

IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ON MONTSERRAT
CASE MNIHCV 2021/0027

IN THE MATTER of the Crown Proceedings Act Cap 02.06;

IN THE MATTER of the Pensions Act Cap 06.07;

IN THE MATTER of the Public Service Act Cap.01.06;

IN THE MATTER of the Civil Service General Orders 1986;

AND IN THE MATTER OF JUDICIAL REVIEW.

BETWEEN

ANGELA ESTWICK

Claimant

And

[1] THE DEPUTY GOVERNOR

[2] THE ATTORNEY GENERAL OF MONTSERRAT

Defendants

APPEARANCES

Ms Jean Dyer for the claimant.

Ms Renee Morgan for the Defendants.

2023: JULY 21

JUDGEMENT

Concerning denial of a pension

- 1 **Morley J:** Ms Angela Estwick now aged 53 (dob 16.07.70) claims a pension and payment for 70 days of accumulated leave, denied by the Government of Montserrat (GoM). She

began civil service work on 01.12.87 when aged 17, and in September 2018 got a new job in banking effective from 01.11.18, and so informed on 03.10.18 the Deputy Governor Lyndell Simpson (DG) via the Human Resources department she wished to 'retire'. She got no response and, needing to start her new job, on 12.11.18 she announced she had 'retired', aged 48, at which point she had 28 years pensionable service. However, then on 30.11.18, the DG informed Estwick¹ she was deemed to have 'resigned', permission to 'retire' had not been given, and because she had resigned she would not get a pension, nor leave payment as she had not given three months' notice, subsuming the leave, and further, she was deemed to owe payment of one month's salary.

- 2 Estwick claims the pension as early retirement was to be worth an immediate gratuity of \$145346.75ec plus annually \$31898.71ec from age 55².
- 3 Various reliefs are overlappingly claimed, including by way of judicial review in which Estwick argues the GoM has acted illegally and irrationally such that the court should order she receive a pension and payment for accumulated leave. Specifically, she seeks³:

1. A declaration that the Claimant having voluntarily retired pursuant to section 21 of the Pensions Act Chapter 6.07 was not required to seek the permission of the Deputy Governor to effect said retirement.
2. A declaration that the Claimant is entitled to be paid retirement benefits in the form of a pension and gratuity under the statutory scheme for public officers under the Pensions Act Chapter 06.07 and by virtue of the Government of Montserrat's consistent practice in relation to other voluntary retirements under the 'transitional provisions' of section 21 of Pensions Act, Cap. 06.07.
3. A declaration that the Government of Montserrat is in breach of its statutory obligation under the Pensions Act, Cap 06.07, and the express terms of the Claimant's contract of employment and/or the Claimant's legitimate expectation in failing and/or refusing to pay the Claimant retirement benefits in the form of a gratuity upon her voluntary retirement from the public service.
4. An order that directs the Defendants to pay to the Claimant her full pension entitlement under the terms of the Pensions Act upon the Claimant reaching the retirement age of 55.
5. A declaration that the Claimant is entitled to be paid a gratuity and pension in accordance with the Pensions Act Chapter 6.07.
6. An order that directs the Defendants to pay to the Claimant the gratuity and pension forthwith.

¹ Names and offices will be brevitised for ease of reading and no disrespect is intended by not writing out every time full titles and the legalese of whether claimants or defendants.

² See letter from attorney Jean Kelsick dated 29.04.21, at page 77 of 'Bundle 3 - Exhibits and documents' (B3-p77).

³ B1-p134.

7. Damages for pay in lieu of vacation leave to be assessed.
8. Alternatively,
 - (a) certiorari to remove to the High Court and quash the decision of the First named Defendant refusing to pay to the Claimant:-
 - i. a gratuity and pension in accordance with the Pensions Act Chapter 6.07; and
 - ii. pay in lieu of the Claimant's 70 days accumulated vacation leave upon her voluntary retirement pursuant to section 21 of the Act and/or in accordance with the Government of Montserrat's consistent practice in relation to other voluntary retirements under the 'transitional provisions' of section 21 of Pensions Act Cap 06.07; and
 - (b) mandamus requiring the first named Defendant to pay to the Claimant a gratuity and pensions in accordance with the Pensions Act Cap 6.07 and pay in lieu of the Claimant's accumulated vacation leave.
9. Costs.
10. Such further or other relief as the Court deems fit.

- 4 As often happens on Montserrat, to settle this stark issue the case has generated a large volume of papers and peripheral arguments:
 - a. Pleadings – 148 pages – Bundle 1⁴.
 - b. Statements in evidence – 255 pages – Bundle 2⁵.
 - c. Exhibits – 233 pages – Bundle 3⁶.
 - d. Additional documents – 76 pages – Bundle 4⁷.
 - e. Closing submissions – 105 pages - claimant argument filed 24.04.23, defendant argument on 19.05.23, and claimant reply on 16.06.23.
- 5 The claim was filed on 28.10.21, was amended on 07.07.22 to focus on judicial review remedies, and was tried on 03-04.04.23, with short hearing on 03.07.23 to agree the length of pensionable service, and finally judgement today, 21.07.23.

Section 21 Pensions Act 2011

- 6 Montserrat is a British Overseas Territory, with 5000 on it, funded almost wholly from London. It might be said by some nowadays retiring in the civil service at 48, with immediate gratuity, then to collect annually at 55, is a bit early. Indeed, pensions on Montserrat were for a time

⁴ B1.

⁵ B2.

⁶ B3.

