

IN THE EASTERN CARIBBEAN SUPREME COURT

ANGUILLA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. AXAHCV 2021/0019

BETWEEN:

LANA HORSFORD-HARRIGAN

Claimant

and

THE DEPUTY GOVERNOR OF ANGUILLA

Defendant

Appearances:

Mr. D. Michael Bourne, instructed by Sagis LP, of counsel for the claimant
The Honourable Attorney General, Mr. Dwight Horsford, with him Mr. Sasha Courtney, Crown Counsel, Attorney General's Chambers, of counsel for the defendant

2021: July 16;
2022: February 24.

Judicial review – Transfer of public officer to office with no immediate increase in emoluments – Whether a public officer had a legitimate expectation that they would receive lead notice and be consulted with by the Public Service Commission or the Governor prior to their transfer – Whether the transfer of the public officer was ultra vires the Public Service Commission Regulations – Public Service Commission Regulations, sections 10, 17 and 21 – Public Service Commission Act, section 6 – Anguilla Constitution Order, 1982 ('the Constitution'), sections 65 and 66

JUDGMENT

[1] **INNOCENT, J.:** The present proceedings concern a claim for judicial review brought by the claimant against the Deputy Governor of Anguilla (the 'Deputy Governor') in which she seeks various declaratory reliefs which are summarised in the following manner, that is to say, a declaration (1) that the Deputy Governor's decision effecting her transfer to the substantive post of Postmaster General in the Anguilla Public Service was contrary to the legitimate expectation that she held that any such transfer would be undertaken in accordance with the applicable Public Service

Regulations; (2) that the Deputy Governor's decision effecting her transfer to the substantive post of Postmaster General in the Anguilla Public Service ran contrary to the legitimate expectation established by long-standing practice that there would be prior consultation with her; (3) that the Deputy Governor in deciding to transfer her to the post of Postmaster General failed to take into account relevant considerations contained in the Public Service Commission Regulations; and in making the decision to transfer her as aforesaid, took into account irrelevant considerations; and (4) that the Deputy Governor's decision effecting her transfer as aforesaid was unreasonable, ultra vires and biased.

- [2] The claimant joined the Anguilla Public Service in the year 1987. She was appointed to the substantive post of Director Human Resource Management on 16th February 2006, a post that she held until her transfer to the post of Postmaster General in the Anguilla Public Service effective 18th January 2021.
- [3] The claimant became aware of her transfer by memorandum from the Deputy Governor to the Permanent Secretary, Public Administration dated 5th January 2021. On 6th January 2021, the claimant received a letter from the Permanent Secretary Public Administration informing her of her transfer to the post of Postmaster General.
- [4] The claimant alleged that prior to the receipt of the memorandum of 5th January 2021 and the letter of 6th January 2021 she had received no official communication from the Public Service Commission, the Governor's Office nor the Department of Public Administration concerning her impending transfer.

The statutory framework

- [5] Section 66(1) of the Constitution vest in the Governor the power to make appointments to public offices and to remove and to exercise disciplinary control over persons holding or acting in such offices, acting in his discretion in relation to the offices of Deputy Governor, Attorney-General and Chief Auditor and in relation to all other offices acting after consultation with the Public Service Commission.

Provided that before appointing any person to any such other office being that of a permanent secretary or head of a department, the Governor shall in addition consult with the Chief Minister. Section 66(2) of the Constitution empowers the Governor, acting after consultation with the Public Service Commission, in his discretion, by regulations published in the Official Gazette, to delegate to any member of the Commission or any public officer or class of public officer, to such extent and subject to such conditions as may be prescribed in the regulations, any of the powers vested in him by section 66(1) of the Constitution.

- [6] The Deputy Governor is appointed by the Governor in pursuance of instructions given by Her Majesty through the Secretary of State.¹ The role and function of the Deputy Governor is to assist the Governor in the exercise of his functions relating to matters for which he is responsible under the Constitution.² The Governor, acting in his discretion, may by writing under his hand, authorise the Deputy Governor to exercise for and on behalf of the Governor, subject to such exceptions and conditions as the Governor may from time to time specify, any or all of the functions of the office of Governor.³
- [7] By virtue of Instrument under the hand of the Governor dated 12th December 2018 and published in the Official Gazette on 14th December 2018, the Governor delegated to the Deputy Governor the powers vested in the Governor over the Anguilla Public Service limited to the power of control and management of the Anguilla Public Service, reserving onto the Governor the power to dismiss public officers. The authority delegated to the Deputy Governor included the power to transfer public officers. In the premises, the Deputy Governor was the relevant decision maker who effected the claimant's transfer within the Anguilla Public Service.

