

ST. CHRISTOPHER AND NEVIS

IN THE COURT OF APPEAL

CIVIL APPEAL NO.14 OF 2004

BETWEEN:

[1] ATTORNEY GENERAL OF ST. KITTS AND NEVIS
[2] PUBLIC SERVICE COMMISSION OF ST. KITTS AND NEVIS

Appellants

and

MARVIN PHILLIPS

Respondent

Before:

The Hon. Mr. Denys Barrow, SC

Justice of Appeal [Ag.]

On Written Submissions

Ms. Joan Mattis for the Appellants

Ms. Gail Edwards for the Respondent

2005: May 23.

JUDGMENT

[1] **BARROW, J.A. [AG.]:** Over three years after the Public Service Commission of St. Kitts and Nevis placed Mr. Phillips, a public officer, on compulsory retirement, allegedly without giving him an opportunity to be heard, Mr. Phillips filed constitutional proceedings against the Attorney General and the Commission (the Appellants/Defendants). He alleged breaches of his human rights to protection from deprivation of property without compensation¹ and to a fair hearing². He sought twelve declarations, compensation for loss of earnings and exemplary damages.

¹ Section 8 of the Constitution.

² Section 10(8) of the Constitution.

[2] The Appellants/Defendants applied to strike out the proceedings as an abuse of process on the basis that alternative means of redress for the contravention alleged were available to Mr. Phillips as he had a right to appeal within 28 days to the Public Service Board of Appeal (the Board) which could have affirmed or set aside the decision or make any other decision which it deemed appropriate. The Appellants/Defendants contended that this right of appeal to the Board provided adequate means of redress.

[3] The Judge was not satisfied that adequate means of redress for the contravention alleged were available to Mr. Phillips. He held that the redress provided by way of appeal to the Board was limited in scope and far greater means were provided by section 18, the remedies provision in the human rights chapter, of the Constitution. The Judge therefore dismissed the application to strike out the constitutional proceedings. On this appeal the Appellants renew their argument that Mr. Phillips had an adequate alternative remedy available to him and they argue, as well, that Mr. Phillips had been guilty of inordinate delay.

[4] Section 18 of the Constitution states:

(1) If any person alleges that any of the provisions of sections 3 to 17 (inclusive) has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter that is lawfully available, that person (or that other person) may apply to the High Court for redress.

(2) The High Court shall have original jurisdiction –

(a) to hear and determine any application made by any person in pursuance of subsection (1); and

(b) to determine any question arising in the case of any person that is referred to it in pursuance of subsection (3)

and may make such declarations and orders, issue such writs and give such declarations as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 3 to 17 (inclusive):

Provided that the High Court may decline to exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law.”

[5] In **Harrikissoon v A-G**³ it was stated that:

“The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter I of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under section 6(1), the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.”

[6] More recently, in **Forbes v Attorney-General of Trinidad and Tobago**⁴ the Privy Council reviewed a number of earlier decisions and restated that the ordinary Court process will usually be appropriate to deal with complaints of wrongful action by public authorities. The Board quoted the following statement by Lord Bingham of Cornhill in **Hinds v Attorney-General (No 2)** UKPC 56, 59 WIR 75:

‘It would be undesirable to stifle or inhibit the grant of constitutional relief in cases where a claim to such relief is established and such relief is unavailable or not readily available through the ordinary avenue of appeal. As it is a living, so the Constitution must be an effective, instrument. But Lord Diplock’s salutary warning remains pertinent: a claim for constitutional relief does not ordinarily offer an alternative means of challenging a conviction or a judicial decision ... The appellant’s complaint was one to be pursued by way of appeal against conviction, as it was ...’

³ (1979) 31 WIR 348 at page 349

⁴ (2002) 60 WIR 462.

[7] The Board thought it unnecessary to add their own observations to the passages quoted because

“[t]hey establish that it is only in rare cases where there has been a fundamental subversion of the rule of law that resort to constitutional redress is likely to be appropriate.”

[8] In the present case Mr. Phillips argued that the redress that he seeks - the many declarations and exemplary damages - could not have been granted by the Board under its powers to affirm or set aside the decision. This argument found favour with the Judge. The argument overlooks the fact that had Mr. Phillips appealed to the Board, for which the Constitution itself provided⁵, it would have been a simple matter for the Board to have reversed the decision of the Commission as having been made in breach of the Commission's own natural justice regulations, assuming the allegation is true. There would then have been no need for any of the declarations or other remedies that Mr. Phillips claimed. The reversal by the Board of the Commission's decision would have provided an adequate and appropriate means of redress. Had Mr. Phillips succeeded on appeal he would not have needed any declaration because he would have been restored to his employment. He would have suffered no loss of pension and other property rights and would have needed no compensation by way of damages.

