

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ON MONTSERRAT

CASE MINHCV 2019/0026

**In the matter of section 7(2)(a) of the Montserrat
Constitution Order 2010;**

And

**In the matter of originating motion by Terrod
Chalmers, Shernyl Burns, Dawnel Francis, and
Banika Bramble for an administrative Order under
the Montserrat Constitution Order 2010 pursuant to
Rule 56 of the Eastern Caribbean Supreme Court
Civil Procedure Rules (CPR) 2000 for declaratory
and other relief.**

BETWEEN

TERROD CHALMERS

SHERNYL BURNS

DAWNEL FRANCIS

BANIKA BRAMBLE

Claimants

AND

THE ATTORNEY GENERAL

DIRECTOR HUMAN RESOURCES MANAGEMENT UNIT

DEPUTY GOVERNOR

Defendants

APPEARANCES

Mr Warren Cassell for the claimants.

Crown Counsel Ms Amelia Daley for the defendants.

2020: JANUARY 14

JUDGMENT

On the permissibility of suspension with reduced pay if facing criminal charge

- 1 **Morley J:** I am asked to decide if it is permissible to suspend a civil servant on reduced pay if facing a criminal charge.
- 2 The action is brought as a challenge under the Montserrat Constitution, that if persons are innocent until proven guilty, as the Constitution guarantees, it cannot be right for the Deputy Governor (DG) to suspend civil servants from working, on half or no income, until the charge is resolved, which may be several years later, during which they will have suffered financial hardship, as a seeming punishment for ever having been charged, and *a fortiori* if later found not guilty, (though if not guilty the withheld monies are reimbursed). Various damages and declarations are sought.
- 3 It is important to note the action is not brought by way of judicial review of the procedure to suspend; instead it is brought as a constitutional challenge to ever suspending.

The history

- 4 The case was first filed on 04.06.19 merely as an 'application', with defence objection to its improper form filed on 02.07.19. Permission was given by Evans J on 05.07.19 for it to be refiled under rule 56 CPR 2000 as an 'originating motion' and 'fixed date claim', so the action

was refiled on 22.07.19, with defence offered on 20.08.19. It then came before me, Morley J, on 23.09.19, where it was opined information was needed on how the procedure to suspend was taken. It was agreed with counsel the matter as filed could be decided on the papers without need to hear oral evidence. There were directions on 04.10.19, with there being open inquiry from the Bench as to whether the action was better pleaded as judicial review of the suspension procedure. Claimant submissions were filed on 13.11.19, with defence reply on 18.11.19. The point was argued by the defence that constitutional relief ought to fail, and that though judicial review of the procedure might be more apposite, it could not arise as it had not been pleaded. On 02.12.19, the case was set down for legal argument on 13.12.19 to discuss whether the action could morph into judicial review of the procedure, leading on 12.12.19 to unsolicited further defence submissions suggesting not. On 20.12.19, at hearing, Counsel Cassell insisted his case was for constitutional relief, not judicial review, and sought an opportunity to reply, filed on 30.12.19, there being no suggestion from him there ought to be amendment to how the case is pleaded. Judgment is due today, on 14.01.20.

5 By way of factual background:

- a. Chalmers is a senior customs officer, within the civil service on a permanent and pensionable basis (PPB). He was charged on 15.03.19 with revealing confidential information between 09-22.10.18 to a person under investigation contrary to s110 Penal Code, and with conspiracy to pervert the course of justice contrary to common law. On receiving a report of the charge from police at the Human Resources Management Unit (HRMU), and following recommendation by the Public Service Commission (PSC), on 01.04.19 by brief letter from the HRMU he was suspended by the DG from duty on half salary.
- b. Burns is a temporary PE teacher employed on a month to month basis by the Montserrat public service, not on the PPB. On 06.03.19, he was charged with conspiracy to import cannabis contrary to common law. On receiving a report of the charge from police at the HRMU, and following recommendation by the PSC, on 23.05.19 by brief letter from the HRMU he was suspended by the DG from duty on no salary.

