

**IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE
(CIVIL)**

GRENADA

CLAIM NO. GDAHCV2021/0038

BETWEEN:

AUGUSTINE PASCALL

Claimant

and

PUBLIC SERVICE COMMISSION

Defendant

Before:

The Hon. Mde. Justice Agnes Actie

High Court Judge

Appearances:

Ms. Karen Samuel for the Defendant /Applicant

Dr. Francis Alexis QC with Ms. Hazel Hopkin for the Respondent

2021: July 17.
August 24.

JUDGMENT

- [1] **ACTIE, J.:** The issue arising in this application is whether the legal practitioner for the claimant should be prevented from further acting and representing the claimant in these proceedings.

Background

- [2] The claimant, Augustine Pascall, filed a fixed date claim for judicial review against the Public Service Commission ("PSC") seeking an order of certiorari to quash the decision made on 28th September 2020 terminating his acting appointment as

Technical Officer in the Ministry of Tourism and Civil Aviation, a position he acted in for over nine (9) years. Mr. Pascall also seeks an order of mandamus directing the PSC to confirm his appointment as Technical Officer. The PSC in response contends that the substantive post of Technical Officer held by Mr. Francis Robertson was not vacant to enable Mr. Pascal to be confirmed in that post.

The Application

- [3] By notice of application filed on 18th June 2021, the PSC applied for an order that the Law Firm of Derick F. Sylvester & Associates be recused as legal practitioners for the claimant, Augustine Pascall. The application is premised on the ground that Mr. Derick F. Sylvester, Attorney-at-Law and Principal of the Law Office of Derick Sylvester & Associates, on record for the claimant, held the position of Chairman of the Public Service Commission during the years 2013 to 2018.
- [4] The application is supported by the affidavit of Naomi Jeremiah, Chief Personnel Officer. The salient grounds of the application are as follows:
- (i) Pursuant to the Legal Profession Act 2011, an Attorney- at- Law is obligated to:
 - (a) act in a manner to promote public confidence in the integrity of the legal system and legal profession;
 - (b) avoid situations of potential and or actual conflict including between his professional and personal interest; and
 - (c) abstain from acting in a manner in which he had previously had responsibility while in public employment.
 - (ii) Mr. Derick F. Sylvester was the Chairman of the Public Service Commission from 2013 to 2018 and during those years had unrestricted access to the Commission's files and participated in decisions affecting the matter in dispute to wit: the firm has filed a request for information concerning the decision-making on Mr. Francis Robertson whose status affected the

decision making in relation to Mr. Augustine Pascall, the claimant in this matter.

- (iii) Further to the filing of the said request for information, the Public Service Commission through counsel made overtures to Mr. Sylvester's chambers to consider their acting in this matter. While awaiting correspondence in response, the chambers of Derick Sylvester proceeded to file a witness statement by Mr. Francis Robertson in anticipation of the trial.
- (iv) By law the proceedings of the Public Service Commission are confidential.
- (v) The Commission fears that the first-hand knowledge obtained by Mr Derick Sylvester in his position as Chairman of the PSC on matters arising in and or relating to the present claim have or will have an impact on the manner in which the claim is prosecuted on behalf of Mr Pascall, giving him an unfair advantage.
- (vi) The Commission believes that Mr. Derick Sylvester has breached the ethics mandated under the Legal Profession Act directed to the preservation of the integrity of the legal system and the profession.
- (vii) There is a risk that the legal system will fall into ill repute and the administration of justice will be adversely affected or in the circumstances justice might not appear to be done should Mr. Derick Sylvester and his law firm be allowed to continue to act as legal practitioners for the claimant in these proceedings.
- (viii) It is unfair, unethical and in clear conflict of interest that an Attorney- at- law as former chairman of the Commission and by extension, the firm of which Mr. Derick Sylvester is Principal, who had first-hand information obtained when he held the most responsible position of the Commission, about the main issues in the claim, be allowed to continue to act against the Commission in that claim.