¹ Section 19A(1) Anguilla Constitution

² Section 19A(2) Anguilla Constitution

³ Section 19A(3) Anguilla Constitution

- [8] Section 21 of the Public Service Commission Regulations⁴ (the 'Regulations'), made pursuant to section 6 of the Public Service Commission Act⁵, makes provision for the transfer of public officers within the Anguilla Public Service. The section stipulates that transfers shall be dealt with under the principles of selection for promotion when an increase in emoluments is involved, and under the procedure for appointments when there is no immediate increase in emoluments.
- [9] The provisions of the Regulations which deals with the procedure for appointments are contained at section 17 of the Regulations and provides that (1) The Commission shall be responsible for the form and manner in which applications are to be made for appointments to public offices within its purview and for the conduct of any examination for recruitment to such offices, and shall determine whether any candidate has the necessary qualifications for appointment to such offices. (2) The Commission may interview candidates for appointment and shall consider in respect of each candidate (a) his educational qualifications;(b) his general fitness;(c) any previous employment of his in the public service or otherwise; and (d) any reports for which the Commission may call from persons such as the principal, headmaster or headmistress of a candidate's university, college or school or any referees named by the candidate.
- [10] Section 1 of the Public Service Commission Act defines "transfer" as the conferment, whether permanently or otherwise, of some public office other than that to which the officer was last substantively appointed, which does not constitute promotion and which does not refer to the posting of an officer between duty posts in the same grade.
- [11] It appears that the relevant provisions of the Constitution, the Act and the Regulations are complimented by the provisions of the General Orders 2010 (the 'General Orders'). Clause 1.3 of the General Orders provides that:
- "The conditions of service for Public Officers, instructions for the conduct of such officers and of public business and in regard to other miscellaneous

⁴ R.R.A. P165-1

⁵ R.S.A. c. P165

matters are embodied in this code of regulations, which are known as General Orders. These orders are intended to be read in conjunction with the Public Service Commission Act and Regulations, the Constitution and the Ray Durrant Report.”

- [12] In addition, Chapter 2 of the General Orders particularly clause 2.20 thereof makes provision for “Transfers and Mobility Obligation” and provides:

“An officer may be required at any time to serve in any department in the exigencies of the Service. When an officer is required, whether permanently or otherwise to perform the duties of some public office other than that to which the officer was last substantively appointed, which does not constitute promotion and which does not refer to the normal posting of an officer between duty posts in the same grade, the officer shall be transferred.”

Issues

- [13] The following issues arise for determination in the present proceedings, namely:

- (1) Whether the claimant had a legitimate expectation that her transfer within the Anguilla Public Service would not be effected without prior consultation; and by extension, whether there exists a long-standing policy or practice in the Anguilla Public Service of prior consultation with a public officer prior to transfer.
- (2) Whether the claimant had a legitimate expectation that the provisions of the Regulations and the Constitution regarding the transfers of public officers that was frustrated by the failure of the Deputy Governor to adhere to the dictates of the aforementioned statutory provisions in effecting the claimant’s transfer.
- (3) Whether the claimant had a legitimate expectation that the principle of natural justice and procedural fairness would be adhered to in relation to her when effecting her transfer which was frustrated by the failure of the Deputy Governor to engage in prior consultation with her before effecting her transfer.
- (4) Whether the Deputy Governor’s decision to transfer the claimant was made without any recommendation from the Public Service Commission; and if

so, whether this failure resulted in the Deputy Governor's decision being unlawful.

- (5) Whether the Deputy Governor's decision to effect the claimant's transfer was ultra vires the provisions of sections 17 and 21 of the Regulations, the said transfer not having been effected in accordance with the aforementioned provisions of the Regulations.
- (6) Whether the Deputy Governor's decision to effect the claimant's transfer was unreasonable, irrational and biased.

Legitimate expectation

- [14] The pivotal starting point of the claimant's case was that given her experience as Director of Human Resource Development in the Anguilla Public Service and ex officio Secretary of the Public Service Commission, she is familiar with the procedure for transfers and appointments within the Anguilla Public Service. Based on her experience in the aforementioned capacities, she expected that there would be dialogue, negotiation and official communication prior to hers, or any other transfer being effected.
- [15] The claimant therefore claimed, that there was a long-established practice in the Anguilla Public Service that prior to transfer there would be a consultative discussion and dialogue with the public officer. In the premises, the claimant contended that she had a legitimate expectation, based on this long-standing practice, that there should have been consultation and dialogue with her in relation to her impending transfer.
- [16] According to the claimant, the long-established practice that she described was so common in respect of transfers within the Anguilla Public Service that the Deputy Governor sought to formulate it into policy. She contended that this long-outstanding practice had crystallised into a Draft Mobility Policy, which incidentally she was responsible for drafting at the behest of the Deputy Governor, and which she submitted to the Deputy Governor. The claimant contended that this Draft Mobility

Policy was consistent with the prior practice that there would be discussion with the public officer prior to initiating their transfer.

