

EASTERN CARIBBEAN SUPREME COURT
ANGUILLA

IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO: AXAHCV2024/0085

BETWEEN:

ALLIN DURAND

Claimant

and

[1] THE CHAIRPERSON, ANGUILLA PUBLIC SERVICE COMMISSION

[2] LARRY FRANKLYN, PERMANENT SECRETARY, DEPARTMENT OF PUBLIC
ADMINISTRATION

[3] MARIA HUGHES, ACTING DEPUTY DIRECTOR, HUMAN RESOURCE MANAGEMENT,
DEPARTMENT OF PUBLIC ADMINISTRATION

Defendants

Before: His Lordship The Honourable Justice Ermin Moise

Appearances:

Mr. Theon Tross for the defendants.

The claimant in person.

2025: May 29;
December 11.

JUDGMENT

[1] **MOISE, J.:** This is a claim for judicial review. The claimant asserts that the Public Service Commission (the PSC) recommended to the Deputy Governor of Anguilla that his employment as Prison Officer at His Majesty's Prison, Anguilla be terminated effective 1st December 2024. The claimant asserts that this recommendation was in breach of section 26 of the **Public Service Commission Regulations**¹. In fact, the recommendation of the Public Service Commission was that the claimant had abandoned his post in accordance with section 25 of the Regulations. The claimant

¹ R.R.A. P165-1

had not been performing his duties for in excess of 4 years at the time of the PSC's recommendations. During this time, he continued to draw a salary from the treasury.

- [2] Having examined the facts and submissions presented in this case, I have determined that the decision of the PSC should be quashed on the sole ground of procedural irregularity. However, I have also determined that the claimant's rationale for remaining out of work for such an extended period of time is not justified and the current state of affairs is not in the public interest. Therefore, the matter is remitted back to the Public Service Commission for further consideration within the full plenitude of its powers and the regulations which govern Mr. Durand's employment, in keeping with the proper procedure and the basic rules of natural justice.

The Facts

- [3] This court notes, without reservation, that the background facts leading up to the dispute in this case reveal a rather unnecessary approach to conflict resolution and the engagement of the court process. It must be said that the use of judicial time in resolving conflict can have a direct impact on access to justice in general. Every minute of the court's time utilized to resolve one conflict takes us away from addressing the cases of other people in need of finality and resolution to their own disputes. In light of this, it is essential that the court's processes are not abused and that litigants, including litigants in person, are not encouraged to view access to justice as a licence to unnecessarily prolong conflict, the substance of which has already been determined by the court.
- [4] It is my considered view that on 9th October 2020 the main substance of the dispute between the claimant and the Public Service Commission in Anguilla ought properly to have been brought to an end. By way of an order of Ventose J (as he then was), the claimant (Mr. Durand), who was previously suspended from his employment with pay, pending a disciplinary hearing, had this suspension set aside. The authorities in the Anguilla Public Service, as well as His Majesty's Prison, accepted the decision of the court and have, since then, made numerous attempts to have Mr. Durand return to work. He has simply refused to do so and continued to collect a salary up until October 2024 without performing any work.

- [5] It is apparent from the submissions presented in this court that Mr. Durand's rationale for not returning to work is that he has appealed the decision of the high court dated 1st July 2022 on the question of damages. In that judgment Henry J (as she then was) determined that Mr. Durand should be awarded damages in the sum of EC\$5,250.00 and costs in the sum of EC\$8,000.00. There has been no stay of that decision pending appeal. However, it is apparently Mr. Durand's view that he has a right to be paid for work he does not perform until such time as the Court of Appeal determines whether the amount of damages he was awarded for his suspension was sufficient. It is worth noting that at the point of his suspension in 2019, Mr. Durand's salary was not suspended.
- [6] It is important for the court to address, in more detail, the procedural history of this dispute as it is also important for the court to call upon the relevant authorities to ensure that proper procedure is followed in dealing with such conflict, which may arise within the public service. The Public Service Commission and heads of department have a public duty to perform and I am satisfied that what has been allowed to transpire over the 4 year period between October 2020 and October 2024 is simply unacceptable and the court does not condone this state of affairs.
- [7] The court takes judicial notice of the history of case number AXAHCV2019/0047 and its relevance to the current dispute. As noted earlier, Mr. Durand challenged the decision to suspend him with pay pending an investigation by the Governor. Although he was initially denied leave to proceed by way of judicial review, the Court of Appeal granted leave. The matter then came to trial on 9th October 2020. During that hearing, the court observed that the defendants had conceded that there were procedural defects in the manner in which Mr. Durand was suspended pending disciplinary proceedings. The court therefore granted him the remedies which he sought and quashed his suspension. The court also awarded damages and costs to be assessed if not agreed.
- [8] There is no dispute that on 2nd December 2020, the Attorney General's Office wrote to Mr. Durand and asked him to report for duty. Mr. Durand did not report to work. Over 7 months later, on 20th July 2021, the then Superintendent of Prisons wrote to Mr. Durand requesting that he reports to work. He did not do so. Almost 3 years later, on 26 April 2024, the acting Superintendent of Prisons again wrote to Mr. Durand requesting that he comes into the office to speak with him about returning to work. Mr. Durand refused.

