



[2013] JMSC CIV. 127

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2013 HCV 04292

BETWEEN	VIRALEE BAILEY-LATIBEAUDIERE	APPLICANT
AND	THE MINISTER OF FINANCE AND PLANNING	FIRST RESPONDENT
AND	THE FINANCIAL SECRETARY	SECOND RESPONDENT
AND	THE PUBLIC SERVICE COMMISSION	THIRD RESPONDENT
AND	THE ATTORNEY GENERAL OF JAMAICA	FOURTH RESPONDENT

IN CHAMBERS

Hugh Wildman for the applicant

Nicole Foster Pusey QC, Solicitor General, Carlene Larmond and Basil Williams
for the defendants

Heard on: August 22, 23 and September 19, 2013

JUDICIAL REVIEW - APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL
REVIEW – INJUNCTION – SECTION 125 OF THE CONSTITUTION OF JAMAICA –

CONTRACT OF EMPLOYMENT – APPOINTMENT ON RECOMMENDATION OF PUBLIC SERVICE COMMISSION

SYKES J

[1] Mrs. Viralee Bailey-Latibeaudiere is the Commissioner General Tax Administration for Jamaica. She entered into a three year contract of employment on July 7, 2011 but it was made effective from May 1, 2011. In addition she was appointed to the post, under section 125 (1) of the Constitution of Jamaica, by the Governor General acting on the advice of the Public Service Commission ('PSC'). No person has made any allegation of impropriety against her. No hearing has been convened to determine whether she is suitable for the post. She has not been informed that specific charges of incompetence or inefficiency or any charge that would warrant her removal have been made. She alleges that on January 28, 2012, the then Financial Secretary, Dr. Wesley Hughes, told her that acting on the instruction of the Minister of Finance, Planning and the Public Service, her contract would be terminated. This was obviously an attempt to remove her from her job without due process. In due course she received a letter which stated that she is to proceed on ten days vacation leave and thereafter arrangements would be made for the termination of her contract. For reasons not known the planned removal did not go smoothly.

[2] Apparently, she did the unexpected. She was steadfast. She stood her ground. The next step phase in what her counsel described as the removal process was to transfer her to the post of Commissioner General, Ministry of Finance, Planning and the Public Service in February 2012; a post that did not exist in February 2012.

[3] Negotiations were taking place with a view to persuading her to leave without a fuss. The discussions did not produce the desired result. The impasse rumbled on for another seventeen months. Things came to a head when her attorneys-at-

law received a letter dated July 10, 2013 which 'advised that the Ministry of Finance and Planning will be terminating the contract ... with effect from July 31, 2013.'

[4] Mrs. Bailey-Latibeaudiere sought and obtained legal advice in the person of Mr. Hugh Wildman who promptly secured an injunction from Campbell J restraining the defendants from terminating her contract. The injunction was extended by Hibbert J.

[5] The applicant has applied for leave to apply for judicial review and for an extension of the injunction. Mrs. Nicole Foster Pusey QC, Solicitor General, and Miss Carlene Larmond opposed both applications. This court granted both applications and these are the reasons.

The test for leave to apply for judicial review

[6] The test for leave to apply for judicial review is that stated in **Sharma v Brown-Antione** (2006) 69 WIR 379. The rule is that leave to apply for judicial review will only be granted when there is a realistic prospect of success and there is no discretionary bar operating.

[7] The learned Solicitor General submitted that this test was not met in this case because this was a case that did not involve any public law at law and was governed solely by private law. By this, learned Queen's Counsel meant that the terms of the contract of employment prevailed and so the contract could be terminated in accordance with the terms of the contract. The corollary of this was even if the contract was terminated in breach of its terms the only remedy was damages measured in terms of the salary the applicant would have earned had she worked the entire contract period. In her written submission, the learned Solicitor General stated:

... the Financial Secretary was not performing a public duty owed to the application in the particular circumstances under consideration. The decision was operational and not disciplinary.

