

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(Civil)**

SAINT LUCIA

SLUHCV2017/0626

BETWEEN:

ELIZABETH DARIUS-CLARKE

Claimant

and

ATTORNEY GENERAL OF SAINT LUCIA

Defendant

Before:

The Hon. Mde. Justice Kimberly Cenac-Phulgence

High Court Judge

Appearances:

Mr. Horace Fraser of Counsel for the Claimant

Mr. Seryozha Cenac with Mr. Mark Maragh of Counsel for the Defendant

2019: July 4;
December 17.

JUDGMENT

- [1] **CENAC-PHULGENCE J:** This claim seeks both constitutional and administrative law reliefs. The claimant, Mrs. Elizabeth Darius-Clarke (“Mrs. Clarke”) aggrieved by the termination of her appointment as Ambassador Extraordinary and Plenipotentiary to the United States of America and Permanent Representative to the Organization of American States (OAS) (“referred to as Ambassador”) by the Governor-General filed this originating motion on 20th October 2017 amended on 18th October 2018 for the following relief:

- (i) a declaration that the termination of Mrs. Clarke's contract with the Government of Saint Lucia as Ambassador is contrary to the provisions of section 87(2) of the Constitution of Saint Lucia¹ and the principles of fairness;
- (ii) a declaration that Mrs. Clarke had a legitimate expectation that in accordance with Schedule 1 of her contract and/or settled practice she would have been allowed to complete her contract or in lieu thereof be paid the full value of her contract to its termination;
- (iii) a declaration that in terminating Mrs. Clarke's contract, the defendant breached the constitutional right not to be discriminated by any person or authority contrary to section 13 of the Constitution;
- (iv) a declaration that the Prime Minister had a duty to act fairly in his recommendation to the Deputy Governor General regarding Mrs. Clarke's employment and by failing to make enquiries or to give her an opportunity to address that issue, the said recommendation is tainted with illegality;
- (v) a declaration that Mrs. Clarke is entitled to the full balance of her emoluments, allowances and other benefits to the end of her contract on 30th April 2017;
- (vi) damages for breach of constitutional rights including aggravated and exemplary damages;
- (vii) damages in the sum of US\$10,000.00 for the loss of chance in completing a certificate programme;
- (viii) damages for distress and inconvenience;
- (ix) interest
- (x) costs.

Mrs. Clarke's Case

- [2] Effective 1st May 2015, Mrs. Clarke was appointed as Ambassador in Washington DC, United States. The contract of employment dated 25th September 2015 stated that Mrs. Clarke was engaged for a tour of two (2) years from 1st May 2015.

¹ Cap. 1.01, Revised Laws of Saint Lucia.

Mrs. Clarke is the wife of Mr. Leo Clarke who is the General Secretary of the Saint Lucia Labour Party (SLP), now the Opposition Party.

- [3] It is well-known that general elections took place on 6th June 2016 in Saint Lucia and that the United Workers Party (UWP) won the elections and a new Government under the leadership of Prime Minister, Hon. Allen Chastanet (“the Prime Minister”) was sworn in. Shortly after those elections, Mrs. Clarke while *en route* back to her position in Washington DC received two telephone calls, the first from the Acting Permanent Secretary in the Ministry of External Affairs (“PS-External Affairs”) informing her that acting on instructions of the incoming Prime Minister, she would not be representing Saint Lucia at the OAS General Meeting due to be held from 13th to 16th June 2016. The second call was from the Cabinet Secretary who advised similarly.
- [4] By a letter dated 17th August 2016 from the PS-External Affairs, Mrs. Clarke was formally requested to tender her resignation no later than 31st August 2016. Mrs. Clarke responded to that letter by letter dated 19th August 2016 advising that she could not comply or accede to the request as it was a fundamental breach of her contract of employment, which made no provision for the Government to demand her resignation without more and that further she could only be terminated for cause as provided in clause 5 of her contract.
- [5] Mrs. Clarke sought the reasons for the request for her to tender her resignation and advised that she looked forward to an amicable resolution of the matter. No response was obtained.
- [6] By an instrument under the hand of the Deputy Governor General dated 30th September 2016, Mrs. Clarke’s appointment as Ambassador was terminated effective 15th October 2016. Mrs. Clarke responded by letter dated 11th October 2016 drawing to the attention of the Deputy Governor General that the termination was in breach of her contract and that there had been no attempts made by the

Prime Minister or his representative to negotiate the terms of her contract. Mrs. Clarke asserts that despite many requests to the PS-External Affairs for clarification of her terminal benefits, she has only been paid a prorated gratuity for the period 1st May 2015 to 15th October 2016 but her other terminal benefits in particular, the outstanding payment of school fees for her daughter had not been addressed.

- [7] Mrs. Clarke asserts that it became apparent to her that the Prime Minister wanted little to do with her, as he gave instructions that another officer accompany him to two meetings which she had been instructed to schedule with the State Department. Mrs. Clarke says that prior to the general elections in June 2016, and in his capacity as Political Leader of the UWP, he openly questioned the payment of school fees for her daughter's education. Mrs. Clarke expresses that as a result of those comments, she was subjected to unflattering commentary, ridicule and threats.
- [8] Mrs. Clarke asserts that after the general elections the Prime Minister told a Press Conference among other things that he did not have a lot of regard for her as Ambassador to the US and that there was nothing in her history which gave him any confidence that she can be an Ambassador. She alleges that he further stated his belief that typically after an election, people in those positions resign and if she did not resign, he intended to relieve her of her duties.
- [9] Mrs. Clarke also asserts that on 7th December 2016 during a television interview, the Prime Minister again singled her out and commented that she had no qualifications to be an Ambassador to the US and was basically a political hack and her appointment was political patronage. Mrs. Clarke asserts that she was given different treatment from the other diplomats and specifically singles out Ms. Menissa Rambally, Mr. Hubert Emmanuel, Mr. Kent Hippolyte, Ms. Yasmin Walcott and Dr. Charles Isaacs of whom the Prime Minister never spoke negatively. nor did he question their qualifications or fitness to hold office.