[9] In light of this, in October 2024, payment of Mr. Durand's salary was suspended pending his compliance with the requests of the Superintendent of Prisons to at least come into the office to discuss his employment. Rather than engaging in dialogue with the prison authorities, Mr. Durand filed yet another judicial review claim seeking an order setting aside the suspension of his salary. It would be apparent from the substance of that judicial review claim that Mr. Durand had no intention of returning to work until the Court of Appeal had considered his appeal on the issue of damages. When the matter came up for hearing, this Court expressed the view that it was not proper for Mr. Durand to continue to be paid without providing any service to the Government and people of Anguilla. The court denied the remedies which Mr. Durand was seeking but instead ordered that he reports to the prison authorities to discuss his employment. The court was also of the view that its time and resources were not best spent on this second claim whilst there was no justifiable basis for Mr. Durand to remain absent from duty. Mr. Durand has not complied with the court's order but rather lodged another appeal. There has not been a stay of the order of the court.

[10] It is against this background that the then acting Superintendent of Prisons wrote a letter to the Permanent Secretary in the Department of Public Administration stating the following:

"Dear Permanent Secretary

I write to you in relation to Officer Allin Durand who is in breach of PSC regulations section 25, by abandoning his post on the 31st October 2024.

On the 29 October 2024 I was summoned to court in relation to Officer Allin Durand as I had suspended Officer Durand's pay as he has failed to report for duty for 4 years and I submit the following as evidence.

On 2 December 2020 Officer Allin Durand was instructed to report for duty by the Ag's office.

On 20 July 2021 Superintendent Sasso again wrote to Officer Durand and instructed him to report for duty.

On 26 April 2024, I invited Officer Durand to meet with me to allow me to understand why he is not reporting for duty and still being paid.

On 29 October 2024 Honourable Justice Ermin Moise stated that Officer Durand's appeal had no restriction on him returning to work and gave Officer Durand an instruction to report for duty within 48 hours (31 October 2024).

Officer Durand has not reported for duty and I consider that he is in breach of PSC regulations section 25, as he has been absent from duty without leave for a continuous period of 1 month from Honourable Justice Moise instruction and I recommend to the Public Service Commission that Officer Durand has abandoned his post on the 31 October.”

[11] I make just two points insofar as it relates to this letter. The first is that the substance of this letter, where it refers to the various attempts to encourage Mr. Durand to report to work, is generally not in dispute. However, secondly, the court's order of 29th October 2024 did not instruct Mr. Durand to report for duty. The status of the dispute at that point was that Mr. Durand's salary was suspended and he was asked to go in to have a conversation with the then acting superintendent so that he could understand the basis upon which Mr. Durand had continued to absent himself from work. The court's order was that Mr. Durand should report to the prison within 48 hours to discuss the status of his employment. Mr. Durand simply ignored the order of the court and filed an appeal without obtaining a stay of the order.

[12] In any event, it would also be observed that the basis of the recommendations made by the acting superintendent in his letter was that Mr. Durand had abandoned his post. Mr. Durand has, however, brought this claim on the basis of a breach of section 26 of the **Public Service Regulations**. In particular, Mr. Durand states the following in paragraphs 3 and 4 of his affidavit in support of his claim:

(3) I have been continuously employed as a duly established Prison Officer in the Prison Service of Anguilla since being first appointed on 21st October 2013. On 27th December 2024, I received a letter by email from. Mrs. Maria Hughes, the Acting Deputy Director of Human Resource Management in the Department of Public Administration of the

Government of Anguilla. The letter indicated in no uncertain terms that my appointment as a prison officer at His Majesty's Prison was terminated effective 1st December 2024. The letter noted in particular that the termination of my services as prison officer had been recommended by the Public Service Commission to the Deputy Governor who had approved said recommendation...

(4) I was surely taken aback by the decision of the PSC to recommend my dismissal from the public service. While I did have and continue to have certain ongoing legal disputes with the prison authorities, I am not aware of any formal disciplinary proceedings having been launched which I was subject to, nor was there any indication of any other action commenced against me that would have or could have the draconian effect or the possible ultimate consequence of the termination of my appointment as a Prison Officer in the service of His Majesty's Prison.