[8] This court cannot accept this proposition. The submission of the learned Solicitor General is hardly distinguishable from that advanced by the Attorney General's Chambers in **McPherson v The Minister of Land and Environment** SCCA No 85/2007 (unreported) (decided December 18, 2009) (see paras 22 - 25 of judgment). It is the same argument wearing different clothes. The major legal premise of Mr. Curtis Cochrane's submissions in **McPherson** is set out below:

*He submitted that the relationship between the appellant and the Government of Jamaica was **entirely** contractual. Accordingly, he contended, the appellant was subject to the terms and conditions of the contract which differed from those of the "ordinary" civil servants. And the contract was clear as to the procedure for termination. (emphasis added)*

[9] There is no question that Mrs. Bailey-Latibeaudiere was appointed by the Governor General acting on the advice of the PSC (The Jamaica Gazette, Thursday, April 5, 2012, No 14). This was an appointment under section 125 (1) of the Constitution of Jamaica. The significance of this was explained by the Court of Appeal of Jamaica in **McPherson** – a replica copy of the present case. Smith JA's analysis of the law established a number of propositions of which the most relevant are these:

- a. once a public servant is appointed by the Governor General under section 125 (1) of the Constitution acting on the advice of the PSC then only the Governor General can exercise 'to remove and to exercise disciplinary

control over' the holder of the office and in so doing he must act on the advice of the PSC and no other person;

- b. the Governor General has no power to act under section 125 (1) of the Constitution unless and until he is doing so 'in accordance with the recommendation of the PSC';
- c. remove in this context means 'remove for reasonable cause' and it does 'not [embrace] any power to remove at the Commission's whim';
- d. the fact that there was a contract of employment did not prevent the office holder securing protection from the Constitution;
- e. the office holder can be removed by the Governor General but this can only be done when he is so advised by the PSC and 'such a decision could only validly be reached if the Commission determined in accordance with the proper procedure, that reasonable cause existed for the officer's removal';
- f. the termination of the contract, before its expiry, is a removal within the meaning of section 125 (1) of the Constitution and such a removal cannot be effective unless the PSC acts in accordance with proper procedure and decides that there is reasonable cause to terminate the contract and remove the officer holder;
- g. the Constitution must take precedence over any contractual provisions that are inconsistent with the Constitution.

[10] Harris JA at paragraph 113 in the same case held:

The power to 'remove' an officer of the public service from office is therefore vested in the Governor General and most

*importantly, he is required to act on the advice of the Public Service Commission... In my judgment, any recommendation by the respondent to the Governor General to terminate the appellant's contract without cause, prior to its natural expiry would constitute a removal from his position ... would constitute a removal from his position .. in breach of section 125 of the Constitution. It is further my view that the constitutional protection under section 125 would operate over and above any contractual provisions that would have ended his contract of employment. **It therefore means that any purported removal ... could not be effective unless the Public Service Commission had beforehand determined, in accordance with a proper procedure, that reasonable cause had existed prior to the expiration of the appellant's ... contract of employment.** What is also abundantly clear is that the [Minister of Land and Environment] had no power to have advised the Governor General on the revocation of the appellant's appointment ... (emphasis added)*

[11] Dukharan JA held at page 131:

*In my view, section 125 of the Constitution guarantees protection in that it is only on the advice and recommendation of the Public Service Commission to the Governor General that a holder of public office can be removed from office. **The recommendation by the respondent to the Governor General to terminate the appellant's contract, without cause, before expiry is a clear breach of the Constitution. The [Minister of Land and Environment] was therefore clearly wrong in***

recommending the termination of the appellant's post ...

(emphasis added)

[12] The Court of Appeal was applying principles that were well settled by the Privy Council in appeals from St Lucia (**Fraser v Judicial and Legal Services Commission** (2008) 73 WIR 175); from St Christopher and St Kitts (**Innis v Attorney General of St Christopher and Nevis** (2008) 73 WIR 187); from Mauritius (**Panday v Judicial and Legal Services Commission** [2008] 4 LRC 340). So strong is the legal position that in **Panday's** case the Constitution of Mauritius protected the removal of a temporarily appointed magistrate who the authorities sought to remove before his temporary appointment came to its natural end. The magistrate was appointed for a fixed temporary term.