- [17] Therefore, according to the claimant's case, the failure to observe the long-established practice of prior consultation and dialogue prior to an officer's transfer in relation to her ran contrary to the legitimate expectation that she held that the same procedure would have been followed in relation to her. Therefore, the decision to transfer her amounted to an unlawful exercise of the Deputy Governor's power to transfer public officers.
- [18] The defendant denied the existence of any established practice in the Anguilla Public Service, in the manner described by the claimant, which gave rise to any legitimate expectation that was capable of supporting the review of the Deputy Governor's decision to transfer the claimant. Therefore, the defendant contended that the Deputy Governor, in the exercise of his delegated authority which included the power to exercise control and management of the Anguilla Public Service, did not require the Deputy Governor to consult with, obtain the prior views of, or the consent of any subordinate officer liable to transfer within the Anguilla Public Service.
- [19] The Attorney General submitted that the evidence adduced by the claimant neither points demonstrably to, nor is it capable of substantiating the existence of such a policy or practice that gave rise to any legitimate expectation with respect to the benefit of prior consultation related to any impending transfer.
- [20] The defendant accepted that with respect to lateral transfers involving Permanent Secretaries, it was not uncommon or unusual for those officers to be given prior lead notice of any intended transfer.
- [21] In respect of the claimant's allusion to the Draft Mobility Policy being a reflection of the long-established practice, the defendant contended that any such long standing practice involving consultation and dialogue with public officers who were liable to transfer was in no way codified into the Draft Mobility Policy in the manner described

by the claimant, or at all. According to the defendant, the Draft Mobility Policy was an inchoate initiative which had never materialised into a definitive policy prior to or at the time of the claimant's transfer.

[22] The Attorney General submitted that the Draft Mobility Policy does not encompass or even acknowledge the existence of any such practice far less a policy of prior consultation with a public officer prior to transfer.

[23] The Attorney General submitted further that there was no duty imposed on the Deputy Governor to engage in prior consultation with any public officer before effecting their transfer, either in law or on the basis of any established practice or policy in the Anguilla Public Service. In support of this submission, the Attorney General relied on the decision in **The Hon Gaston Browne, Leader of the Opposition and others v The Constituencies Boundary Commission and others**⁶ to illustrate the point, that unlike in that case, in the present case there was no statutory duty imposed on the Deputy Governor to consult with the public officer. According to the Attorney General, if such a statutory duty had been imposed on the Deputy Governor, then it was incumbent on him to engage in such a process of consultation.

[24] In short, the defendant adhered to the position that the terms and conditions of employment of public officers in the Anguilla Public Service are governed by the Constitution, the Regulations and the General Orders. In the premises, it is an accepted fact that all public officers are liable to transfer to any other position within the Anguilla Public Service at any time and without the requirement for consultation, discussion or dialogue in the manner contended by the claimant.

[25] The Attorney General submitted that the General Orders and the Regulations coalesce to establish the terms and conditions of employment of public officers. He contended that all public officers are subjected to the jurisdiction of the Governor by virtue of section 66 of the Constitution which said jurisdiction includes the power to

⁶ [2014] 84 WIR 318

transfer, which is implied and incidental to the power to appoint and remove public officers under section 66 of the Constitution.

- [26] There is no doubt that a regular practice can give rise to a legitimate expectation, thereby creating the presumption that a decision-maker will follow a certain procedure.⁷ Legitimate expectation of either kind may arise in circumstances where a public decision-maker changes, or proposes to change an existing policy or practice. The doctrine will apply in circumstances where the change or proposed change of policy or practice is held to be unfair or an abuse of power. The case based on legitimate expectation arises where a public authority has provided an unequivocal assurance, whether by means of an express promise or an established practice that it will give notice or embark upon consultation before it changes an existing substantive policy.
- [27] Legitimate expectation will not often be established, as will be seen in the present case, where there has been no assurance either of consultation or as to the continuance of a policy. There will generally be nothing in the case save a decision by the authority in question to effect a change in its approach to one or more of its functions. Clearly, there can be no objection to that, for it involves no abuse of power. In the ordinary case there is no space for intervention on grounds of abuse of power once a rational decision directed to a proper purpose has been reached by lawful process.
- [28] Accordingly, for the claimant's case based on legitimate expectation to succeed, the impact of the Deputy Governor's past conduct on potentially affected public officers must, again, be pressing and focused. One would expect at least to find an individual public officer or group of public officers who have substantial grounds to expect that the substance of the relevant policy will continue to enure for their particular benefit, not necessarily forever, but at least for a reasonable period, to provide a cushion against the change. In such a case the change cannot lawfully be made, certainly

⁷ CCSU v Minister for the Civil Service [1984] 1 AC 374

not made abruptly, unless the authority notify and consult. Based on the evidence presented here this is clearly not the case at all.