Response to the application

- [5] Derick F Sylvester, in affidavit in opposition to the application, categorically denies that he is estopped from acting in the claim whether by operation of law, ethics,

conduct or otherwise. He contends that his position as chairman of PSC when making decisions affecting or regarding public officers without more, cannot justify his restraint from involvement in the extant claim.

[6] Mr. Sylvester contends that he had no direct contact with the claimant or his file as a public officer while he served as chairman. He states that he has no recollection of his involvement in the making of any decision, substantial or otherwise in relation to Mr. Francis Robertson. It is for that reason that he sought further information as to his interactions with the file as had been alleged by the applicant.

[7] Mr. Sylvester contends that in as much as the PSC business maybe confidential, the outcomes of deliberations are published in the relevant departments involving the affected public officer. He contends that the issues of confidence do not properly arise considering the limited scope of public information that was requested from the PSC in the request for further information filed on 12th April 2021. Mr. Sylvester contends that none of the information requested and disclosed are confidential information against the PSC. He contends that the PSC has not pleaded or proved that the interactions he had with Mr. Robertson gave him an unfair advantage. He avers that Mr. Robertson's evidence was not a product of any special knowledge as alleged by the PSC. Mr. Sylvester further contends that the breach of ethics does not arise in the context of the case as he has not used or obtained any secret information regarding the parties neither is he in breach of confidence or integrity of the legal system.

Applicant's submissions

[8] Ms. Karen Samuel, counsel for the PSC, in her filed submissions states that the Public Service Commission is a body corporate appointed by the Constitution to deal with appointments and related matters of public servants. Ms. Samuel contends that Mr. Derick Sylvester's tenure as chairman gave him unrestricted access to the PSC's files and as chairman made decisions affecting the crux of the defence in the substantive claim. Ms. Samuel submits that Mr. Sylvester is acting in

breach of the subscribed oaths of allegiance as Chairman pursuant to Section 83(1) of the Constitution.

- [9] Ms. Samuel further contends that Mr. Sylvester is also acting in breach of the mandatory Rule 1(3) of the code of ethics under the Legal Profession Act¹.and refers specially to Rules 71 and 72 which provide as follows:

‘71. An attorney-at-law who holds a public office, shall not use his public position to influence or attempt to influence a tribunal, to act in favour of himself or of his client.

72. An attorney-at-law shall not accept private employment in a matter upon the merits of which he previously acted in a judicial capacity, or for which he had any responsibility while he was in public employment.

- [10] Ms. Samuel submits that although the mandatory provisions of Rules 71 & 72 speak in terms of employment and holding a public office, however, by analogy the principles underpinning those rules suggest that it would be contrary to the ethics of the profession to permit Mr. Sylvester who acted as chairman of a high constitutional body as the PSC to (i) use information while he held in that position to advance his client's case (ii) Use the knowledge of the file of Francis Robertson to determine the manner in which he would conduct his client's case to wit, the questions directed to the PSC in the request for information and be placed in a position to cross-examine an officer of the PSC at trial with the full knowledge and secrets of the decision making room which may not be possessed by the witnesses of the PSC as the minutes only produce decisions and not a transcript of the proceedings.

- [11] Ms. Samuel further submits that Mr. Sylvester's conduct is not such as promotes confidence in the integrity of the legal system. Counsel relies on the dictum Lord Millet in the House of Lords decision in **Jefri Bolkiah v KPMG (a Firm)**² where he stated:

¹ No 25 of 2011,

² [1999] 1 All ER 517.

Extent of the solicitor's duty

"Whether founded on contract or equity, the duty to preserve confidentiality is unqualified. It is a duty to keep the information confidential, not merely to take all reasonable steps to do so. Moreover, it is not merely a duty not to communicate the information to a third party. It is a duty not to misuse it, that is to say, without the consent of the former client to make any use of it or to cause any use to be made of it by others otherwise than for his benefit. The former client cannot be protected completely from accidental or inadvertent disclosure. But he is entitled to prevent his former solicitor from exposing him to any avoidable risk; and this includes the increased risk of the use of the information to his prejudice arising from the acceptance of instructions to act for another client with an adverse interest in a matter to which the information is or may be relevant.

