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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2009/HCV 00660

BETWEEN	LEGAL OFFICERS STAFF ASSOCIATION	1 ST APPLICANT
AND	TASHA MANLEY	2 ND APPLICANT
AND	MELISSA SIMMS	3 RD APPLICANT
AND	THALIA FRANCIS	4 TH APPLICANT
AND	MAURICE BAILEY	5 TH APPLICANT
AND	KHADREA FOLKES	6 TH APPLICANT
AND	TRUDY-ANN DIXON-FRITH	7 TH APPLICANT
AND	SUSAN WATSON-BONNER	8 TH APPLICANT
AND	THE ATTORNEY GENERAL OF JAMAICA	1 ST RESPONDENT
AND	THE MINISTER OF FINANCE AND PUBLIC SERVICE	2 ND RESPONDENT

Mrs. Nicole Foster-Pusey and Mrs. Symone Mayhew for the Applicants.

Mr. Ruel Henriques Q.C., Mr. Allan Wood, and Mrs. S. Ridsen-Foster instructed by Livingston Alexander & Levy for the Respondents.

HEARD: 30th July, 2009 & 3rd March, 2011

Contested Application for Leave to Apply for Judicial Review - whether Governments right to change its policy can be fettered by Legitimate Expectation arising from its previous promise or conduct - Right to be heard

KING, J.

In this contested application:

1. The Applicants seek leave to apply for Judicial Review of:-
 - “(a) the decision of the Minister of Finance and the Public Service/Cabinet of Jamaica/Government of Jamaica ‘to de-link’ the calculation of the basic salaries of Legal Officers from that of members of the Judiciary;
 - (b) the decision of the Minister of Finance and the Public Service/Cabinet of Jamaica/Government of Jamaica to calculate and pay to the Legal Officers salaries not calculated in accordance with the Cabinet Decision of 1993 which decision linked the calculation of the basic salaries of the Legal Officers with that of the members of the Judiciary.”
2. The Applicants indicate the relief which would be sought on Judicial Review as being Prerogative Orders of Certiorari, Mandamus and Prohibition to rectify what the Applicants perceive to be an injustice being suffered by them as a result of the decision which they seek to challenge.
3. In addition, the Applicants seek an order directing the Respondents to indicate the date on which the “alleged” decision was made and to provide a copy of it or extract from thereof to the Court and to the Appellants.
4. An extension of time, if necessary, for the making of this application for leave to apply for Judicial Review.

BACKGROUND

Sometime in or before 1992 the Heads of Departments (Solicitor General, Chief Parliamentary Counsel, Director of Public Prosecutions, and Director of Legal Reform) arrived at an understanding with the Ministry of Finance and Public Service regarding parity of their salaries with those of the Judges of the Court of Appeal.

On the 24th December 1992 the first Applicant which represents the interests of Legal Officers, Clerks of Court and Deputy Clerks of Court in the Public Service of Jamaica (hereafter called LOSA) entered into a Heads of Agreement with the Government of Jamaica governing salaries and allowances for legal officers for the period 1st April 1991 to 31st March 1993. Clause 2F of that Heads of Agreement states, ***"In the event any upward adjustment is made to the basic salary and allowances of Legal Officers at Level VII in keeping with the understanding between the Heads of Departments and the Ministry of Public Service regarding parity with Judges of the Court of Appeal adjustments will be made as appropriate to the basic salary and allowances of other level of the group."***

On the 14th March 1994 Cabinet gave approval for a clearly defined pay policy to determine the salaries of Legal Officers whereby the increases in salaries of Legal Officers was linked to increases in salaries of the higher judiciary, i.e. judges of the Supreme Court and Court of Appeal.

This situation continued until September of 2008 when the Cabinet, acting on a recommendation contained in the report of the 6th Independent Commission appointed by the Minister under Section 4(2) of the Judiciary Act to inquire into the adequacy of the salaries, benefits, and condition of service of Judges, took the decision to de-link the salary increases granted to judges from those of the Legal Officers.