⁷ B4.

considered most generous, therefore becoming too expensive to maintain, and so on 23.05.11 a new **Pensions Act 2011** cap 6.07 came into force. This adjusted the rules, including retirement ages, and sought to preserve some measure of early benefits for those with already 20 years' service up to May 2011, by when Estwick, then aged 40, had about 22 years' service.

- 7 Under the **s21 transitions provisions**, those with 20 years' service were to be treated as if born in 1961, being then therefore eligible for 'early retirement' after 30 years' service or at age 55, allowed under **s8 Pensions Act**.

Part 2...

Early retirement

8(1) ...a pensionable officer may take early retirement if –

(a) he is an existing officer and -

- (i) he has completed the years of service set out in column 4 of the schedule that corresponds to the year of his birth in column 1; or
- (ii) he has completed at least ten years – but not the years required under sub-paragraph (i) – and has attained the age set out in column 3 of the schedule, that corresponds to the year of his birth in column 1...

[which schedule shows if born in 1961 normal retirement is 60, while early retirement is available if aged 55 per column 3 or after 30 years' service per column 4 – these italics added – and see Annex⁸]

Protection of persons with twenty years of service

21 A pensionable officer with twenty or more years continuous service ...at the date of commencement of this Act, at any time after the commencement of this Act may elect to receive pension benefits under Part 2 as if they were an existing officer born in 1961.

- 8 The immediate problem is Estwick is neither aged 55 nor with 30 years' service, meaning she is not on the face of the **Pensions Act** entitled to early retirement.
- a. If her pensionable service had commenced on 01.12.17, and remained pensionable throughout, then by 12.11.18 she would have 30y11m12d, but on 03.07.23 it was agreed by counsel, both Ms Morgan and Ms Dyer, making allowances from 1987 for some medical and study leave, in fact her pensionable service was just over 28 years.
 - b. This agreed fact is important, and reflects what Estwick herself said in her purported 'retirement' letter of 03.10.18, namely:

⁸ B3-p45 – and see Annex at judgment end.

Having joined the Public Service on December 1st, 1987, I will have completed just over 28 years of service....

- 9 To justify a claim for early retirement, Counsel Dyer argues **s21** should be read so 'in' means 'before', meaning the section should read:

A pensionable officer with twenty or more years continuous service ...at the date of commencement of this Act, at any time after the commencement of this Act may elect to receive pension benefits under Part 2 as if they were an existing officer born before 1961.

- 10 If so, then under **s8**, where a person has been born before 1961, per the schedule normal retirement is at 55, column 3 allows early retirement at any age, and column 4 with any number of years' service. If accepted, this would mean **s21** allows early retirement at any age after 20 years' service up to 23.05.11.

- 11 The first problem with this argument is, as an act of simple statutory interpretation, the meaning of the word 'in' is not difficult, and to substitute the word 'before' is plainly bold, and so arguably wrong.

- 12 In answer, Counsel Dyer points to Hansard where on 05.05.23, discussing on Montserrat the second reading of the Pensions Bill, to try to show the purpose of **s21**, the Minister for Communications & Works Charles Kirnon says⁹:

I think the only other new clause I would like to deal with is one because one of the concerns I find Madam Speaker, with a lot of your civil servants is that they thought those who were eligible to leave after 20 that that would have been done away with and clause 21 makes provision for those persons. So that you don't have to up and run and leave; if you had your 20 years up to 31st December 2010 you are still entitled under that old regime to have your early exit. I believe that most people had some worrying about that.

- 13 However, even if Hansard relevant assuming the wording unclear, the meaning of this paragraph is muddled, as it mentions having 'early exit' not early retirement, noting early exit then appears in **Part 3 at s13 Pensions Act**:

Early exit benefit for ten years or more service

- 13(1) A pensionable officer with ten years or more service may retire and opt to receive one of the following early exit benefits –
(a) a lump sum payment of the prescribed amount; or

⁹ B3-p20.

(b) a deferred benefit of the prescribed amount, calculated at the date of retirement but starting no earlier than his early retirement age.

- a. Further, these seven lines appear the only reference to **s21**, in otherwise 5 pages¹⁰ of discussion offered by the Minister, suggesting the section not a priority, meaning attention to it during debate may not have been focused.
- b. Moreover, if the seven lines do reflect a belief **s 21** will allow early retirement based only on 20 years' service pre-23.05.11, then it appears unhappily the specific Minister speaking has not read the section properly, so that what is being said is mistaken, which may not be surprising in only offering seven lines among so much other material, noting he did not propose or second the Bill (done instead by the Chief Minister and Minister for Health, Education and Community Services); it does not follow because a Minister may have mistakenly believed what the Act said, therefore the Act coming into force 18 days later must be interpreted to reflect what he mistakenly said, particularly so where the words in the Act are not ambiguous.
- c. Finally, other remarks contradict the seven lines, furthering they are mistaken, during 28 pages of debate¹¹, noting what was said by the Chief Minister Reuban Meade moving the bill, pointing impliedly under **s21** to a retirement age of 60, or after 30 years' service, or early retirement between 55 and 59, consistent with the schedule line pertaining to in '1961', not 'before 1961'¹²:

old one and the new one coming into force? For existing pensionable officers the following normal and early requirements and option will apply assuming that that new rules take effect from January 1st 2011. Officers who have completed 20 or more years of service at the date the new rules take effect would have the following options: Retire at anytime with an immediate gratuity calculated as on the new rules with deferred pension starting at age 60 or retire at age 60 with immediate unreduced pension and gratuity or retire after 30 years of service regardless of age with an immediate pension and gratuity , or retire between 55 and 59 with an immediate pension and gratuity reduced by 5% for each year less than age 60. Officers who are 50 and over with at least 10 but less than 20 years of service would be able to retire at any age between 55 and 60 with an immediate pension and gratuity as per the new rules without any early retirement reduction adjustments. So there will be no penalty for early retirement.