[13] Mr. Durand goes on to state that he was perplexed about the content of Mrs. Hughes' letter, given that on 20th December 2024, he received a letter from the said Mrs. Hughes confirming that his salary had been "placed on hold" for the month of December 2024. Mr. Durand took that to mean his salary had not been discontinued.

[14] In response to this claim, the defendant filed an affidavit of Mr. Larry Franklin who was, at the time, the Permanent Secretary in the Department of Public Administration. Mr. Franklin states that he was aware that effective 1st December 2024 Mr. Allin Durand was deemed to have resigned his office as Prison Officer within the Anguilla Public Service, in accordance with section 25 of the **Public Service Commission Regulations** having absented himself from duty for in excess of four (4) years. Mr. Franklin referenced the content of Mr. Wilcox's letter of 9th December 2024 and stated that he had no objections to it and therefore forwarded the information to the Public Service Commission for its consideration. The PSC agreed that Mr. Durand had abandoned his post and Mr. Franklin sent a letter to the Deputy Governor on 18th December 2024 for his approval. The Deputy Governor approved the termination of Mr. Durand's appointment on the grounds of abandonment of office. In light of this, Mrs. Maria Hughes communicated the decision of the Deputy Governor to Mr. Durand on 27th December 2024.

- [15] It is important to draw some measure of distinction between the content of the correspondence of Mr. Wilcox and Mr. Franklin on the one hand and that of the letter written to Mr. Durand by Mrs. Hughes on the other. Neither Mr. Wilcox nor Mr. Franklin made a recommendation that Mr. Durand's employment be terminated. The word "terminated" was never used. Up until Mrs. Hughe's letter the issue being considered was Mr. Durand's absence from work and whether he had abandoned his post.
- [16] Prior to the hearing in these proceedings the parties requested that they be allowed to cross-examine on the affidavits filed; bearing in mind that this is a claim for judicial review. However, during the course of the hearing it became apparent that there is no dispute regarding the relevant facts of this case and that the court's time was not best spent on unnecessary and lengthy cross examination. There is no dispute regarding the fact that Mr. Durand has not returned to work. There is also no dispute regarding the content of Mr. Franklin's affidavit as it relates to the steps taken to have Mr. Durand return to work. Mr. Durand did not file any affidavit in response disputing these facts. The narrow issue for consideration is whether the process adopted in "terminating" Mr. Durand's appointment was lawful, reasonable and procedurally proper. However, the court also considers that the state of affairs over the 4 year period raises issues of public policy and the public interest. This series of judicial review proceedings commenced in 2019 and the outcome in October 2020 was not a licence for monies to be drawn out of the country's treasury without Mr. Durand's fulfillment of his duties. The parties were therefore invited to file further submissions on the matter as the court was not prepared to entertain any further cross-examination which was unnecessary in assisting in bringing resolution to this issue.

Submissions

- [17] Mr. Durand has hinged his case on section 26 of the **Public Service Commission Regulations** which states follows:

"Reasons for termination of appointment

26. The services of an officer may be terminated only for the reasons stated hereafter:-

(a) Where the officer holds a permanent appointment:

(i) on dismissal or removal in consequence of disciplinary proceedings,

- (ii) on normal retirement,
- (iii) on retirement for medical reasons,
- (iv) on compulsory retirement in the public interest, or to facilitate improvements in the organisation of a Department, or on the grounds of financial stringency, or
- (v) on abolition of office.”

[18] It is Mr. Durand’s submission that none of the provisions of this section applies to his case. He states that there was no disciplinary proceeding held against him prior to his dismissal. Mr. Durand has not retired, whether normally, on medical grounds or in the public interest. His office has also not been abolished. As such, he argues that his termination was illegal and in breach of the proper procedure. He also argues that there has been a breach of the rules of natural justice in relation to his case.

[19] It must be observed, however, that although the correspondence refers to a termination of Mr. Durand’s employment, it was made clear that the PSC was relying on the provisions of section 25 of the **Public Service Commission Regulations**. This section relates to abandonment of one’s employment as a result of the non-user of the office. The section states that **“an officer who is absent from duty without leave for a continuous period of 5 working days, unless declared otherwise by the Governor, shall be deemed to have resigned his office and thereupon the office becomes vacant and the officer ceases to be an officer.”**

[20] The defendants have referred to the case of **Milton Pringle v The Hon. Molwyn Joseph & Ors**², where the Court of Appeal noted the following definition of abandonment of office as stated in **Blacks Law Dictionary**:

“...abandonment of a public office is a species of resignation, but differs from resignation in that resignation is a formal relinquishment, through non-use. It is not wholly a matter of intention, but may result from complete abandonment of duties of such continuance that the law will infer a relinquishment. It must be total, and under such circumstances as clearly to indicate an absolute relinquishment and whether an officer has abandoned an office depends on his overt acts rather than declared

² ANUHCVP2015/0008

intention. It implies non-user, but non-user do not itself constitute abandonment. The failure to perform the duties pertaining to the office must be with actual or imputed intention on the part of the officer to abandon and relinquish the office.”

