

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ON MONTSERRAT

CASE MNIHCV2019/0049

IN THE MATTER OF sections 13, 14, and 20 of the Montserrat Constitution Order 2010

IN THE MATTER OF an application for an Administrative Order

BETWEEN

VICKIE STEPHENSON

Claimant

AND

DEPUTY GOVERNOR LYNDELL SIMPSON

Defendants

ATTORNEY GENERAL

APPEARANCES

Mr Warren Cassell for the claimant.

Mrs Sheree Jemmotte-Rodney, the Attorney General, for the defendants.

2019: OCTOBER 25

NOVEMBER 6

RULING

On a public officer running for election

- 1 **Morley J:** Following argument until late in the evening on 25.10.19, I am asked to rule on what employment restrictions can properly arise when Vickie Stephenson as a public officer runs for

election to parliament on 18.11.19. Various declarations and damages are sought that any restrictions on her are unconstitutional.

- 2 Stephenson¹ is a senior clerical officer in the Montserrat Ministry of Agriculture, Trade, Lands, Housing and the Environment (MATHLE). As such she is on record as a civil servant who is in a public office. There will be a general election on Montserrat on 18.11.19. From among a population of 5000, Stephenson has vowed in my presence in court to run for one of nine seats in parliament. Nominations for candidates will be received on 07.11.19. This ruling is timed for the day before nominations so she will know what restrictions may be created by her job.
- 3 The specific question arises whether because she is a public officer she must resign to run, and if unsuccessful whether she can expect her job back.
- 4 On 07.10.19, by fixed date claim form, anticipating the election, other questions were also mooted, in particular whether as a public officer there can rightly be restrictions on her freedoms of speech and assembly. However, during hearing on 25.10.19, the issues narrowed by agreement of counsel to resignation and reinstatement.

The broad attack

- 5 For this ruling I mention early the original broadness of the filing. It had sought to rewrite the rules for the Montserrat civil service, claiming it was a breach of constitutional rights that as a public officer Stephenson had any restrictions at all upon her as to what she could say and as to any assembly or political affiliation. However, it is well known a civil service must be, and be seen to be, politically neutral, and therefore in many Commonwealth countries there are restrictions on what civil servants can say and do, though consistent with living in a democratic society, with many judgments on the issue.

¹ The parties will be referred to by their names or office for ease of reading and no disrespect is intended by not writing out the legalese of whether claimants or defendants.

- 6 Here, challenge under **ss13 and 14 of the Montserrat Constitution Order 2010** had been raised to formal **guidance**² offered on 27.09.19 by the Deputy Governor (DG), in particular to **paragraphs 2.1.1 (b) iii, iv, v, vi, viii, ix, xi, xii, and to para 2.2.1**. However, the discussion narrowed the challenge to para 2.2.1. It is helpful at this point to set out key sections of the 2010 Order, and of the guidance.

The guidance

2.0 It is useful for public officers to take account of the fact that the dissolution of the legislative assembly does not affect the day to day operation of government business...

2.1 The following general principles must be observed by all public officers....

2.1.1(b) Public officers...must...

iii not express opinions about any party or candidates or on matters of political controversy to the press or in letters to the editor nor in books and articles nor by any other printed or electronic means including social media.

iv not allow the expression of their personal political views to constitute so strong and so comprehensive a commitment to one political party as to inhibit or appear to inhibit loyal and effective service to ministers or members of the legislative assembly who are part of another party.

v take particular care to express comments with moderation, particularly about matters for which their own ministers are responsible, to avoid comment altogether about matters of controversy affecting the responsibility of their own ministers and to avoid personal attacks.

vi not attend in their official capacity conferences or functions convened by or under the sponsorship of a political party...

viii not hold office in any political party or make political speeches.

ix not act as election officials during an election...

xi not wear political party/parliamentary candidate t-shirts, caps, buttons, pens or any other similar items to work.

xii must not take part in any political activity when on duty or in a uniform or on official premises.