¹⁰ B3-p17-21.

¹¹ B3-p5-33.

¹² B3-p9.

- 14 Further, prior to the debate, there is an ‘explanatory memorandum’¹³ to the Pensions Bill from then Attorney General (AG) Barbara Vargas, saying *‘Part 6 protects the pension benefits that have already accrued to persons who have completed 20 years of service before the commencement of this Bill and who are therefore eligible to retire under the law in force before the commencement of this Bill’*. But as can be seen, the memo does not reflect the letter of the Bill, nor the muddle of the debate that followed, such that the memo cannot define the court’s approach to the Act.
- 15 More, legal research quickly shows there was specifically an amendment to **s21** assented on 17.08.11¹⁴, changing the wording, **Part ‘3’** to **‘2’**, with in addition deletion of **s23**, three months after the Act come into force. However, there was no change in **s21** of the word ‘in’ to ‘before’, pointing therefore to how it appears the intention of the legislature was to maintain the plain wording, with the implication the meaning is ‘in’, irrespective of what may have been ambiguously said, or meant, during debates in the legislature on 05.05.11.
- 16 Counsel Dyer goes on to point to an email dated 15.05.12 from Paul Lewis¹⁵, then president of the Montserrat Civil Service Association, now leader of the opposition, to Daphne Cassell then director of Human Resources, calling for clarity on **s21**, saying *‘I trust that should read as if born before 1961’*. However, there is no evidence of a reply, such that the silence may be thought of weight and indicative to the mind of the GoM the word is ‘in’, not ‘before’.
- 17 Finally, Counsel Dyer points to the treatment of others¹⁶, to try to show inter alia **s21** has been interpreted as meaning ‘before’. This does not at all arise clearly on the materials offered.
- a. To start, concerning JP¹⁷, AS¹⁸, HW¹⁹ and RA²⁰, their requests to leave public service were all made prior to the new **Pensions Act** being in force from 23.05.11, so no issues as to interpretation of **s21** arise.

¹³ B3-p80.

¹⁴ Sections 20 and 21 Miscellaneous Amendments (Constitution of Montserrat) Act no 9 Of 2011.

¹⁵ B3-p34.

¹⁶ Such others as non-parties will not be identified in the wider publication of this judgment because the litigating parties agree they should receive privacy.

¹⁷ B3-p4, dated 01.12.10.

¹⁸ B3-p87, dated 14.01.11.

¹⁹ B3-p94, dated 08.03.11.

²⁰ B3-102, dated 28.12.10.

- b. Concerning DD²¹ and TM²², their requests were for early exit, not early retirement.
- c. Concerning LL, aged 49, with 29 years' service, including more than 20 years up to 23.05.11, initially she had been told she could seek early retirement and tellingly this was corrected to early exit, as she lacked 30 years and was not 55, as appears in a letter to her from the DG dated 20.04.21²³, then adding she had therefore been overpaid by \$88673.63^{ec}.
- d. Of interest are CD and JM:
 - i. Correspondence to CD from Jocelyne Clarke-Fletcher as Chief Human Resources Officer (CHRO) dated 16.04.18²⁴ reports various options available to Dyett, with **s21** meaning 'before', mentioning early exit under **s13**, but it is not clear what benefit was sought or paid;
 - ii. Correspondence to JM from Daphne Cassell as CHRO dated 11.12.14²⁵ reports, at age 51 with 24 years' service, and it appears 20 years prior to the new **Pensions Act** of 23.05.11, she qualifies for 'early retirement', but under '**part 3**' (which instead refers to 'early exit'), with **s21** being read as meaning 'in', begging whether Cassell's tangled memo simply makes a mistake when saying she qualifies for 'early retirement'.
- e. The upshot is the materials concerning others just do not establish any reliable pattern of 'in' meaning 'before', and indeed provide some evidence the GoM has thought the word is 'in'.

18 Statutory interpretation proceeds under four rules, in order, being the *literal*, *golden*, *mischief* and *purposive*. Here the literal rule applies as the words are clear. If not clear, then the golden rule might apply, to achieve the intention of the Act, only then begging a review of the debates in parliament, which here does not arise as 'in' is not unclear, and as above in any event the debate is muddled. There is no loophole to close under the mischief rule. As to the purposive rule, it applies to ensure the law is effective as Parliament requires to be consistent with overarching legislation, like the Montserrat Constitution, but does not arise here as there is no suggestion the Act is usurped by the Constitution, while in addition, as above, the intention of the word 'in' under the literal rule is clear.

²¹ B3-p46.

²² B3-p67.

²³ B3-p78.

²⁴ B3-p43.

²⁵ B3-p97.