[29] The power of public authorities to change policy is constrained by the legal duty to be fair. A change of policy which would otherwise be legally unexceptionable may be held unfair by reason of prior action, or inaction, by the public authority. If it has distinctly promised to consult those affected or potentially affected, then ordinarily it must consult. If it has distinctly promised to preserve existing policy for a specific person or group who would be substantially affected by the change, then ordinarily it must keep its promise. If, without any promise, it has established a policy distinctly and substantially affecting a specific person or group who in the circumstances was in reason entitled to rely on its continuance and did so, then ordinarily it must consult before effecting any. To do otherwise, in any of these instances, would be to act so unfairly as to perpetrate an abuse of power.⁸

[30] The Court was unable to distill from the evidence lead at the trial that there exists or existed any discernible long-standing practice of prior consultation with public officers prior to their transfer within the Anguilla Public Service. Also, nowhere in the Regulations or in the General Orders can be found any express or implied expression of such a long standing practice or policy.

[31] The claimant's reliance on the Draft Mobility Policy also does not avail her in this regard. In fact, the substance of the Draft Mobility Policy defeats the claimant's argument on this point while bolstering the defendant's arguments in relation to this aspect of the case. The Draft Mobility Policy, separate and apart from it not having been implemented, contains absolutely no reference to any established practice of prior consultation with public officers prior to transfer.

⁸ R (on the application of Bhatt Murphy (a firm) and others) v Independent Assessor; R (on the application of Niazi and others) v Secretary of State [2008] EWCA Civ 755 at para. [50]

- [32] The claimant also formulated her claim for judicial review on the basis that she had a legitimate expectation that the provisions of the Regulations pertaining to the procedure for appointments and transfer under sections 17 and 21 of the Regulations would have been adhered to by the Public Service Commission and the Deputy Governor. The claimant contended that since her transfer was a lateral transfer, the Public Service Commission was obligated to consider what she described as mandatory factors enumerated in section 17 of the Regulations.
- [33] The fulcrum of the claimant's case in relation to this point was that she had a legitimate expectation that the principles of procedural fairness and natural justice would have prevailed by the Public Service Commission's adherence to the provisions of sections 17 and 21 of the Regulations. Therefore, the claimant contended that the Public Service Commission's failure to consider the factors contained in sections 17 and 21 of the Regulations frustrated her reasonably held legitimate expectation that these provisions would have been considered prior to the decision effecting her transfer.
- [34] The answer to the claimant's contentions in this regard is dependent on whether the claimant can establish that she had a legitimate expectation that a particular procedure would have been followed in effecting her transfer, and whether the claimant has established by virtue of the evidence lead at the trial that such a procedure as established by the relevant provisions of the Regulations were not followed either by the Deputy Governor or the Public Service Commission; the latter, in any event, is not a party to the present proceedings and therefore the present claim cannot interrogate the legitimacy of any decision made by the Public Service Commission. Indeed, there was no decision made by the Public Service Commission in relation to the claimant's transfer.
- [35] The claimant contended, that in arriving at his decision effecting her transfer, the Deputy Governor failed to act on any recommendation from the Public Service Commission as he was required to. Therefore, the Deputy Governor's failure to seek the recommendation of the Public Service Commission or to act on their

recommendation was procedurally improper and rendered the Deputy Governor's decision ultra vires.

- [36] Mr. Bourne, in his written submissions, ascribed unlawfulness to the Deputy Governor's decision by praying in aid the provisions of section 10(1)(a) of the Regulations. Mr. Bourne submitted that section 10(1)(a) of the Regulations provides that the Public Service Commission shall make recommendations to the Governor with respect to (a) appointments, promotions, transfers and secondments of suitable officers.
- [37] The pith and gravamen of Mr. Bourne's submission appeared to be that the Deputy Governor ignored the requirements of section 10(1)(a) of the Regulations. According to Mr. Bourne, this is apparent from the Deputy Governor's letter to the Permanent Secretary, Public Administration, wherein the Deputy Governor simply advised the Permanent Secretary and the Public Service Commission of his decision to effect the claimant's transfer seemingly without consultation with the Public Service Commission as required by section 66(1) of the Constitution and without accepting any recommendation of the Public Service Commission.
- [38] Mr. Bourne submitted that it is clear from the memorandum that the decision to transfer the claimant was the Deputy Governor's unilateral decision without first having consulted with or having sought the recommendation of the Public Service Commission. Mr. Bourne then submitted, that as a consequence, the Deputy Governor fell into error thereby rendering his decision to transfer the claimant unlawful.
- [39] Mr. Bourne extended this argument further, by submitting that the Deputy Governor appeared to have operated under the erroneous assumption or belief that section 66(1) of the Constitution gave him an unfettered right to make any decision to transfer a public officer without consulting with or seeking any recommendation from the Public Service Commission. Mr. Bourne submitted that this fact rendered the Deputy Governor's decision unlawful.