- [10] Mrs. Clarke asserts that the Prime Minister's comments about her and especially her lack of qualifications were hurtful, demeaning, offensive and discriminatory. Mrs. Clarke provided a detailed account of her qualifications which is not necessary to set out for the purposes of this decision. Mrs. Clarke asserts that the Governor General typically acts on the recommendations of the Prime Minister and there is no facility in place which would afford her the opportunity to make representations to the Governor General which might have led him not to carry out the Prime Minister's recommendations. She says it was open to the Prime Minister to call upon her to show that she was suitably qualified.
- [11] As a result of the termination, Mrs. Clarke says she was forced to withdraw from a post graduate course of study which she was pursuing and which she was scheduled to complete in April 2017 and had already invested US\$10,000.00 in the programme.
- [12] Mrs. Clarke says that as of 15th October 2016 all payment of salary and allowances were stopped and no provision was made to take care of her relocation to Saint Lucia. Her diplomatic visa allowed her to stay in the US for 30 days after 15th October 2016 and thereafter she had to leave and return on her ordinary visitor visa. She also had to change her daughter's visa status which was still ongoing at the time of filing of the claim.
- [13] Based on the pre-trial memoranda filed by the parties, the following issues arise for the Court's determination:
- (a) Whether the actions of the Deputy Governor General under section 87 of the Constitution is non-justiciable pursuant to section 121 of the Constitution?
 - (b) Whether the termination of Mrs. Clarke's appointment as Ambassador was in breach of the provisions of section 87 of the Constitution?
 - (c) Whether there exists a duty to act fairly on the part of the Prime Minister when advising the Governor General under section 87 of the Constitution and

whether the termination of Mrs. Clarke as Ambassador was in breach of the principles of fairness?

- (d) Whether Mrs. Clarke's constitutional right not to be discriminated against was violated contrary to section 13 of the Constitution in her termination as Ambassador?
- (e) Whether Mrs. Clarke had a legitimate expectation that she would be entitled, whether pursuant to her contract or by customary practice to fulfil the term of her contract or be paid in lieu thereof?
- (f) Whether Mrs. Clarke is entitled to any of the heads of damages claimed and to the full balance of emoluments and benefits to the end of her contract period?

[14] This case raises a challenge and issues which appear unprecedented. The parties have not put before the Court any authority which specifically addresses the issues raised in the context of the appointment of ambassadors.

[15] An ambassador is a diplomat regarded as being the top-ranking representative of their own country to the host country in which they are stationed. Principally, their roles would involve conducting negotiations with the host government on behalf of their own government; representing their state in meetings and delivering messages on behalf of their own government to the host government; receiving messages and communications from the host government for relay back to their own government and being the spokesperson for their own government and its policies in the host country.

Issue (a) - Whether the action of the Governor General is non-justiciable?

[16] In answer to this claim, the defendant asserted that the termination of Mrs. Clarke is non-justiciable by virtue of section 121 of the Constitution as it was done by the Deputy Governor General in accordance with the provisions of the Constitution.

[17] Section 121 provides that

“Where by this Constitution the Governor General is required to perform any function in accordance with the advice of, or after consultation with,

any person or authority, the question whether the Governor General has so exercised that function shall not be enquired into in any court of law.”

- [18] That section indicates that whether the Governor General has acted on advice or consulted with any person or authority is non-justiciable. There is a presumption of legality.
- [19] Counsel for the claimant, Mr. Horace Fraser (“Mr. Fraser”) argued that Mrs. Clarke’s claim is not that the Governor General did not act on the advice of the Prime Minister but that the advice was bad in that she could not be dismissed without just cause and the termination was in breach of the rules of fairness. He submitted that she holds office by an instrument of appointment and not by her contract, which simply sets out the terms and conditions of her employment. That instrument of appointment was not exhibited.
- [20] The authors of **Fundamentals of Caribbean Constitutional Law**² state that generally, courts are less willing to go behind ouster clauses that insulate the largely political powers exercised by a Head of State - from appointments of a Prime Minister to the appointment and removal of Ministers. In the case of **Re Bain**,³ the Court adverted to the administrative nature of most of the powers of the head of state, as distinct from acts of a judicial nature, as supporting their non-justiciability.
- [21] However, in **Knowles v Superintendent of Fox Hill Prisons**,⁴ the Privy Council pointed out that the ouster clause would not preclude judicial inquiry into violations of the Constitution. In **Re Office of the Prime Minister**,⁵ Mohammed J acknowledged that judicial review would be available where a breach of the rule of law is alleged.

² Robinson Tracy, Bulkan Arif, Saunders Adrian, *Fundamentals of Caribbean Constitutional Law*, Sweet & Maxwell, 2015 at para 5-020.

³ Trinidad and Tobago, 1987 HC 132, delivered 30th July 1987.

⁴ [2005] UKPC 17.

⁵ Trinidad and Tobago, 2002 HC 115, delivered 27th August 2002.