- 19 *Obiter*, the court expresses curiosity as to who drafted the Bill, and where, as there is reference in the debates to MPs visiting London, much socializing with members of both Houses there, begging whether the bulk of the drafting was off-island, not on Montserrat, but in the UK, not by those introducing the Bill, with then the impact of **s21** perhaps not being fully comprehended, little time being spent on it in the debates, (though this curiosity makes no difference to interpreting the words).
- 20 Overall, in my judgment the words of **s21 Pensions Act** are striking. 'In' does not mean 'before'. Applying the literal rule, there is no ambiguity nor opacity. In the schedule in the Act there is a specific 'birth year' line for 'before 1961' and a different specific line for in '1961'²⁶, where **s21** refers pointedly to the latter. There is no need to refer to Hansard for clarity; but if one does, such clarity is not there. If the words were to be changed it should have happened in August 2011, or since; and if it is what the legislature wants, the words can still be changed. But until changed, the meaning is plain. The Act is explicit that after 23.05.11, Estwick, and others, need 30 years or to be 55 to request early retirement, as LL was told, and unfortunately as at 12.11.18 Eastwick had neither. Her claim should be for 'early exit'. Insofar as her pleadings seek declarations she should be paid out for 'early retirement', regrettably she fails, at the first hurdle in these proceedings because as a matter of simple statutory interpretation she did not qualify.
- 21 To the mind of this court, the whole point of the **Pensions Act** was to change eligibility for pension benefits, as discussed in debate, and to try to create fairness between competing situations.
- a. For example, treating 'in' as 'before' would mean, after 2011, Person A employed in pensionable service from early 1991, from age 17, born in 1974, could at age 37 in 2011 under the new law claim immediate gratuity, and at 55 in 2029 a normal pension fully 18 years after the new law came into force, the spirit of which was it seems to stop such claims as arose under the old law, (noting JP's claim under the old law on 10.12.10 was at age 37²⁷).
 - b. Instead, the Act contemplates such Person A eligible for gratuity after 30 years (having already 20 years up to 2011) meaning at age 47 in 2021 (assuming full pensionable

²⁶ B3-p45.

²⁷ B3-p83.

service), or early retirement at 55 in 2029, or normal pension payable at 60 in 2034, all three ages being perhaps still early by elsewhere standards, but being some measure of generosity carried over from the old law.

- c. This can be contrasted against another Person B, also born in 1974, but joining the civil service a year later, in 1992 aged 18, but without the 20 years' service up to 2011, meaning under the schedule Person B must have 35 years' service up to 2027 or be 59 in 2033 to retire early²⁸, or would face normal retirement at 64 in 2038, such very different treatment from Person A being created not by age difference but by the haphazard timing of joining, meaning 'para b' above is an obviously fairer circumstance for Person A alongside Person B than 'para a'.

- 22 Of wider interest is this judgment has begged an analysis of the Act, not much discussed by either counsel, possibly with ramifications beyond merely the interests of the Applicant Estwick, and now ought to make clear 'in' does not mean 'before'; where it may earlier have been attractive to Montserrat civil servants to hope for the most generous payment to themselves, not applying the letter of the statute, with the implication if it has happened mistakenly with others, that folk after 23.05.11 were retiring at any age if they had given 20 years to that date, regrettably reading the Act this would have been in error.

Early exit

- 23 However, this finding Estwick was not eligible for 'early retirement' does not end the case. The issue which still follows on is whether Estwick was entitled to some other benefit under the **Pensions Act**, being 'early exit' under **s13**, or whether she was entitled to nought.
- 24 If receiving early exit benefit, under **s13(1)(a)** she might elect for a lump sum, or under **s13(1)(b)** she might elect for deferred benefit at her early retirement age, being here 55.
- 25 The reason the court can continue its analysis is the reliefs sought above appear a scattergun, so that here the application for judicial review can be construed as asking, 'to what is Estwick entitled under the **Pensions Act**?', where the tenth relief is as generic as seeking '*such further or other relief as the Court deems fit*'.

²⁸ B3-p45.

26 On the facts, I find what happened is as follows.

- a. Joining the civil service on 01.12.87, Estwick rose in time by 2017 to acting Permanent Secretary in the Premier's Office and from March 2018 to Director of Development Planning and Policy at the Ministry of Finance.
- b. Through 2018, and from earlier, Estwick was unhappy at work. There has been much material offered to explore why. It appears much of her employment file, including from as long ago as the 1990s, has been put into evidence. Further, there has been suggestion she fell out in September 2017 with the DG over a government payment to the DG's husband; and then in November 2017, allegedly she was absent without leave for two weeks, abroad on a cruise, for which she was reported to the PSC²⁹ on 08.12.17 for disciplinary action, notified to her on 08.03.18.
- c. On 07.09.18, Estwick was offered different employment, with the ECCB³⁰.
- d. On 01.10.18, the PSC formally reported³¹ there should be no formal action against Estwick for being absent.
- e. On Wednesday 03.10.18, Estwick wrote to the CHRO³²:

I am applying for retirement effective 16.01.19 under **s21 Pensions Act**. Having joined the Public Service on 01.12.87 I will have completed just over 28 years of service at that retirement date. As per leave records I have 70 days remaining leave....I wish to apply these as retirement leave beginning on [Monday] 08.10.18...
- f. The effect of her letter was she was declaring herself gone from office within two working days, meaning she would be working only the Thursday and Friday.
- g. Getting no reply to her letter, despite making approaches to others, and under pressure to take up her job at the ECCB, on Monday 12.11.18 she again wrote to the CHRO³³:

...I retire under **s21 Pensions Act** with immediate effect... I also request I receive payment of the balance of the vacation leave days as at today's date.

²⁹ Public Service Commission.

³⁰ B3-p57, Eastern Caribbean Central Bank.

³¹ B3-p167-181.

³² B3-p59.

³³ B3-p65.