[40] On the contrary, the defendant contended that the Deputy Governor is obliged to consult with and obtain recommendations from the Public Service Commission; and in the present case he in fact did.

[41] Section 10(1)(a) of the Regulations provides that the Commission shall make recommendations to the Governor with respect to (a) appointments, promotions, transfers and secondments of suitable officers. In the present case, the claimant has not provided any incontrovertible proof that the Deputy Governor failed to act on the recommendation of the Public Service Commission.

[42] In the Court's view, given the extent of the Deputy Governor's mandate and responsibility for the public service in the exercise of his delegated authority, the Deputy Governor must obtain the recommendation of the Public Service Commission in conformity with section 10(1)(a) of the Regulations and, to that extent there ought to exist a process of consultation and exchange of views. However, the use of the word "recommendation" suggests that the Deputy Governor is not obligated to act on or accept any recommendation made by the Public Service Commission. The ultimate decision is that of the Deputy Governor and not the Public Service Commission. The duty imposed was to seek recommendations from the Public Service Commission in the decision-making process contrary to any express duty to accept those recommendations which did not correspond with his views or his final decision on the matter.

[43] Implicit in the Memorandum is the fact that the Deputy Governor did seek the recommendation of the Public Service Commission and, to that end, engaged in consultation with the Public Service Commission. The Court is fortified in this view by the wording of the Memorandum where it states:

"We have continued to discuss the proposed moves in the Anguilla Public Service, however, I want to set out my position more formally and clearly. I have carefully considered your email of 23 September and your note of 5 October. It is obvious to me that you have given this matter a great deal of thought, for which I am grateful. I thank the PSC for their consideration of this matter as well."

- [44] Therefore, it cannot be said that the Deputy Governor breached the provisions of section 66(1) of the Constitution and section 10(1)(a) of the Regulations in arriving at his decision. There was indeed a process of consultation with the Public Service Commission which resulted in the Public Service Commission making a recommendation, which clearly the Deputy Governor was not inclined to accept.
- [45] The Court has considered the decision in the case of **The Hon. Gaston Browne, Leader of the Opposition and others v The Constituencies Boundaries Commission and others**⁹ in concluding that the Deputy Governor had complied with his duty to consult with and to seek recommendations from the Public Service Commission. The aforementioned decision supports the view that a decision-making body is required to provide to persons with whom it must consult such information, in clear terms, as to what the proposal is and why it is under positive consideration. The decision-making body ought to furnish enough information to enable persons to make an intelligent response. The obligation, although it may be quite onerous, goes no further than this. Therefore, the Deputy Governor's obligation was to consult with the Public Service Commission in relation to the transfers being proposed. The undisputed evidence in this case indicates that such information was provided to the Public Service Commission.
- [46] Another principle that emanates from the case of **The Hon. Gaston Browne, Leader of the Opposition and others v The Constituencies Boundaries Commission and others** is that a public body which is under a duty to consult must let those with whom it must consult know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response. It is not sufficient simply to inform those with whom the Deputy Governor must consult that he is considering transfers in the public service and ask for their recommendations. Proposals must be put forward around which comments and alternative proposals may be put forward for the Deputy Governor's consideration.

⁹ [2014] ECSCJ No. 87

[47] The evidence presented in this case disclosed that the Deputy Governor had complied with his duty to consult with and seek the recommendations of the Public Service Commission in effecting the claimant's transfer. Therefore, the claimant's contention that her legitimate expectation that the procedure prescribed by section 66(1) of the Constitution and section 10(1)(a) of the Public Service Regulations would have been followed in effecting her transfer had been frustrated and was therefore unlawful cannot stand.