- c. Francis is a senior clerical officer in the Montserrat civil service on the PPB. She was charged on 05.04.19 with unlawful wounding and being armed with an offensive weapon on 05.04.19 contrary to s168 and s70 of the Penal Code. On receiving a report of the charge from police at the HRMU, and following recommendation by the PSC, on 23.05.19 by brief letter from the HRMU she was suspended by the DG from duty on half salary.
 - d. Bramble is a revenue assistant in the Montserrat civil service on the PPB. With Francis, she was charged on 05.04.19 with unlawful wounding and being armed with an offensive weapon on 05.04.19 contrary to s168 and s70 of the Penal Code. On receiving a report of the charge from police at the HRMU, and following recommendation by the PSC, on 23.05.19 by brief letter from the HRMU she was suspended by the DG from duty on half salary. However, in tandem, on 26.02.19, Bramble had applied for no-pay-leave effective 15.05.19 to 14.05.20, which was granted on 21.03.19, begging whether there was need to suspend her, or whether her circumstance ought to mean her year of leave is revoked.
- 6 There is the strong impression following charge suspension on reduced or no pay is merely routine; no letter offers reasoning and no representations were invited prior.

The legal framework

- 7 The legal background involves consideration of:
 - a. The **Montserrat Constitution**, cap 1.01, sections 7, 24, 83 and 84;
 - b. The **Public Service Act**, cap 1.06, section 40; and
 - c. **CPR 2000**, rule 56.
- 8 Concerning the Montserrat Constitution:

Provisions to secure protection of law

7 (1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

- (2) Every person who is charged with a criminal offence—
 (a) shall be presumed to be innocent until he or she is proved guilty according to law...

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...

Functions and operation of Public Service Commission

- 83** (1) The Public Service Commission shall have—
 (a) such advisory functions in relation to the appointment, discipline and removal of public officers; and
 (b) such oversight and other functions in relation to the public service, as may be prescribed by law.
(2) The Legislature may by law make further provision for the Public Service Commission not inconsistent with this Constitution.

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....

9 Concerning the Public Service Act:

Suspension

- 40** (1) Where there have been or are about to be instituted against an officer—
 (a) disciplinary proceedings; or
 (b) criminal proceedings,

and where the Commission or the authorised officer is of the opinion that the public interest requires that that officer should forthwith cease to perform the functions of his office, the Commission or the authorised officer may recommend his suspension from his duties.

(2) An officer so suspended shall, subject to the provisions of regulation 44, be permitted to receive such proportion of the salary of his office as the Deputy Governor may decide after considering the recommendation of the Commission or the authorised officer. (Amended by Act 10 of 2011)

(3) If disciplinary proceedings against any such officer result in his exculpation, he shall be entitled to the full amount of the salary which he would have received if he had not been suspended from duty but if the proceedings result in any punishment other than dismissal the officer shall be allowed such salary as the Deputy Governor may decide after considering the recommendation of the Commission or the authorised officer.

10 Concerning CPR 2000:

Administrative Law

56.1 (1) This Part deals with applications —

- (a) by way of originating motion or otherwise for relief under the Constitution of any Member State or Territory;
- (b) for a declaration in which a party is the State, a court, a tribunal or any other public body;
- (c) for judicial review; and
- (d) where the court has power by virtue of any enactment or at common law to quash any order scheme, certificate or plan, any amendment or approval of any plan, any decision of a minister or government department or any action on the part of a minister or government department.

(2) In this Part —

such applications are referred to generally as “applications for an administrative order”.

(3) The term “judicial review” includes the remedies (whether by way of writ or order) of—

- (a) certiorari, for quashing unlawful acts;
- (b) mandamus, for requiring performance of a public duty, including a duty to make a decision or determination or to hear and determine any case; and
- (c) prohibition, for prohibiting unlawful acts.

(4) In addition to or instead of an administrative order the court may, without requiring the issue of any further proceedings, grant —

- (a) an injunction;
- (b) an order for the return of any property, real or personal; or
- (c) restitution or damages.

How to make application for administrative order

56.7 (1) An application for an administrative order must be made by a fixed date claim in Form 2 identifying whether the application is for

- (a) a declaration;
- (b) judicial review;
- (c) relief under the relevant Constitution; or
- (d) for some other administrative order (naming it); and must identify the nature of any relief sought.

