

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ON MONTSERRAT

CASE MNIHCV 2019/0059

IN THE MATTER of an application for an administrative order pursuant to CPR rule 56;

IN THE MATTER of an application for a declaration pursuant to CPR 56.1.(1)(b); and

IN THE MATTER of the Public Service Commission and the Deputy Governor in dealing with a vacancy for an agriculture science teacher at the Montserrat secondary school.

BETWEEN

CLAUDE GERALD

APPLICANT

AND

PUBLIC SERVICE COMMISSION

DEPUTY GOVERNOR

RESPONDENTS

APPEARANCES

Mr David Dorsett for the applicant.

Ms Cedricia Shiell of the office of the Attorney General for the respondents.

2020: DECEMBER 7, 15

2021: JANUARY 14

RULING

On appointment of temporary teacher

- 1 **Morley J:** The Montserrat secondary school has needed an agriculture teacher, there has been a temporary appointment, and Claude Gerald has complained, as the job was once his, he applied for it afresh, was not appointed, and through Counsel Dorsett argues the procedure for appointing the temp was flawed, meriting judicial review.
- 2 Fixed date claim was filed on 05.12.19, originally against the Public Service Commission (PSC) alone, but on reading the response of Angela Greenaway, Chair of the PSC, filed on 10.01.20, Counsel Dorsett then filed an amended claim on 03.02.20, drawing in the Deputy Governor (DG).
- 3 Judicial review may arise under **rule 56 CPR 2000**, which allows for a declaration of error by the state, leading to an 'administrative order', which remedies can include certiorari, mandamus, and prohibition, and also injunction, restitution, and damages. Application may be made by any person with 'sufficient interest', per **rule 56.2**, which for the purposes of this ruling it is accepted is fulfilled by Gerald, as the former agriculture teacher with an interest in who got the job. Leave is required for the application, per **rule 56.3**, which I grant, as the point raised may have wider ramifications. Affidavits have been received from Gerald¹, Greenaway, and from Cheverlyn Kirnon, the Chief Human Resources Officer (CHRO). The application has been heard on the papers, without there being live evidence, by agreement with counsel, with Counsel Dorsett filing submissions on 05.11.20, with response by Counsel Shiell on 11.11.20, there was a hearing on 07.12.20, though adjourned as there was an illness, with then further submissions by Counsel Dorsett offered later on 07.12.20, and final argument on 15.12.20.
- 4 To merit judicial review, Counsel Dorsett must establish on balance, broadly speaking:
 - a. there has been a procedural flaw in the appointment, amounting to an error of law leading to 'error on the face of the record'; or

¹ The parties and witnesses will be referred to as shortened form for ease of reading, and no disrespect is intended by not writing out full title or the legalese of whether claimant or respondent.

- b. 'Wednesbury unreasonableness', meaning such unreasonableness in the temporary appointment that no reasonable person in authority would have made it; or
 - a. breach of natural justice, meaning of the principles expressed in Latin as 'audi alteram partem' (let the other side be heard), or 'nemo iudex in causa sua' (no one shall be judge in their own cause).

- 5 What has happened is as follows, in part adopting the helpful summary prepared by Counsel Shiell in paras 1-13 of her 11.11.20 submissions:
 - a. The post of agriculture science teacher was advertised in May-June 2019, requiring by 10.06.19 a completed application form, with cover letter, cv, copies of qualification certificates, a statement of suitability, two references and a police character certificate. Gerald submitted a flawed application, being only a letter dated 10.06.19, no more, and so was not short listed, nor anyone else as none were suitable.
 - b. Meanwhile the need to have a teacher in place for 2019-20 was pressing. Following research in August, on 12.09.19 the CHRO submitted a recommendation to the PSC for the employment of a person, X, on a one year contract, but who it appears had not applied for the formal vacancy. The PSC sought further information, and instead X, given the pressing need, was placed on consecutive three month 'special agreements', which has been ever ongoing for now 16 months. In June 2020, the permanent post was re-advertised on radio ZJB and the Government of Montserrat (GoM) website, and at present the permanent post remains unfilled.

- 6 The GoM, per the CHRO, recruits three types of worker: permanent and pensionable, under contract, and temporary. Temporary workers, like X as above, are engaged under special agreements, rolling over every three months, which recruitment has been delegated by the DG to the CHRO.