- [22] The ouster clause can be said to establish a presumption of regularity which can be rebutted if there is manifest, glaring and capricious exercise of discretion.
- [23] In **Richardson v The Attorney General Anguilla**,⁶ Bruce-Lyle J said he could not go behind the ouster clause “to inquire into the exercise of the Governor’s wide powers of discretion as provided for in the said Section” unless there was “a manifest, glaring and capricious abuse of the exercise of that discretion”.
- [24] That is precisely what Mrs. Clarke asserts. That in the instant case, her termination was in breach of the rules of fairness and that she could not be terminated without cause and therefore, the actions of the Governor General can be enquired into in such circumstances. The argument is that the basis for the Prime Minister’s advice being wrong in law could not then lead to a proper termination.
- [25] In order, therefore, to conclude on the justiciability issue, I must proceed to determine the other issues concerning the legality and fairness of the decision.

Issue (b) - Whether the termination of Mrs. Clarke’s appointment as Ambassador was in breach of the provisions of section 87 of the Constitution?

- [26] Section 87 of the Constitution under the heading “Appointment etc., to particular offices” addresses appointment of ambassadors and provides as follows:

“87. Appointment, etc., of Permanent Secretaries and certain other officers

- (1) This section applies to the offices of Secretary to the Cabinet, permanent secretary, head of a department of government, deputy head of a department of government, any office designated by the Public Service Commission as an office of a chief professional adviser to a department of government and any office designated by the Commission, after consultation with the Prime Minister, as an office the holders of which are required to reside outside Saint Lucia for the

⁶ Anguilla, 2006 HC 6, delivered 27th April 2006.

proper discharge of their functions or as an office in Saint Lucia whose functions relate to external affairs.

- (2) The power to appoint persons to hold or to act in offices to which this section applies (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 shall vest in the Governor General, acting in accordance with the advice of the Public Service Commission.

However—

- (a) ...
- (b) before the Public Service Commission tenders advice to the Governor General with respect to the appointment of any person to hold an office to which this section applies (other than an appointment to an office of permanent secretary on transfer from another such office carrying the same salary) it shall consult with the Prime Minister and if the Prime Minister signifies his or her objection to the appointment of any person to the office, the Commission shall not advise the Governor General to appoint that person;
- (c) **in relation to any office of Ambassador, High Commissioner or other principal representative of Saint Lucia in any other country or accredited to any international organization the Governor General shall act in accordance with the advice of the Prime Minister, who shall, before tendering any such advice in respect of any person who holds any public office to which appointments are made by the Governor General on the advice of or after consultation with some other person or authority, consult that person or authority.”** (my emphasis)

[27] This section deals with specific offices and vests the power to appoint and remove such officers in the Governor General, acting on the advice of the Public Service Commission (PSC). It then introduces another element in sub-paragraph (b) which is that before the PSC advises the Governor General, it must consult with the Prime Minister and if the Prime Minister signals his objection to the appointment of such person, it is not to advise the Governor General to appoint that person.

- [28] The section then continues and specifically names the following offices, Ambassador, High Commissioner or other principal representative of Saint Lucia in any other country or accredited to any international organization and provides in the case of these offices, that the appointment be by the Governor General acting, not in accordance with advice of the PSC, but with the advice of the Prime Minister. The section continues that where the person to be appointed holds a public office to which appointment is by the Governor General in consultation with some other person or authority, then before the Prime Minister advises the Governor General, he must consult with that person or authority.
- [29] It is clear that appointment to and removal from the office of Ambassador fall squarely within the purview of the Governor General acting on the advice of the Prime Minister. Counsel for Mrs. Clarke has acknowledged that her termination was in keeping with the section and has not alleged any non-compliance with the section. Therefore, on the face of it no breach has been identified. The instrument of 30th September 2016 specifically stated that it was being made pursuant to section 87(2)(c) and that the Deputy Governor General was acting in accordance with the advice of the Prime Minister.⁷ There therefore appears to be no basis for enquiry into the Governor General's actions and section 121 would apply.
- [30] So, what is the breach of section 87(2) being alleged? In her claim, Mrs. Clarke asserts that there is a breach of section 87(2) in that her termination was contrary to the principles of fairness in that (i) she was terminated without cause or without a hearing; (ii) the termination was in breach of her contract of employment and (iii) was contrary to the settled practice in Saint Lucia of termination by mutual consent or paying for the remaining parts or period of contracts of Ambassadors or allowing them to complete their contracts after a change of Government. Mr. Fraser argued that Mrs. Clarke being a public officer was not subject to dismissal at pleasure and could not be terminated without cause and without being given a

⁷ List of Exhibits filed 20th October 2017 as "EDC5".

hearing. Mrs. Clarke also asserted in her claim that the Prime Minister had a duty to act fairly in advising the Governor General and having failed to make the necessary enquiries into her qualifications or failing to give her an opportunity to address the issue, his advice was tainted with illegality.

[31] The defendant's answer is two-fold; the first being that the actions of the Governor General cannot be enquired into. Counsel for the defendant, Mr. Seryozha Cenac ("Mr. Cenac") argued secondly that the position of Ambassador is not a public office and did not enjoy the security of tenure offered by the Constitution as the power to make appointments to that position did not lie with any service commission. The Governor General acting on the advice of a particular service commission is the constitutional mechanism that affords a particular office, constitutional protection. Therefore, Mrs. Clarke was not the holder of public office as she was not appointed through a commission. As such, he said she came within the 'discretion and control' of the appointing authority which in this case is the Governor General acting on the advice of the Prime Minister. This therefore brought Mrs. Clarke within the Crown's common law right to dismiss at pleasure.