[13] The learned Solicitor General submitted that the Government was aware of **McPherson's** case. Instead the PSC 'advised the Financial Secretary to approach the matter of termination on the basis of a 'buy-out' of the contract of the applicant.' It is a remarkable thing that the very Commission established by the Constitution of Jamaica in order to protect civil servants from the political executive is said to have advised a course of conduct which is contrary to the very *raison d'être* and contrary to its constitutional role. This is all the more remarkable when our highest courts have clearly stated the path that must be taken in the circumstances of this case. It appears that the PSC was not the only entity that acted unlawfully but also the Ministry of Finance, Planning and the Public Service, in that having been given clearly wrong advice by the PSC, the Ministry purported to do what it had no lawful authority to do.

[14] What the learned Solicitor General has called a 'buy out ' seems to bear an extremely close resemblance to the concept of dismissal at pleasure the effect and consequence of which were described by Lord Diplock with his customary clarity in **Thomas v Attorney General** (1981) 32 WIR 375, 381:

To speak of the right of the Crown to dismiss its servants at pleasure is to use a lawyer's metaphor to cloak a political reality. "At pleasure" means that the Crown servant may lawfully be dismissed summarily without there being any need for the existence of some reasonable cause for doing so: in other words "at whim"; and "the Crown" in the context of the 1962 Constitution of Trinidad and Tobago meant that the Governor-General who, in this regard, was required by section 63 of the Constitution to act in accordance with the advice of the Cabinet or a Minister acting under the general authority of the Cabinet. Under a party system of government such as exists in Trinidad and Tobago and was expected to exist after Independence in other Commonwealth countries whose Constitutions followed the Westminster model, dismissal at pleasure would make it possible to operate what in the United States at one time became known as the "spoils" system upon a change of Government, and would even enable a Government, composed of the leaders of the political party that happened to be in power, to dismiss all members of the public service who were not members of the ruling party and prepared to treat the proper performance of their public duties as subordinate to the furtherance of that party's political aims. (emphasis added)

[15] His Lordship then explained the *raison d'être* for service commissions at page 381:

The whole purpose of Chapter VIII of the Constitution which bears the rubric "The Public Service" is to insulate members of the Civil Service, the Teaching Service and the Police

Service in Trinidad and Tobago from political influence exercised directly upon them by the Government of the day. The means adopted for doing this was to vest in autonomous commissions, to the exclusion of any other person or authority, power to make appointments to the relevant service, promotions and transfers within the service and power to remove and exercise disciplinary control over members of the service.

- [16] The modification to this statement in the case of Jamaica would be that the PSC would advise the Governor General who would act on that advice.
- [17] If the Solicitor General is correct that the Government knew of the Court of Appeal's decision (presumably as well the cases from the Judicial Committee of the Privy Council) and then decided to ignore them under the guise of what is euphemistically called a 'buy-out' then it is indeed disturbing. It would mean that the Government knew of the law and made a deliberate decision to deny a citizen the protection of law that the Court of Appeal has stated she ought to have. I hope this is not the case because the implications for the rule of law and acceptance of judicial decisions of our highest courts are far reaching.
- [18] The allegations reveal a unilateral act by the executive to rid itself of the applicant. The idea that the executive can ignore the Constitution, ignore clear and unambiguous authority from the Court of Appeal of Jamaica, and from our highest court, the Judicial Committee of the Privy Council must be rejected. This court cannot accept a deliberate attempt by the Government to circumvent the Constitution of Jamaica, our supreme law. If the Solicitor General is correct, that a 'buy-out' is a legitimate tool to deprive a public servant of the protection of our highest law, the Constitution, then it means that any public servant appointed by the Governor General acting under section 125 (1) of the Constitution of Jamaica can be summarily dismissed by the expedient of placing money in his or her bank

account and sending a letter of dismissal for this is what the 'buy out' looks like in this case. With such a concept, the role of the various service commissions under the Constitution would be eliminated. This court cannot be too emphatic in its absolute and total rejection of this idea. Thus a public servant who has done no wrong could suddenly find himself or herself without a job because the executive branch of government, aided and abetted by the various commissions, could 'buy' him out against his will, without due process and without following lawful procedure. This would mean a reintroduction of the colonial era-principle that a public servant could be dismissed without cause.

