

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA**

**IN THE MATTER OF SECTION 103 OF THE
ANTIGUA AND BARBUDA CONSTITUTION
ORDER, CAP 23 OF THE LAWS OF ANTIGUA AND
BARBUDA**

and

**IN THE MATTER OF AN APPLICATION BY THE
APPLICANT FOR JUDICIAL REVIEW PURSUANT
TO PART 56 OF THE CIVIL PROCEDURE RULES,
2023**

and

**AND IN THE MATTER OF THE JUDICIAL AND
LEGAL SERVICES COMMISSION SUSPENDING
THE APPLICANT FROM HER DUTIES AS CHIEF
MAGISTRATE INDEFINITELY.**

Claim No: ANUHCv 2023/0309

BETWEEN:

JOANNE WALSH

Applicant

and

JUDICIAL AND LEGAL SERVICES COMMISSION

1st Respondent

THE ATTORNEY GENERAL OF ANTIGUA & BARBUDA

2nd Respondent

Appearances:

Kendrickson Kentish, Chaku Symister, Wendell Alexander and Cherise Archibald of counsel for the Applicant

John Carrington K.C. and C. Debra Burnette of counsel for the First Respondent

Carla Brooks – Harris and Joy Dublin of counsel for the Second Respondent

2023: September 2nd

September 4th

JUDGEMENT

- [1] **Drysdale J:** This is an application for interim relief in which the Applicant amongst other things is seeking to preclude the tribunal appointed by the First Respondent from sitting to hear certain charges made against her.
- [2] Prior to this matter the Applicant was also a party to a previous matter¹ in which she sought and obtained an injunction to prevent the Permanent Secretary from conducting an investigation into her conduct. An injunction was granted in that case but this issue stems from subsequent actions by the Respondents to hear and determine whether there is any merit to various allegations of misconduct made against the Applicant. To that end a brief factual matrix is set out below.

Background

- [3] The Applicant is the Chief Magistrate of Antigua and Barbuda and has held that position for the past 12 years. On or about 27th September 2022 the Applicant was advised by the Permanent Secretary in the Ministry of Legal Affairs that consequent upon several allegations made against her that an investigation into the same would be convened. The Applicant took issue with the ability of the Permanent Secretary to act in such a manner and petitioned the court for an injunction which was granted on the basis that the complaints alleged in the letter referred to disciplinary matters which were outside the purview of the Permanent Secretary. Although that matter was set down for a speedy trial on the date the Court was informed that that issue had now become moot as the matter had been referred to the appropriate authority for action. Thus, that claim was discontinued.
- [4] The issue of the allegations of misconduct of the Applicant being referred to the First Respondent, Mr. Godfrey Smith SC was appointed to investigate the allegations made against the Applicant.
- [5] During the investigation the Applicant was given an opportunity to respond to the allegations and the applicant participated in the process. Subsequently 10 disciplinary charges were preferred against the Applicant which charges include but are not limited to the destruction of magistrate's notes, destruction of vouchers, destruction of government property and the collection of monies without transmitting the same to the government treasury.
- [6] The Applicant was served with a letter dated 19th July 2023 which suspended her effective 20th July 2023 from all duties until further notice.
- [7] On 4th August 2023 the Applicant was summoned to attend the tribunal which had been convened to hear the charges preferred against her. The tribunal is scheduled to commence sitting on Monday 4th September 2023.

¹ Claim Number ANUHCv2022/0396

[8] The Applicant claims that the suspension was unlawful and further certain recent statements made by Lionel Hurst which statements indicated that the First Respondent was in the process of conducting interviews to replace her is a deliberate act by the executive to prejudice not only the minds of the public but the Disciplinary Tribunal.

[9] The Applicant therefore filed this application on Friday 1st September 2023 seeking the following orders:

1. 'This application be heard on an urgent basis in the Court's Long Vacation as the disciplinary proceedings challenged by this claim will commence on 4th September 2023
2. An Interim injunction be granted to the Intended Claimant / Applicant restraining the Respondent, whether by itself, its servants, or agents from acting on or continuing to act on the decision to convene a Disciplinary tribunal investigating the Applicant's Conduct by letter dated 27th September 2022
3. A mandatory order directing the Respondent Commission to remove the Applicant from suspension with immediate effect until the final determination of his claim.
4. Further or alternatively, an order staying the disciplinary process against the Applicant until the final determination of his claim by this Honourable Court.
5. An order requiring a speedy trial of this claim.
6. Costs of the interim application to be determined at the end of the hearing of the claim.
7. The Intended Defendant/Respondent do pay the costs of and incidental to these proceedings.'