[32] Mr. Cenac argued that when a prime minister advises the Governor General to appoint an ambassador, the prime minister is exercising an executive power. In light of this, one government, through the exercise of that power cannot bind a future government in the exercise of that power. Therefore, a provision in a contract which seeks to fetter the discretion of the executive in the exercise of that executive power would be unenforceable.

[33] The question of whether Mrs. Clarke could have been terminated without cause and was therefore dismissible at pleasure turns on whether the office of ambassador is a public office. 'Public office' is defined in the Constitution as 'any office of emolument in the public service' and 'public service' is defined as 'subject to the provisions of this section, the service in a civil capacity of the Government.'

- [34] Section 124(2) specifically provides which offices do not fall within the definition of public office and the position of ambassador is not a named position. That notwithstanding, it is critical to this case that a determination be made as to whether the position of ambassador is a public office for the purposes of this case.
- [35] Section 86(1) states that the power to appoint persons to hold or act in offices in the public service vests in the PSC.
- [36] Mr. Cenac referred to the case of **Gordon Yaw v V.J Correira**⁸ to support his argument. In that case the Guyana Court of Appeal heard an appeal against the decision of the High Court refusing an application for certiorari to quash the order for his dismissal of the appellant who was a watchman on the ground that he was not a public officer and could be dismissed at pleasure.
- [37] The Court in that case looked at the definitions of public officer under the Guyana Constitution and observed that the term office had not been defined. They were therefore of the view that ‘office’ should be construed as a post created and designated, and intended to be, of a subsisting, permanent and continuing nature.’ The Court held that in order to determine whether a ‘public office’ has been constituted under articles 125(1) and 96(1) of the Guyana Constitution (sections 124(1) and 86(1) of the Saint Lucia Constitution), the question should be examined in this way:
- “(1) Is there an ‘office’ established in the sense afore described with a sufficient degree of permanence and continuity, and which exists apart from the holder? If so, (2) has an appointment been made to that office in accordance with article 96(1)? If so, (3) is it an office of emolument? If so, (4) is it an office which involves service with the Government of Guyana in a civil capacity?”
- [38] When each of these four questions can be answered in the affirmative, then the person who holds the ‘office’ could be counted a public officer. In other words, there must be (a) an office held by a person appointed by or on behalf of the

⁸ (1975) 65 WIR 144 at 152..

Public Service Commission, (b) to serve the State, (c) for an emolument; all of which must be duly satisfied before the person can be regarded as a public officer.”

[39] The Court also stated that although every public officer may be in the public service, not everyone in the public service is the holder of a public office.

[40] Mr. Cenac and Mr. Fraser both referred to the seminal case of **Endell Thomas v The Attorney General**.⁹ In that case Lord Diplock set out the purpose of constitutional commissions:

“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 in Trinidad and Tobago 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 other person or authority, power 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. These autonomous commissions, although public authorities, are excluded by section 105(4)(c) from forming part of the service of the Crown.”¹⁰

[41] Mr. Fraser referred to the cases of **Horace Fraser v Judicial and Legal Services Commission**¹¹ and **Angela Innis v Attorney General**.¹² In these two cases, the Privy Council was clear that the provisions of the Constitution had not been adhered to. In the case of **Fraser**, the Permanent Secretary of the Public Service purported to terminate his contract as a magistrate when the Constitution clearly said that removal of a magistrate was in the purview of the Judicial and Legal Services Commission. The Privy Council found that the office of magistrate had security of tenure and therefore was subject to the principles of natural justice so that where an allegation of wrongdoing had been levelled at the magistrate, he should have had an opportunity to make representations. In the case of **Innis**, the Privy Council found that there was no evidence that the Judicial and Legal

⁹ [1981] 3 WLR 601.

¹⁰ Ibid at page 608.

¹¹ [2008] UKPC 25.

¹² 2008] UKPC 42

Services Commission had been consulted in relation to the removal of Ms. Inniss as Registrar. What is clear is that both these cases involved offices where a service commission was part of their appointment process and therefore are not entirely applicable to the case at bar.

[42] In the affidavit of Mrs. Elizabeth Bailey, the Deputy PS-External Affairs, she states that it is the standard diplomatic practice that unless an ambassador is a career diplomat, a politically appointed diplomat is expected to offer their resignation to the incoming administration who is at liberty to accept or decline the resignation. She continues that it would be contrary to good governance and inimical to the public interest if politically appointed ambassadors could insist upon serving out their contracts of varying durations or failing which, to be paid their outstanding sums.

[43] Mrs. Bailey continues that an ambassador represents the head of state of a country. Accordingly, Mrs. Clarke would be representing Her Majesty in the United States, and as such a contract cannot purport to constitutionally limit Her Majesty to determine her external representative. The appointment she says is akin to the appointment of a Minister of Government.

[44] In keeping with the Privy Council's statements in the **Fraser** case, what seems to be the practice is that once the appointment is made by the Governor General, a written agreement to give effect to the appointment and deal with matters such as salary and allowances is made between the person and the Government of Saint Lucia acting by the PS-Public Service. The Privy Council thought that this was not inconsistent with the Constitution as if the agreement was in any way inconsistent with section 87 of the Constitution, then the Constitution prevails.