2.2.1(a) A public officer...who is intending to run for political office must resign from his/her post before being publicly adopted, named or declared as a prospective candidate for any political party or an independent candidate....(c) Candidates who are not elected are not entitled to reinstatement to their former public service positions. Candidates who wish to rejoin the public service have to do so through the established procedures of application for any advertised posts.

² See exhibit VS1 - General Election Guidance Notes, ref odg1, issued on 27.09.19, filed on 07.10.19; this guidance is consistent with and arises under exhibit LS1 – Montserrat establishment circular no2 of 2017, concerning general orders for the Montserrat public service, filed on 17.10.19.

Montserrat Constitution Order 2010

s13 Protection of freedom of expression

(1) Except with his or her consent, no person shall be hindered in the enjoyment of his or her freedom of expression, and for the purposes of this section the said freedom includes freedom to hold opinions and freedom to receive and impart ideas and information without interference, and freedom from interference with his or her correspondence and other means of communication.

(2) Nothing in any law or done under its authority shall be held to contravene this section to the extent that it is reasonably justifiable in a democratic society— ... (c) for the imposition of restrictions on public officers or teachers that are reasonably required for the purpose of ensuring the proper performance of their functions.

(3) For the purposes of subsection (2)(c) in so far as it relates to public officers, “law” in subsection (2) includes directions in writing regarding the conduct of public officers generally or any class of public officer issued by the Government.

s14 Protection of freedom of assembly and association

(1) Except with his or her consent, no person shall be hindered in the enjoyment of his or her freedom of peaceful assembly and association, that is to say, his or her right to assemble freely and associate with other persons and in particular to form or belong to political parties or to form or belong to trade unions or other associations for the promotion and protection of his or her interests.

(2) Nothing in any law or done under its authority shall be held to contravene this section to the extent that it is reasonably justifiable in a democratic society— ... (c) for the imposition of restrictions on public officers that are reasonably required for the purpose of ensuring the proper performance of their functions.

(3) For the purposes of subsection (2)(c), “law” in subsection (2) includes directions in writing regarding the conduct of public officers generally or any class of public officer issued by the Government.

s20 Enforcement of fundamental rights

(1) If any person alleges that any of the foregoing provisions of this Part has been, is being or is likely to be contravened in relation to him or her, then, without prejudice to any other action with respect to the same matter which is lawfully available to him to her, that person may apply to the High Court for redress.

7 Concerning the 2010 Constitution the question had been whether the guidance was in conflict with ss13 and 14, so that redress could be sought under s20, requiring various court declarations, with attendant damages if any. The difficulty, readily conceded by counsel, was that 'broad attack' on para 2.1.1 of the guidance amounted to an invitation to reconsider how the civil service could function on Montserrat, irrespective of there being any election and irrespective of whether the claimant was running, when that was not the intention of the claim, which instead is rooted firmly in Stephenson being a candidate, not a stalking horse for such broad attack on civil service restriction.

8 Though the broad attack has become moot, it is worth reflecting for a moment on the well-known decision of **De Freitas v Permanent Secretary (MinAfih) 1998** 53 WIR 131, where concerning Antigua & Barbuda the Privy Council said at p138:

"Their lordships also recognize the special position which is enjoyed by civil servants in a democratic society. As Sir Vincent Floissac CJ pointed out in the Court of Appeal, in every truly democratic society, the public officer or civil servant holds a unique status in many respects...As the servant or agent of the State he enjoys special advantages and protections and correspondingly must submit to certain restrictions. Their special position is recognized in the existence of a special chapter...in the Constitution containing provisions relating to them and to the express provisions in sections 12 and 13 authorising restrictions on the freedoms contained therein. The preservation of the impartiality and neutrality of civil servants has long been recognized in democratic societies as of importance in the preservation of public confidence in the conduct of public affairs. The point can be found in the quotation which Redhead J took from Hood Phillips's Constitutional and Administrative Law (5th Edn) (1973) page 299

"...the public interest demands the maintenance of political impartiality in the civil service and confidence in that impartiality as an essential part of the structure of government in this country."

