

**THE EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA**

**IN THE HIGH COURT OF JUSTICE
(Civil)**

SLUHCV2014/0834

BETWEEN:

MOSES JAMES

Claimant

and

**THE PERMANENT SECRETARY
MINISTRY OF HOME AFFAIRS**

Defendant

On Written Submissions:

Before:

The Hon. Mde. Justice Kimberly Cenac-Phulgence

High Court Judge

Appearances:

Mr. Alberton Richelieu for the Claimant

Mrs. Brender Portland-Reynolds for the Defendant

2018: May 7.

JUDGMENT

- [1] **CENAC-PHULGENCE J:** This claim has become somewhat academic given the fact that the position of Assistant Commissioner of Police is no longer vacant and has been filled. The parties agreed for the matter to be dealt with on written submissions.

[2] The claimant, Mr. Moses James ("Mr. James") obtained leave to file a claim for judicial review which he filed by fixed date claim on 16th December 2014 against the Permanent Secretary of the Ministry of Home Affairs ("PS-Home Affairs"). The claim relates to a decision of the PS-Home Affairs not to forward a recommendation from the Commissioner of Police for the acting appointment of Mr. James as Assistant Commissioner of Police to the Ministry of the Public Service for onward submission to the Public Service Commission ("PSC"). Mr. James claims the following relief:

- (a) A declaration that the PS-Home Affairs has no authority to make a decision to refuse to transmit the Commissioner of Police's ("COP") recommendation for Mr. James' acting appointment as Assistant Commissioner of Police to the PSC for consideration;
- (b) A declaration that the decision of the PS-Home Affairs to refuse to transmit the COP's recommendation to the Permanent Secretary of the Ministry of Public Service ("PS-Public Service") for onward transmission to the PSC is arbitrary, oppressive, unfair, manifestly unlawful and in violation of the Saint Lucia Constitution Order 1978.
- (c) A declaration that the directives of the PS-Home Affairs to the PS-Public Service was for an unlawful purpose, done in bad faith, specifically with the objective of usurping the functions of the PSC.
- (d) A declaration that the decisions and acts of the PS-Home Affairs were not in accordance with basic principles of fairness.
- (e) That the decision of the PS-Home Affairs be quashed.
- (f) An order that the recommendation of the COP be permitted to proceed to the PSC for their determination.

Background facts

[3] Mr. James joined the Royal Saint Lucia Police Force ("RSLPF") on 1st June 1988. At the time of the claim he held the position of Superintendent of Police. Mr. James was appointed to act as acting Assistant Commissioner of Police by the

PSC for the periods 2nd July to 31st August 2012, 1st September to 31st December 2012 and 1st January to 30th June 2013.

- [4] By memo dated 3rd June 2013, the then Commissioner of Police, Mr. Vernon Francois recommended Mr. James' acting appointment as Assistant Commissioner of Police for the period 1st July to 31st December 2013 and asked that the said recommendation be forwarded to the Ministry of the Public Service for consideration and approval.
- [5] Mr. James alleged that it was only in August 2013 that he was alerted to the fact that a successful polygraph was a criterion for appointment and averred that this was never a mandatory requirement before. The COP wrote to the PS-Home Affairs by memo dated 28th August 2013 indicating that he was prepared to amend his recommendation and requesting the reasons for the non-acceptance of the recommendation in relation to Mr. James' acting appointment. The COP wrote another memo dated 19th September 2013 requesting that the matter be treated urgently and indicating that he was still awaiting a response to his memo of 28th August 2013.
- [6] No response was received to these memos until 30th December 2013. The response however did not address the requests of the COP for the reasons for the non-acceptance of the recommendation made in relation to Mr. James, but instead referenced correspondence from the Ministry of the Public Service. The memo stated that 'in cases where more than one eligible officer merits equal consideration for an acting appointment, where practical, the other eligible officer(s) should be given an opportunity to act in that public office by way of rotation.' That response was rather strange.
- [7] By letter dated 7th November 2013, Mr. James' solicitors wrote to the PS-Home Affairs inquiring as to the reason for the non-submission of the COP's

recommendations for the acting appointment in relation to Mr. James. There was no reply to this letter.

- [8] By memo dated 10th February 2014, the PS-Public Service wrote to the Secretary, PSC, copied to the PS-Home Affairs, the subject of the memo being “Mandatory Vetting And Polygraph For Gazetted Officers Of The Royal Saint Lucia Police Force.” That memo referenced the Cabinet Conclusion No. 724 dated 30th December 2013 and was in the following terms:

“...Cabinet by Cabinet Conclusion 724 dated 30th December 2013 agreed that all gazetted officers of the Royal Saint Lucia Police Force shall undergo mandatory vetting by polygraph or otherwise, as approved by the Ministry of Home Affairs and National Security, to be eligible for appointments, acting appointments and promotions.

Cabinet agreed that this requirement be established as a condition of employment for the Royal Saint Lucia Police Force.