- 11 The narrow legal question arising on how the case has been presented by Counsel Cassell is whether **s40(1)(a) Public Service Act**, should be struck down (under **s20 and s117 Constitution**) as in conflict with **s7(2) Constitution**. The latter provides '*every person who is charged with a criminal offence... shall be presumed to be innocent until he or she is proved guilty according to law*'; while the former provides '*where there have been or are about to be instituted against an officer...criminal proceedings, and where the [PSC]...is of the opinion that the public interest requires that that officer should forthwith cease to perform the functions of his office...*' the DG can suspend under **s40(2)**, '*receiving such proportion of the salary of his office as the Deputy Governor may decide*'.

Judicial review

- 12 Beginning an analysis of this action, I turn to **s56.7 CPR 2000**. As I understand the pleadings filed on 22.07.19, though in part loosely worded and lacking particularity, Counsel Cassell has sought an Administrative Order under s56.7(1)(c), not s56.7(1)(b). Despite nudging, and hints being offered on 23.09, 04.10, and 20.12.19, he has insisted his application is for relief under the Constitution, concerning the presumption of innocence at s7(2), and not for judicial review of the suspension procedure. It is clear it could have been an application for both, per **The Judicial Review Handbook** by Michael Fordham, 2nd edition, at p61, which contemplates dual listings, but specifically is not.
- 13 An application for judicial review, meaning a request the court review the fairness of the procedure, might have sought *certiorari*, namely the quashing of the decision to reduce or stop

salary, because no claimant had been given the opportunity to be heard, in breach of the well-known principle of natural justice, *audi alteram partem*, meaning 'listen to the other side'. It is a significant event to suffer reduced income awaiting the outcome of a High Court trial, which may take up to two years on Montserrat, sometimes more, where the Judge does not sit through the year, but only for up to 15 weeks, being up to 75 sitting days, separated into three assizes of up to five weeks, so that to get through trial lists can take overlong. A candidate for suspension may have a family, with a mortgage and other regular financial commitments. Reducing or stopping salary will likely cause hardship, not just to the suspendee. This likely consequence merits at least some enquiry of the candidate by the PSC, and HRMU, with opportunity to make a case for whether suspension is necessary, whether a person might be put to work elsewhere, and what will be the likely financial consequence. If after making such inquiry, giving the candidate opportunity to make representations, whether oral or in writing, then a suspension with reduced or no salary might be permissible, dependant on the reasoning of the decision. For example, the PSC might consider the impact of reduced income, recording what it has been told, perhaps as a written submission, how it has been weighed, and where appropriate why reduction is still required, all to be reported in the relevant letter. However, for there to be no procedure to allow a candidate to be heard is questionable. In this context, it is puzzling Counsel Cassell, despite gentle invitation, has not sought to amend his pleadings to include specifically under s56.7(1)(b) leave to seek judicial review of the procedure adopted, where a candidate is not heard, leading to the letters from the HRMU wherein there was no reasoning offered.

- 14 Moreover, cases filed in support of his seeking constitutional relief are not on point, but would be if seeking judicial review. For example, Counsel Cassell cites **Re Rafael Mitchell 2003**¹, from Trinidad & Tobago, where a revenue officer was suspended on $\frac{3}{4}$ salary after being charged for making a false declaration. Certiorari was granted by Ventour J, as the procedure had been in breach of the principle of *audi alteram partem*. The case had been an application for judicial review of the procedure, not that the power to suspend and reduce salary was unconstitutional. Further, in the case of **Card v AG 1983**², from Belize, concerning a senior

¹ HCA No 3211 of 2000, delivered 30.07.03.

² Action no 386 of 1982, delivered on 07.04.83.

economist, suspended on half salary under charge, Moe CJ determined there was successful challenge he had been suspended by the wrong entity, namely by the Governor, when under the Belize Constitution it should have been by the PSC, meaning the action was for review of the procedure, not the constitutionality of the suspension.

15 The Court had wondered on 02.12.19 whether notwithstanding the pleadings and Counsel Cassell being unnudgeable, given the primary objective of any court action is to see justice done, the action could be deemed *proprio motu* somehow to morph into judicial review, to which Counsel Daley has responded persuasively with an emphatic no in written submissions filed on 12.12.19.

16 Of note, Counsel Daley points to **s56.11(1) CPR 2000**, which reads:

First hearing

56.11 (1) At the first hearing the judge must give any directions that may be required to ensure the expeditious and just trial of the claim and the provisions of Parts 25 to 27 of these Rules apply.