Along with these elements of neutrality and impartiality their lordships would associate an element of loyalty, in particular to the Minister whom the civil servant has been appointed to serve. The importance of these characteristics lies in the necessity of preserving public confidence in the conduct of public affairs."

9 Moreover, concerning public service, there is the decision of **Ahmed v UK 1999** IRLR 188 where in the European Court of Human Rights Judge De Meyer opined:

"It is not only legitimate, but also necessary, especially in a democratic society, to ensure as far as possible the loyalty of officers in public service towards the authority to which they are accountable and at the same time the freedom of the electorate in its choice of representatives.

The people are entitled to count on the objectiveness, impartiality and political neutrality of their servants, those being essential requirements of a position of trust. They are likewise entitled not to be exposed to a risk that their servants may, during elections or in other circumstances, benefit personally or politically from their position.

Members of staff in the public service must not therefore be allowed to be members of assemblies elected by the people or to stand as candidates for such assemblies, or permitted to take part in any manner whatsoever in the activity of the parties. Common sense dictates that such interests are incompatible with the public service.

People who wish to work in public service must renounce 'politics', that being a restriction on their freedom of expression, freedom of association and electoral rights that is inherent in their position."

- 10 In addition, perhaps in anticipation precisely of the earlier **De Freitas** and **Ahmed** dicta supra, the **2010 Constitution Order** makes specific provisions concerning public officers for a measure of restriction in the application of their rights, in **ss13 and 14**, both at sub-paras **(2)(b)** and **(2)(c)**, as above. Without deciding the issue, and not prejudging it for possible future litigation, an initial assessment suggests it would be surprising if the guidance in para 2.1.1(b) contravenes the Constitution, because as can be seen the Constitution specifically places public officers in a special category, arguably to avoid politics, consistent with earlier judgments.
- 11 The issue will be one of degree: namely, does the guidance overdo it, is it too restrictive? Public officers as voting members of society must be allowed a cautious extent of participation in public discussion too, but within reason, dependent on their grade and the sensitivity of their role, consistent with maintaining the actual and apparent neutrality of the civil service. Balance is needed. It is for this reason the Montserrat DG has separated officers into different classes: namely, politically restricted (grades R22 and above), partially restricted (grades R23 to 46), and free (grades 47 to 51). This separation is in keeping with the **General Election Guidance**

2017 by the UK Cabinet Office³. The need for separation into different grades of political sensitivity is further consistent with the decision of **Leon Natta-Nelson v AG 2019** SKBHCV2018/0254, where concerning St Kitts & Nevis Ventose J at para 26 struck down secondary legislation in the form of **ss36 and 38 Public Service (Conduct and Ethics of Officers)** for contravention of the Constitution there because it amounted to a blanket ban on political activity by any public officer, none being in any way differentiated.

- 12 In sum, any discussion whether the guidance at para 2.1.1(b) contravenes the Montserrat Constitution must start with how on Montserrat the different grades are recognised precisely to accommodate ss13 and 14 of the 2010 Order, so balancing the need for neutrality with what is, per those sections, 'reasonably justifiable in a democratic society'.
- 13 I should add obiter that, given the express language of the Montserrat Constitution, the burden is on the claimant to show the guidance should be struck down, not the reverse, so that much more scholarship will be needed by claimant counsel, more than has been filed here, on 25.10.19 and 04.11.19, being nine pages of narrative submissions, without copies of authorities; in contrast the Attorney General (AG) for the DG has filed copiously and in depth in three legal submissions, dated 10, 24 and 31.10.19, running to 19 pages of narrative submissions, supported by 182 pages of carefully selected cases and legislation excerpts⁴. If the broad attack had not been abandoned, I doubt Counsel Cassell would have met the burden.