[9] The other limb of Mr. Phillips' argument was that an application to the High Court alleging the contravention of a fundamental right is without prejudice to any other action with respect to the same matter that is lawfully available, according to section 18(1) of the Constitution. He relied on the case of **Attorney General of Antigua and Barbuda and others v Lake (Cuthwin)**.⁶

[10] In that case the claim alleged breach of provisions in Chapter VII of the Constitution, relating to the exercise of the powers of the Public Service Commission. The allegations were that a public officer had been removed from office not by the Commission but by the Prime Minister and that the Commission had wrongfully permitted itself to be subject to the

⁵ Section 87.

⁶ (1998) 53 WIR 148.

direction of the Prime Minister. The claimant also alleged that he had been subject to discrimination because of his political opinions, contrary to the relevant provision in Chapter II, the human rights chapter.

- [11] It is important to observe that the claimant sought relief in respect of a contravention of a provision of the Constitution other than a provision of Chapter II (the human rights chapter) as well as relief in respect of a contravention of a provision of Chapter II.⁷ The Respondent challenged both claims for relief. The Privy Council held that in refusing to strike out the constitutional proceedings the High Court had properly applied the law, set out in Chapter VII of the Constitution, that the right to apply for relief in respect of a contravention of a provision of that chapter “shall be in addition to any other action in respect of the same matter that may be available to that person under any other law or rule of law.”⁸ The Privy Council further held that the High Court Judge, in refusing to decline to grant relief because an alternative remedy was available, had properly exercised the discretion given to the Court by the proviso to section 18(2) of the Antigua and Barbuda Constitution, the alternative remedy provision.⁹
- [12] The **Harrikissoon** case was distinguished on the basis that in that case it was manifest that the alleged violation, the transfer of a teacher from one school to another, was not of a right that was included among the human rights and fundamental freedoms specified in the human rights chapter of the Constitution. In contrast, in the **Lake** case the claimant alleged a breach of a specific provision of Chapter VII of the Constitution. On the facts alleged by the claimant to ground a claim for such a breach the Board held there could be no substance in an argument that the claim for constitutional relief was frivolous or vexatious or an abuse of the process of the Court.
- [13] Mr. Phillips seeks to bring himself within the ambit of the decision in the **Lake** case by arguing that his case is an allegation of the contravention of a fundamental right and

⁷ See page 159 c to d and page 160 b.

⁸ Section 119(6).

⁹ This section is in exactly the same terms as the proviso to section 18(2) of the St. Kitts and Nevis Constitution.

freedom and his claim is neither frivolous nor vexatious. Therefore, he argued, he should also benefit from the exercise of discretion that his claim should not be declined because of the availability of other remedies. With respect, this argument misses the point of the **Lake** decision, namely, that it was because of the existence of the Chapter VII claim that the human rights claim was allowed, as a matter of discretion in the circumstances, to proceed. In contrast, Mr. Phillips has no other claim but the human rights claim which, I have found, he need not have brought had he appealed to the Public Service Board of Appeal.

[14] The constitutional proceedings brought by Mr. Phillips cannot escape the force of Lord Diplock's pronouncement in **Harrikissoon**.¹⁰ It is not every wrongful action by a public authority that justifies an application for constitutional redress. That view was recently repeated and expanded, in the context of an allegation of inordinate delay, in **Durity v A-G of Trinidad & Tobago**.¹¹ In that case a magistrate had been suspended pending a disciplinary inquiry. Eight years later he started constitutional proceedings claiming declarations of breach of a number of human rights provisions, including the right to the enjoyment of property, the right to the protection of the law, the right to a fair hearing and the right to procedural safeguards. The Attorney General filed a cross-motion raising four preliminary objections: res judicata, abuse of the process of the Court, the Statute of Limitations, and inordinate delay.

[15] The High Court dismissed the constitutional motion, ruling in favour of the magistrate that the matters were not res judicata or an abuse of process, but against him that the limitation period applied and that inordinate and unexplained delay disentitled Mr. Durity to constitutional relief. The Court of Appeal dismissed the magistrate's appeal on the basis that the claim was statute barred. The Privy Council reversed that decision and held that the limitation period did not apply to constitutional proceedings.

[16] The Board made extensive general observations on the matter of delay. It stated:

¹⁰ See paragraph [5] above.

¹¹ (2002) 60 WIR 448.