...It is of overriding importance for the proper administration of justice that a client should be able to have complete confidence that what he tells his lawyer will remain secret. This is a matter of perception as well as substance. It is of the highest importance to the administration of justice that a solicitor or other person in possession of confidential and privileged information should not act in any way that might appear to put that information at risk of coming into the hands of someone with an adverse interest.

...I prefer simply to say that the court should intervene unless it is satisfied that there is no risk of disclosure. It goes without saying that the risk must be a real one, and not merely fanciful or theoretical. But it need not be substantial³."

- [12] Ms. Samuel concludes that the House of Lords in **Jefri Bolkiah** makes it clear that the duty described applies not only where the relationship of solicitor-client exists in

³ Ibid at pages 527-528

the strict sense but where any person holds a position of confidence with another as was that of Mr. Sylvester as Chairman of the PSC.

Respondent's Submissions

- [13] Dr. Francis Alexis QC for the respondent states that the allegation of breach of confidence made by the PSC is untenable. Queen's Counsel admits that as much as the Commission's business may be confidential, the outcomes and deliberations are published in the relevant departments involving the affected public officer.
- [14] Dr. Alexis QC asserts that the PSC in judicial review proceedings owes a duty of candour and is under an obligation to voluntarily disclose all the relevant facts relating to the office of the Technical Officer while the claimant acted and why after having acted that long was being reverted. Dr. Alexis QC contends that the PSC seeks to hide the issue whether the post in which Mr. Pascall acted was vacant. Dr. Alexis QC avers that the PSC cannot prove that the confidential information is at risk of being disclosed, or that the PSC is at risk of suffering prejudice. Dr. Alexis QC admits that Mr. Sylvester was party to decisions relating to Francis Robertson, the substantive post holder, but did not handle any file in relation to the claimant, Pascall.
- [15] Dr. Alexis QC contends that matters pertaining to Francis Robertson are wholly irrelevant, immaterial and extraneous to the main claim. Dr. Alexis QC is of the view that the firm of Derick F. Sylvester and Associates should not be refrained from acting and relies on the Court of Appeal decision in **Honourable Guy Joseph v The Constituency Boundaries Commission Etal**⁴.

⁴ SLUHCVP2015/0013

Law and Analysis

- [16] The test to be applied whether a legal practitioner should be refrained from acting was restated by Thom JA in the Court of Appeal decision in **Honourable Guy Joseph v The Constituency Boundaries Commission Etal** above. The test is whether a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice requires that a legal practitioner should be prevented from acting, in the interests of the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice.
- [17] The question is whether, having regard to the relationship existing between Mr Derick Sylvester as legal practitioner for the claimant and as former chairman of the PSC, there is a real and appreciable risk that the fair-minded and reasonably informed member of the public would conclude that Mr. Derick Sylvester and/or his firm should be restrained from continuing to act in the interest of the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice.
- [18] Dr. Alexis QC is of the view that applying the principles espoused by the Court of Appeal in **Honourable Guy Joseph v The Constituency Boundaries Commission**, the PSC cannot succeed in its application. Dr. Alexis QC contends that the application should be refused as there is no evidence that Derick Sylvester had any direct dealings with decisions affecting the claimant, Augustine Pascall. As the evidence refers to Mr. Sylvester's dealings with an unrelated matter, namely Francis Robertson.
- [19] In **Honourable Guy Joseph v The Constituency Boundaries Commission**, the appellant filed an application for an order restraining the Commission from retaining the services of Mr. Astaphan SC, to represent it in the proceedings on the ground that inter alia that Mr. Astaphan, SC's close and notorious relationship with the Prime Minister, the Chairman of the Commission, as well as his political alignment with the Saint Lucia Labour party will lead a fair minded and informed observer to