[45] In his text, **Commonwealth Caribbean Public Law**,¹³ Professor Albert Fiadjoe looking at the whole question of dismissal at pleasure, stated that **Endell Thomas**

¹³ Fiadjoe Albert (Professor), Cavendish Publishing, 2005 at page 182-183.

established without a doubt that the common law doctrine of dismissal at pleasure of Crown servants was no longer good law in light of the Constitution of Trinidad and Tobago and by necessary implication of the independent Commonwealth Caribbean States. However, Professor Fiadjoe raises a very interesting question as to whether the categories of employees which are excluded by section 124 of the Saint Lucia Constitution from the category of public officers would be liable to dismissal at pleasure. He continues that 'we may safely conclude that there is still a residuary category of Crown employees within the Public Service'. Professor Fiadjoe suggests that though the matter has not been tested, they may not be liable to dismissal at pleasure because of the equality of treatment provision in the Constitution.

[46] I think it is important to examine the categories of employees which section 124 says do not fall within the definition of public officer. The first category is 'office of President or Deputy President, the Speaker or Deputy Speaker, the Prime Minister or any other Minister, a Senator, a Parliamentary Secretary or a member of the House, the Parliamentary Commissioner or the Deputy Parliamentary Commissioner. None of these offices are appointed by or with the involvement of any service commission. The Constitution specifically provides for their appointment and removal and they are all except in the case of the Prime Minister made by the Governor General on the advice of the Prime Minister in some cases, or in consultation with the Prime Minister and Leader of the Opposition in others.

[47] The second category referred to is the office of any member of any Commission. The Constitution provides a comprehensive regime for appointment, resignation etc. in relation to these offices. The third category is the office of judge or officer of the Supreme Court. Appointments to these offices are specifically provided for in the **Supreme Court Order** which also provides the procedure for removal of such officers.

[48] The position of Ambassador is akin to the first category of offices in section 124. Whilst the office is not specifically named in that section, it is clear that that position of ambassador, high commissioner, or other principal representative of Saint Lucia in any other country or accredited to any international organization is not subject to the involvement of any service commission in relation to appointments, discipline and removal in relation to these positions. It stands to reason that the framers of the Constitution thought it necessary to create a separate regime for these positions such that their appointment and removal would be outside of the purview of any service commission and would be subject only to the advice of the Prime Minister. It must therefore be the case that by dint of this, these positions are therefore not constitutional offices subject to the protections and security of tenure enjoyed by other offices. It is therefore arguable that an ambassador, high commissioner, or other principal representative of Saint Lucia in any other country or accredited to any international organization is liable to dismissal at pleasure. I am therefore prepared to conclude that Mrs. Clarke could have been dismissed at pleasure given that she held the position of Ambassador.

[49] Whilst I believe that this must be what was intended by the framers of the Constitution by taking these positions outside of the service commissions' purview, I am of the considered opinion that such exercise of the powers in section 87 would still be subject to the rules of fairness, so that where a person is being removed from office for a specific reason or where a specific allegation of misconduct is levelled at such an individual, that the rules of fairness would dictate that that individual be given the right to make representations in relation to the allegation before a decision is made.

[50] Nevertheless, I am of the view that an ambassador would serve at the pleasure of the State and could be recalled at any time even where there is no cause or allegation made. This is in keeping with the nature of the position. A Prime Minister must have the right to decide whether he wishes to continue with an

ambassador as the State's representative and it would be wrong for the Court to attempt to fetter that discretion.

[51] I find support for the above in the decision of the Privy Council in the case of **Patrick Manning v Feroza Ramjohn; (1) Patrick Manning (2) Public Service Commission v George Persad Kissoon**.¹⁴ In that case, the Board looked at section 121 of the Trinidad and Tobago Constitution which provides for certain powers of the Prime Minister in respect of certain public offices. In the case of Ms. Ramjohn, the Privy Council held that the power to make an appointment on transfer was exercised based on certain allegations and that Ms. Ramjohn had not been afforded the opportunity to be heard and to answer the allegations. The exercise of the Prime Minister's powers was therefore unfair in these circumstances.

[52] In the case of Mr. George Persad Kissoon, the veto power was not based on any specific allegation against him, so fairness would not have required any advance notice of the veto. The Board however concluded that because Mr. Kissoon was aware that he had topped the promotion interviews, fairness required that he at least be provided with a rationale for being bypassed. The Board held that:

“...the power of veto is subject only to the comparatively narrow limitations and ... the obligation to act fairly must be viewed in that light ... If, obviously, the ground of objection was some specific allegation ... then fairness would require that it be put to the candidate. But if the Prime Minister was objecting on general grounds involving no particular ‘case’ ... fairness would not demand any advance notice of the veto.”¹⁵

[53] In that same case, the Privy Council considered the reason for the Prime Minister being given a power of veto in respect of section 121(4) offices and referred to the 1974 Report of the Constitution Commission and said thus:

“These officials are so directly concerned with the formulation of the policy and the supervision of its implementation that they must be acceptable to the political chiefs with whom they must have a close working relationship.

¹⁴ [2011] UKPC 20.

¹⁵ Ibid at paragraph [45].

This does permit some measure of political influence in purely public service appointments but is necessary on purely practical grounds. We would mention that the recommendation of ours is in keeping with the views of the Public Service Associations as expressed to us.”¹⁶

[54] That view is consistent with the submission of Mr. Cenac¹⁷ that ‘it is in the public interest, recognized by the Constitution that appointments to the office of ambassador is on the advice of the prime minister. Mr. Cenac further submitted that this is so because such an office impacts on the nation’s foreign affairs and must be occupied by someone who shares the vision of the administration of the day. He argued that it is for these reasons that section 87(2) of the Constitution and section 4.1 of the Foreign Service Orders are framed the way they are in order to give the Executive, in the exercise of the executive prerogative, the latitude to appoint persons to hold that office who inspire the trust and confidence of the current administration. This is recognized by Dr. Anthony in his statement that ambassadors are replaced if that was “the will of the prime minister of the day”.