This decision was communicated to LOSA's president Miss Tasha Manley by a letter dated 21st November 2008 from the Financial Secretary, Ministry of Finance. This letter was sent in response to a letter written by Miss Manley of 10th November 2008 to the Minister without Port Folio in the Ministry pointing out that the arrangement in place since 1994 had not been followed in that when the judges received their last increase, the expected corresponding increase had not been received by the Legal Officers. The salary scale applicable to the Legal Officers had been confirmed by Civil Service Order 2008 as amended by the Civil Service Establishment (Amendment) (No. 2) Order 2009.

On 19th February, 2009 this application for leave was filed by the Applicants, the application having been subsequently amended on 4th March 2009. Having regard to the fact that the decision to de-link which is the subject of this application was communicated to LOSA on the 21st November 2008, I do not consider that there has been undue delay in the making of this application or the need, therefore, for the order sought at paragraph 6 of the Notice of Application.

APPLICANT'S SUBMISSIONS

The Applicants contend that:-

1. They have met all the procedural requirements for the application as set out in Rule 56.3 or the Civil Procedure Rules 2002.
2. They have attained the necessary legal threshold required to receive leave in that in addition to there not having been undue delay in the making of this application, and to the fact that they clearly have sufficient interest in the subject matter of the application, they have an "arguable case" for review.
3. The decision to de-link represents a change in Government policy which, admittedly the Government have a right to do. However, where, as in this case, the previous policy was one arrived after negotiations with the Applicants, and that policy having been implemented and followed for a number of years, has given rise to a legitimate expectation on the part of the Applicants that that policy will continue and that any proposed change in the policy will be the subject of prior consultation with the Applicants, to change the policy without first affording the Applicants any opportunity to be heard or even giving them notice of the proposed change constitutes acting in a procedurally unfair manner. They therefore complain that the decision of the Government is unfair and an abuse of power in that it frustrates their legitimate expectation both procedurally and substantively.

RESPONDENTS SUBMISSIONS

The Respondents, on the other hand, point out that the orders to be sought on Judicial Review include:

- (a) an Order of Certiorari quashing the decision of the Minister to de-link the calculation of the salaries of legal officers from those of judicial officers;
- (b) an Order of Mandamus directing the Minister to re-calculate the salaries of legal officers for the period 2007-9 in accordance with the prior Cabinet decision, and
- (c) an Order of Prohibition prohibiting the Minister from changing the basis upon which salaries for legal officers is calculated without having had proper consultation with the legal officers or their representatives.

The effect of these Orders, say the Respondents, would be to give the legal officers in the public service salary increases. The matter of salary increase is an arrangement arrived at by private contractual agreement between the parties which cannot properly be the subject of Judicial Review. A number of decisions of the Court are cited as examples of unsuccessful attempts by litigants to utilize the public law process of judicial review to enforce private contractual rights. The most prominent of these was the case of **Sykes v Ministry of National Security and Justice and The Attorney General (1993) 30 JLR 76** in which the Court of Appeal refused to entertain claims for salary withheld

by a public authority, declaring that the appropriate procedure for enforcing such a right is not the prerogative orders, but an ordinary private law action.

The Respondents argue that no decision of Government can fetter its right to subsequently change its own policy. To grant the orders sought on judicial review would be to compel the Government to "carry out the previous executive decision taken by Cabinet in 1993," notwithstanding the changing circumstances which necessitated a change in its policy.

The emoluments of legal officers in the public service fall to be determined under the Civil Service Establishment Act by the Minister by way of an order made in exercise of a power delegated to him by Parliament. The emoluments are therefore the subject of subsidiary legislation.

For these reasons the application has no chance of succeeding and as such has failed to reach the legal threshold, and leave ought to be refused.