[19] In reviewing the affidavit evidence presented by both sides, four things stand out. First, there is no allegation of wrong doing alleged against Mrs. Bailey-Latibeaudiere (affidavit of Darlene Morrison, Acting Financial Secretary, dated August 8, 2013, para. 7). Second, there is no evidence that the PSC conducted any hearing according to proper procedure and made any recommendation for her removal (affidavit of Basil Williams, attorney at law, Attorney General's Chambers dated August 11, 2013; affidavits of Hazel Edwards, Assistant Attorney General, dated August 9 and 16, 2013,). Third, there is no evidence that the Governor General removed the applicant on the recommendation on the PSC (same affidavits as mentioned earlier). Fourth, the decision to terminate the applicant's contract before the natural expiry date was made by the Ministry of Finance and Planning which has no lawful authority to do anything of the kind since the applicant was appointed by the Governor General acting under section 125 (1) of the Constitution of Jamaica (affidavit of Viralee Bailey-Latibeaudiere filed July 26, 2013 with letter signed by Solicitor General exhibited).

[20] In light of the authorities there can be no doubt that leave to apply for judicial review should be granted. This court will look at the discretionary bars urged by the Solicitor General as reasons why leave should not be granted.

Detriment to good administration

[21] One of the bases on which the application was opposed was that it would be detrimental to good administration. It was said that the applicant was too late in her application. Respectfully, the court is unable to see how insisting that the Constitution of Jamaica be followed can be detrimental to good administration. On the contrary, not to insist on it would be detrimental to good administration. This is no ordinary judicial review. On the material presented, the Ministry of Finance, Planning and the Public Service overstepped its boundaries and purported to make a decision that it had no lawful or more pointedly, no constitutional basis to make. The only body competent to take action against the applicant is the Governor General who must (and he cannot do otherwise because no Governor General has the right to act contrary to law if for no other reason than that the Constitution of Jamaica is the supreme law and stands above everyone including the Governor General) act on the advice of the PSC. Thus the Ministry of Finance, Planning and the Public Service, in the context of this case, would be a constitutional interloper. Were this court to accept the Solicitor General's proposition then it would subvert constitutional order and remove the constitutional protection given to all public servants appointed under section 125 (1) of the Constitution.

[22] Subject to full examination at the hearing of this matter, Smith JA suggested that the removal of Mrs. Bailey-Latibeaudiere may not only be unlawful but may well be a nullity which opens the possibility that the judicial review court may well find that the applicant is still in the job (**McPherson [37]**). The real detriment to good administration would be if this court were to hold that the executive branch of government, acting through a ministry or minister, could turn the Constitution of Jamaica on its head with impunity without any interference by the courts. In any event, the applicant in this case acted promptly. The principle of detriment to good administration is usually applied to circumstances where the applicant has delayed too long in applying for leave to apply for judicial review. The principle has no application in this case unless it is being said that what is alleged against the executive is detrimental to good administration.

[23] If one looks at the time line in this case it will be seen that the applicant's lawyers were advised by letter dated July 10, 2013 that her contract would be terminated on July 31, 2013. The processing of the payment for the rest of the applicant's contract period began on July 25, 2013 and ended with the placement of funds in the applicant's account on July 29, 2013. Were this court to accept the Solicitor General's logic, the implication is that a more malevolent minister or ministry could arrange for everything to be done simultaneously. The process for payment could start on July 25 and end on July 29 with the payment and notification of the termination the employment on the same July 29. According to the learned Solicitor General, any challenge allowed to this state of affairs would be detrimental to good administration and so should be rejected. The consequences of this line of reasoning have far reaching implications not just for public servants but for the very Constitution.