[21] In response to that submission, Mr. Durand states firstly that:

“... the Claimant has consistently argued in response to suggestions of abandonment emanating from the Attorney General's Chambers, the Superintendent of Prisons and the Public Admin officials that he genuinely believes that though the quashing of his suspension by the court entitles him to return to work, given the lack of final resolution of the legal dispute between the Claimant and the Superintendent of Prisons, it is not legally prudent for him to report for duty without more, meaning full resolution or settlement of the legal dispute or some form of indemnification regarding the outstanding matters. Meanwhile it has always been open to the Defendants to seek closure of the legal dispute by way of an application to strike out the appeal proceedings brought by the Claimants in the Court of Appeal. For whatever reasons the Defendants have eschewed this clearly viable option.

Moreover, the Claimant cites and has repeatedly brought to the attention of the Government authorities, the letter of admonition issued by the Superintendent of Prisons dated 8th April 2019 at the time of his suspension which exhorts him in strongly worded terms to refrain from setting foot on the Prison compound until final resolution of the matter. The letter states in extenso as follows;

"Dear Mr. Durand,

As you are aware of disciplinary charges laid against you that have been referred to the Governor, His Excellency Mr. Tim Foy, I wish to inform you that with immediate effect you are suspended from your duties. Under section 14 (1) and (2) of the Revised Prison Regulations of Anguilla under Prison Act R.S.A. c. P20, the Superintendent is given such authority to make this decision.

Please he advised that you will not be allowed entry to the prison Compound

and should not report for duties until this matter is resolved.

Yours sincerely,

Kerrice Saunders Lake-Banks

Superintendent of Prisons (Ag)”

- [22] For my part, I must state that there are a number of observations to be made regarding those specific submissions. The first is that Mr. Durand did not place any of this in his initial pleadings before the court. He also did not file an affidavit in response to those filed in defence of the claim. Be that as it may, the second observation to be made is that the content of the letter of 8th April 2019 was precisely the basis of Mr. Durand’s initial claim for judicial review. It was this very suspension, and all associated with it, which was set aside on 9th October 2020. In light of this, and without prejudice to the observations I make later on regarding the procedure to be adopted by the PSC and the relevant authorities in dealing with such issues, I refer to paragraphs 12 and 13 in the case of **Huggins Neal Nicholas v Attorney General et al**³:

“Abandonment connotes a voluntary relinquishment of the performance of the duties of an office with the actual or imputed intention on the part of the office holder to abandon and relinquish that office. When one considers the pertinent facts it is clear that the road to abandonment is littered with insurmountable hurdles. A fact of great significance is that the appellant never voluntarily relinquished the performance of the duties of his office. He was unable to execute the functions of his office because of the failure to reinstate him to his job after the criminal charges against him were dismissed.

The fact that the appellant proceeded to the United Kingdom and pursued a course of study in law for 3 years, without receiving a response to his request for study leave, does not in itself indicate that he had abandoned his job. The matter has to be looked at in context. He remained suspended from his job even after the dismissal of the criminal charges against him. He ought to have been reinstated. During his period of study in the United Kingdom there is no evidence that he was ever called upon to

³ SLUHC VAP2008/018

resume his duties and refused. In fact the appellant attended a meeting in Saint Lucia in January 2000 convened by the Ministry of Education, during his period of study in the United Kingdom. This is not a case where the appellant was called back to work to resume his functions and refused to return or failed to return. As long as the suspension of the appellant continued, it was effectively out with his ability to perform his duties as a teacher.”

[23] I have referenced these 2 paragraphs of the decision of Baptiste JA in order to draw a distinction between the manner in which the claimant in that case was treated as opposed to Mr. Durand. In that case, the claimant was suspended from employment pending criminal proceedings against him. In Mr. Durand's case, he was suspended with pay pending disciplinary proceedings. In the case of Mr. Neal Huggins Nicholas, the criminal charges against him were dismissed. In Mr. Durand's case, it was conceded at trial that the procedure adopted in suspending him and commencing disciplinary proceedings was not proper and the court therefore set the suspension aside. As noted by Baptiste JA, Mr. Nicholas was **“unable to execute the functions of his office because of the failure to reinstate him to his job after the criminal charges against him were dismissed.”** The Court of Appeal went on to note that **“...[t]his is not a case where the appellant was called back to work to resume his functions and refused to return or failed to return. As long as the suspension of the appellant continued, it was effectively outwith his ability to perform his duties as a teacher.”** This is not the same in Mr. Durand's case.