Resignation

- 14 I turn now to whether to run Stephenson must resign. The answer is yes, as it lies again in the specific language of the Montserrat **2010 Constitution Order**, at **s52**, which says:

s52 Disqualifications for elected membership

³ See exhibit LS3 - UK Cabinet Office Guidance of 20.04.17, filed on 17.10.19.

⁴ See - Unison v Lord Chancellor 2013 EWHC 2858 (admin); Leon Natta- Nelson v AG St Kitts & Nevis 2019 SKBHCV2018/0254; Daniel et al v PSC & AG St Vincent & Grenadines 2019 SVGHCVAP2016/0007; Montserrat Constitution Order 2010 cap 1.01 (excerpts); De Freitas v Permanent Secretary (MinAflh) et al 1998 53 WIR 131; Fraser v PSSRB 1985 2SCR 455; Ahmed et al v UK 1998 IRLR 188; Re McKinney 2004 NIQB 73; Montserrat Election Act 2013 cap 1.04 (excerpts).

(1) No person shall be qualified to be elected as a member of the Legislative Assembly who—; ...(b) holds or is acting in any public office...

- 15 No more need be said. Because it is in the Constitution it is trite to say the section cannot be struck down as contravening the Constitution, and its meaning is clear: to run, Stephenson cannot hold or act in a public office, and this means she must resign.
- 16 Moreover, in the **Natta-Nelson** case supra, the St Kitts & Nevis Constitution does not have an equivalent section requiring no civil servant shall be elected, so that though that case decided a public officer there was not impeded from seeking election, the case is diametrically distinguishable from Montserrat.
- 17 Counsel Cassell next raised the question whether Stephenson is indeed a public officer, so that if not she need not resign. It was argued her job as a senior clerical officer involves so little decision-making, being mostly letter opening and filing, it begs whether she should be held to the standing of a public officer with consequent political restrictions. Yet in the pleadings she describes herself as '*a civil servant for upwards of five years*'⁵. Her very terms of appointment are to '*provide secretarial support to the Director of Housing and administrative support to the Department of Housing*'⁶. The whole claim is premised on the basis she is indeed a public officer, and of course knows this. Moreover, she will also know that her public employment is protected in ways it is not in private, in particular as to the circumstances under which she can be dismissed, further supporting she holds a public office. The line has to be drawn somewhere as to who is a public officer and plainly Stephenson, like it or not, is within it, not outside it.
- 18 Adding to this assessment is **s107 2010 Constitution Order**, where definitions are offered:

"public office" means... an office of emolument in the public service...;

"public officer" means the holder of any public office and includes any person appointed to act in any such office;

⁵ See para 6.1 of affidavit of Vickie Stephenson filed on 07.10.19.

⁶ See exhibit LS2 – MATHLE senior clerical officer job description, filed on 17.10.19.

“public service” means the service of the Crown in a civil capacity in respect of the government of Montserrat;...

“

- 19 Reviewing the definitions, as a senior clerical officer in MATHLE she is a public officer receiving emolument in the service of the Crown, and to argue otherwise is misconceived.
- 20 Moreover, still mindful of **Natta-Nelson** supra, and the UK Cabinet Office 2017 guidance, Stephenson’s minor role is reflected in how she is characterised within the civil service as *‘partially politically restricted’*, not fully so⁷, so that per **para 2.1.2 of the guidance**, though bound by para 2.1.1 (b) nevertheless she can with DG written permission *‘...hold office in any political party or make political speeches,...act as an election official during elections,...and act as a party agent, sub-agent or canvasser’*. The Montserrat civil service system is sensibly not deaf or blind to her minor role, though her minor role does not mean she is outside it, which was the point offered by Counsel Cassell. It makes sense she remains within, as she will have contact with more senior figures, including political, and those elected, and in her role will have knowledge of government workings, so that her impartiality, subject to the oversight of the DG, remains of public importance.
- 21 In sum, so far, Stephenson is bound by para 2.1.1 (b) and under para 2.2.1 must resign to be formally nominated to candidature⁸. The question remaining is more finely balanced, namely whether she can expect her job back if unelected.