Alternate remedy

[24] It was submitted that section 127 (4) of the Constitution permitted another remedy. That is asking that the matter be referred to the Privy Council. It is said that the applicant has exercised this option and this shows that other remedies have not been exhausted.

[25] It is important to look at the important words of section 127 (4). It reads in material part:

Where, by virtue of an instrument made under this section, the power to remove or exercise disciplinary control over any officer has been exercised by a person or authority other than the Governor-General acting on the advice of the Public Service Commission, the officer in respect of whom it was so exercised may apply for the case to be referred to the Privy Council

[26] It is the view of this court that section 127 (4) is not authorising illegality or encouraging unconstitutional conduct. Section 127 (4) assumes that the person

who removed or exercised disciplinary control had the lawful authority to do so and did so lawfully. If learned Queen's Counsel's submission is correct then it would mean that a member of the political executive or a senior member of the civil service acting at the behest of the executive could dismiss any member of the public service and when challenged say, 'According to section 127 (4) I can dismiss you and if you are aggrieved go to the Privy Council because no court will allow you to apply for judicial review to challenge by unlawful, or (chuckle, chuckle) more accurately, my unconstitutional action.'

[27] If what Mrs. Bailey-Latibeaudiere has said is true then there was not even the pretence at legality. The submission is not accepted.

Legitimate expectation

[28] One of the grounds on which application rests is that of legitimate expectation.

The learned Solicitor General submitted that leave should not be granted on this ground because there is no legitimate expectation in this case. It was said that there was no clear and unambiguous representation to the applicant and thus the very foundation of the principle is absent. This court disagrees. It seems that every public servant against whom action is taken to remove him or her from office has the legitimate expectation that the State would act in accordance with lawful procedures. No public servant has a right to remain in a job but surely the public servant is entitled to be treated fairly in accordance with the law. In this case the applicant was appointed under section 125 (1) of the Constitution. The many cases cited above have clearly indicated the implication of such an appointment. Smith JA has outlined what must be done to remove a public who has section 125 (1)-protection. In the view of this court, an implied representation to the public servant which is clear and unambiguous is that any removal must take or will take place in accordance with the law as interpreted by courts. The fallacy in the proposition advanced by the learned Solicitor General is that the relationship between the applicant and the Government, in this case, is governed exclusively by private law. Thus the learned Solicitor General's submissions may

be internally logical and the reasoning valid but they are based on a false premise. There is no need in this case for the applicant to appeal to any long standing practice. The law has been declared by the courts and it must be obeyed unless changed. Thus the applicant in this case has a legitimate expectation that the Government will act lawfully when seeking to end her contract. The court will now look at whether the injunction should be extended until trial.

Whether injunction should be dissolved

[29] Miss Carlene Larmond submitted that under the famous American Cyanamid principles an injunction should not be granted. Learned counsel raised a number of objections. First, an injunction cannot be granted against the Attorney General. Second, the application was made without notice to the respondents. Third, there was material non-disclosure. Fourth, damages are an adequate remedy.

[30] The court now addresses the four objections in the order stated above. In this case, the Solicitor General, the civil servant head of the Attorney General's Chambers wrote the letter to the applicant's attorney informing her of the decision to terminate her contract. It is not entirely clear the full role of the Attorney General in all this but prima facie, he has become involved, in some way, in the removal of the applicant from her post.