[10] Due to the urgency of this matter the Court directed that the Respondents be served and set the matter down for an inter partes hearing on 2nd September 2023.

The Issues

[11] The following issues arise for consideration:

- i. Whether the applicant has met the threshold of there being a serious issue to be tried?
- ii. In whose favour does the balance of convenience lie?
- iii. Whether the application for the suspension to be lifted is determinative of the claim?

Analysis and Law

Issue 1: Whether the applicant has met the threshold of there being a serious issue to be tried?

- [12] Although the parties agree that this matter should be determined in accordance with the principles enunciated with **American Cyanamid Co. v Ethicon Ltd**² it appears that the parties have strongly divergent views on whether there is a serious issue that warrants trial.
- [13] The Applicant arguments concerning whether there is a serious issue to be tried is twofold and surrounds the legality of the suspension and an allegation of bias.
- [14] The Applicant argues that she had a right to a hearing before a suspension could lawfully be imposed on her. She relied on the authority of **Wendell Robinson v Police Service Commission**³ in this regard. She also argues that the suspension may be unconstitutional due to a lack of authority of the First Respondent. Particularly the Applicant posits that pursuant to section 103 of the Constitution the suspension letter should have been issued by the Governor General and not the First Respondent who erroneously took on a power it did not possess and wrongly suspended her. The Applicant suggests that had the First Respondent given her a chance to be heard she could have pointed out their error. She therefore claims that her suspension is legally flawed.
- [15] The Applicant also argues that there is a perception of bias within the First Respondent. She relies on a statement made by Lionel Hurst on the local news media to the effect that the First Respondent was in the process of interviewing candidates to essentially replace her as Chief Magistrate and suggests that this conveys a bias which may prejudice the mind of the public and more importantly the members of the Disciplinary Tribunal.
- [16] The Applicant believes that when these factors are examined that they present serious issues warranting further consideration.
- [17] As previously indicated the First Respondent strongly disagrees that the Applicant has met the threshold of there being any serious issue to be tried. The First Respondent argues that the Applicant needs to demonstrate a seriously arguable case with genuine prospects of success. Counsel for the First Respondent argues that this can only be done through her evidence. The First Respondent submits that the Applicant is incapable of making a case solely through legal submissions and or grounds where the affidavit evidence is lacking to substantiate the same. The First Respondent highlighted paragraphs 5 to 9 of the Applicant's affidavit as being the relevant paragraphs concerning this matter and argue that the same is woefully deficient in establishing a serious issue to be tried.