- h. On 22.11.18, AG Rodney then wrote a memo³⁴ for the DG, opining at para 22 Estwick had on 12.11.18 resigned without notice, not retired, which required permission which had not been sought, having by this letter constructively abandoned her request for early retirement made in her earlier letter of 03.10.18, and therefore had abandoned any pension benefit; and if resigning should have given three months' notice, so that her leave was subsumed and she should pay back a month's salary. On the facts, there is nothing to suggest this memo was other than a good faith interpretation of the complicated various rules surrounding retirement and resignation.
- i. In consequence, on 30.11.18, Cheverlyn Kirnon as CHRO wrote³⁵ to Estwick her 'resignation' had been accepted with immediate effect on 12.11.18, forfeiting her 70 days' leave, and being liable for a month's salary in lieu of notice.
- j. Estwick then sought through personal contacts in the civil service and among politicians to secure what she believed her pension benefits, but to no avail, and finally issued proceedings, as above on 28.10.21.
- k. During trial, eight witnesses were called: the claimant Angela Estwick, Tyrell Duberry, Romeo Donaldson (former Premier), Reuban Meade (former Premier), Paul Lewis (leader of the opposition), Daphne Cassell, Cheverlyn Kirnon, and the respondent DG Lyndell Simpson.

27 Lots of arguments have been offered, the relevant distilling to:

- a. Is judicial review too late;
- b. If not, was Estwick entitled to any benefit under the **Pensions Act**;
- c. Did Estwick resign or retire, and does this make any difference to whether a pension benefit arises;
- d. To have any benefit, must permission be sought from the DG;
- e. Can the DG withhold permission; and
- f. Can a benefit be denied?

³⁴ B4-p29-36, tab11.

³⁵ B3-p66.

- 28 In a sense the core question is, what happens to a benefit under the **Pensions Act 2011** when a long-serving public officer hurriedly leaves?

Unreasonable delay

- 29 Concerning judicial review, **Rule 56.5 Civil Procedure Rules 2000** as amended ³⁶states:
- (1) In addition to any time limit imposed by any enactment, the judge may refuse leave or to grant relief in any case in which the judge considers that there has been unreasonable delay before making the application.
 - (2) When considering whether to refuse leave or grant relief because of delay the judge must consider whether the granting of leave or relief would be likely to –
 - a. Be detrimental to good administration; or
 - b. Cause substantial hardship to or substantially prejudice the rights of any person.
- 30 Counsel Morgan in her submissions filed on 19.05.23 in paras 7-31 makes a spirited argument for unreasonable delay, being 30.11.18 to 28.10.21, almost three years. In my judgement the argument fails because of the following.
- a. Seized now of the details, and vastly more, being everything that can possibly be said of this case, it is clear it does not turn on what any witness says, but instead is about interpreting the applicable rules, so fading memory is not relevant, if it can be said ever to have faded, noting how much material has been filed, suggestive none have forgotten anything; further, any suggestion the memory of Financial Secretary ‘Colin’ Owen has failed, per an email pleading wholesale memory loss he sent from Wales under the name ‘David’ Owen on 29.09.22³⁷, is unattractive as the more rational understanding of his evidence is he just does not want to be involved in this row, while his involvement is in any event not determinative.
 - b. It is well known to this court in six years of sitting on Montserrat the first thing any disputatious civil servant will do is talk to allies, so it is wholly unsurprising Estwick sought to speak with the Governor, and politicians, and rally friends and colleagues, to press for her money, including with pre-action letters from attorney Jean Kelsick in early 2021, in an attempt to avoid litigation; there are only 5000 on island, folk know each other, there

³⁶ Civil Procedure Rules 2000.

³⁷ B3-p222.

is no anonymity created by large population numbers, the island is a village, so gathering supporters and writing letters rather than litigating is to be expected.

- c. Decisions then take time, often too long, so it is unsurprising it took as long as three years, recalling the period spans covid restrictions beginning March 2020, for it to be finally clear there would be no favourable decision before Estwick then resigned herself to formal filing of a claim.
- d. Given this circumstance, it then must be recalled the issue is what benefit arises after 28 years' service, perhaps generating no small sum, not lightly surrendered, so in the judgment of the court, in my discretion applying **CPR rule 56**, it is only fair to consider Estwick's plight rather than deny her all after 28 years' service for want of an earlier filing.
- e. More, reflecting on **CPR rule 56.5(2)**, the delay is not detrimental to 'good administration', instead inviting the court improve it, making the case in the public interest, by clarifying **s21**, and the meanings of 'retirement' and 'resignation', while no hardship arises or prejudice owing to fading memory.
- f. In sum, in the context of Montserrat, I do not find the delay unreasonable.

Eligibility for benefit

- 31 Concerning entitlement under the **Pensions Act**, it is clear Estwick is eligible for 'early exit' under **s13**, (and in the alternative, would have been eligible for 'early retirement' under **s8** had the wording in **s21** been or meant 'before' and might yet be if it is changed with retrospective effect). Of interest, the word '*eligibility*' is specifically used in **s6**. However, eligibility is not '*entitlement*', which appears in **s5**. The sections read:

Entitlement

- 5(1) This Act does not confer on a pensionable officer the right to compensation for past services.
- 5(2) The entitlement if any to compensation for past services and the circumstances in which any such compensation may be reduced, suspended or withheld is determined under the public service law.

Eligibility

- 6. A pensionable officer is eligible for pension benefits upon –

- (a) Normal retirement;
- (b) Early retirement...