Reinstatement

- 22 For Montserrat, from the research offered it appears there may be no detailed jurisprudence on how now to proceed.
- 23 With no definitive guidance available, in my judgment the first question is, what is meant by resignation from a public office. For example, it is reported in the Merriam-Webster online

⁷ See para 16 affidavit of Lyndell Simpson filed on 17.10.19.

⁸ See ‘Nomination Paper’, form no.4, under Elections Act Cap1.04, requiring that Stephenson be ‘qualified for election’, meaning she must at that stage have resigned before being put forward on a nomination paper.

dictionary 'resignation' is '*an act of giving up a job or position in a formal or official way*'. There are occasions when a resignation may not be accepted. The noun refers to a formal act. A resignation should be neither casual nor unconsidered. It connotes after careful reflection giving something up of importance. 'Giving up' connotes surrendering something to others, or '*to yield control or possession*'. In this sense, resignation of a public office connotes surrendering it back to the Crown, so that control over it is yielded back to the Public Service Commission (PSC). On this analysis, the answer to the question shows the resigner retains no residual control over the office surrendered, as this is the meaning of resignation.

- 24 If some control is retained, then there might be foundation for an argument after failing in an election a candidate might have a 'right' to public office reinstatement, or perhaps a lesser 'legitimate expectation' of it, or perhaps to be inventive with language an even lesser 'tentative contemplation', or least of all a 'cautious optimism'. But to retain any such 'anticipation', to use a word collectively covering these four concepts, would be to retain a sense of connection to the position resigned, with a view to that connection allowing some measure of influence, leading to some measure of control, over its return; however, any measure of control over its return is contrary to what resignation means.
- 25 In sum, resignation means giving up all anticipation of any control over what happens to the office surrendered.
- 26 There are two cases obliquely of relevance to consider.
- a. In **Re McKinney 2004** NIQB 73, Weatherup J considered resignation and reinstatement concerning in Northern Ireland the candidature of an Administrative Officer in accounts at the Child Support Agency. Resignation was required. Concerning reinstatement, after reviewing the different categories of civil servant, at para 6 it was said: '*the applicant occupies a post in the intermediate group that is not politically sensitive. Accordingly under...the Code he is eligible for freedom to engage in any or all of the national or local political activities other than a candidature for the Westminster Parliament or the European Assembly or any Northern Ireland Assembly. He must resign on adoption as a candidate, and if unsuccessful apply for reinstatement which is a matter of discretion. Were he in the*

politically free group he would have a right to re-instatement'. In most material respects, McKinney was similar to Stephenson, being in an 'intermediate group' like her who is said to be subject to 'partial political restriction', and yet he was found to have no right to re-instatement, which instead is discretionary. It follows that case does not help this one.

- b. In **Daniel et al v PSC 2019** SVGHCVAP2016/0007, school teachers sought reinstatement, to which Baptiste JA leading a strong Court of Appeal found they had such a right, owing to there being on St Vincent & the Grenadines a specific agreement between the government and the teachers' union, in which article 16 allowed for leave up to six months to contest elections, raising a legitimate expectation they would be reinstated if not elected; however, no such agreement arises here.

- 27 The rub in this case is reinstatement. Of a total labour force of 2703 per the census of September 2018, there are 726 employed by the Montserrat Public Service, which is 27%, in a voting population of about 3500, meaning 21% of voters are public officers. Of that 21%, many are public spirited, well-educated, and care very much about their community, making them an ideal and likely source of candidates to serve in the legislature. However, folk hesitate to put themselves forward as it means resigning from good jobs with good pensions, without guarantee of getting their job back if unelected. It might be said political life on Montserrat is the poorer for such hesitation.
- 28 On the other hand, being so small a community, it would be difficult to run for office without upsetting some at least, such that it might be controversial to be reinstated supposedly as politically neutral after a bruising public campaign.
- 29 I am told that in the past some unsuccessful candidates have not been reinstated: in particular there was mention of Lesroy Greaves, a building inspector, and Claude Gerald many years in I think MATHLE later a popular teacher. Moreover, it is said those who have been reinstated lost their earlier years of service toward their pension⁹. In addition, once resigned, even though the election period is only about three weeks, if having to reapply folk fear they may be told their position has gone to another and that there is no vacancy, or if there is a vacancy it will be

⁹ See para 11 affidavit of Stephenson, filed 21.10.19.

