

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ON MONTSERRAT

CASE MNIHCV 2018/0052

BETWEEN

THEODORE WOODLEY

Applicant

AND

THE ATTORNEY GENERAL

First Respondent

HIS EXCELLENCY THE GOVERNOR

Second Respondent

THE PUBLIC SERVICE COMMISSION

Third Respondent

APPEARANCES

Mr David Brandt for the applicant.

Ms Amelia Daley for the respondents.

2019: MARCH 19

RULING

On a delayed application for judicial review

- 1 **Morley J:** I am asked to rule on an application for leave to seek judicial review of a decision of the Human Resources Management Unit (HR), communicated by letter dated 06.01.17 by which

Theodore Woodley (Woodley)¹ lost his job as Superintendent of the Montserrat Prison following a disciplinary hearing before the Public Service Commission (PSC) on 14.09.16.

- 2 Woodley was the acting superintendent during November 2007 to April 2009 and April 2011 to March 2014. He received the substantive appointment in April 2014, there were allegations made in June 2015, and he was suspended on 10.07.15. This led to a report concerning the prison to the Governor into sexual harassment, pig management, and alleged poor prisoner management, dated 17.01.16 from David Foot (Foot), an independent prisons investigator based in the British Virgin Islands. The report then led to a disciplinary inquiry at which Woodley faced four charges signed off by the head of HR. The effect of the letter from HR on 06.01.17 was that he was demoted a rank to the post of senior warden, at Oriole Villas where there are vulnerable residents, with a corresponding reduction in salary.
- 3 Woodley was unrepresented at the PSC hearing, but on getting the letter from HR went to a lawyer, David Brandt, who wrote on 16.01.17 to HR to say Woodley was aggrieved, wanted the record of the hearing, and asked that the decision to demote and transfer him be held in abeyance until the matter is heard by the court.
- 4 In the meantime, the post of Superintendent of the Prison was advertised and subsequently filled by Bennet Kirwan.
- 5 On 23.05.18, some 17 months after the first letter, and before a transcript was received, Counsel Brandt wrote again to HR pointing out he was still waiting for the transcript, and that there were four points to contest:
 - a. That HR had no authority to bring the charges, which should instead have been signed off by the Governor;
 - b. That Woodley had not been given an opportunity, though specifically announced on the charges, to examine or cross-examine the primary witnesses who constituted the allegations of misconduct, and in particular Foot;

¹ The parties will be referred to as bracketed for ease of reading, and no disrespect is intended by not writing out full titles or the legalese of whether applicants or respondents.

- c. That Foot's investigation was not carried out in accordance with the Public Service Act 2013; and
 - d. That Foot had included in his report police material which he had been told in the terms of his investigation to exclude.
- 6 The transcript finally arrived in June 2018.
- 7 Application for leave to apply for judicial review of the hearing of 14.09.16 was filed on 14.12.18, six months or so after receiving the transcript.

The Hearing

- 8 The PSC is a quasi-independent body to which matters of discipline within Montserrat's civil service are referred. On the panel for Woodley's hearing were members Dewar, Sergeant, Skerritt, West, and Kelsick, with a secretary named Lindsay. By a letter from HR dated 22.04.16, the hearing was originally to be on 18.05.16, though it appears not all the relevant materials were disclosed, the hearing convened but was adjourned, Woodley wrote seeking more material on 01.06.16, so that it was by letter from HR of 26.08.16 the case materials were disclosed in a thick binder and the hearing was rescheduled for 07.09.16, then later delayed to 14.09.16.
- 9 The transcript runs to 74 pages. No witnesses were made available to Woodley who said at p23 he did not accept Foot's findings, which appear in a final report of 12 pages, as it was 'incomplete and contains irregularities', while Kelsick, a well-known local lawyer, said the PSC were relying on what they had read.
- 10 The test for granting leave is that the applicant must show there is an arguable ground for judicial review having a realistic prospect for success and not subject to a discretionary bar such as delay or an alternative remedy, per **Sharma v Brown-Antoine 2007** 1WLR 780 (para E at page 787).
- 11 Leaving aside other complaints by Woodley, I do think it was odd there was no opportunity offered to him to ask Foot questions and to challenge the PSC relying on his report when Woodley was saying to the face of the PSC it was not reliable. I will call this 'the witness point'.

It may be the absence of an opportunity to question may be in breach of the well-known principle of natural justice, *audi alteram partem*, meaning let the other side be heard.