[55] The Board made clear however that there is no reason to doubt that in the exercise of his power the Prime Minister is exercising a public duty or performing a public function and is therefore required to do so in accordance with the principles of natural justice or in a fair manner.

Issue (c) - Whether there exists a duty to act fairly on the part of the Prime Minister when advising the Governor General under section 87 of the Constitution and whether the termination of Mrs. Clarke as Ambassador was in breach of the principles of fairness?

[56] This leads me to the other question which is whether, in the circumstances of this case, the Prime Minister had a duty to act fairly. Mr. Fraser submitted that the statements made by Hon. Allen Chastanet before and after he became Prime Minister clearly showed that he thought that Mrs. Clarke was not suitably qualified for the position and therefore he ought to have given her an opportunity to defend her reputation and refute this. There is nothing in Mrs. Clarke’s case which

¹⁶ At paragraph [27].

¹⁷ Para 22 of submissions filed 13th February 2019.

suggests that her appointment was terminated as a result of a specific allegation of misconduct in which case she would have had to have been given the opportunity to make representation and answer the allegation.

- [57] There was no specific allegation made against Mrs. Clarke which required the invocation of the principles of fairness. There is no evidence that Mrs. Clarke's appointment was premised on any specific qualifications at the time of her appointment. Further there is no evidence of the basis of the Prime Minister's advice to the Governor General.
- [58] Mr. Cenac in response to Mr. Fraser's submissions argued that even if the Court is invited to 'glean' the nature of the advice, the Court would be speculating as it would still not be aware of what the advice was as a matter of fact. He submitted further that because the action of the Governor General is predicated on advice which is ordinarily confidential, the Court cannot inquire into the advice unless it is proved to be required in the public interest.
- [59] Mr. Cenac further argued that unlike regular civil servants, Mrs. Clarke was not appointed through the procedure of 'fair and open competition' but was selected and appointed by the Governor General acting on the advice of the then Prime Minister, Dr. Kenny D. Anthony, as was his executive right so to do.
- [60] There is nothing in this case which suggests that the principles of fairness should have applied. While I can appreciate Mrs. Clarke's sentiments about the comments made about her and her qualifications, there is nothing which suggests that she ought to have been given any opportunity to make any representations about same as suggested by Mr. Fraser. In keeping with the **Manning** case, the Prime Minister would have exercised his executive power and advised the Governor General accordingly which is in sync with the nature of the position of ambassador and the fact that appointments to these positions are not based on qualifications so much as they are on the Prime Minister's discretion.

- [61] The conclusion is no breach of section 87(2) of the Constitution has been made out and the relief sought at paragraphs (1) and (4) of the amended claim form are dismissed.

Issue (d) - Whether Mrs. Clarke's constitutional right not to be discriminated against was violated contrary to section 13 of the Constitution in her termination as Ambassador?

- [62] Mrs. Clarke asserts that her termination was in breach of her constitutional right not to be discriminated against guaranteed by section 13 of the Constitution. She asserts that she was afforded different treatment and was not accorded privileges or advantages which were given to other ambassadors and principal representatives of the Government of Saint Lucia before and after the General Elections of June 2016; and was discriminated against because of her political beliefs and/or the fact that she continues to be married to the General Secretary of the Saint Lucia Labour Party. In her supplemental affidavit filed on 26th October 2018, Mrs. Clarke averred that the other ambassadors in the employment of the Government, whose posts the newly elected Government desired to have vacated were invited to debriefing sessions where mutual agreements were reached with them and the Government regarding their individual resignation from their posts. She claims that no such facility was afforded to her.
- [63] The defendant's denied that there was any discrimination. In the affidavit in reply of Mrs. Elizabeth Bailey, she asserts that the Government afforded no different treatment to the other ambassadors and issued letters to each of them requesting their resignation in the same manner as the letter issued to Mrs. Clarke. She pointed to the case of Ambassador Michael Willius who was removed as ambassador following the change of administration. She says in any event, Mrs. Clarke did not act in the manner consistent with diplomatic convention relating to ambassadors on the change of an administration as had been expressed by the Prime Minister in the excerpt which Mrs. Clarke alluded to in her affidavit in support of her claim.

[64] Section 13(2) and (3) of the Constitution states as follows:

“(2) Subject to the provisions of subsections (6), (7) and (8), no person shall be treated in a discriminatory manner by any person or authority.

(3) In this section, the expression “discriminatory” means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by sex, race, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.”

[65] It is important not to get side-tracked in this matter. The question is whether Mrs. Clarke’s termination violated her right not to be discriminated against. It must be remembered that it is the Governor General and not the Prime Minister who terminated Mrs. Clarke. Mr. Cenac argued that in any event, it is clear from the evidence of Mrs. Bailey that all ambassadors were treated in like manner. The evidence reveals that the letter issued to Mrs. Clarke dated 17th August 2016 which stated that it was a formal request for her resignation no later than 31st August 2016 is the same as that issued to Ambassadors, Michael Willius, Menissa Rambally, Dr. Charles Isaac and Hubert Emmanuel all of even date. All the letters including Mrs. Clarke’s further stated that the Government and people of Saint Lucia ‘are pleased to acknowledge and to express our appreciation for the service provided during your tenure.’ It went on, ‘for smooth transitioning, the Department of External Affairs necessitates your cooperation and looks forward to the debriefing with you at a mutually convenient time.’