- 7 In the first claim, the complaint was against the PSC that Gerald was *'the lone applicant for a vacant teaching position, but which position was filled by a person who did not apply for the said position'*. When this turned out to be wrong, namely X had not been appointed to the vacancy as a permanent teacher, the complaint shifted to, vaguely, being against both the

- PSC and the DG that Gerald was, as above, *‘the lone applicant for a vacant teaching position, but which position was filled by a person who did not apply for the said position’*, pleading X was unqualified, and having not applied his temporary appointment was irrational, particularly as it was by the DG, for whom the CHRO acts, and had not been approved by the PSC which oversees the appointment of public officers.
- 8 Concentrating on the pleadings, it can be said straight away Gerald was not the lone applicant, and sight of X’s cv, exhibited by the CHRO, shows X is suitably qualified, so that evidentially these two complaints fail.
- 9 Concentrating on the procedural issue raised in the pleadings, albeit expressed by Counsel Dorsett in woolly terms, exploration in court of what exactly was the problem revealed, eventually, much unhappiness X could ever be a teacher, even temporary, if not already in the ‘public service’ (which seemed a further deviation from the original claim).
- 10 Therefore I will turn now to deal with the recruitment of X, being suitably qualified, who did not apply, not being already in the public service, but who was instead recruited as a temp by consecutive three month special agreements under the pressing need for a temporary teacher.
- 11 Significant attention has been drawn to the **Montserrat Constitution**, the **Public Service Act** cap 1.06, and to the **Public Service Regulations**, (with underlining added in the follow-on sections of legislation).
- 12 The functions of the DG are governed by **s24 Montserrat Constitution**:
- Functions of Deputy Governor
- 24 - (1)** The Deputy Governor shall assist the Governor in the exercise of his or her functions, and shall have such functions, not of a ministerial nature, as (subject to this Constitution and any other law) may be assigned to him or her by the Governor, acting in his or her discretion.
- (2) Under the authority of the Governor, the Deputy Governor shall be responsible for—
- (a) in accordance with section 84, the appointment of persons to public offices, the suspension, termination of appointment, dismissal or retirement of public officers, and the taking of disciplinary action in respect of public officers;

- (b) the application to any public officer of the terms or conditions of employment of the public service (including salary scales, allowances, leave, passages or pensions) for which financial provision has been made; and
- (c) the leadership and management of the public service, and the organisation of the public service in so far as it does not involve new financial provision.

13 Concerning appointment of public officers, there are **s83** and **s84 Montserrat Constitution**:

Functions and operation of Public Service Commission

83 - (1) The Public Service Commission shall have—

- (a) such advisory functions in relation to the appointment...of public officers; and
 - (b) such oversight and other functions in relation to the public service,
- as may be prescribed by law.

Appointment, discipline and removal of public officers

84 - (1) Power to make appointments to public offices, and to remove or exercise disciplinary control over persons holding or acting in such offices, shall be exercised by the Deputy Governor in accordance with section 24 and subject to regulations made under this section...

(3) Regulations made by the Governor, acting in his or her discretion, may provide for the delegation to any other public officer, to such extent and subject to such conditions as may be prescribed in the regulations, of any of the powers conferred on the Deputy Governor by section 24(2)(a).

14 In the **Public Service Regulations**, attached to the **Public Service Act** cap 106, the following are relevant:

Interpretation

2.-... “appointment” means the conferment of an office of emolument in the public service upon a person;...

Functions of the Commission with regard to appointments and promotions

15 - (1) The Commission or authorised officer shall make recommendations to the Deputy Governor with respect to—

- (a) appointments...of suitable officers;

Advertisement of vacancies

18 - (1) The Deputy Governor shall, by circular or by publication on the radio and in a newspaper, give notice of vacancies and any officer may make application for appointment to any such vacancy. Such application shall be forwarded to the Deputy

Governor through the Head of Department and Permanent Secretary under whose authority the applicant is serving.

(2) Where the Commission or authorised officer considers either that there is no suitable candidate already in the public service available for the filling of any vacancy or that having regard to qualifications, experience and merit it would be advantageous and in the best interest of the public service that the service of a person not already in the service be secured, the Commission shall take such steps (including advertisement of the existence of such vacancy) as it may think necessary for the filling of such vacancy;

15 What this legislation means, in my judgment, is:

- a. The DG is empowered to appoint 'public officers' to emolument in the public service, as permanent and pensionable workers, on consultation with the PSC.
- b. In addition, the powers of the DG can be delegated as needed to manage and organise the 'public service', which is not expressed to be populated only by 'public officers', these terms not therefore meaning the same thing else as a matter of statutory construction it can be assumed only one term would be used: in short, persons in public service are not all public officers.
- c. Moreover, the DG has a duty to advertise vacancies for public office, where it is expected a post will go to persons who are already public officers, but where after advert there is no suitable candidate who is already a public officer, then a new person can be recruited to be a public officer. In other words, the vacancy as a public officer teaching agriculture science ought to go to an existing permanent and pensionable teacher as an officer within the public service, but if there is no suitable candidate, there can be recruitment as a public officer of someone from outside.

16 If this analysis is right, then the application by Counsel Dorsett is misconceived. The legislation quoted deals with 'public officers', not temporary workers, and as above, not everyone assisting public service is necessarily a public officer. His argument supposes to teach in public service X must be or be made a public officer, approved by the PSC, receiving emolument as a permanent and pensionable person in the public service. But this is not so. Instead, here, X is a temp, under a finite contract, not a pensionable salary scale, easily terminated, limited to doing temporary teaching of a specific class of children.