Therefore, the Public Service Commission is asked to note that the Ministry of Home Affairs and National Security shall provide the documentary evidence required to confirm that gazetted officers being recommended for higher office have undertaken the mandatory vetting. The Ministry of the Public Service, Information and Broadcasting will then submit all the relevant supporting documents, along with the recommendation, for approval by the Public Service Commission.

The above is offered for your guidance.”

- [9] Mr. James averred that the mandatory vetting and polygraph testing was not a mandatory requirement and was never a criterion for making a decision relating to acting appointments, promotions or appointments. Mr. James alleged that the PS-Home Affairs transmitted recommendations from the COP for acting appointments of officers to the post of acting Superintendent of Police without them having satisfied the requirements of having undergone a polygraph test.
- [10] Mr. James averred that at the time when the recommendation for his acting appointment was not transmitted to the PSC, the issue of polygraph testing had not been raised as a criterion for acting appointments and promotions.

- [11] The PSC by memo dated 2nd April 2014 wrote to the PS-Home Affairs copied to PS-Public Service and the Commissioner of Police referencing the Cabinet Conclusion No. 724 of 2013 and indicating that the Commission required further clarification on the process and the manner in which the vetting process is administered. The PSC stated that the implementation of the policy would impact its work and therefore it thought it appropriate to meet with the relevant persons to obtain a better understanding of the mandatory vetting requirement, especially as it was established as a condition of employment for Gazetted Officers in the RSLPF. The PSC in a letter dated 4th November 2014 to counsel for Mr. James indicated that it was not in receipt of any recommendation for promotion in relation to Mr. James.

The Defendant's Response

- [12] The defendant filed an affidavit in response sworn by the Permanent Secretary in the Ministry of Home Affairs, Mr. Agosta Degazon ("Mr. Degazon"). Mr. Degazon was assigned to the position of Permanent Secretary from March 2014 and prior to him, Mrs. Glenda Polius was the Permanent Secretary.
- [13] In response to Mr. James' claim, Mr. Degazon referred to the Cabinet Conclusion No. 353 of 2013 dated 17th June 2013, which he said approved promotion guidelines for the RSLPF and provided a fair, consistent and transparent process and opportunities for all officers to advance their careers. Mr. Degazon referenced section 4.8 of the Promotions Guidelines and stated that the mandatory vetting by polygraph or otherwise was established and approved as the eligibility requirement for appointments, acting appointments and promotions.
- [14] Mr. Degazon averred that the requirement for polygraph testing under the Promotions Guidelines was a matter before Cabinet for its consideration prior to the memo of the COP dated 3rd June 2013 (the memo which recommended Mr. James' continued acting appointment).

- [15] Mr. Degazon further stated that the requirement for polygraph testing under the Promotions Guidelines was well-known, having regard to the fact that reference was made to Joseph Eugene having successfully completed his polygraph test in the COP's memo dated 8th July 2013. He stated that it was an acceptable criterion for the assessment process.
- [16] Mr. Degazon stated that Mr. James knew of the mandatory requirement and he was polygraphed but was unsuccessful and therefore the recommendation for appointment by the COP could not be transmitted to the Ministry of the Public Service to enable it to be forwarded to the PSC. Mr. Degazon stated that the COP's recommendation was merely a recommendation for consideration and all supporting documentary evidence of successful mandatory vetting had to be forwarded to the Ministry of the Public Service before any appointment could be made by the PSC.
- [17] The defendant's contention is that the then PS-Home Affairs considered the recommendation and was aware that Mr. James' polygraph test had to be re-done. However, after re-testing Mr. James was still not successful and as a result the recommendation could not have been considered by the PS-Home Affairs and/or forwarded to the PS-Ministry of the Public Service. The defendant's position is that the PS-Home Affairs acted reasonably.
- [18] Mr. Degazon stated that the Ministry of Home Affairs as the designated line ministry was required to vet the nominee being recommended for the acting appointment and ensure that financial arrangements were in place to facilitate the appointment to the post to act as Assistant Commissioner of Police and also to ensure that the nominee was suitable and met the criteria for the position.
- [19] The defendant's position is that the PS-Home Affairs acted in accordance with the Promotions Guidelines approved by Cabinet and acted reasonably having regard to the specifications contained in those Guidelines.

The Claimant's Response

- [20] Mr. James in his response to Mr. Degazon's affidavit averred that the Promotions Guidelines did not apply to him and that in accordance with the advice of the Attorney General, Gazetted Officers are to be appointed by the PSC and the procedure for the appointment is to be established by the PSC.
- [21] Mr. James stated that neither Cabinet Conclusion 353 of 2013-Promotions Guidelines nor Cabinet Conclusion 724 of 2013-Mandatory Vetting and Polygraph were in effect at the time when he took the polygraph test on 23rd March 2013 and 21st April 2013. There was no polygraph policy in place then. He stated that he was not aware of the mandatory polygraph requirement and was not polygraphed for that reason. His evidence was that he was polygraphed from as far back as 2007 and 2011 and that was because of his involvement in police intelligence related matters.
- [22] The affidavit of Mr. Vernon Francois, former Commissioner of Police supports the evidence of Mr. James as regards the polygraph testing which he had previously undergone. Mr. Francois in his affidavit stated that in 2011 he appointed Mr. James as the Single Point of Contact (SPOC) for the Telecommunications Intercept Unit. One of the requirements for functioning in the position of SPOC was a biennial polygraph examination which Mr. Francois stated Mr. James subjected himself to on 8th June 2011 and passed. Mr. Francois stated that Mr. James subjected himself to another polygraph test on 23rd March 2013 as this was a requirement for his continuation as the SPOC. He went on to explain that the results of that polygraph test were not favourable and that Mr. James subjected himself to another polygraph test. Although Mr. James was said to have passed this test, the team of external examiners to whom the results had been sent to ensure accuracy and impartiality did not grant clearance to Mr. James.