conclude that there was a real possibility that Mr. Astaphan, SC would not bring to the discharge of his duties an unbiased mind and so would likely infect the Commission with his prejudices and predilections. The Court of Appeal affirmed the High Court decision where the judge found that the evidence presented did not prove conclusively that Mr. Astaphan SC was retained to represent any of the parties in the underlying claim prior to the commission retaining him or that the Attorney General or any other person directed or influenced the Commission to retain Mr. Astaphan SC. The learned judge concluded that there could not be any perception that there is a real and appreciable risk that the administration of justice would be adversely affected if Mr. Astaphan, SC represented the Commission in the underlying claim.

- [20] The court in making the determination whether to restrain an attorney from acting must have regard to the attorney's conduct in its entirety. The evidence before the court reflects the minutes of meetings dealing with issues in relation to Mr. Francis Robertson who is holder of the substantive post in which the claimant, Mr Pascall acted for nine (9) years.
- [21] The claimant in this case is seeking judicial review to reverse the decision of the PSC in reverting him to his substantive post after having acted in a higher post for approximately nine years. It is the PSC's defence that the substantive post was not vacant as it was held by Mr. Robertson. It is the evidence that Mr. Derick Sylvester made a request for information seeking, inter alia, information as to who was the substantive post holder and what are the full particulars of his alleged assignment, including where he was assigned, for how long, on what terms, when was he due to return and when did he in fact return; when is the substantive holder due to retire; details of the claimant's pension and NIS benefits in the position that he was reverted to (Grade F) and the benefits that he would have obtained had he been confirmed in the substantive post (Grade I);
- [22] The minutes of meetings of the PSC detailed below reveals the following meetings:

- (i) 20th January 2014- Transfer of Mr. Francis Roberson, Technical Officer, Ministry of Tourism to act in the office of Policy Development Officer, Cabinet Secretary, Office of Prime Minister with effect from 3rd February 2014.
- (ii) 5th January 2015 - payment of salary at a higher point in Grade K to Mr. Francis Robertson, Policy Development Officer (Ag)- PSC rescinded decision of 20th January 2014 (above) and as a special case appointed Mr. Francis Robertson to act at a specified approved rate from 3rd February 2014 until further notice.
- (iii) 4th September 2017- Request for release of Mr. Francis Robertson to the OECS Tourism Competitiveness Project – PSC terminated the acting appointment of Mr. Robertson Ministry in the office of Policy Development, Cabinet Secretariat and reverted him to his substantive office of Technical Officer, Ministry of Tourism, Civil Aviation, Culture and Cooperatives from 31st August 2017. Mr. Robertson was released as Technical Officer to take up an assignment with the World Bank funded OECS Tourism Competitiveness Project with effect from 1st September, for a period of two years in the first instance.

In all these meetings Mr. Derick Sylvester is recorded as the chairman of PSC.

- [23] This court is of the view that the facts in this case are very different from the case of **Honourable Guy Joseph v The Constituency Boundaries Commission Joseph**. The court found that there was no evidence that Mr. Astaphan SC had acted for the appellant in previous proceedings or had acquired any personal knowledge of the appellant due to a previous attorney-client relationship.
- [24] It is evident from the minutes of the meetings of the PSC that Mr. Derick Sylvester as Chairman deliberated and made decisions in relation to the transfer of Mr. Robertson, terms and conditions of his transfer, and emolument of the substantive post in dispute. Mr. Sylvester in request for information from the PSC requested

precise information in relation to all the issues discussed during his tenure. This would all have been information which he would have deliberated and decided upon which is now relevant to his client's case.

[25] Dr. Francis Alexis QC states that the PSC was under a duty of candour to disclose all the relevant information. The court accepts Queen's Counsel's assertion that the PSC in judicial review proceedings is under a duty to provide all reasonable evidence to the court in support of its pleadings in relation to the substantive post which is alleged not to be vacant.