Discussion

[48] Unlike other constitutional arrangements obtained in other jurisdictions in the Eastern Caribbean, where the power to appoint and transfer public officers is the exclusive domain of the various Public Service Commissions established under the respective Constitutions, the Anguilla experience is quite unique and differs substantially in its scope and application. For example, unlike section 66(1) of the Anguilla Constitution, section 86(1) of the Constitution of Saint Lucia¹⁰ vest in the Public Service Commission the power to appoint persons to hold or act in offices in the public service (including the power to confirm appointments), and, subject to the provisions of section 96, the power to exercise disciplinary control over persons holding or acting in such offices and the power to remove such persons from office.

[49] The arguments advanced by the Attorney General has given the Court occasion to pause and consider for the purpose of exposition the question of whether powers conferred on the Governor by section 66(1) of the Constitution in relation to the Anguilla Public Service and delegated to the Deputy Governor, in particular the power to transfer a public officer, was unqualified to the extent that these powers were exercisable to the exclusion of any recommendation made by the Public Service Commission.

[50] The Court is of the view that the answer to this question lies in the language of section 66(1) of the Constitution itself. Section 66(1) of the Constitution clearly

¹⁰ Cap. 1.01

states, “and in relation to all other offices acting after consultation with the Public Service Commission”. Therefore, the obligation imposed on the Deputy Governor is to “consult” with the Public Service Commission. Section 66(1) does not impose any obligation on the Deputy Governor to adopt any recommendations made by the Public Service Commission, neither does it confer any power on the Public Service Commission to make recommendations to the Deputy Governor.

[51] At first glance it can be said that the powers exercisable by the Governor under section 66(1) of the Constitution is unqualified by the powers conferred on the Public Service Commission. The Attorney General’s argument appeared to be that the power of the Governor to transfer which has been delegated to the Deputy Governor in this instance, was unqualified since it is a constitutional power exercisable under section 66(1) of the Constitution, subject only to the Constitution itself. It is the Court’s view that the qualifications imposed by the Constitution are indeed important.

[52] It is well-established and generally accepted that the new independent Constitutions have limited the arbitrary power that had previously been exercised by the Crown in relation to the public service, in particular, by abolishing the concept of dismissal at pleasure and by giving government employees security of tenure superintended by an autonomous Public Service Commission.

[53] The qualifications which affect the exercise of the powers conferred on the Public Service Commission include the obligation to act for reasonable cause and not to act whimsically or arbitrarily, to apply the constitutional provisions, regulations it administers and to observe the rules of natural justice. Therefore, the whole purpose of Chapter VIII of the Constitution which bears the rubric “The Public Service” is to insulate members of the Civil Service, The Teaching Service and the Police Service from political influence exercised directly upon them by the Government of the day. The means adopted for doing this was to vest in autonomous Commissions, to the exclusion of any person or authority, powers to make appointments to the relevant

service, promotions and transfers within the service and power to remove and exercise disciplinary control over members of the service.

[54] However unfortunate it may seem, the constitutional arrangements found in the New Independent Constitutions are dissimilar to that obtained in the Anguilla Constitution, Anguilla being a British Overseas Territory where the power to exercise superintendence over the Public Service is not vested in the Public Service Commission but in the Governor. Whatever the shortcomings of this constitutional arrangement is entirely a matter for legislative intervention by way of constitutional reform.

[55] Therefore, it is important to consider the question of what qualifications, if any, are imposed on the exercise of the Governor's powers conferred by section 66(1) of the Anguilla Constitution and delegated to the Deputy Governor over the Anguilla Public Service. In the Court's considered view, they are the same qualifications that are applied to the holders of public office exercising a public function; that is, the duty to act fairly, reasonably, and to exercise such powers as are conferred on them in a manner that is not arbitrary and that is in conformity with the rules of natural justice.

[56] Apart from the allegation that the Deputy Governor exercised his power to transfer her without prior consultation, and that his decision was illegal, unreasonable and irrational, the claimant did not allege in her claim that she was deprived of her right to natural justice by not being afforded the opportunity to be heard prior to her transfer. Neither did the claimant advert to any constitutional right that she possessed that was infringed. Instead, the claimant relied on the right to be heard as a legitimate expectation she held based on what she described as long-established practice that had somehow crystallised into policy. It has already been determined that based on the evidence presented at the hearing that no such established practice or policy existed.

[57] The relevant provisions of the Constitution and the Regulations define the legal rights enjoyed by a public officer in relation to his or her transfer from one post to another in the Anguilla Public Service. It is in the exercise of these rights that he or

she is entitled to the protection of the law by way of judicial review of the decision to transfer. Therefore, having held that there had been no breach of the procedure established by either the Constitution or the Public Service Regulations or both, the claimant cannot ascribe to herself the enjoyment of rights greater than that prescribed by the Constitution or the Regulations.