² [1975] AC 396

³ ANUHCv2018/0202

- [18] The First Respondent also cited the authority of **Robinson v The Police Service Commission**⁴ and sought to distinguish the manner it was used by the Applicant. The First Respondent suggests that that case is in fact authority for the position that whether there is a right to be heard in suspension cases depends on whether there is a rule in place. The First Respondent argues further that there is no blanket rule requiring a hearing and that the same is dependent on whether the suspension is an administrative exercise or a punishment. The First Respondent citing various parts of the Rules argues that the Applicant's suspension was merely administrative and not punitive thus no right to a hearing arose.
- [19] As it relates to the issue of bias, the First Respondent argues that the evidence of the Applicant is woefully lacking to establish the claim of bias. The First Respondent argues that the Disciplinary Tribunal's role and function are distinct from its own. It submits that the Tribunal hears the evidence and submits it to the First Respondent who then makes a decision. That the Applicant has not attributed any bias to any of those parties. Moreover, the maker of the statement is a third party who has no association with the First Respondent or the Tribunal.
- [20] An injunction is a discretionary remedy which ought not to be granted lightly. For that reason, the Applicant must demonstrate that there is a serious issue to be tried. This acts as a threshold test to determine whether a party seeking an injunction has a prima facie case. This is important as the Court should only be concerned with genuine disputes that warrant further consideration. Thus, it is prerequisite without which an application for injunction will automatically fail.
- [21] The procedure for convening disciplinary proceedings against judicial officers is clearly contained in the Judicial and Legal Services Commission Disciplinary Rules. The relevant sections relating to the process for suspension are captured below and state:
- 2.(1) Where a report or allegation is made that an officer has committed an act of misconduct, the Commission shall inform the officer concerned in writing of the report or allegation made.
- (2) On receipt of a report pursuant to paragraph (1) the Commission shall refer the matter to any officer who shall investigate the matter.
- 3.(1) The investigating officer appointed, within three days of his appointment, shall give the officer concerned a written notice specifying a time, not exceeding seven days, by which such officer may, in writing give an explanation concerning the report or allegation to the investigating officer.
- (2) The investigating officer shall, with all possible dispatch but not later than twenty-one days from the date of his appointment, provide the Commission with the original statements and all relevant documents, together with his own report on the particular act which shall not be an assessment of the evidence.
- (3) Where in answer to the allegation the explanation made pursuant to subparagraph (1) the officer admits the facts in question, the Commission may dispense with any further enquiry
- (4) The Commission, after considering the report of the investigation officer and other material provided under subparagraph 3(1), shall decide whether the officer should be charged with an

⁴ ANUHCv2018/0202

act of misconduct and if the Commission decides that the officer should be so charged, the Commission shall, as soon as possible, cause the officer to be informed in writing of the act of misconduct with which such officer is charged, together with particulars as will leave the officer under no misapprehension as to the precise nature of the charge.

4.(1) The Commission may suspend an officer until further notice at any time after receiving a report or allegation of misconduct against the officer.

(2) The effective date of suspension shall be such date as the Commission shall direct.

(3) An officer who is suspended from duty under this procedure shall make himself available to the Commission until the conclusion of the matter.

[22] In this case it seems that the decision to suspend the Applicant arose upon conclusion of the investigation of the allegation of misconduct, in which the Applicant fully participated. Whilst the First Respondent appeared to follow strictly the parameters of the Disciplinary Rules the question of whether the Applicant should have been granted a hearing before the suspension is the contested issue in the case at hand. In the case of **Smith v Inner London Education Authority**⁵ established that 'public authorities should not be restrained from exercising their statutory duties and powers unless the plaintiff has an extremely strong case on the merits.' In this case however the Applicant has demonstrated a mere arguable case. **Robinson v The Police Service Commission**⁶ can easily be distinguished in its factual circumstances as the Claimant in that case had not been informed of any charges before being suspended. Moreover, there were no rules relating to what should have obtained for disciplining the Commissioner of Police. This is not the case here where I agree there are clear rules guiding the process.

[23] Further the authorities differ on if an affected party may be entitled to a hearing, it being contingent on whether there is a finding that the suspension was administrative or punitive. Whilst this may be an issue requiring further ventilation, as it relates to this matter being the ability of the First Respondent to determine the charges this issue does not arise. The Tribunal is tasked with the responsibility of hearing the charges and submitting report to the First Respondent who thereafter makes a decision and recommendation to the Governor General.

[24] The suggestion that the suspension is unlawful it not emanating from the Governor General is also lacking in merit as if taken to its natural conclusion would result in the executive disciplining the judiciary is a clear breach of the independence of the judiciary. Section 103 of the constitution limits the ability of the Governor General to act only upon the recommendation of the First Respondent. The Disciplinary Tribunal not having convened and having not produced any report no such advice is possible at this juncture.

[25] Finally in this case the suspension is a precursor to the hearing of the charges before the Disciplinary Tribunal. The legal authority of the tribunal to be convened and determine the matter pursuant to the disciplinary rules is not the issue at hand. There being no challenge to the validity of the rules but merely the application thereof. The authority of **Belize Alliance of Conservation**

⁵ [1978] 1 All E R 411

⁶ ANUHCv2018/0202

of Non Governmental Organizations v The Department of the Environment et al⁷ guides that 'even so, the court should not restrain a public authority by interim injunction from enforcing an apparently authentic law unless it is satisfied, having regard to all the circumstances, that the challenge to the validity of the law is, prima facie, so firmly based as to justify so exceptional a course being taken.'