By way of response the Applicants maintain that their application does not rely on a contract of employment but on a change in governmental policy and its resulting breach of their legitimate expectation, both procedural and substantive.

The field of Public Law is enjoying a period of rapid growth, nowhere moreso than in the developments taking place in the area of

Judicial Review and in the continuing expansion of the doctrine of legitimate expectation.

JUDICIAL REVIEW

Judicial Review has grown from a means of reviewing the proceedings of courts of inferior jurisdiction to exercising jurisdiction over “any body having legal authority to determine questions affecting the rights of subjects and having a duty to act judicially.”

Having then shed the limitation imposed by the need for the body to have “a duty to act judicially,” (**Ridge v Baldwin (1964) AC 40, (1963) 2 All ER 66**) the process of Judicial Review has continued to extend its reach into areas which were previously inaccessible to it.

LEGITIMATE EXPECTATION

The doctrine of legitimate expectation had its genesis in the case of **Schmidt v The Secretary of State for Home Affairs** which raised the question of whether a duty to act fairly imposed on the Government the added duty to be flexible in its policies. To this Lord Denning’s response was *“It all depends on whether he (the applicant) has some right of which it would not be right to deprive him without hearing what he had to say.”* In the **Council of the Civil Service v Ministry of Home Affairs (1984) 3 All ER 935 at 943**. Lord Fraser recognized that *“even where a person claiming some benefit or privilege has no legal right to it as a matter of*

private law, he may have a legitimate expectation of receiving the benefit or privilege and if so the Courts will protect his expectation as a matter of public law."

"Legitimate or reasonable expectation may arise either from an express promise given on behalf of a Public Authority or from the existence of a regular practice which the claimant can expect to continue." – Lord Diplock in **O'Reilly v Mackman (1982) 3 All ER 1124**.

Is the doctrine of legitimate expectation limited to matters of procedure or does it extend to substantive expectations?

In Ministry of Agriculture, Fisheries, and Food exp. Hamble (offshore) Fisheries Ltd. (1995) 2 All ER 714.

The formulation of the doctrine by Sedly J included the protection of substantive expectations, both procedural and substantive expectations being based on the "discipline of fairness."

The dictum of Sedley J purporting to include substantive expectations in the doctrine of legitimate expectation was unanimously overruled by the (UK) Court of Appeal in **R v Secretary of State for the Home Department et al exp. Hargreaves et al (1997) 1 All ER**.

Yet in more recent cases including the Privy Council's Judgment in the Trinidadian case of **Francis Paponette and others (3) v The Attorney General of Trinidad and Tobago (2010) UKPC 32** delivered on 13th December 2010; substantive legitimate expectation has again found recognition.

In considering a case where the legitimate expectation is based on a promise or representation, reference was made to principles enunciated by Lord Hoffman in **R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2) (2008) UKHL 61 (2009) AC 453** at paragraph 60:-

“It is clear that in a case such as the present, a claim to a legitimate expectation can, be based only on a promise which is clear unambiguous, and devoid of relevant qualifications: See Bingham LJ in R v Inland Revenue Comrs. Exp. MFK Underwriting Agents Ltd. (1990) 1 WLR 1545, 1569. It is not essential that the applicant should have relied on the promise to his detriment, although this is a relevant consideration in deciding when the adoption of a policy in conflict with the promise would be an abuse of power and such a change of policy may be justified in the public interest.”

The Board, in its majority decision, was of the opinion that (paragraph 34):-

“The more difficult question is whether the Government was entitled to frustrate the legitimate expectation that had been created by its representation.”

And citing from the judgment of Lord Woolf MR in the (UK) Court of Appeal in **R v North and East Devon Health Authority exp Coughlan (2001) QB 213**

“Where the Court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive not simply procedural, authority establishes that here too the Court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the Court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy.”

At paragraph 36:

– “The critical question in this part of the case is whether there was sufficient public interest to override the legitimate expectation to which the representatives had given rise.”

