

SAINT LUCIA

IN THE COURT OF APPEAL

HCVAP 2009/12

BETWEEN:

[1] SAMUEL FLETCHER
[2] VINCENT JN LOUIS
[3] CYRUS BOYCE
[4] LILIA CORNIBERT
[5] JUSTINA BELASSE

Appellants

and

THE ATTORNEY GENERAL

Respondent

Before:

The Hon. Mde. Ola Mae Edwards
The Hon. Mr. Michael Gordon, QC
The Hon. Mr. Davidson Baptiste

Justice of Appeal
Justice of Appeal [Ag.]
Justice of Appeal [Ag.]

Appearances:

Horace Fraser for the Appellants
Raulston Glasgow and Leslie Prosper for the Respondent

2009: July 7;
September 28.

Legitimate expectation – whether the learned trial judge erred by failing to give effect to the appellants' legitimate expectation after finding as a fact that a representation was made to them – whether the appellants had a legitimate expectation.

The appellants were appointed as special police constables under section 55 of the Police Ordinance which mandates that such appointment is for 3 years and then subject to renewal for a further 3 year term. The appellants' first appointments were made as far back as 1987, and remained without renewal until 2003 when the then Commissioner of Police in an effort to regularize the system required that appointments be made in accordance with section 55. The appellants contend that at the time of their first appointment they were told by the then Commissioner that upon the successful completion of their probation, their employment would be made permanent. The appellants contend that having been promised by the former Commissioner, they had a legitimate expectation

to be permanently appointed as Police Constables by the Commissioner who had the constitutional authority to do so.

The learned trial judge found that the appellants sought employment as special police constables and not police constables. The learned trial judge found that at best the appellants can argue that they have a legitimate expectation to be allowed to serve as special police constables for an undetermined period, which is what they have said was promised by the Commissioner upon their appointment and which is in fact what they continue to receive. Therefore as there has been no endeavour to terminate their appointments or refuse them reappointment as each 3 year period expires, then the appellants have no need to seek redress from the court. The learned judge dismissed the claim and made no order as to costs.

Held: appeal dismissed with parties to present submissions on costs within 14 days if not agreed.

1. The learned trial judge did not err in law in failing to give effect to the representation which the appellants contend was made by the Commissioner because he could not have lawfully given effect to it. The Commissioner could not have lawfully made such a representation to persons employed in the capacity of special constables.
2. The learned judge did not pay regard to subsection 3 of section 55 of the Police Ordinance. A power or undertaking that is beyond the powers of an authority cannot initiate a claim in legitimate expectation. The representation could not be said to be clear, unambiguous and devoid of relevant qualification. However although this ground of appeal was allowed it has no effect on the appellants' status in the Police Force and as a result they remain as special constables.

JUDGMENT

- [1] BAPTISTE J.A. [AG.]: This is an appeal against the decision of Cottle J refusing declaratory relief sought by the appellants in respect of their employment in the Royal St. Lucia Police Force.
- [2] The appellants were appointed as special constables by the Commissioner of Police pursuant to section 55 of the Police Ordinance No. 30 of 1965. Subsection 3 of section 55 provided that every such appointment shall be for three years as may be specified in such appointment. Some of the appellants were appointed as long ago as 1987. After their first appointment the appellants remained in their post without further appointment, performing duties normally

performed by police constables. In 2003, the then Commissioner of Police sought to regularize the position by requiring all special constables to take the oath of office and to be sworn in as special constables. The appellants complied.

- [3] In 2008, the appellants instituted proceedings in the High Court. They sought various declarations including that they were appointed for an indeterminable period and are therefore police officers in accordance with section 94(3) of the Saint Lucia Constitution Order 1978 and the Police Ordinance No. 30 of 1965; and that they were entitled to the financial benefits, emoluments and entitlements applicable to police constables.
- [4] The appellants averred in the court below that at the time of their employment they were told by the then Commissioner of Police that after six months of probation they would be employed as permanent workers. The learned judge made the finding of fact that the appellants were told by the Commissioner of Police that if they successfully completed the probationary tour of duty their appointment would be for an indefinite term. The learned judge also stated that at best the appellants can argue that they have a legitimate expectation to be allowed to serve as special constables for the undetermined period.
- [5] Two grounds of appeal have been urged upon the court. The first is that the learned judge having found as a fact that the Commissioner of Police did make a representation to the appellants which they relied on, erred at law by failing to give effect to the appellants legitimate expectation. The second ground is that the learned judge misdirected himself and therefore erred in law when he found that the appellants may have a legitimate expectation to be allowed to serve as special constables for an indeterminable period.
- [6] In the appellants' skeleton arguments Mr. Fraser contended that the learned judge failed to properly analyze their case in its factual context, that is, having regard to the representation made to them by the then Commissioner of Police, the subsequent policy of having them work without any further appointment prior to 2003, was contrary to section 55(3) of the Police Ordinance. For the

representation to be legal the Commissioner of Police could only have been speaking in the context of his powers pursuant to section 94(3) of the Saint Lucia Constitution Order 1978 under which he had authority to appoint police constables.

