facts and the circumstances.
- [51] From what is now before the Court there seems to be co-existing both an appointment to an office and a contract of service. The law in this area has certainly evolved. The courts have shown a willingness to examine the facts specific to each case and make a determination on the intention to create an employment relationship - **President of the Methodist Conference v Preston** (ibid); **Sharpe v The Bishop of Worcester**¹⁹. The traditional view that the clergy is an office holder and not an employee is no longer strictly applied.
- [52] This to my mind is an adequate alternative remedy. Since there could be no certiorari ordered against the church, when one looks at all the remaining remedies sought one immediately recognizes that a private law action is an obvious and available alternative.
- [53] The Claimant's life has been seriously impacted. He has lost his livelihood, his home and his congregation in a process which he alleges was procedurally unfair and infringes his constitutional rights. But judicial review is not an available course.

¹⁹ [2015] EWCA Civ 399

[54] For these reasons the application will succeed.

Determination:

[55] The application is allowed.

[56] The Claim is struck out.

[57] Costs to the Applicant to be assessed by the Master if not agreed by the 30th August, 2024.

**Sonya Young
High Court Judge**

By the Court

Registrar