Illegality unreasonableness and irrationality

[58] In her claim for judicial review, the claimant also relied on the ground that the Deputy Governor's decision effecting her transfer was tainted with illegality and in all the circumstances of the case amounted to an unreasonable and irrational exercise of the powers conferred on the Deputy Governor.

[59] According to the claimant, the Deputy Governor, in arriving at his decision to transfer her from the substantive post of Director Human Resource Development to the substantive post of Postmaster General, took into account irrelevant and improper considerations while failing to take into account the relevant considerations that he ought to have in exercising his delegated powers.

[60] The claimant's complaint is partly grounded on contents of the Deputy Governor's memorandum to the Permanent Secretary Public Administration dated 5th January 2021 (the 'Memorandum'). For the purpose of exposition, it is necessary to set out the terms of the Memorandum that are relevant to this issue in full. In the Memorandum the Deputy Governor wrote:

"With regard to the matter at hand, the exigency is the need to develop capacity within the APS and to give serving officers the opportunity to broaden their experience. Transfers are a good way of promoting the exchange of ideas, building new relationships and broadening perspectives.

Given that the Permanent Secretaries are usually selected from the Heads of Department ranks, it makes sense to offer such persons a chance to broaden their experience. By working across a wider range of policy areas may be better prepared for their eventual elevation to higher office.

Whilst I appreciate that you are concerned about the timing and criteria, I am satisfied that these transfers are in the best interest of the Anguilla Public Service (APS) and the people that we serve.”

- [61] It appears that the Deputy Governor’s reasons for effecting the claimant’s transfer and other transfers undertaken at the same time is partly embodied in the Memorandum. The question then is whether any of the matters alluded to by the Deputy Governor in the Memorandum can be considered irrelevant considerations which rendered his decision unlawful; and also, whether having taken into account these matters they rendered the Deputy Governor’s decision irrational and unreasonable.
- [62] The claimant relied on the contents of the Deputy Governor’s missive as leading to the inescapable inference and/or substantial proof, that the Deputy Governor disregarded relevant matters and failed to give any adequate weight to matters that were relevant and of significant importance, and/or attached excessive weight to irrelevant matters in arriving at his decision.
- [63] The relevant considerations that the claimant alluded to were the matters contained in section 17 of the Regulations. The claimant adverted to the qualifications necessary to hold the position of Postmaster General which she alleged was a post for which she did not possess the necessary qualifications and skillset to hold, and which made her relatively unsuitable for that position. According to the claimant, her qualifications made her more suited to hold the post of Director Human Resource Management. On that basis, the claimant contended that the Deputy Governor’s decision was unreasonable and irrational.
- [64] In support of his argument that the Deputy Governor’s decision was irrational, Mr. Bourne relied on the authorities of **Associated Provincial Picture Houses Ltd. v Wednesbury Corporation**,¹¹ and **Council of Civil Service Unions and others v Minister for the Civil Service**.¹² Mr. Bourne submitted that given the matters that

¹¹ [1948] 1 KB 223

¹² [1985] AC 374

the Deputy Governor adverted his mind to and given the matters that he ought to have considered and failed to consider, no sensible or reasonable decision-maker who had applied his mind to the question of the claimant's transfer could have arrived at the decision that the Deputy Governor did.

[65] According to the Deputy Governor, in arriving at the decision to transfer the claimant, he considered and took into account the fact that the claimant was a competent departmental manager with human resource management experience and possessed sufficient experience as an accounting officer. In the Deputy Governor's estimation, these qualifications rendered her suitable to effectively deploy and manage budgeted allocation. Therefore, in the Deputy Governor's view, the claimant was eminently suited for such a managerial position, which entailed broader responsibilities than that which she discharged as Director Human Resource Development.

[66] The Deputy Governor explained that certain events had underscored and accelerated the urgent necessity for the Anguilla Public Service to become more flexible, dynamic and responsive, which necessitated cross-departmental training and experience be offered to public officers at all levels, particularly at the senior management level.¹³

[67] The Deputy Governor affirmed that he in fact considered all of these matters contemplated by section 17 of the Regulations, which he considered as not being an exhaustive list of the matters that he ought to have considered, along with the provisions of paragraph 2.20 of the General Orders including the exigencies of the Anguilla Public Service in arriving at his decision to effect the claimant's transfer.