(2) In particular the judge may –...

(c) allow the claimant to –

(i) add or substitute a claim for relief other than an administrative order;

(ii) amend any claim for an administrative order; or

(iii) substitute another form of application for that originally made...

17 What this means is that the rules specifically contemplate early in the proceedings allowing '*the claimant*' to amend the claim; but Counsel Cassell refused. The rules do not appear to contemplate that the court can then choose '*to substitute another form of application*', but instead the application to amend lies at all times in the hands of the claimant.

18 Put at its simplest, is not for the court to say what action to bring, or to morph the proceedings into something different, as it would then be open to an accusation of bias in the cause it has promoted, and therefore of contradicting the second great principle of natural justice, namely *nemo iudex in causa sua*, meaning 'no one can be judge in his own cause'.

Breach of Constitution

- 19 The remaining question is whether **s40(1)(b) Public Service Act** should be struck down as being in conflict with **s7(2) Constitution**, with attendant declarations and damages.
- 20 The starting point is to read the Constitution. It must be noted immediately it specifically provides at **s24(2), s83(1)(a), and 84(1)** *supra* that the DG, on advice from the PSC, can discipline and suspend civil servants, and can determine their pay and terms of employment.
- 21 Grounds for suspension are then identified in **s40 Public Service Act**, which states: ‘...*where the Commission or the authorised officer is of the opinion that the public interest requires that that officer should forthwith cease to perform the functions of his office, the Commission or the authorised officer may recommend his suspension from his duties*’.
- 22 A civil service requires the confidence of the public. Such confidence is in the public interest. Being under charge may undermine public confidence in an officer, and it is not uncommon for persons admirably to choose to cease to work in many jobs, particularly politicians, in order, as they often put it, to ‘clear their name’. Moreover, discomfort or clashes of interest may arise in any office with others where a person is sadly under a cloud of suspicion. Suspension in these circumstances cannot be controversial. It is merely a requirement to take leave. It is not a punishment, but a mechanism to protect the institution for which the person works, and to protect the person, and others around the person. There is no determination of whether a person is guilty. Instead, suspension is protection, and not obviously a presumption of guilt contrary to **s7(2) Constitution** (about which more later).
- 23 Noting suspension is compulsory leave, a public servant is an employee of the Crown on terms and conditions, as anticipated by **s24 Constitution**, named the **General Orders for the Public Service**, to which civil servants agree on appointment. Under **Order 609**, ‘*an officer may be required by the Governor to take leave which is due to him and an officer may be required by the Governor on public grounds to remain on leave after the expiry of leave granted to him*’. This order permits the DG, acting for the Governor, to suspend indefinitely in the public interest, as agreed by a civil servant on appointment.

24 The question now arises whether on suspension salary can be reduced or stopped. This is likely the real nub of matters.

25 The starting point is to ask, what is the effect of suspension? It is that a person no longer performs their function for which when performing they are rewarded. It is in the nature of an employment contract that the employee works and the employer pays, meaning if not working it is open to the employer not to pay. Support may be found in **Wallwork v Fielding et al 1922**³, where Lord Sterndale MR opined, reinforced by further dicta later from Warrington LJ:

I should have thought that a power to suspend a contract necessarily suspended the whole operation including not only the performance of duty but also the right to pay during the period of suspension...it seems to me that is the inevitable meaning of suspension...and that involves the suspension of payment for the discharge of duty.

26 It follows there is nothing inherently wrong in law with suspension on reduced or no pay. Indeed it might even be thought the DG fair minded to pay half salary, as it is not inevitable a suspended civil servant, not performing any function, must be paid anything. Moreover, if a suspended civil servant could expect full pay, then suspension might be open to abuse, being actively sought so that some might sit comfortably at home for as long as they might garner. To avoid abuse, it makes commercial and management good sense that suspension should have a downside, which in principle can be by reducing income.

27 However, as pleaded, the heart of the legal argument is whether on charge suspension is permissible set against **s7(2) Constitution**, which needs now to be addressed head on. A purposive construction plainly shows the presumption of innocence is applicable to criminal trial proceedings in court, as the section is set in the context of a trial, beginning at s7(1) with how *‘the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law’*, and the various headings under s7(2) then relate to events at trial. Set in this context, suspension, on reduced or no pay, is not a criminal trial proceeding, and does not therefore engage rights under s7(2).