- [26] In relation to the issue of bias, the Applicant has not made out a case that there is a serious issue to be tried arising from the statement by Lionel Hurst. The test for apparent bias is found in the case **Poter v Magill**⁸ is stated as 'whether the fair-minded and informed observer, having considered the facts, would consider that there is a real possibility that the tribunal was biased.'
- [27] The Second Respondent has provided clear evidence that Mr Hurst is not a member of the executive and or the Cabinet Secretariate. More importantly that at no time has the suggestion of the process being triggered to replace the Applicant ever been tabled or discussed at the Cabinet of Ministers.
- [28] Further whilst the statement was referred to in an online publication there is no evidence submitted by the Applicant that the same may have come to the attention of any of the appointed tribunal members. In fact, the Applicant appears to have made widespread and sweeping assumptions that Mr Hurst's statement alone is sufficient to establish bias. The Applicant however admitted that despite undertaking a search with the Bar Association which association receives notification of any vacancies that no such vacancy for the post of Chief Magistrate was ever seen. There being no nexus between Mr Hurst and the First Respondent and no evidence that the statement reached the tribunal and influenced their ability to fairly adjudicate on the matter is a significant failing in establishing a serious issue to be tried.
- [29] Thus, the Applicant has not established a serious issue of either the claim of unlawful suspension or bias stemming from Mr. Hurst's comments. This is sufficient to deny the application for interim relief as the preliminary hurdle has not been circumvented. However, for the sake of completeness and if my analysis may prove wanting on the issue of a serious issue to be tried, I will still consider the remaining issues.

Issue 2: Where does the balance of convenience lie

- [30] The Applicant argues that damages would not be an adequate remedy as she is not seeking to protect purely financial rights; she is seeking to uphold the law and to challenge an unlawful suspension as well as a tainted disciplinary process.
- [31] The First Respondent argues that the issue of suspension differs to the hearing of the charges levelled against the Applicant. The First Respondent suggests that there would be no injustice in the Disciplinary Tribunal proceeding to hear the charges even whilst the Applicant challenges the suspension. The First Respondent also argues the lack of evidence provided by the Applicant

⁷ PC App No 47 of 2003

⁸ [2002] 2AC 357

coupled with her the position in the justice system that it is in the public interest that this matter not be kept in abeyance whilst the Applicant proceeds with her challenge to the suspension but that the same be determined swiftly. The First Respondent asserts that accordingly the application for interim relief should be refused.

- [32] The balance of convenience is a legal concept used in determining which party would suffer the least irremediable harm for which damages would not be a suitable relief. Lord Diplock in the **American Cyanamid Co v Ethicon Ltd**⁹ case dealing with the issue of determining the balance of convenience advised that whether the applicant could readily be compensated by an award of damages was an important factor for consideration. He stated:

‘if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant’s continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be an adequate remedy, and the defendant would be in a financial position to pay them, no interlocutory injunction should be granted, however strong the plaintiff’s claim appeared to be at that stage.’

- [33] The adequacy of damages therefore is an important consideration. Before proceeding further, the court notes that the Applicant has not provided an undertaking in damages. The Applicant only mentioned being willing to provide an undertaking in damages after being questioned by the Court. Statements by counsel at the bar table are not evidence that the Court can rightly consider.
- [34] The requirement of an undertaking is an important requirement as it essentially ensures that if an injunction was wrongly granted that the party adversely affected can be compensated for any losses incurred. Without the undertaking the Court is unable to assess the Applicant’s financial position if the injunction is overturned. The undertaking is also pivotal in ensuring that both parties are treated fairly.
- [35] In the case of **Belize Alliance of Conservation of Non Governmental Organizations v The Department of the Environment et al**¹⁰ the Privy Council decided that even in public law cases that an undertaking should be provided as requirement to obtaining interim relief. Given the superiority of the Privy Council and the finding I see no reason to depart from this position. Thus, having regard to the above the failure of the Applicant to provide the undertaking weighs in favour of the Respondents in determining the balance of convenience.
- [36] Returning to the issue of the adequacy of damages, the Applicant suggests that because she is not seeking a purely financial benefit that damages are not an adequate remedy. The Applicant is not seeking to challenge the validity of any law. Rather she is seeking the Court’s endorsement to her claim that the decision to suspend her was unlawful. Flowing from that the Applicant has