- [7] In the same vein Mr. Fraser contended that having found as a fact that a representation was made to the appellants, the learned judge fell into error when he framed the expectation thus:

“...at best they can argue that they have a legitimate expectation to be allowed to serve as Special Constables for an undetermined period. This is what they say was promised to them by the Commissioner of Police.”

Mr. Fraser argued that the legitimate expectation thus framed was wrong in law as it did not pay regard to section 55(3) of the Police Ordinance. Mr. Fraser opined that the representation of permanence could not be as permanent special police constables as this would be contrary to section 55(3). Under the Police Ordinance, permanence could only be attached to the office of Police Constable.

- [8] Mr. Glasgow, on behalf of the respondent, argued that at all times the appellants were appointed as special constables and were treated as such. Further, the Commissioner of Police has no power to change the nature of the appellants' appointment without following the statutory and other regulatory mechanisms. Mr. Glasgow pointed out that in cases where it is argued that a representation creates a legitimate expectation “it must be clear, unambiguous and devoid of relevant qualifications.”

- [9] Mr. Glasgow further contended that the legitimacy of the expectation found by the learned judge to have been engendered in the appellants is not supported in law. Mr. Glasgow pointed out that “a power or undertaking that is beyond the powers of the authority cannot found a claim in legitimate expectation.”¹ Mr. Glasgow also relied on Lord Wolfe's observation that “it is axiomatic that a public authority which derives its existence and its powers from statute cannot validly act outside those

¹ Fiadjoe, Commonwealth Caribbean Public Law, 2005 at page 279

powers”². Mr. Glasgow argued that in light of the foregoing the Commissioner of Police is only empowered to act within the confines of his statutory and other remit. Any expectation the Commissioner of Police seeks to provoke in the appellants by way of assurance or otherwise must fall within his expressed or implied authority to so offer.

[10] Mr. Glasgow posited that the Commissioner of Police could not act in the manner asserted by the appellants even if he wished to do so. The reason being that the statute and policy guidelines prescribed the qualifications and criteria necessary to fill the posts in question “Clear statutory words...override any expectation howsoever founded.”³ Accordingly, it was not open to the learned judge to find that the appellants had an expectation to be employed for an indeterminate period when the statute providing for their appointment evidently prescribes such appointments.

[11] In *Regina (Bibi) v Newham London Borough Council*⁴ Lord Justice Schiemann stated at paragraph 19:

“In all legitimate expectation cases, whether substantive or procedural, three practical questions arise. The first question is to what has the public authority whether by practice or by promise, committed itself; the second is whether the authority has acted or proposes to act unlawfully in relation to its commitment; the third is what the court should do.”

Lord Justice Schiemann opined at paragraph 20 that the answer to the first question posed no jurisprudential problems; it is a question of analyzing the evidence. At paragraph 21 he stated:

“Sometimes, the answer to the first question is dispositive of the case. If the public body has done nothing and said nothing which can legitimately have generated the expectation that is advanced to the court, the case ends there. It seems likely that a representation made without lawful power will be in this class.”

² *R v North and East Devon Health Authority ex P Coughlan* [2001] QB 213 at 243, para 64

³ *Wade on Administrative Law*, Eighth Edition, page 497

⁴ [2002] 1WLR 237

For an expectation to be legitimate the party seeking to invoke it must show that it lay within the powers of the ... authority both to make the representation and to fulfill it”⁵.

[12] Mr. Fraser undoubtedly recognized that there can be no legitimate expectation in an illegality. I agree with Mr. Fraser that the representation of permanence cannot be as permanent special constables as this would be contrary to subsection 3 of section 55 of the Police Ordinance. But what of Mr. Fraser’s contention that for the representation to be legal the Commissioner of Police could only have been speaking in the context of his powers under section 94(3) of the Saint Lucia Constitution Order 1978 pursuant to which he has authority to appoint police constables? In the context of this case and looking at the statutory background I find it difficult for an expectation to be defeated under subsection 3 of section 55 of the Police Ordinance and to succeed under section 94(3) of the Constitution. That cannot happen. Both would founder on the rock of the statutory framework.