³ 1922 2 KB 66.

- 28 Moreover, if suspension on reduced or no pay leads to hardship, this is not formal punishment, which instead is a consequence of conviction after a trial process. However, it is right the hardship may 'feel' like a punishment for having been charged, which is why the procedure for suspension needs to be monitored so that it is transparent and fair. But that said, the narrow question is, does this hardship which 'feels' like a punishment amount to a reversal of the presumption of innocence? When put this way, plainly it does not, as the suspension has no effect on the criminal court proceedings, whenever they occur, where the presumption of innocence is separately preserved.
- 29 The short point is the narrow argument of Counsel Cassell attacking suspension on reduced or no pay as reversing the presumption of innocence is misconceived. Suspension on charge is protection for all concerned, reduced pay on suspension can be a consequence of employment terms and good commercial sense, and neither have anything to do with criminal court proceedings, which must proceed separately on the basis of presumed innocence. This action should only ever have been an argument for judicial review of the suspension procedure adopted, for which as has been seen there is supporting case law.
- 30 In the circumstances, I do not need to examine the slightly different situations of Burns and Bramble. However, *obiter*, concerning Burns, it can be said it might properly remain in the discretion of the DG not to pay, given the temporary nature of the contract; and concerning Bramble, I suspect the point of the request pre-charge on 26.02.19 for a year out, was to pursue something in Birmingham, UK, between May 2019 to May 2020, which if so and if prevented now by being on charge since 05.04.19 and unable to travel, perhaps might cause the year-long leave at least to be reconsidered, though in the unfettered discretion of the DG, so that Bramble might, dependent on the view of the DG, instead merely be suspended like Francis on half pay.

Fresh action

- 31 Finally, there is now the question whether Counsel Cassel might be permitted to file a fresh action for judicial review. However, the case in the Supreme Court of **Virgin Atlantic v Zodiac**

Seats 2013⁴ suggests not. In it, fascinating concerning a patent, in paragraphs 17-26, over pages 726-732, Lord Sumption analysed the principles of *res judicata*, adopted fully by Lord Neuberger, and setting out early on in particular at para 18 on page 727 a long-standing overarching dictum from Wigram VC in **Henderson v Henderson 1843**⁵. Distilling the learning of Lord Sumption, in my judgment the All-England Reports headnote captures with clarity his conclusion, which unusually I will quote:

The following general principles of *res judicata* were established: (i) cause of action estoppel was absolute in relation to all points which had to be and were decided in order to establish the existence or non-existence of a cause of action; (ii) cause of action estoppel also barred the raising in subsequent proceedings of points essential to the existence or non-existence of a cause of action which were not decided because they were not raised in the earlier proceedings, if they could with reasonable diligence and should in all the circumstances have been raised; (iii) except in special circumstances where that would cause injustice, issue estoppel barred the raising in subsequent proceedings of points which were not raised in the earlier proceedings or were raised but unsuccessfully. If the relevant point was not raised, the bar would usually be absolute if it could with reasonable diligence and should in all the circumstances have been raised.

- 32 What this means is judicial review could have been raised in this action, and was not, indeed it was invited, and so cannot now be raised in a fresh one. The special circumstance allowing fresh action to be raised to avoid injustice does not apply, as in this action judicial review was specifically invited and ignored. In consequence, as concerns this claim, unfortunately any further action hereafter ought to be deemed *res judicata*, meaning ‘it is a thing already adjudicated upon’.

Disposition

- 33 In the circumstances, because of how it has been pleaded, the cause of action fails and is dismissed, meaning the court finds **s40(1)(b) Public Service Act** is not in conflict with **s7(2) Constitution**. However, there shall be no order as to costs because this action has highlighted a point of public importance, namely that future suspensions and decisions as to

⁴ 2013 4 AER 715

⁵ 1843 3 Hare 100.

pay should be reasoned and in advance a candidate should be heard, lest such decisions may be subject to judicial review.

The Hon. Mr. Justice Iain Morley QC

High Court Judge

14 January 2020