[26] The Privy Council in **Dennis Graham v Police Service Commission and the Attorney General of Trinidad & Tobago**⁵ states "It is well established that a public authority, impleaded as respondent in judicial review proceedings, owes a duty of candour to disclose materials which are reasonably required for the court to arrive at an accurate decision⁶".

[27] The duty of candour to the court imposes the burden on the PSC to adduce all the relevant evidence to support the lawfulness of its decision in reverting Mr. Pascall to his substantive post. The information requested by Mr. Sylvester in the court's view are all relevant information that the PSC should have laid before the court.

[28] However, counsel for the PSC asked that the court take into consideration the sequence of events leading to the application as outlined in the Affidavit of Naomi Jeremiah. It is the evidence that Ms. Samuel made overtures to Mr. Sylvester's chambers to consider their acting in this matter after the filing for request for information when it was discovered that Mr Sylvester was then chairman of PSC. It is the evidence that Mr. Sylvester did not respond but rather proceeded to file a witness statement by Mr. Francis Robertson, the alleged substantive post holder, in anticipation of the trial.

⁵ [2011] UKPC 46

⁶ Ibid at para. 18

[29] Whether or not to disqualify the legal practitioner from further acting depends on the nature of the issue to be decided and the significance of the decision concerned. The court looks at the character of the office of the decision-maker as chairman and the express entrenched constitutional nature of the Public Service Commission.

[30] The Court of Appeal in the **Honourable Guy Joseph v The Constituency Boundaries Commission et al**⁷ said:

“The court always has an inherent jurisdiction (i.e. the authority) to restrain solicitors from acting in a particular case and to control its processes to ensure the proper administration of justice. **If there are circumstances which are likely to compromise the discharge of these duties to a court by a legal practitioner acting in a case, whether because of some prior association with one or more of the parties against whom the legal practitioner is then to act, or because of some conduct by the practitioner (whether arising from associations with the client or a close interest which gives rise to the fair and reasonable perception that the legal practitioner may not exercise the necessary independent judgment),** a court may conclude that the legal practitioner should be restrained from acting, even for a client who desires that the legal practitioner continue to represent him. **(My Emphasis)**

[31] **Rule 1(3) of the Legal Profession Act** provides “where in any particular matter, explicit ethical guidance does not exist, an attorney-at-law shall determine his conduct, by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system, and the legal profession”.

[32] The court will restrain an attorney from acting for a party where it is demonstrated that there are circumstances which show a real risk that the independence or objectivity of the legal practitioner has or may be compromised. It is accepted that

⁷ SLUHCVP2015/0013

there is no evidence of Mr. Sylvester making decisions in relation to the claimant, Mr. Pascall. However, the deliberations taken with respect to Mr. Francis Robertson go to the core of the PSC defence that the substantive post held by Mr. Robertson post was not vacant to afford the claimant's (Mr. Pascall) confirmation in the post.

[33] The court when deciding whether to restrain Mr. Sylvester from acting is also required to look at the perception of those persons whose rights or interests will be affected by the outcome of the substantive claim which included that of the highly confidential constitutional post of Chairman of the Public Service Commission. The House of Lords in **Jefri Bolkiah v KPMG (a Firm)** referring duty of confidentiality held "Like a solicitor, an accountant providing litigation support services owed a continuing professional duty to a former client following the termination of the client relationship to preserve the confidentiality of information imparted during the subsistence of the relation⁸".

[34] By analogy, Mr. Sylvester as Chairman of the PSC is required to preserve the confidentiality of all information and deliberations obtained during his tenure as from 2015 to 2018.

[35] Thom JA at paragraph 77 of the judgment in **Joseph v The Constituency Boundaries Commission** said

.....

What was left remaining was evidence of a relationship. In the small societies of the Caribbean, it is not unusual for counsel appearing to have a relationship with one or more than one party involved in the litigation. What must be shown in those circumstances for the court to exercise this very exceptional jurisdiction is that as a result of that relationship, having regard to the issues before the court, there is a risk that counsel would not perform his/her obligations to the court with the objectivity and independence required of him/her."