[13] Section 94(3) of the Constitution authorizes the Commissioner of Police to appoint constables. Section 15(1) of the Police Ordinance deals with qualifications for appointment of police constables. Matters covered included the minimum age as well as the maximum age of recruitment; standard height and chest measurements; the passing of a medical examination as to bodily fitness and the attainment of a reasonable standard of education. Section 16(1) provided that initial appointment to the Force shall be for a two year period during which a subordinate officer or constable shall be deemed to be on probation. If at any time during the probationary period a constable is found wanting in character, intelligence or otherwise unfit to be a police officer his services may be terminated by the Commissioner of Police. Subsection 1 of section 55 of the Police Ordinance provided for the Commissioner of Police to appoint fit and proper persons to be special constables generally on any occasion if it appears to him to be expedient in the interest of public safety so to do. Subsection 3 provided that

⁵ Per Schiemann LJ at paragraph 46.

every such appointment shall be for such period not exceeding three years as may be specified in such appointment.

[14] Having regard to the statutory framework, the Commissioner of Police could not have lawfully represented to the appellants, who were appointed as special constables, that after the period of probation they would be permanently appointed as police constables. The appellants were appointed as special constables. Different regimes govern the appointment of special constables and police constables. The Commissioner of Police could not lawfully make a representation to persons employed as special constables that if they successfully completed their probationary period their appointment would be for an indefinite term, as this would fly in the face of subsection 3 of section 55 of the Police Ordinance No. 30 of 1965. That being the case, the learned judge did not err in law in not giving effect to such a representation as he could not have lawfully given effect to it. Accordingly the first ground of appeal must fail. Likewise the Commissioner of Police could not lawfully make a representation to persons employed as special constables that at the end of the probationary period they would be permanently employed as police constables. I agree with Mr. Glasgow that there is no power residing in the Commissioner of Police to change the nature of the appellants' appointment without following the statutory and other regulatory mechanisms. The second ground of appeal succeeds as it appears that the learned judge did not pay regard to subsection 3 of section 55 of the Police Ordinance. In the circumstances, I agree that a power or undertaking that is beyond the powers of authority cannot found a claim in legitimate expectation.

[15] Mr. Fraser had argued that parliament never intended for special police constables to work for those number of years, even if consecutive appointments were made. Nothing in a reading of subsections 1 and 3 of section 55 of the Police Ordinance precludes the Commissioner of Police from making consecutive or successive appointments of a person as a special constable, once it appears to him to be expedient in the interest of public order and safety so to do. Subsection 3 of section 55 does not impose a limit on the number of times a person can be

appointed as a special constable. It simply provides that every such appointment shall be for such period not exceeding three years as may be specified in such appointment. It does not preclude successive three year appointments.

[16] The court is mindful of the fact that after the first appointments as special constables were made, the appellants continued to work without further appointments until 2003, when the Commissioner of Police regularized the situation. In so doing it cannot be said that the Commissioner of Police acted so unfairly that his action amounted to an abuse of power. There was nothing in his action which could be construed as an abuse of power. The appellants were not treated as having any appointment other than as special constables. There is no basis for any legitimate expectation on their part to be treated as police constables.

[17] Mr. Glasgow contended that one of the conditions for a legitimate expectation to arise is that the representation should be clear, unambiguous and devoid of relevant qualification. Counsel argued that the representation relied on did not satisfy this requirement. In *R v Inland Revenue Commissioners Ex parte MFK Underwriting Agents Ltd. and others*⁶ Bingham LJ said:

“Secondly, it is necessary that the ruling or statement relied upon should be clear, unambiguous and devoid of relevant qualification.”

The learned judge found that the Commissioner of Police told the appellants that if they successfully completed the probationary tour of duty their appointment would be for an indefinite term. In my judgment that statement or representation is not devoid of relevant qualification. The statement begins with a qualification: “If they successfully completed...” “Their appointment would be for an indefinite term” also appears to be ambiguous.

[18] The affidavit evidence of Samuel Fletcher is that:

“Before we were detailed we were told by the then Commissioner of Police...that we would be working in the first instance for six (6) months as

⁶ [1990] 1 WLR 1545 at 1569

a probationary period and thereafter we would be employed as permanent workers.”

When one considers the representation contained therein it is apparent that it suffers from the vice of unclearness and ambiguity. What permanent workers would they be employed as? The rival contentions of the parties with respect to permanence/permanent workers which I referred to earlier, also serves to highlight the difficulty. The representation could not be said to be clear, unambiguous and devoid of relevant qualification.

[19] In conclusion, the appellants have failed on the first ground of appeal and this ground is accordingly dismissed. Although they have succeeded on the second ground, it has no effect on their status in the Police Force. They remain as special constables.

[20] Both counsels are to address the question of costs in submissions to be filed and served within 14 days from the delivery of the judgment if there is no agreement as to costs.

Davidson Kelvin Baptiste
Justice of Appeal [Ag.]

I concur.

Ola Mae Edwards
Justice of Appeal

I concur.

Michael Gordon, QC
Justice of Appeal [Ag.]