

ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

HCVAP 2009/011

BETWEEN:

THE POLICE SERVICE COMMISSION

Appellant

and

GARY NELSON

Respondent

Before:

The Hon. Mr. Michael Gordon, QC

Justice of Appeal [Ag.]

Appearances:

Watt and Associates for Appellant

Dane Hamilton and Associates for Respondent

2009: July 31.

JUDGMENT

- [1] **GORDON, J.A. [AG.]:** This is a procedural appeal which is being considered on paper by a single judge pursuant to Part 62.10(3) of the **Civil Procedure Rules 2000**.
- [2] The respondent assumed the duties of Commissioner of Police of Antigua and Barbuda on 1st March 2008. He was dismissed from office on 28th August 2008. He applied for judicial review of the decision to dismiss him.
- [3] The procedural history of this application for judicial review will readily put this appeal in context. The respondent by application dated 24th September 2008, applied for leave to apply for judicial review. Leave was granted by order of the High Court on 23rd October 2008. In addition to granting leave, the order required

that a fixed date claim be filed within 14 days of the date of the order and that the application (giving rise to the order) and the affidavit in support be served on the two respondents named in the application, the second of which is the appellant herein. Further, the October 2008 order stated “The Respondents have liberty to apply.”

[4] The respondent to this appeal filed a Fixed Date Claim Form on 31st October 2008. On 15th January 2009 the appellant filed a Notice of Application seeking that “[t]he Claimant’s statement of case be struck out”. The grounds of the application to strike out were, *inter alia*:

- (1) The Constitution of Antigua and Barbuda sets up a Public Service Board of Appeal and mandates that a police officer aggrieved at a decision to ‘remove him or her from office’shall appeal the decision to the Public Service Board of Appeal;
- (2) the claimant (respondent in this appeal) had failed to pursue this mandatory remedy;
- (3) the contents of the application for leave without notice disclosed that the respondent’s claim was for breach of contract;
- (4) on the face of the documents filed that the respondent had not exhausted all legal remedies at his disposal before resorting to an application for judicial review.

[5] In a written judgment handed down on 22nd April 2009, the learned trial judge refused to strike out the claim of the respondent to this appeal. In my view, the fundamental point made by the learned trial judge appears at paragraph 53 of her judgment which I reproduce:

“It is clear that the effect of the Commission’s application, in part, is to challenge the leave that the Court granted to Mr. Nelson to institute the claim. I agree that if the Commission was of the view that that Court had improperly exercised its discretion in granting Mr. Nelson leave to institute the proceedings, it ought to have utilised the correct procedure to

challenge the order of that Court. It is not open to the Commission, to indirectly challenge the leave that was granted by that Court by seeking to have Mr. Nelson's claim struck out. This is not the correct procedure for the Court to embark on an examination as to whether the leave was properly granted. In any event, I do not share the view that leave was improperly granted."

[6] To put it shortly, an unsuccessful litigant is provided, within the rules, a procedure for appealing any decision with which the litigant disagrees. In this case there were two approaches that the appellant might have availed himself of. Firstly, as the order granting leave invited, he might have challenged the grant of leave by an application for an *inter partes* hearing. Secondly, he might have appealed the order granting leave. Having chosen to use neither method, the appellant cannot now mount a collateral attack on the original grant of leave. In effect, by the strike out application the appellant is asking the High Court to sit in appeal on itself. This cannot be done. I would dismiss this appeal.

[7] There is no counter-notice by the respondent so I will follow the learned trial judge and make no order as to costs.

Michael Gordon, QC
Justice of Appeal [Ag.]