- 12 Moreover, the proceedings, on reading them, seem to pit Woodley against the PSC, where there was no independent body bringing the complaint, so that it might be thought the PSC had evolved into the body prosecuting the disciplinary hearing while adjudicating on it too, which might again be a breach of natural justice, namely of the principle *nemo iudex in causa sua*, meaning no one should be judge in their own cause.
- 13 On the other hand, Counsel Daley for the Government points out Woodley never asked to question anyone; and this was despite having had an earlier hearing on 18.05.16 and having been engaged in correspondence on 01.06.16 as to what materials he wanted for the re-scheduled hearing. In tandem, being a senior prison officer, he could probably be expected to understand the concept of questioning a witness.
- 14 If Foot had been questioned, though I make no formal finding, it seems likely Foot would have robustly defended his report, probably with the result it would then have been relied on (as the PSC had said from the outset).
- 15 At the hearing before me, Counsel Brandt explained Kelsick should have recused himself as he had once represented a prisoner named Jones, years before on a plea to manslaughter, and who had been part of the Foot investigation. I should say immediately I find no weight in this. Professional persons in so small a jurisdiction can be expected to put out of mind an earlier interaction, which in any event was on matters wholly different to the instant case. If this were not so, the wheels of administration would grind to a halt as folk on Montserrat mix widely within a population of currently only 4600. In my judgment, here on this island, such is the way of life and local interactions that concerning Jones there would have been no actual bias by Kelsick and a third party observer would not have thought there was apparent bias. The local tipping point for bias has not arisen. Instead, the issue for Woodley and the PSC was always the Foot report, nothing else, and never who had been Kelsick's client on a plea years' earlier.

The Delay

- 16 Weighing against the oddity of the witness point is the delay in bringing proceedings.

- 17 In my judgment, Woodley probably knew all along after 14.09.16 he could in theory raise complaint about there being no witnesses offered without need to wait for a transcript, or even the formal letter from HR of 06.01.17. This is clear from the letter of 23.05.18 which raised the complaint ahead of the transcript, but which waited 17 months. Woodley through his counsel should have said all this much earlier, perhaps even in the letter of 16.01.17 (which was otherwise bland). In addition, his other complaints in the letter of 23.05.18 were part of the proceedings of 14.09.16, namely about the validity of HR signing the charges, account perhaps being wrongly taken of the police proceedings, and that the Foot report was outside its terms, so that these complaints could also have been raised in an early filing for judicial review.
- 18 And once the transcript was received, there has been no fulsome explanation for the further delay of six months in filing.
- 19 The difficulty with so long delay, from 14.09.16 to 14.12.18, being 27 months, is that much has moved on. There is a new superintendent, by now long in his job. An application to quash the proceedings and order their re-hearing, with possibly the outcome Woodley might ask to be reinstated, seems wholly academic. Instead, any permitted judicial review would possibly morph into an allegation of unfair dismissal seeking vast monies from the government, all arising from a suspension as long ago now as 10.07.15, being nearly four years. It may be this is the very reason the proceedings were delayed, namely to create a claim for money, not reinstatement.
- 20 A delay of this sort causes administrative chaos and because of this mischief there is enshrined in the **Civil Procedure Rules 2000** concerning judicial review a power at rule 56.5 to deny leave where there has been unreasonable delay.

Delay

56.5

1. ... the judge may refuse leave or to grant relief in any case in which the judge considers that there has been unreasonable delay before making the application.

2. When considering whether to refuse leave or to grant relief because of delay the judge must consider whether the granting of leave or relief would be likely to –
 - a. be detrimental to good administration; or
 - b. cause substantial hardship to or substantially prejudice the rights of any person.

21 I consider the delay has been unreasonable and will apply the discretionary bar. This is because it is reasonable to suggest the claim could have been filed ahead of waiting on a transcript as the points were known, either having been argued at the hearing or the witness point being identifiable without need to wait. The transcript would have arrived in due course as the proceedings took shape, which could then have been adjusted or withdrawn if appropriate.

22 Counsel Brandt has suggested it would be bad practice to file without sight of the transcript, and therefore any delay awaiting the transcript is not unreasonable. To my mind this is not so: instead he should just follow his client's instructions, which would have been as indeed he wrote on 23.05.18. Therefore, it was unreasonable to delay 17 months up to that letter.

23 Moreover, it was unreasonable to delay a further six months after getting the transcript in June 2018 for which there has been no proper explanation.

24 The unreasonableness stands alone, simpliciter, under rule 56.5.1. However, it can also stand on assessing under rule 56.5.2 whether granting leave would be detrimental to good administration (as discussed) or substantially prejudice another (namely Kirwan, now superintendent, it seems for longer than was Woodley).

25 I suggest this application for judicial review should have been filed within three months of receipt of the letter from HR of 06.01.17. And if that is wrong, it should have been filed within three months of receipt of the transcript. Indeed, there is such a three-month time limit in the UK, and though not strictly applicable here, that time limit in a sister jurisdiction is helpful in weighing at what point delay may start to become unreasonable. The short point is any application for judicial review must be filed as quickly as possible or it risks being barred.

- 26 Moreover, if this application had been so filed, I think it only fair to say leave may well have been granted on the witness point, though I cannot predict with what result on full hearing.
- 27 I accept this decision is disappointing for the applicant who might have had a good case if filed earlier. I will therefore not make any order as to costs.

The Hon. Mr. Justice Iain Morley QC

High Court Judge

19 March 2019