[31] This court approaches this issue with the learning from **Gairy v Attorney General of Grenada** (1999) 59 WIR 174 in mind. The present case is not just a case of public law in the ordinary sense of the word. It is a case that involves possibly serious breaches of the Constitution of Jamaica by state actors and one of those persons may well be the Attorney General. Lord Bingham in **Gairy** accepted the fundamental premise of counsel for Miss Gairy in that case. Counsel submitted the Constitution is the supreme law and all other laws, written or unwritten, must be subject to the Constitution. Lord Bingham built on this to say that '[h]istoric common-law doctrines restricting the liability of the Crown or its

amenability to suit cannot stand in the way of effective protection of fundamental rights guaranteed by the Constitution' ([19] (2)). The point is that in light of the Constitution, some of the principles which predated the Constitution must be reconsidered. The present case is not a breach of any fundamental rights guaranteed under the Charter of Rights of the Constitution but it does involve constitutional protection of employment of certain public officers. If this constitutional protection is to be meaningful then surely there must be interim remedies to protect those rights given by the Constitution of Jamaica. The effect of Lord Bingham's reasoning is that all principles of law, all procedure must conform to the Constitution.

[32] If Miss Larmond's argument is correct then it means that an Attorney General can be as unlawful as he wants to be and there would no power to constrain him – a truly stunning conclusion in a constitutional democracy where the constitution is the supreme law.

[33] The second objection was that the circumstances were not so urgent that the respondents should not have been notified. This court accepts that notice is appropriate unless there is very good reason for not giving notice. However, this is not a sufficient reason not to extend the injunction granted in this case.

[34] The third objection is that there were material non-disclosures. Miss Larmond relies on **Jamculture Limited v Black River Upper Morass Development Co Ltd** (1989) 26 JLR 244. The first non-disclosure is said to be the failure to inform the judge who granted the injunction that questions were raised about Mrs. Bailey-Latibeaudiere's leadership of the revenue department. The question is, what does 'concerns raised' mean? Did she act improperly, incompetently or in any manner that required her removal? No evidence has been presented in any of four affidavits filed by the respondents to this application. It could hardly be a that a defendant who is opposing an application for grant of leave to apply for judicial review would fail to make the point that grounds existed for removal if they exist. There is no evidence that these 'concerns' ever rose to the level of

anything that would warrant removal from office. If that were the case, then the law states what must be done. The applicant would need to be properly informed; a hearing held; findings made and a recommendation made to the Governor General for her removal. In the view of this court, this non-disclosure was not material and if disclosed would not have prevented the issuing of an injunction.

[35] The second material non-disclosure was said to be the applicant's failure to disclose that she accepted her transfer from Commissioner General Tax Administration Jamaica to Commissioner General in the Ministry of Finance, Planning and the Public Service. It is the respectful view of this court that this is a non-issue because the undeniable fact is that the applicant's application for leave is not grounded in any transfer that took place in 2012 but rather a decision to end her contract in apparent breach of the process laid down by the Constitution of Jamaica. The reference to events of 2012 was purely for the purpose of putting the matter in context. The fact of accepting a transfer a year earlier in my respectful view has nothing to do with whether the manner of her purported removal in this case was lawful.

[36] The fourth objection is that damages are an adequate remedy. This submission, it is respectfully suggested, fails to take into account that at the hearing the court may conclude that the applicant was not lawfully removed and consequently is still the holder of public office. If no injunction is granted and the applicant is successful then it would mean she would have lost the opportunity to continue in employment. To say it another way, the risk of injustice to the applicant is greater if the injunction is not granted. The risk of injustice to the Government is less if the injunction is granted. The fact that the working relationship may be uneasy is a necessary corollary to public sector employment underpinned by the Constitution. Public sector employment has unique characteristics in the context of our Constitution. It must not be forgotten that the 'whole purpose of [service commissions] is to insulate member of the civil service ... from political influence exercised directly upon them by the Government of the day' (**Thomas v**

Attorney General of Trinidad and Tobago (1981) 32 WIR 375, 381(Lord Diplock)). How else can this principle be recognised and implemented in a practical manner but by the grant of an injunction in an appropriate case?

[37] It would be up to the applicant after such a conclusion to determine whether it would be prudent to continue in office and leave the PSC to make the next move. On the other hand the applicant may decide to leave immediately after the case is concluded.

[38] This case shows why American Cyanamid principles do not translate easily into public law particularly public law with constitutional implications.

Conclusion

[39] Leave to apply for judicial review is granted. Injunction granted. Costs to be costs in the claim.