[24] It seems rather clear to me that, if one is to take Mr. Durand's own submissions into account, as well as the undisputed facts of this case, it cannot be said that he was unable to execute the functions of his office from 9th October 2020. Not only did the court set aside his suspension but he was written to by the Attorney General's office and, expressly, asked to report for duty. The Superintendent of Prisons on more than one occasion requested that he report for duty. Even the court, in a bid to bring this conflict to an end, ordered Mr. Durand to have a conversation with the Superintendent of Prisons in order to address the status of his employment. He has simply refused to return to work.

[25] What makes this case somewhat troubling to the court is that Mr. Durand in his own submissions states that he believes that though the quashing of his suspension by the court entitles him to return to work he is somehow equally entitled to not return to work until the Court of Appeal determines

whether the decision on damages is to be upheld or not. He states that he has informed the authorities that it is not legally prudent for him to do so. I find this to be a completely unacceptable basis upon which Mr. Durand was allowed to draw a salary from the government treasury for 4 years without performing his duties.

[26] A fundamental principle in the court's powers of judicial review is that of fairness and proportionality. These principles must be weighed on both sides. In this case where the government conceded that procedural missteps were made in Mr. Durand's initial suspension, Mr. Durand never lost any income as a result, and he was asked to return to work soon after the court's order of 9th October 2020. I can see no justifiable basis in law, equity or even a basic sense of fairness and morality for Mr. Durand to have remained away from work for such a long time. This simply is not right. The issue of the assessment of damages, which is currently before the Court of Appeal, provides no legal or practical basis upon which Mr. Durand can be entitled to draw resources from the treasury as a salary whilst not performing his duties. This is not a proportionate response to whatever legal disputes Mr. Durand continues to have with the prison authorities.

[27] In his submissions Mr. Durand states the following in response to submissions which have been made by counsel for the defendants:

"Bearing in mind, among other things, the huge disparity in stature and resources as between the Defendants and the Claimant as pro-se litigant, this stunningly unprofessional use of invective by the Defendants is uncalled for and has no place in the realm of legal dispute; and in this particular instance the practice provides a clue as to the question of whether this matter has become far too deeply personal for the Defendants. It also gives substance to the creeping realisation of the existence of a personal crusade to punish the Claimant for his resort to the courts in challenge of the actions of the authorities such that no reasonable attempts at mediation of matters in issue would be ever be possible, and also explains why all reasonable efforts at settlement of this and other related matters have constantly faced rejection.

Yet the court is concerned not with the emotions of Counsel for the Defendants, but solely with the application of the law in this matter within the context of the overriding objective of the Rules of Court in achieving justice as between the parties.

In response, it requires to be said that consistent with his constitutional right to protection of the law, the Claimant is entitled to access to the court to have his grievances addressed according to law. And it is monumentally improper for Counsel for the Defendants to make egregious accusations of a criminal nature against the Claimant in response.”

[28] In light of these submissions, the court makes a few observations. Firstly, the constitutional right of access to justice is not one which is to be taken for granted. That right does not make it justifiable for one to abuse the process of the court and/or that of public administration. The people of Anguilla, as members of the public, have an interest in ensuring that the principles of good administration are observed and this is undermined by resources being put into salaries for public officers who, for no good and justifiable reason, are not performing their duties. There is therefore a public interest element in the circumstances currently presented to this court. The proper and reasonable use of national resources are factors to be considered. Mr. Durand is also a Prison Officer and, similar to police, and fire officers, the performance of his duty, or lack thereof, can have an impact on national security and that of Anguilla's only prison.

[29] Secondly, the fact that Mr. Durand is a litigant in person does not place him in any special category which allows him to get away with potential abuse of the system in general. Litigants in person should not take it for granted that their actions or approach to the use of the administrative or justice system will be met any differently if the approach is not justified. Equally so, in cases of judicial review, the fact that the claimant is a litigant in person does not mean that the authorities or the court should turn a blind eye if his or her own actions are disproportionate to the alleged breaches of the agents of the government. It is a matter of fairness and proportionality.

[30] Thirdly, and contrary to Mr. Durand's submission, I find no evidence here that what has transpired over the last 5 years amounts to a personal crusade against him. On the contrary, it seems to me that the approach of the authorities has been disproportionately weighed in Mr. Durand's favour, as opposed to the public interest. It is worth repeating that on 9th October 2020 the Attorney General's

office conceded the case and Mr. Durand's suspension was set aside. No attempt was made to re-engage any disciplinary proceedings against Mr. Durand. For 4 years he was simply asked to return to work with no punitive measures being taken against him, whilst his income remained in tact. It is he who has refused to do so.