“When a court is exercising its jurisdiction under s 14¹² of the Constitution and has to consider whether there has been delay such as would render the proceedings an abuse or would disentitle the claimant to relief, it will usually be important to consider whether the impugned decision or conduct was susceptible of adequate redress by a timely application to the court under its ordinary, non-constitutional jurisdiction. If it was, and if such an application was not made and would now be out of time, then, failing a cogent explanation the court may readily conclude that the claimant’s constitutional motion is a misuse of the court’s constitutional jurisdiction. This principle is well established. On this it is sufficient to refer to the much repeated cautionary words of Lord Diplock in **Kemraj Harrikissoon v Attorney-General** (1979) 31 WIR 348 at 349. An application made under s 14 solely for the purpose of avoiding the need to apply in the normal way for the appropriate judicial remedy for unlawful administrative action is an abuse of process.”

- [17] The Board approved the High Court decision that this was the position regarding Mr. Durity’s application for constitutional relief in respect of the decision to suspend him from office. Also, the Board stated that the Court of Appeal ‘was plainly correct’ to refuse an application by Mr. Durity to amend his judicial review proceedings to introduce such a challenge, given the lapse of time and the absence of explanation.
- [18] In the instant case Mr. Phillips argued that there had been no inordinate or unreasonable delay because it was as a result of difficulties with legal representation that he had not brought proceedings before. In his skeleton argument Mr. Phillips is quoted as having deposed that he was informed of the Public Service Commission’s decision to place him on compulsory retirement effective 6th November 2000, in or about October 2000. He said he then instructed a firm of solicitors to commence proceedings on his behalf but despite his repeated requests the said firm failed to do so for over 2 years. He said he then sought to instruct another firm of solicitors, who also failed to institute proceedings. After going to about 2 other lawyers, who also failed to act, Mr. Phillips said, he sought Counsel from outside the Federation. It was thereafter that he obtained the services of his present solicitors. As a result of the above, the Respondent argued, there were no delays on his part because he did not sit idle while time eroded his rights. Further, the Respondent submitted, the delay caused no prejudice to the Appellants.

¹² This is the redress provision in the human rights chapter of the Trinidad and Tobago Constitution.

- [19] The Judge did not indicate what view he took of Mr. Phillips' explanation. It may have struck him that more information was needed from Mr. Phillips to give it cogency. When did he first instruct lawyers? Who were they? This last would have enabled the Defendants to test the truth of Mr. Phillips' explanation. A number of other basic concerns about the explanation arise which could be relevant to the issue of abuse of process. However, the explanation is not a matter that needs to engage consideration.
- [20] Even if the integrity of the explanation is assumed, what it amounts to is that others were to blame for causing the delay in commencing proceedings, not Mr. Phillips. That gives Mr. Phillips a cause of action against the lawyers who he said were negligent. It does not enable a court to relieve him of the consequence of that negligence. Delay in excess of three years in commencing proceedings is no less inordinate because a party's lawyers were to blame for causing the delay.
- [21] It seems plain that such delay was inordinate, given the absence of cogent explanation. The extent of the delay may be seen by reference to the expiration of the period for appealing to the Board. There is no period fixed for commencing constitutional proceedings, in contrast with lodging an appeal, for which a period of 28 days is fixed. But that fixed period is relevant because, to paraphrase the quote from Durity's case, if a non-constitutional proceeding that had been available to a litigant was not brought and would now be out of time, then, failing a cogent explanation the court may readily conclude that the claimant's constitutional motion is a misuse of the court's constitutional jurisdiction. As I understand it, a litigant who allows a time limit for appealing to expire, for no cogent reason, may readily be regarded as abusing the court's process by now bringing constitutional proceedings because he is time barred from pursuing the alternative and appropriate remedy.
- [22] Mr. Phillips stated that he deliberately chose not to proceed by way of an appeal to the Public Service Board of Appeal because (i) the form of redress provided by the Public Service Commission Regulations presumes the validity of the decision taken; (ii) the said decision which is being challenged was made in breach of the regulations and is therefore

invalid and outside the scope of Regulation 21(4); and (iii) the adoption of such a course of action would be tantamount to an admission that the said decision was validly made.

[23] I agree with the submission of the Appellants that the reasons given by the Respondent are “unreasonable, unsatisfactory and without merit.” As the Appellants submitted, the filing of an appeal to the Board questions the validity of the decision that is appealed; it does not presume its validity. It is the absence of an appeal against a decision that would presume its validity.

[24] By deliberately choosing not to appeal (assuming this to be true) Mr. Phillips is in the same position as the litigant who brings constitutional proceedings solely for the purpose of avoiding making an application to the court in the normal way. For this reason, and for the other reasons stated above, his constitutional claim amounts to an abuse of the process of the court.

[25] I would allow the appeal and order that the claim be struck out as an abuse of the process of the court. In accordance with the CPR 56. 13(6), which provides that the general rule is that no order for costs may be made against an applicant for an administrative order unless the court considers that the applicant has acted unreasonably, I make no order for costs.

Denys Barrow, SC
Justice of Appeal [Ag.]