[68] In respect of the Deputy Governor's averments regarding the matters that he took into account that were outside the provisions of section 17 of the Regulations, Mr. Bourne, counsel appearing for the claimant, made the point in his written submissions that the provisions of section 17 of the Regulations were unqualified

¹³ At paras. 30 -33 Affidavit of the Honourable Perin Bradley filed 21st June 2021

and finite. Mr. Bourne used the Latin maxim “*expressio unius est exclusio alterius*” to describe them. Mr. Bourne submitted that therefore, the list of matters enumerated in section 17(2) of the Regulations are closed and exhaustive. According to Mr. Bourne, that being the case, the Deputy Governor was not at liberty to look outside of the specific criteria set out in section 17(2) of the Regulations. In support of this argument, Mr. Bourne referred the Court to the case of **Attorney General of Belize and others v Belize Telecom Ltd and another**¹⁴ in support of his proposition.

[69] Mr. Bourne’s final submission on this point was that the Deputy Governor’s assertion that he also relied on and considered the provision of paragraph 2.20 of the General Orders and the exigencies of the Anguilla Public Service, amounted to an admission by the Deputy Governor of having taken into account irrelevant considerations.

[70] According to Mr. Bourne, the factors to which the Deputy Governor adverted to were plainly not within the criteria expressly enumerated in section 17(2) of the Regulations. Mr. Bourne submitted that section 17(2) gave the Deputy Governor no discretion to look outside or amplify the provisions of that section. Mr. Bourne submitted that therefore, the Deputy Governor acted outside the ambit of section 17(2) which thereby rendered his decision ultra vires. In the circumstances, according to Mr. Bourne, the Deputy Governor exceeded the general ambit of the powers conferred on him by virtue of section 66 of the Constitution.

[71] The evidence presented does not support the view that the Deputy Governor in arriving at his decision failed to take into account the matters contained at sections 17 and 21 of the Regulations. These matters were essentially for the consideration of the Public Service Commission and not the Deputy Governor. There is no evidence presented by the claimant to suggest that the Public Service Commission did not advert its collective mind to the considerations contemplated by sections 17 and 21 of the Regulations. In addition, it does not appear, as the Court has

¹⁴ [2009] 2 All ER 1127

previously pointed out, that the present claim interrogates any decision taken by the Public Service Commission.

[72] What is relevant to the present proceedings is whether the Deputy Governor exceeded the ambit of his delegated authority of superintendence over the Anguilla Public Service. The Court is reminded of the provisions of clause 2.20 of the General Orders. In the Court's view, the Deputy Governor was empowered in the exercise of his discretion in effecting the transfer of a public officer, and in so doing was obliged to consider the exigencies of the Anguilla Public Service. It is clear from the Memorandum that the Deputy Governor did consider the exigencies of the public service as he was entitled to do. It would not be correct for the Court to delimit or attempt to define the full spectrum of matters which relate to the exigencies of the Anguilla Public Service.

[73] It is undeniable that the Deputy Governor considered the exigencies of the Anguilla Public Service when he expressly stated in the Memorandum that this was indeed the case.

[74] It is ironic that the claimant having relied on the Draft Mobility Policy in support of her claim seemed to have overlooked the fact that the embodiment of the Draft Mobility Policy is consistent with the matters adverted to in the Memorandum as they relate to the exigencies of the Anguilla Public Service.

[75] The test for irrationality has been aptly described by the Court of Appeal in **Cove Hotels (Antigua) Limited v The Hon. Gaston Browne, Prime Minister of Antigua and Barbuda and others**¹⁵ where the Court held that the decision of a public body is irrational where it is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at it. Applying this test to the Deputy Governor's reasons for deciding to effect the claimant's transfer, the Court is not in a position to say that such decision was either unreasonable or irrational. The Court cannot ascribe onto

¹⁵ [2019] ECSCJ No. 348

itself the knowledge of the exigencies of the Anguilla Public Service. The Deputy Governor who has the superintendence of the Anguilla Public Service is better placed than the Court to have an appreciation of the exigencies of the Anguilla Public Service. To hold otherwise would be a direct usurpation by the Court of Executive authority.

- [76] In the circumstances, there is nothing found in the Deputy Governor's decision to effect the claimant's transfer that the Court finds unreasonable, irrational or ultra vires.

Conclusion

- [77] In the premises, and for the reasons stated in this judgment, the declarations sought by the claimant in her claim for judicial review are denied. Accordingly, the claim for judicial review is dismissed. Even if the Court were to find that the Deputy Governor in arriving at his decision to transfer the claimant on the basis of any procedural impropriety, illegality, irrationality or unreasonableness that rendered it susceptible to judicial review, if the Court were to quash the decision this would merely amount to a pyrrhic victory for the claimant. The Court is not in a position to direct the Deputy Governor to reinstate the claimant to her previous substantive post in the Anguilla Public Service.

Costs

- [78] The Court makes no order as to costs given the nature and substance of the present proceedings and the relative positions of the parties involved.

Shawn Innocent
High Court Judge

By the Court

Registrar