[66] Mrs. Clarke suggested in her supplemental affidavit that other ambassadors were invited to debriefing sessions where mutual agreements were reached but that no such facility was afforded to her. However, that does not square with the evidence that she provided which shows that all the persons written to were invited to debriefing at a mutually convenient time. Thus far, the evidence has not suggested that Mrs. Clarke was treated any different from other ambassadors. Mrs. Clarke refers in her supplemental affidavit to the case of Menissa Rambally

and provides Ms. Rambally's termination letter dated 16th December 2016. Mr. Fraser in his submissions pointed to the fact that this letter indicated that the Prime Minister had advised the Governor General that the termination was agreed by both herself and the Government of Saint Lucia. I am yet to understand how this proves that Mrs. Clarke was discriminated against. In the case of Mr. Willius, his letter/instrument of termination was in the exact terms as that of Mrs. Clarke.

[67] Mr. Fraser suggested in his submissions that when all the circumstances of the case are looked at, Mrs. Clarke was targeted because of her political affiliation. This he says can be gleaned from the statements of the Prime Minister. However, as indicated above, there is no evidence to suggest what the basis of the advice given to the Governor General was and it would simply be an exercise in pure speculation to venture down that path. It is undeniable that Mrs. Clarke has political affiliations to the Saint Lucia Labour Party by virtue of her husband. However, as discussed above, the office of ambassador seems to be an office which is subject to the exercise of the executive discretion given that the persons who occupy such positions must have the trust and confidence of the Government of the day. It must be and I believe is well-known in all diplomatic circles that it is really the prerogative of the Prime Minister as to whether he wishes to keep the ambassadors whom he finds on assumption of office or whether he wishes to replace them and accordingly what advice he will give to the Governor General.

[68] Of course, it is to be expected that an individual who has served the State in the position of ambassador would be treated with the dignity and respect which such position deserves and all attempts to bring a smooth end to the ambassadorial relationship with the State would and ought to be made taking into account all relevant factors.

[69] I find that Mrs. Clarke has not shown that she was discriminated against in violation of section 13 of the Constitution when her appointment as Ambassador was terminated by the Deputy Governor General. Mrs. Clarke has not provided

any evidentiary basis to substantiate the allegation of discrimination. As stated by Georges J [Ag.] in **Imran Jean v The Attorney General**,¹⁸ mere allegation of a breach is insufficient to found a cause of action. Mrs. Clarke has consequently failed to demonstrate that there has in fact been a breach of section 13 (2) and (3) of the Constitution and the relief sought at paragraph 3 of the amended claim form is accordingly dismissed. This brings me to the next issue.

Issue (e) - Whether Mrs. Clarke had a legitimate expectation that she would be entitled, whether pursuant to her contract or by customary practice to fulfil the term of her contract or be paid in lieu thereof?

[70] Mrs. Clarke asserts that there is a settled practice in Saint Lucia after a change of Government that ambassadors' appointments are terminated by mutual consent, they are allowed to work out their contracts or they are paid for the balance of their contract period. This settled practice Mrs. Clarke asserts give rise to a legitimate expectation on her part that she would be entitled to fulfil the term of her contract or be paid in lieu thereof.

[71] Dr. Kenny D. Anthony was Saint Lucia's Prime Minister for the periods 1997-2001, 2001- 2006 and 2011-2016. His evidence is that on 1st August 2012, the Governor General acting on his advice appointed Mrs. Clarke as Minister Counsellor in the Embassy of Saint Lucia in Washington DC, USA for a period of two years. She was re-appointed for a further two years from 1st August 2014. Before the end of that term, on 1st May 2015, the Governor General again acting on his advice appointed Mrs. Clarke to the position of Ambassador for a term of two years which was to terminate on 30th April 2017.

[72] Dr. Anthony says¹⁹:

"At the time of her appointment, I was acutely aware that General Elections were constitutionally due for the latest on or about April 06, 2017. For that reason, I specifically recommended that [the] Claimant's tour of duty end on April 30, 2017 **to allow an incoming Prime Minister**

¹⁸ SLUHCv2008/0970, (delivered 12th August 2010, unreported).

¹⁹ Paragraph 7 of affidavit filed on 28th February 2019.

sufficient time to be briefed and to be replaced if that was the will of the Prime Minister of the day. ...” (my emphasis)

- [73] Dr. Anthony’s evidence is that in all the years he served as Prime Minister, he did not recall a single instance where an ambassador, high commissioner or other principal representative abroad was summarily terminated by the fiat of the Prime Minister. His evidence was that no letter was ever issued to diplomatic personnel inviting them to tender resignations by a fixed date. He said when it was necessary to replace a foreign service functionary, termination was normally by mutual consent and agreement between the parties after paying regard to the contract of engagement.
- [74] By contrast, Mrs. Bailey in her affidavit in reply averred that it was standard diplomatic practice that unless an ambassador is a career diplomat, a politically appointed diplomat is expected to offer their resignation to the incoming administration who is at liberty to accept or decline the resignation. Mrs. Bailey posits that it is contrary to good governance and inimical to the public interest if politically appointed ambassadors could insist on serving out their contracts of varying duration or be paid the balance of their contracts instead.
- [75] Legitimate expectation is of two kinds: procedural legitimate expectation and substantive legitimate expectation. Laws LJ in the case of **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**²⁰ referred to legitimate expectation as a well-known public law headline whose reach in practice is still being explored.
- [76] Legitimate expectation of either kind may (not must) 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