- 17 What may exercise the mind of Counsel Dorsett is mischief which may arise in theory, to save money, where the GoM might appoint almost everyone to rolling terminable special agreements, avoiding permanent and pensionable status, which if it happened as a policy, uttered or apparent, would be capable of judicial review; but such would be very different from this one case, which is in the context of a pressing need, and where the temporary nature of the work by X has not extended beyond 16 months so far.
- 18 Moreover, a further mischief might be that special agreements might be abused for nepotism, recruiting friends and relatives without scrutiny to government money, deliberately circumventing fair recruitment procedures, but this is not suggested here.
- 19 Counsel Dorsett has offered several arguments, shifting position as the case developed:
- a. X cannot have been appointed as he did not apply – no, he has not been appointed to the vacancy, to which he did not apply, instead he has been recruited not as a public officer to fill a temporary need, so that not applying, but being recruited, is permissible.
 - b. The job of a teacher is to be in public service, which must mean to be a public officer, so that X cannot do the job as he is not a public officer, and he cannot be appointed one as he did not apply – no, see ‘a.’ above, and in addition a person can where appropriate assist the public service, such as by teaching, and yet not be a public officer under emolument as a permanent and pensionable worker.
 - c. A police officer is a public officer, and a person not a police officer cannot be appointed one, even temporarily, reinforcing that only an existing public officer can do the job of a public officer, or must be appointed one to do it, which is a principle which must apply to a teacher who in public service is also expected to be a public officer – no, this argument likens apples to oranges; though both fruit, in this sense both sharing public service, teachers and police are different, as an obvious reality, so that it can be appropriate to have a temp teaching in a way it may not be to have a temp policing (though curiously ‘special constables’ in the UK are part time folk, not paid, and not in permanent and pensionable status, suggesting a temporary police officer is not beyond consideration).
 - d. The PSC should have considered the appointment of X – no, the PSC considers the appointment of public officers, which X is not.

- e. There has been insufficient transparency at the appointment of X, meriting sanction – no, there has been recruitment to a special agreement, which is a private arrangement between the contracting parties, limited by time, requiring less openness than a public vacancy recruitment to a limitless public office.
 - f. The DG has no positive power to appoint X, which she must have as a person exercising public authority, rather than being a private person – no, the DG plainly has positive power, delegated to the CHRO, to recruit workers on contracts and special agreements, which is at least implicit and longstanding accepted, as the alternative would be the function of government would fail for being required to put everyone recruited to help the public service briefly in a pressing circumstance into the unrealistic and unmanageable position of a permanent and pensionable public officer: in short, it would create absurdity to agree the DG has exceeded her powers by securing through the CHRO a qualified temp to teach the children agriculture, requiring instead they are not taught at all.
 - g. Gerald should have his job back – no, he must apply correctly and be assessed per the recruitment criteria, he is not an exception, he may consider he should be, but the rules apply equally to him.
- 20 I am indebted to counsel for various authorities offered, in particular to Counsel Dorsett who has characteristically offered many, though perhaps not fully on point, including **R v Lancashire CC exp Huddleston 1986 2 AER 941**, **R v Somerset CC exp Fewings 1995 1AER 513**, **R v Richmond LBC exp Watson 2001 QB 370**, **Belize alliance v DoE 2004 UKPC 6**, **R (I) v Home office 2010 EWCA Civ 727**, and **ICI Commissioner v Police Federation 2020 UKPC 11**.
- 21 Of particular assistance was **Charter v Simon et al 2002** Grenada civil appeal 5 of 2001, offered by Counsel Shiell, a decision of Byron CJ, as he then was, where a gatekeeper working for the Grenada government from 1985 to 2000, on contract, not appointed by the local PSC, at contract termination claimed to be a pensionable public officer, governed by public service regulations, which at para 8 was rejected by the learned appeal judge; though the matter was ultimately decided on other grounds, this decision appears to provide some

authority for how a person can help the public service, on contract, but this does not mean or require he is a permanent and pensionable public officer.

22 In sum, analysis shows the following:

- a. There has been no Wednesbury unreasonableness – in the circumstances the recruitment of X has been reasonable;
- b. There has been no breach of natural justice – Gerald applied, was defective, but his defective application has been heard, while there has been no suggestion of bias or nepotism, where the CHRO has acted somehow in her own cause by recruiting X;
- c. There has been no procedural flaw – temporary recruitment of a teacher to fill a pressing gap by special agreement negotiated by the CHRO is not improper.

23 As this point has been of wider public interest, pertaining to temporary recruitment by the GoM, though Gerald has lost his action and though the arguments of Counsel Dorsett changed, there will be no order as to costs.

The Hon. Mr. Iain Morley QC

High Court Judge

14 January 2021