32 The effect of these sections is an eligible benefit, applicable to 'early retirement' at **s8** - and by implication 'early exit' at **s13** which is a type of early retirement with lesser years' service, and refers to retiring - to which there is no absolute entitlement, can be reduced, suspended or withheld, but this must be appropriate within public service law, and reasonable. Withholding cannot be at whim, where a person is simply disliked, which would make an ogre of the Governor or DG. Instead, an example of reasonable withholding might be where a public officer is found guilty of misconduct, noting routinely officers found guilty of criminal offences are dismissed from the service without pension benefit.

33 In this sense, the question arises whether there were grounds to withhold from Estwick for misconduct any eligible benefit under the **Pensions Act**.

- a. From December 2017, Estwick was under investigation by the PSC for misconduct, having been absent without leave; however, she was cleared by report on 01.10.18.
- b. In evidence during trial, it emerged the DG did not immediately see the report, and at the time of Estwick purporting to retire was awaiting it, which was partly why there was not quick response to the letter of 03.10.18, as the question arose in the mind of the DG as to any benefit being reduced or withheld dependent on the report and then the view of the Governor.
- c. However, there was no final finding, as following the letter of 12.11.18 the advice of AG Rodney on 22.11.18 was Estwick had resigned, implying no benefit arose, overtaking the DG's contemplation, so there was no separate determination benefit should be reduced or withheld owing to misconduct by earlier absence without leave.
- d. In sum, the state of the evidence is there have been no grounds shown for withholding benefit, except that there was a resignation, and permission had not been formally sought to retire.

Resignation and retirement

34 The question is begged, does resignation mean no benefit? This begs, what is the difference between resignation and retirement?

35 Under the **Public Service Act Regulations**:

Resignation

32. An officer who wishes to resign his appointment shall give due notice in writing of his intention to the Deputy Governor or...authorized officer.

Retirement

33. Any officer may at any time he has attained the minimum age specified in the pensions law for retirement apply to the Deputy Governor for permission to retire....

- 36 In evidence, Kirnon as CHRO tellingly observed 'resignation' and 'retirement' are terms used interchangeably, and as she put it, *'I am yet to find out what is the effect on pension if you resign'*.
- 37 What do the terms mean:
- a. *'Resignation'* is where a person chooses voluntarily to leave office. The **Cambridge Dictionary** says resignation is *'to give up a job or position by telling your employer that you are leaving'* and the **Merriam Webster Dictionary** says it is *'to give up by a formal or official act'*.
 - b. *'Retirement'* means stopping working, usually because old. The **Oxford Dictionary** refers to *'the fact of leaving your job and stopping work, usually because you have reached a particular age'*, and the **Merriam Webster** says it is *'to withdraw from one's position or occupation to conclude one's working or professional career'*.
- 38 Narrowly, and historically, retirement has arisen, and arises, when elderly and may be compulsory. But as pensions have developed during the 20th Century, retirement can arise by reason of years of service, or reaching a specific age not requiring vacating office, fudging its meaning, because it amounts to resigning voluntarily with a view to retiring from office to receive a pension benefit.
- 39 In my view, to receive benefit for any type of early retirement a person by a voluntary act resigns.
- 40 Resignation is an action and retirement is a state of being. To retire early requires an action, which is resignation. A person therefore resigns in order to retire early. It follows a resignation can be retirement, in the sense it is an act causing a person to enter into a state of retirement; the terms are not mutually exclusive, they can overlap, though not all resignations are retirements and not all retirements are resignations, as there can be resignation where no pension benefit has yet arisen owing to too few years' service, and there can be retirements

which are compulsory owing to age and not by resignation as a voluntary act. To determine if a resignation is a retirement, and vice versa, the court looks to the intent and context. In the case of Estwick, after 28 years, she sought 'early retirement', said so, and to achieve this she had to resign.

41 It turns out, per this judgment, she should have sought 'early exit', but the effect would be the same, as the language above in the Act at **s13** specifically contemplates early exit as 'retiring', and so to claim her retirement benefit as early exit in like manner she had to resign.

42 In sum, to think resignation and retirement in the context of this case are wholly different is in error; logically, they lead to each other, so by retiring she resigned, and by resigning she retired.

Permission

43 The question now arising is whether permission from the DG is needed to retire, begging whether it can be withheld so no benefit under the Act is ever given.

44 **PSA reg 33** above contemplates permission required and came into force on 23.07.80, pre-dating the new **Pensions Act 2011**.

45 As above, under **s21 Pensions Act**, it says Estwick '*may elect to receive pension benefits under Part 2*' if seeking early retirement. But as she does not qualify for early retirement, **s21** does not apply. Even if it did, it does not mean that election obviates permission. In my judgment, the section merely establishes as election an eligibility, not an entitlement, for seeking early retirement.

46 The permission contemplated under **PSA reg 33** is where an officer '*has obtained the minimum age specified in the pensions law*', written pre-2011, and which by implication and evolution of pensions law now refers to early retirement (as it refers to 'minimum age'), where early retirement is now governed by **Part 2 of the Pensions Act**, which also contemplates early retirement as arising after specified years of service.

a. In my judgment, to retire early, by reason of age, or years, under **PSA reg 33** permission is required, as it would be illogical permission is only required if reaching an age, but not years of service.

- b. Moreover, 'early exit' under **s13** is not 'early retirement' under **s8**, again being an evolution of pensions benefit. Being based not on age, but only on lesser years of service than early retirement under **s8**, by implication this also requires permission under old **PSA reg 33**, as otherwise there would be an anomaly early exit under **s13** owing to years of service can simply be announced while early retirement under **s8** owing to years of service cannot.