²⁰ [2008] EWCA 755.

change of policy or practice is held to be unfair or an abuse of power with the court standing as the judge of what is unfair or abusive.²¹

Procedural legitimate expectation

- [77] In the **Bharrt Murphy** case, Laws LJ said that ‘the paradigm case 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’. He continued that in the paradigm case the court will not allow the decision-maker to effect the proposed change without notice or consultation, unless the want of notice or consultation is justified by the force of an overriding legal duty owed by the decision-maker, or other countervailing public interest such as national security.²²

Substantive Legitimate Expectation

- [78] Laws LJ defines this as arising where the court allows a claim to enforce the continued enjoyment of the conduct – the substance – of an existing practice or policy, in the face of the decision-maker’s ambition to change or abolish it. Reference was made to the case of **Ex p Coughlan** at paragraph 57 (242C) where Lord Woolf said:

“(c) Where the court considers that a lawful promise or practice has induced a legitimate expectation of a *benefit which is substantive*, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy.”²³

- [79] At paragraph 33 of **Bharrt Murphy**, Laws LJ states that it will either be an authoritative representation of what the relevant policy is and will continue to be, or else simply the fact of a policy’s being settled and established in practice. A promise or practice: but not the kind of promise found in the paradigm case of

²¹ Ibid, para 28.

²² Ibid, para 30.

²³ Ibid, para 32.

procedural legitimate expectation. In the procedural case, it would be a promise or practice of notice or consultation in the event of a contemplated change. In the substantive case, it is a promise or practice of present or future substantive policy.

[80] It is clear that in this case, Mrs. Clarke is not claiming a procedural legitimate expectation as there is no evidence of any promise or representation made by, or practice of the Governor General, Prime Minister or any other functionary for that matter as to giving of notice or engaging in consultation. The source of the expectation was not from any express promise for none was made to Mrs. Clarke. Mrs. Clarke's source of her expectation is therefore a practice which she says has been in place with regard to ambassadors and what transpires when a new Government assumes office after general elections. Mrs. Clarke asserts that the practice is either that one is allowed to work the balance of his/her contract term or be paid in lieu thereof meaning be paid the balance of the remaining contract term. In that sense, Mrs. Clarke is claiming a substantive legitimate expectation.

[81] In the case of **Patricia Harding v The Attorney General**,²⁴ the Privy Council said:
"A legitimate expectation is not the same as an unqualified right. It is a factual situation in which a public authority has caused a person to believe on reasonable grounds that he or she would enjoy some advantage."

[82] In the Court of Appeal decision of **Patricia Harding**²⁵, Baptiste JA referred to the case of **Regina (Bibi) v Newham London Borough Council**,²⁶ where Schiemann LJ said:

"In all legitimate expectation cases, whether substantive or procedural, three practical questions arise. The first question is to what has the public authority, whether by practice or by promise, committed itself; the second is whether the authority has acted or proposes to act unlawfully in relation to its commitment; the third is what the court should do."

[83] Whilst Dr. Anthony's evidence is that in his experience ambassadors were not terminated summarily but on mutual consent and having regard to the terms of the

²⁴ [2018] UKPC 22 at paragraph 5.

²⁵ AXAHC VAP2013/0003, delivered 23rd November 2015, unreported.

²⁶ 13 [2002] 1 WLR 237.

contract, he does not speak to such persons either working out their contracts or being paid the balance of their contracts. The practice to which Mrs. Clarke speaks was not borne out on the evidence. There was no evidence of ambassadors who had been paid the balance of their contracts or who had been allowed to complete their contract term, although it was spoken of in the course of the trial. Nor did Mrs. Clarke's contract speak to what happens on termination of the contract and so that must follow the normal contractual principles. Notwithstanding Mrs. Clarke's assertions, what is clear from Dr. Anthony's evidence is that the practice is that a new Prime Minister on assumption of office could decide to keep or relieve an existing ambassador. Persons appointed as ambassador and career diplomats I believe are well-seized of that fact.

- [84] Perhaps if Mrs. Clarke could have demonstrated the established practice that she speaks of, then the issue of legitimate expectation may have arisen but that is not the case. Mrs. Clarke had no substantive legitimate expectation to be paid the balance of her contract or to be permitted to work the balance of her contract. The answer to Schiemann LJ's first question is that Mrs. Clarke has not shown what the Governor General or the Prime Minister committed themselves to by practice. That effectively disposes of this issue of legitimate expectation, whether procedural or substantive. The relief sought at paragraph (2) of the amended claim form is therefore dismissed.

Conclusion:

- [85] In summary, the Court finds that the claimant, Mrs. Clarke has failed to make out her claim for the reliefs sought in her amended claim. She has failed to show that her termination as Ambassador was done in breach of section 87(2) of the Constitution or that the circumstances of the case warranted the application of the principles of fairness or that she could only be terminated for cause such that the advice given to the Governor General by the Prime Minister was unlawful. Mrs. Clarke has also failed to show that there was a breach of section 13 of the Constitution in that she was discriminated against or that she had any legitimate

expectation to be allowed to work out the balance of her contract or to be paid in lieu thereof. The termination of Mrs. Clarke by the Governor General pursuant to section 87(2) of the Constitution is therefore non justiciable as it could not be said to be a manifest, glaring and capricious exercise of discretion nor was it done in violation of the provisions of the Constitution.

Order:

[86] Based on the foregoing, Mrs. Clarke's claim is therefore dismissed with no order as to costs.

**Kimberly Cenac-Phulgence
High Court Judge**

By the Court

Registrar