[31] Fourthly, Mr. Durand submits that the actions of the authorities suggest that "*no reasonable attempts at mediation of matters in issue would ever be possible, and also explains why all reasonable efforts at settlement of this and other related matters have constantly faced rejection.*" I must note here that nowhere in the pleadings did Mr. Durand mention anything about attempts being made to mediate the outstanding issues between himself and the authorities. He makes no mention of any reasonable attempts made by him to settle the issues. In any event, the court must ask what are the outstanding issues and how do they practically affect Mr. Durand's obligations to put in a fair day's work for a fair day's pay?

[32] The only outstanding issue emanating from the court's order on 9th October 2020 is the issue of damages in circumstances where Mr. Durand was never denied his salary. There is no evidence to suggest that government officials involved in this matter have ever expressed any desire to not abide by whatever order for damages which is made by the court. In effect, therefore, Mr. Durand has had his day in court. His suspension was quashed. His damages and costs were already assessed by the court. It is he who was unsatisfied with the order of the judge and appealed the judgment on damages; which is his right. However, there is no obligation on the defendants to concede the issue of damages. Both parties are entitled to a full hearing before the Court of Appeal.

[33] What is to be noted, however, is that the appeal regarding damages provides no legal, practical or even moral impediment to Mr. Durand returning to work. Even he acknowledges in his submission that he has a right to return to work. What he seems to be claiming in his submissions, however, is a right to refuse to return to work until the government either concedes the issue of damages or the Court of Appeal determines the appeal. In my view, there is no legal basis for this posture, and it is certainly against the public interest for this state of affairs to have been allowed to continue for such an extensive period of time.

The Proper Procedure

[34] Notwithstanding this, it is important to give some consideration to the issue of abandonment of office and the proper procedure to be adopted here. I refer firstly to the case of **David Penn v. The Governor of the British Virgin Islands**⁴⁴ where the legislative provisions regarding abandonment of office states that “[u]nless declared otherwise by the Governor, an Officer who is absent from duty for a continuous period of ten working days without reasonable excuse, shall be deemed to have resigned from the relevant service and thereupon his or her office becomes vacant and the officer ceases to be an officer.” In determining the proper procedure to be adopted in such cases, Byer J noted that:

“[49] From this Section, it is clear that there are two operative parts. Firstly, the officer must have been absent without reasonable excuse and secondly, that there shall be an automatic action thereafter of him having been “deemed to resign” without more.

[50] It is therefore pellucid, that upon this Section becoming operational by the actions of the officer himself, the employment of that officer comes to an end - pure and simple.

[51] Thus, there must be at first an investigation whether the first limb has been satisfied. By the triggering of this investigation, it must be accepted that there would be a requirement to ensure that any inquiry is conducted with procedural fairness. In other words, to ensure that the affected person is given an opportunity to be heard and is in fact heard.”

[35] One distinction between the provision in the BVI and that of Anguilla is the requirement to prove that the employee has been absent from work without reasonable excuse. The Public Service Commission Regulations in Anguilla do not make reference to the need for reasonable excuse. Section 25 of the Regulations simply states that “[a]n officer who is absent from duty without leave for a continuous period of 5 working days, unless declared otherwise by the Governor, shall be deemed to have resigned his office and thereupon the office becomes vacant and the

⁴⁴ BVIHCV2013/0215

officer ceases to be an officer.” It may therefore be argued that if an employee does in fact have a reasonable excuse for being absent from work for more than 5 days it is incumbent on him to seek leave of the Governor to be absent for the relevant period of time; unless of course his absence is on account of some form of incapacitation or a general inability to communicate with the relevant authorities. It is my view that there is a duty on the part of the employee himself to use the proper channels to ensure that leave is granted to him prior to merely absenting himself from work for more than 5 days if he has a reasonable excuse for doing so.

[36] However, I am also prepared to find, just as Byer J did in the case of **David Penn v. The Governor of the British Virgin Islands**, that section 25 of the Regulations requires an investigation into the circumstances of the case by the PSC prior to a recommendation being made to the Governor. This, in turn, requires procedural fairness. The officer who has absented himself from duty should at least be written to by the PSC and given an opportunity to explain, whether at a hearing or otherwise, the reasons for his absence from work and the PSC must give consideration to the issue with due regard to the full plenitude of its powers. It would be for the PSC to examine the actions of the officer and the reasons given for his absence from work to determine whether he has abandoned his office. The previous correspondence from the head of the department to the officer regarding his absence from work should equally be taken into account. I will return to this issue in relation to Mr. Durand later on in this judgment.

[37] It is my view that consideration must also be given to the provisions of section 3.11 of the General Orders of the Anguilla Public Service. This section states as follows:

“Officers who are absent from duty without reasonable cause will be liable to disciplinary action. Officers who willfully refuse to perform their duties or who omit to perform their duties will be liable to disciplinary action (See Chapter 4).