The Board agreed with the observation of Laws LJ in **Nadarajah v Secretary of State for the Home Department 2005 ECWA Civ 1363** at paragraph 68:

“The principle that good administration requires public authorities to be held to their promises would be

undermined if the law did not insist that any failure or refusal to comply is objectively justified as a proportionate measure in the circumstances. It is for the authority to prove that its failure or refusal to honour its promises was justified in the public interest. There is no burden on the applicant to prove that the failure or refusal was not justified.”

At paragraph 45

The Board referred to the judgment of Schiemann LJ in **R (Bibi) v Newham London Borough Council (2001) EWCA Civ 607 (2002) 1 WLR 237** in which it was said that an authority is under a duty to consider legitimate expectation in its decision making process. – The Learned judge said at paragraph 49 of his judgment:

“Whereas in R v North and East Devon Health Authority, exp. Coughlan (2001) QB 213 it was common ground that the authority had given consideration to the promises it had made, in the present cases that is not so. The authority in its decision making process has simply not acknowledged that the promises were a relevant consideration in coming to a conclusion as to whether they should be honoured and if not what, if anything should be done to assuage the disappointed expectations.”

The Board agreed with this pronouncement at paragraph 51 of the judgment in Bibi "The law requires that any legitimate expectation be properly taken into account in the decision making process. It has not been in the present case and therefore the authority acted unlawfully."

The threshold test which I apply to this application is that enunciated by Sir John Donaldson in **Regina v Secretary of State for the Home Department ex. p. Swati (1986) 1 WLR 477 at 485 letter A.**

"An applicant must show more than that it is not impossible that grounds for judicial review exist. To say that he must show a PRIMA FACIE Case that such grounds do in fact exist may be putting it too high, but he must at least show that it is a real, as opposed to a theoretical possibility. In other words, he must have an arguable case."

This application gives rise to a number of interesting and important legal questions, among which, for example, are:

1. In the absence of a breach private contractual rights can the breach of a legitimate expectation not relied on to the detriment of its holder (and therefore not amounting to an equitably estoppel) form the basis of an action in private law, or can such a breach only be addressed in the arena of public law?
2. Assuming that there are circumstances which render a decision making process and the resulting decision unfair, should the

fact that the granting of prerogative orders (such as those sought here) in respect of such a decision would result in an increase in the salaries of the applicants preclude them from mounting such a challenge by way of Judicial Review.

I hope that my brief review of the authorities tracing the development of the doctrine of legitimate expectation will have illustrated the dynamic state of this area of the law. If I am to usefully assess whether the applicants have an arguable case I need to do more than look at and compare this case to decisions of fifteen or twenty years ago. I must also consider these decisions in the context of the rapid evolution still taking place in the relevant area of the law.

In doing so I find myself unable to say that the applicants do not have an arguable case as defined in the threshold test which I have accepted and hold that they do.

- (1) Consequently I make the order sought in terms of paragraph 1 of amended Notice of Application for leave to apply for Judicial Review filed on the 4th March 2009.
- (2) The relief sought at paragraphs 2, 3 and 4 will be duly considered on the hearing of the application for Judicial Review.
- (3) The information sought in Order 5 has already been supplied in the affidavit of the Respondents witnesses.
- (4) The request in paragraph 6 has already been dealt with.

- (5) The leave here granted is conditional upon the applicants making a claim for Judicial Review within 14 days of today.
- (6) The leave hereby granted shall not operate as a stay.
- (7) The hearing shall be by a single judge in open Court.
- (8) The first hearing shall be on 9th May, 2011 at 11:00 a.m. for one (1) hour.
- (9) Leave to Appeal.

Lastly

I very much regret the delay in dealing with this application except to the extent that it has allowed me the not inconsiderable assistance derived from the decision in the **PAPONETTE case**.

I am indebted to all the Attorneys for their assistance.