⁹ [1975] AC 396

¹⁰ PC App No 47 of 2003

petitioned the Court for aggravated and exemplary damages. Whilst in some cases damages will not be an adequate remedy this is not the case here. The potential damage suffered by the Applicant if her suspension is deemed unlawful could be remedied by a monetary award for any income lost and or vindictory damages for any damage to her reputation.

- [37] The Applicant holds an important judicial position as Chief Magistrate. The nature of the charges and suspension from duties would to my mind given that the same could potentially affect how the Applicant is perceived in her official capacity should trigger a desire to challenge the same and possibly be vindicated if so agreed by the Tribunal and ultimately the Governor General pursuant to section 103 of the Constitution. The public interest also demands that if there are allegations of misconduct against a judicial officer that the same would be dealt with and determined expeditiously. Delaying the resolution of such matters could erode public trust and confidence in the judiciary and the legal system.
- [38] Further the Applicant takes issue with the suspension which predated the scheduled hearing rather than the process to challenge the charges themselves. Thus conversely, if the injunctions are denied, the Applicant can still pursue her claim for review of the suspension. There is no evidence that this would in any way impede her ability to defend herself on the charges concurrently.
- [39] When considering whether injunctive relief is appropriate as it concerns public authorities the case of **Beryl Issac et al v The Grenadian Hotel**¹¹ held that 'the public law element is a special factor in considering the balance of justice. In determining where the balance of justice lies the court has a wide discretion to take the course which seems most likely to minimise the risk of an unjust result.' The Court of Appeal went on to further state that:
- 'it is an exceptional course for the court to restrain a public authority from enforcing an apparently valid law. A court would only take such course where having regard to all of the circumstances of the case the court is satisfied that the challenge to the validity of the law is prima facie based and adoption of such an exceptional course is justified.'
- [40] Based on the Court's finding that the lawfulness of the Applicant's suspension does not preclude the authority or ability of the Tribunal from proceeding with the determination of the charges and the Applicant's admission that her objective is to uphold the law rather than challenge the validity, this factor supports the Respondents position.
- [41] In light of the above the Court is of the considered opinion that the balance of justice tips heavily in favour of the Respondents. The broader public interest and the potential harm in allowing such a matter to flounder until determination of other issues which can be determined independently of the process before the Tribunal, the failure to give an undertaking in damages, damages being an adequate remedy and the special factor relating to public bodies and the Applicant not

¹¹ GDAHAP2017/0002

demonstrating any exceptional circumstances collectively contribute to a decision to deny the application for injunctive relief.

Issue 3: Whether the application for the suspension to be lifted is determinative of the claim?

[42] The Applicant seeks an Interim injunction to restrain the First Respondent, whether by itself, its servants, or agents from acting on or continuing to act on the decision to convene a Disciplinary Tribunal investigating the Applicant's Conduct and a mandatory order directing the First Respondent Commission to remove the Applicant from suspension with immediate effect until the final determination of his claim. I agree with counsel for the First Respondent that this interim remedy is effectively a final remedy. By virtue of this naturally it is unlikely that in such circumstances the Applicant would be minded to pursue the matter in an expeditious manner before the Courts. In such case, the rule is that the application cannot succeed unless a particularly strong case is shown; the case of **R (Detention Action) v Secretary of State for the Home Department** refers.¹² However the Applicant's case lacks substantial evidence to support the allegations of any abuse of process by the First Respondent in exercising its statutory power to suspend. Accordingly, the grant of interim relief in the circumstances would be wholly inappropriate.

Order

[43] In light of the above it is hereby ordered that:

- a. The application for interim relief is hereby refused.
- b. No order as to costs.

Jan Drysdale
High Court Judge

By The Court

Registrar

¹² [2020] EWHC 732 Admin4