In certain circumstances, an officer whose conduct and/or performance is unsatisfactory may be required by Public Administration, on the advice of the Head of Department, to attend a meeting to discuss the officer’s conduct and/or performance, identify the areas of the officer’s conduct and/or performance that are considered unsatisfactory and offer such guidance and/or counsel as appropriate to

assist the officer in improving his or her conduct and/or performance to make it satisfactory.”

[38] In balancing the provisions of section 25 of the Regulations with section 3.11 of the **General Orders**, it will be observed that absence from work may be a form of resignation for non-user of the office in some circumstances but may also be a matter for disciplinary action in others. In my view, an employee who provides an excuse for his absence from work may very well be deemed not to have abandoned his office. As was noted in the case of **Milton Pringle v The Hon. Molwyn Joseph & Ors** what is required under the common law is proof that the failure to perform the duties pertaining to the office is accompanied by an actual or imputed intention on the part of the officer to abandon and relinquish the office. Where he provides an excuse, whether it is reasonable or otherwise, the circumstances may be such that this is proof of an intention to retain rather than resign his office.

[39] However, this is not the end of the matter. The excuse provided by the officer may be unreasonable and the employee’s general approach may be subject to discipline in accordance with the General Orders. This may therefore place the matter within the purview of section 26 of the Regulations rather than section 25. However, given that Mr Durand is a Prison Officer, the specific provisions relating to the discipline of Prison Officers should be considered. It is important to give consideration to all of those factors before making recommendations to the Governor on the issue, as a determination that the officer has abandoned his post has more far-reaching consequences than what may be considered in the remedies available for discipline.

[40] It is also important to give consideration to section 4 of the General Orders which addresses the procedure to be adopted in matters of discipline within the orders itself. Section 4.35 states that **“[d]isciplinary procedure against police officers below the rank of Gazetted Officer is governed by the provisions of the Anguilla Police Act, as amended; and for Prison Officers, below the rank of Superintendent of the Prison, disciplinary procedure is governed by the Prison Rules. Additionally, disciplinary procedure against fire officers is governed by the Fire Regulations.”**

[41] Therefore, although the general duties of a public officer are contained in the General Orders the disciplinary procedure to be adopted regarding prison officers fall within specific provisions. Although

the General Orders refer to the Prison Rules, it is my understanding that what is in place are the **Prison Regulations** which were promulgated in accordance with the **Prisons Act**. I will therefore give consideration to those provisions.

[42] Firstly, section 37(1) of the **Prisons Regulations** states that “[i]t shall be the duty of every Prison Officer to conform to these Regulations, to assist and support the Superintendent in their observance, and to obey the lawful instructions of the Superintendent.” It is my view that one simply cannot ignore the fact that the Superintendent of Prisons has on at least 2 occasions, instructed Mr. Durand to report for duty after his suspension has been set aside. Mr. Durand was also instructed to report to the prison to have a conversation with the Superintendent. On all occasions he has refused to do so and has continued to defy those instructions.

[43] Section 41 of the **Prison Regulations** also states that “[t]he code of discipline set out in the Schedule shall have effect in relation to all Prison Officers.” Section 2(m) of the Code of Discipline states that “[a] Prison Officer to whom this Code applies commits an offence against discipline if guilty of ... *Absence without leave or being late for duty, that is to say, if a Prison Officer without reasonable excuse, is absent without leave from the prison or from any parade or place of duty or is late for any duty or parade...*”

[44] Whether one examines it from the perspective of section 25 or 26 of the **Public Service Commissions Regulations**, section 3.11 of the **General Orders**, or section 2(m) of the Code of Discipline for prison officers, it is not acceptable for an officer to be absent from duty without reasonable or lawful excuse. This court finds it to be a completely unacceptable state of affairs for Mr. Durand to have remained away from duty as a prison officer for such an extended period of time.

[45] The Prison Regulations go on to make provision for the process to be adopted in relation to disciplinary proceedings against Prison Officers. It is not necessary to go into the full details of the provisions contained therein. However, I refer particularly to section 7(2) of the **Prison Regulations** which states as follows:

“The Superintendent may, after hearing the evidence, refer any charge to the Governor and, unless he dismisses it, shall so refer a charge under section 1(2) or any provision of section 2 of this Code, other than the following sections—

2(a)(i), (iii), (b), (c), (d), (h)(ii), (l)(i), (m) or (n).”