47 In sum, in my judgment, to 'retire' under the **Pensions Act**, under either **s8** or **s13**, permission is required under **PSA reg 33** which has to be read as adapting to the evolution of pensions benefits beyond 1980 and beyond merely having reached normal retirement age.

48 The question now becomes, what is the point of permission being sought?

49 To the mind of this court, the permission being sought is to obtain the benefit. The permission is not to retire simpliciter, which is to resign; instead, the permission is asking, '*on resignation, if accepted, leading to retirement, may I please be paid the pension benefit?*'

50 Applying common sense, permission cannot be withheld without good reason; as above, withholding cannot be based capriciously on whether an applicant is popular. Instead, the task of the DG's office, and the CHRO, is then to assess:

- a. whether the resignation will be accepted; and
- b. whether there are reasons not to pay out, and therefore refuse permission to be given the benefit, which can include, as above under **s5**, withholding or reducing or suspending payment for misconduct.

51 It should be noted the resignation may not be accepted under rules in the **Civil Service General Orders 1986**³⁸:

- 702 Notice of resignation may be refused -
- (a) if it is conditional;
 - (b) if the officer does not intend to complete a period of service for which he is bonded to serve the Government;
 - (c) if disciplinary proceedings against the officer are contemplated or pending;
- or

³⁸ Established by Establishment Circular No. 022017 amending the Government of Montserrat General Orders for the Public Service issued by the Chief Human Resources Officer and approved by the Governor under Order 103(2) of the General Order for the Public Service of Montserrat' 1986.

(d) if the requisite period of notice is not given or salary in lieu of notice is not paid.

703 An officer may not give notice of resignation while on leave...

- 52 On the facts explored in this case, the resignation was accepted, per the CHRO letter of 30.11.18, while the only reason not to pay out pension benefit would be for misconduct by unauthorized leave, but which resulted in a PSC report saying there should be no formal action. In the circumstances there have been offered no grounds for refusing permission to receive the benefit, here for early exit, though originally sought as early retirement, and which if applicable, likewise there would be no grounds for refusal.
- 53 In sum, though Estwick resigned abruptly, which was accepted, and therefore she retired, though failing to observe the niceties of language to seek permission to retire, nevertheless early exit benefit is payable to her, absent any good reason not, not offered in these proceedings.

70 days accumulated leave

54 What then of the accumulated leave?

55 Recalling to retire Estwick resigned, **rule 701 General Orders** says:

701(2) An officer who has been confirmed in his appointment to a pensionable post may resign after giving not less than three months' notice (exclusive of leave) in writing to the permanent secretary, administration....

701(4) Notwithstanding the provisions in paragraph... (2)... an officer...may instead of giving due notice resign his appointment at any time after paying to the government one month's salary in lieu of notice. In such cases the officer will forfeit all leave...for which he might be eligible.

56 The **General Orders** are clear.

- a. On 12.11.18 Estwick resigned, to retire, without due notice and so she has forfeited her 70 days leave and owes a month's salary, as correctly stated by Kirnon in the letter of 30.11.18.

- b. It can be observed on 03.10.18 Estwick had sought to retire, to be absent from 08.10.18, taking her leave into account (creating an effective retirement date of 16.01.19), but this is not permissible within the rules, as to retire was to resign, and three months' notice was required exclusive of leave. This would mean the DG had the right to refuse to accept such a resignation under **GO rule 702**, (though any such contemplation was then superseded by the immediate resignation announcement of 12.11.18).

57 There are eight examples offered of others retiring, and what is important is how much notice was given. None sought to leave office after two working days and all except DD gave at least three months' notice.

- a. DD applied on 26.06.18 to retire on 01.09.18³⁹, (failing to give fully three months' notice, so that one month's salary was payable⁴⁰);
- b. JP applied on 02.12.10 to retire on 31.07.11⁴¹;
- c. TM applied on 27.05.19 to retire on 31.08.19⁴²;
- d. AS applied on 14.01.11 to retire on 08.09.11⁴³;
- e. HW applied on 08.03.11 to retire on 01.12.11⁴⁴;
- f. JM applied on 25.11.14 to retire on 30.06.15⁴⁵;
- g. RA applied on 28.12.10 to retire on 31.07.11⁴⁶; and
- h. LL applied on 08.05.18 to retire on 09.08.18⁴⁷.

58 Finally, there is a letter dated 10.12.19 from CHRO Kirnon⁴⁸ to AJ waiving repayment of one month's salary in lieu of adequate notice, but without any explanation or context, so that I find this lone document cannot begin to establish Estwick should have her accumulated leave and a waiver of a month's salary owing.

59 In sum, I find Estwick by resigning without given three months' notice has lost the accumulated leave she claims.

³⁹ B3-p46.

⁴⁰ B3-p47.

⁴¹ B3-p4.

⁴² B3-p67.

⁴³ B3-p87.

⁴⁴ B3-p94.

⁴⁵ B3-p96

⁴⁶ B3-p102

⁴⁷ B3-p106.

⁴⁸ B3-p233.

Judicial Review

60 Given the analysis above of the mistaken approach by both parties to the relevant legislation, judicial review is available under basic principles.

61 The classic statement setting out the grounds for judicial review is that of Lord Greene MR in **Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948]** 1 KB 223. He said:

...The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may be still possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere. The power of the court to interfere in each case is not as an appellate authority to override a decision of the local authority, but as a judicial authority which is concerned, and concerned only, to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in them.