- elsewhere in the public service in perhaps a less stimulating role. Moreover, in this small community, there is a fear of petty rivalries leading to bias in refusing to reinstate. I can see all this causes perturbation.
- 30 So what's to be done? In my judgment, after much reflection, with no legislation or jurisprudence to hand on the point, the answer is nought.
- 31 The primary reason is resignation is a serious matter, and should not be done lightly. Running for election is not a sport. There should not be an attitude of 'have a go'. Running should only occur if carefully weighed. If coordinated and cautious soundings suggest a realistic prospect of election, then that industry studying the lie of the land may justify taking the plunge to resign, knowing it is a plunge into the unknown. Also the drive to do public service in elected office can be measured against the risk of not being reinstated; it can act as a yardstick for the public of a person's integrity and zeal for the job. If civil service positions were guaranteed after, then this would likely diminish the candidacy, as being too easily pursued, and without consequence.
- 32 Further, there is the danger an anticipation of reinstatement would undermine the effect of any guidance on neutrality, turning the civil service into an ill-disciplined debating club, generating endless spats in public, irrespective of there being an election.
- 33 Moreover, any campaign must involve argument and attack (though within the law and fair debate). In the heat of election battle some stray over the line. Any reinstatement to public office must first require an assessment by the PSC, which decides public service appointments, of whether a candidate has so tarnished their neutrality as objectively to be no longer suitable for public office, or so damaged their relations with other candidates that they cannot work as civil servants with those elected, either because they sense it, or the elected do.
- 34 So, to avoid casual candidacy, and to preserve the neutrality of the public service, there cannot be any 'anticipation' of reinstatement, in the sense of the four categories above. Instead, the decision whether a candidate can rejoin the public service must rest unfettered in the hands of the PSC.

- 35 It should be noted, as mentioned, there is no legislation governing reinstatement or rejoining. It may be this should be addressed by the soon to be elected Assembly. It is not for the court to create it, which under the doctrine of separating the powers of the government, legislature, and judiciary, would be to over-extend the function of the judiciary and usurp the legislature.
- 36 However, it should also be noted that any decision by the PSC concerning an application to rejoin the public service cannot occur in a vacuum. To 'rejoin' is not the same as to 'reinstate'. Rejoining the public service connotes, like rejoining the army, that the PSC can place an applicant as needed, not that an applicant will be placed where previously (though this may happen). That said though, a determination that there is no vacancy or to refuse to allow a failed candidate to rejoin would have to be reasonable, not irrational, offering a written detailed decision, after fair-minded and honest due process, not discriminatory, nor personally manipulative, making appropriate allowance for the struggles of having been in a political campaign in a democracy, keeping with the twin principles of natural justice of no bias and with opportunity to be heard as needed, and with attention to the quality and longevity of previous service; anything less would likely render refusal of rejoining susceptible to judicial review.
- 37 In short, though a candidate cannot anticipate reinstatement, the PSC can be expected in its discretion fairly to consider a candidate rejoining.

Disposition

- 38 As such the claim fails, as seeking declarations striking out the guidance, the need for resignation, and that reinstatement is a right. However, as this has been an important point of law and for public attention, Stephenson and Counsel Cassell are to be thanked for raising matters, and there shall be no order as to costs.
- 39 Finally, the court wishes Vickie Stephenson and all candidates the very best of good luck in the coming election.

The Hon. Mr. Justice Iain Morley QC

High Court Judge

6 November 2019