[46] This section establishes two distinct powers on the part of the Superintendent of Prisons. Firstly, he has a discretion, after hearing evidence to refer any charge to the Governor. That includes a charge under section 2(m). Secondly, unless he actually dismisses a charge, the Superintendent of Prisons is compelled to refer a matter to the Governor except charges relating to the provisions outlined above. In relation to a charge under section 2(m) therefore, there is a discretion on the part of the Superintendent to refer a charge against an officer for being absent from duty to the Governor, if he is of the view that the circumstances warrant it. The Governor's powers after a hearing are broader than those of the Superintendent of Prisons. Therefore, if the Superintendent is of the view that the prisoner's actions may warrant a more stringent sanction, such as termination, he has the discretion to refer the matter to the Governor.

[47] At this stage, I wish to make reference to section 31(1) and (2) of the **Public Service Commission Regulations** which states that:

(1) The Commission shall deal with disciplinary proceedings against officers in the light of reports from Heads of Departments or otherwise.

(2) Subject to subsection (3), where the Commission is of the opinion that disciplinary proceedings should be instituted against an officer, the Commission may recommend to the Governor that such proceedings be instituted.”

[48] Subsection (1) gives broad discretion to the PSC. Disciplinary proceedings may be dealt with either upon a report from a head of department or otherwise. In my view and bearing in mind that disciplinary proceedings against Prison Officers below the rank of Superintendent fall within the Prison Regulations where the PSC received a recommendation that an officer has abandoned his post, consideration must be given to whether the actions of the officer amount to an abandonment

or whether it may amount to a matter of discipline. This is done by giving the officer an opportunity to explain himself to the commission. It may be that the officer provides a reason which does not amount to proof of an intention to resign from his office as outlined in the common law principles. However, the rationale provided may be so unreasonable that it amounts to a matter of discipline within the various provisions I have outlined above. The PSC would therefore be empowered to take the actions it deems necessary to address the issue within the general principles of fairness and proportionality. Abandonment of office has only one outcome, which is the loss of employment (although impliedly by resignation). Disciplinary proceedings, on the other hand, gives broader powers to the Governor to tailor a remedy which is proportionate to the issues. The recommendations made by the PSC must take those issues into consideration. If it is a matter of discipline, rather than abandonment, then the matter should be referred back to the Superintendent of Prisons to deal with in accordance with the powers conferred on that office in the Prison Regulations.

[49] In all of this however, the PSC as well as the Superintendent must be guided by principles of fairness as outlined in the case of **Lloyd v McMahon**⁵ where Lord Bridge stated as follows:

“... the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates. In particular, it is well established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness.”

⁵ [1987] UKHL 5

Conclusions

- [50] It is my view that the failure to engage Mr. Durand directly prior to recommending to the Deputy Governor that he had abandoned his post was not in keeping with the principles of procedural fairness. He ought to have been given an opportunity to be heard by the PSC before making a recommendation. The PSC must determine whether the overall facts of the case amount to an abandonment. In doing so, it must determine whether there is an intention on the part of Mr. Durand to resign from his post, prior to making a recommendation to the Governor. If the matter does not amount to an abandonment, it is open to refer the matter back to the Superintendent who can then deal with it within the provisions of the Prison Regulations.
- [51] However, I am equally satisfied that Mr. Durand has not behaved in a manner which is reasonable throughout this dispute. Regardless of the procedural challenges, he has been given ample opportunity by the head of his department to return to work. Even the court has ordered him to report to work to discuss the status of his employment. His refusal to return to work is not justified. Whether his reasons stand as proof of an abandonment of office or is a matter for discipline is within the purview of the PSC to consider.
- [52] This court is satisfied that what has been allowed to transpire since 9th October 2020 is a matter of concern. It is the duty of the Superintendent of Prisons, the Public Administration Department and the Public Service Commission to ensure the good administration of the public service. The fact that an officer has been allowed to remain away from work whilst drawing resources from the country's treasury is a matter of public interest which ought not to have been allowed to continue for this long a period of time. In light of this, I am satisfied that the decision should be quashed. However, the matter is to be remitted back to the Public Service Commission for consideration within the full plenitude of its powers, but also in keeping with the principles of natural justice and procedural fairness.
- [53] The court is also satisfied that Mr. Durand's contribution to the prolonging of this dispute is a ground upon which the court will decline to make a costs order in his favour.
- [54] In the circumstances it is hereby ordered that:

- (a) The decision of the Public Service Commission in recommending to the Deputy Governor that the claimant has abandoned his post is set aside;
- (b) The matter is remitted to the Public Service Commission for reconsideration within the full plenitude of its powers and in keeping with the principles of procedural fairness;
- (c) The Public Service Commission is permitted a period of 8 weeks from the date of this order to consider the issue and commence whatever procedure it deems necessary in this matter. If there is no communication with Mr. Durand at the end of this 8 week period, he is to immediately report for duty and his salary restored;
- (d) The court makes no order as to costs.

Ermin Moise
High Court Judge

BY THE COURT



REGISTRAR