62 Further, the broad headings upon which there may be a review of administrative actions and decisions have been set out and defined by Lord Diplock in **Council of Civil Service Union v Minister for the Civil Service [1984]** 3 All ER 935:

- (i) Illegality – “the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.”
- (ii) Irrationality – “a decision so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.”
- (iii) Procedural impropriety – “susceptibility to judicial review under this head covers failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision and also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.”

63 In sum, aside from misunderstanding s21, I find it was a procedural impropriety and technically an illegality to construe resignation meant no benefit, and this is reviewable by the court, as conducted above.

Conclusion

- 64 What has happened is Estwick, unhappy, has hurriedly left the Civil Service by resigning, mistakenly claiming early retirement, her correspondence has not sought permission, and AG Rodney in good faith has correctly concluded she resigned without notice, incorrectly meaning resignation implies no benefit, though correctly she lost her leave and owes a month's salary. Both parties are in part right and in part wrong.
- 65 On review:
- a. Estwick was not eligible for 'early retirement' benefit under **s8**.
 - b. Estwick was eligible for 'early exit' benefit under **s13**, for which the Act says she '*may retire*'.
 - c. To retire, either for early retirement or early exit, Estwick had to resign.
 - d. By her letter of 03.10.18, she purported to retire for 16.01.19, taking account of accumulated leave, but her implicit resignation was not yet responded to as accepted under **GO rule 702**, there being no reply yet from the CHRO, where the DG was not yet aware of the PSC report of 01.10.18 which may have had an effect on benefit payable.
 - e. Then by her letter of 12.11.18 Estwick, purporting to retire immediately, resigned with immediate effect, but without due notice and therefore under **GO rule 701(4)** she lost her 70 days accumulated leave and owed a month's salary.
 - f. Her resignation was on 30.11.18 accepted under **GO rule 702**.
 - g. Receipt of her early exit benefit requires permission under **reg 33** from the DG, meaning consideration as to whether there are grounds to withhold, suspend or reduce it, and where on the facts offered there is no reason so to do.
 - h. No benefit was paid because in good faith it was mistakenly thought in the AG memo of 22.11.18 resignation meant no benefit.
 - i. Weighing all the above, the court finds Estwick should receive early exit benefit.
- 66 Concerning relations between Estwick and the DG, Estwick's whole leave history going back to the 1990s, and why she was unhappy, which all became an overmuch deluge in the case, I find there is nothing useful to explore and make no findings, nor was there much relevant evidence from the 8 witnesses, apart from what has already been mentioned. However, in fairness to the DG, it must be said not paying out was, I find, a direct consequence of the

good faith advice of AG Rodney on 22.11.18 and therefore cannot be, and should not be, attributed to any animus on her part.

67 Correspondence in the case shows retirement benefit as early exit is usually not paid out for at least six months from notice⁴⁹, with effective notice here being 12.11.18, meaning from 12.05.19. In my view, interest therefore arises from then at I expect 4%pa if a lump sum sought.

68 As to costs, each party shall bear their own, as each failed and succeeded in part.

69 Going forward, this judgment creates a procedure for retiring early.

- a. An applicant should seek permission to retire from the DG, writing to Human Resources as part of her office, requesting payment of any benefit under the **Pensions Act**, suggesting they wish to resign effective from a specified date, asking if this will be administratively accepted.
- b. To give due notice and avoid losing accumulated leave, and payment of a month's salary, the effective date should be at least three months hence, and not offered while on leave.
- c. The DG's office will then determine within a reasonable time and within reason whether to accept the resignation.
- d. Further, the DG's office will determine within a reasonable time and within reason whether there are proper grounds for withholding, suspending or reducing the benefit.
- e. Assuming matters proceed smoothly, the DG's office, through correspondence with the CHRO, will communicate acceptance of the resignation to retire, discuss and then show the calculated benefit, and from when it will be paid, usually not later than six months from the date of retirement.
- f. If matters do not proceed smoothly, then the applicant may pursue mechanisms for dispute resolution, including discussion with the CHRO, and ultimately litigation, which may include judicial review.

70 As to the Order of the Court:

- a. It is declared Angela Estwick is owed early exit benefit under **s13 Pensions Act 2011**, the details of which will need to be discussed with her by the CHRO;

⁴⁹ B3-p68.

- b. Interest at 4% is payable on any lump sum sought under **s13(1)(a)**, arising from 12.05.19;
- c. By act of mandamus - arising because there has been a good faith misapplication and therefore ultra vires assessment of the statute and regulations, leading to procedural error in assessing whether Estwick could claim a benefit, though not because the GoM has acted out of reason - the lump sum if sought, with interest, is ordered paid within three months; and
- d. Each party shall bear their own costs.

71 I would like to thank counsel for the voluminous work they have each done, to high standard, with myriad thrusting argument, in a blizzard of disputation, most ably presented.

The Hon. Mr. Justice Iain Morley KC

High Court Judge

21 July 2023

ANNEX
The Schedule in the Pensions Act 2011

SCHEDULE
(Sections 7 and 8)

Retirement Age and Years of Service Requirements for existing officers

Column 1	Column 2	Column 3	Column 4
Birth year	Normal Retirement	Early Retirement	
	Age	Age	Years of service
Before 1961	55	N/A	N/A
1961	60	55	30
1962	60	55	31
1963	60	55	31
1964	61	56	32
1965	61	56	32
1966	61	56	33
1967	62	57	33
1968	62	57	34
1969	62	57	34
1970	63	58	35
1971	63	58	35
1972	63	58	35
1973	64	59	35
1974	64	59	35
1975	64	59	35
After 1975	65	60	35