⁸ Ibid (Headnote)

- [36] The court accepts that the decisions of the PSC are public as the outcome of the decisions are published in the ministry or department to which the officer is assigned. What is not public are the deliberations and rationale leading to the final decision. Those are integral matters within the knowledge of the Chairman and other members of the PSC involved in the decision-making process.
- [37] Thom JA at paragraph 80 of the judgment in **Joseph v The Constituency Boundaries Commission** cited with approval the decision in **Black v Taylor**⁹ where a solicitor was restrained on the ground of conflict of interest where it was shown that the solicitor who had acted for the family over the years and who was in receipt of confidential information relevant to the issue in the proceedings was retained to act for one member of the family in a family dispute.”
- [38] Applying the principles outlined in **Joseph v The Constituency Boundaries Commission** and **Jefri Bolkiah v KPMG (a Firm)**, this court is of the view there is compelling evidence before this court to restrain Mr. Derick Sylvester from continuing to represent the claimant in the substantive claim. As chairman of the Public Service Commission, he was privy to confidential information in the decision-making process and had acquired personal knowledge of the status of the substantive post of the Technical Officer now in dispute.
- [39] The court has a duty to maintain and instill public confidence in administration of justice. The harm that may be brought to the reputation of a highly constitutional body in that of the Public Service Commission cannot be disregarded, in that its chairman having been integral in the decision-making process would use his knowledge to advance his client’s case against the same Public Service Commission. This, in my view, would erode public confidence in the Public Service Commission and in the administration of justice.

⁹ (1993) 3 NZLR 403

- [40] It has been said that the disqualification is not only granted where there is a pecuniary interest, but where it connects the individual in a substantial and meaningful way with the issues in dispute. The chairman of the PSC entrusted to decide the fate of public servants must under the rule of reticence avoid the appearance of bias. It would ruin the integrity of the Public Service Commission to allow the perception that a former chairman can use information that became known to him as chairman to advance his client's claim.
- [41] The court is of the view that a reasonable fair-minded person sitting in court and informed of all the relevant facts would from an outward view conclude that there is a reasonable suspicion that Mr. Derick Sylvester having been the chairman of the Public Service Commission and integrally involved in the decisions affecting the substantive holder had full knowledge as to whether or not the post was vacant. The court is of the view that the firm of Derick F. Sylvester and Associates should not continue to act on behalf of the claimant in the interest of the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice.
- [42] The court commends the overtures made by counsel Ms Karen Samuel as colleague to Mr Derick Sylvester to consider his voluntarily recusal before filing the extant application. In my view, Mr Derick Sylvester, being cognisant of the full facts, should have accepted that there are lines that may have been crossed and/or a potential conflict of interest in his previous position as chairman especially considering the issues relating to the circumstances of the substantive post holder, Mr Francis Robertson. The failure to recuse himself at the earliest necessitated an adjournment of the trial to determine the application. Parties are expected to behave reasonably in the conduct of litigation to assist the court and to save time and expense in meeting the overriding objective of the CPR 2000.

[43] Taking all in the round and for the reasons advanced above, the application to restrain the Law Firm of Derick F. Sylvester & Associates from further acting in the proceedings is granted, with costs to the applicant in the sum of \$750.00.

ORDER

[44] It is hereby Ordered and Directed as follows:

- (1) The application for the Law Firm, Derick F. Sylvester and Associates, be recused as legal practitioners for the claimant is granted.
- (2) The Law Firm, Derick F. Sylvester & Associates, is hereby restrained from further acting and is hereby removed from the record as the Legal Practitioners for the claimant, Augustine Pascall, in these proceedings.
- (3) The Law Firm, Derick F. Sylvester & Associates, shall pay costs to the Applicant, Public Service Commission, in the sum of \$750.00 within twenty-one (21) days of today's date.
- (4) The matter shall be listed for further hearing and to enable the claimant to retain new counsel on a date to be arranged and notified by the court office.

Agnes Actie
High Court Judge

By the Court

Registrar