[23] Mr. Francois' evidence was that despite this he permitted Mr. James to continue functioning in his post. Mr. Francois stated that at a meeting with the PS-Home Affairs subsequent to him sending the recommendation of 3rd June 2013, the PS suggested that he recommend someone else in place of Mr. James since he had failed the polygraph examination. He then received a memo from the PS asking that the recommendations be re-submitted to which Mr. Francois said he responded by indicating that he was prepared to amend the nomination on the basis of the PS returning the recommendation with a reason for the non-acceptance of Mr. James' nomination.

[24] In summary, in considering the recommendation for Mr. James to act as Assistant Commissioner of Police, the PS-Home Affairs took into account (a) whether financial arrangements were in place to facilitate the acting appointment; (b) whether Mr. James was suitable and met the criteria for the position; (c) the Promotions Guidelines approved by Cabinet Conclusion No. 353 of 2013 dated 17th June 2013, in particular section 4.8 and (d) the fact that Mr. James had not passed the polygraph test. On the evidence, there were no issues with (a). In relation to (b) this could not have been an issue as Mr. James had been acting in the said position from 2nd July 2012 to 30th June 2013, six-month periods at a time. I will only concern myself therefore with the considerations at (c) and (d) above.

Whether the PS-Home Affairs has the authority to refuse to transmit the recommendation of the COP for the acting appointment of Mr. Moses James as acting Assistant Commissioner of Police to the Public Service Commission

[25] The Ministry of Home Affairs is the ministry under which the Royal Saint Lucia Police Force falls. Based on the evidence of Mr. Degazon, the PS-Home Affairs, on receipt of a recommendation for an acting appointment, the Ministry of Home Affairs was required to vet the person being recommended to ensure that (1) financial arrangements were in place to facilitate the acting appointment and (2) that the person recommended was suitable and met the criteria for the position. If the recommendation is in order, it is then forwarded to the Ministry of the Public

Service with all the supporting documents. I accept that this is the practice in the absence of any evidence to suggest that the practice is different. The PS-Home Affairs does not make recommendations to the Public Service Commission, but to the PS-Public Service.

[26] It stands to reason that if the person recommended does not meet the criteria or qualifications which have been set for the acting position, then the PS-Home Affairs can refuse to transmit the recommendation to the Ministry of the Public Service or he/she can in the alternative request documentation which may be missing. The salient question therefore has to be whether in this case, there were grounds for the PS-Home Affairs to refuse to transmit the COP's recommendation in relation to Mr. James to the Ministry of the Public Service.

[27] The reason proffered by the PS-Home Affairs in his affidavit in response for refusing to transmit the recommendation to the Ministry of the Public Service was that Mr. James did not meet the criteria set in the Promotions Guidelines and he did not pass the mandatory polygraph test. However, none of these reasons are stated in the memo dated 30th December 2013 from the then PS-Home Affairs. What the memo refers to is correspondence from the Ministry of the Public Service advising that where there is more than one eligible officer who merits consideration for an acting appointment, the other eligible officer(s) should be given an opportunity to act in the position by way of rotation. Clearly that is totally unrelated and different to the reasons given by Mr. Degazon as forming the basis for the refusal to transmit the recommendation to the PS-Public Service.

[28] Mr. James' position is that the Promotions Guidelines do not apply to him. The position for which he was recommended to act in was that of Assistant Commissioner of Police. I note that the Promotions Guidelines approved by Cabinet Conclusion No. 353 of 2013 and dated 17th June 2013 refers to the following: promotion procedure and criteria for Constables to Corporal, Corporal to Sergeant, Sergeant to Inspector, Constable I to Constable II and Constable II to

Senior Constable. It is also worthy of note that the power to appoint persons to all the positions to which the Promotions Guidelines refer vests in the Commissioner of Police by virtue of section 94(3) of the **Constitution of Saint Lucia**.¹ Nowhere in these guidelines does it speak to positions above the rank of Inspector. I therefore find that the Promotions Guidelines could not have formed the basis for any decision of the PS-Home Affairs in relation to the recommendation made for the acting appointment of Mr. James. In addition, these guidelines relate to promotion of the officers to the positions to which the guidelines relate and do not seem to relate to acting appointments. The Promotions Guidelines was therefore not a relevant consideration.

[29] The defendant contended that the Promotions Guidelines stated at section 4.8 that 'a candidate should not be **promoted** unless that candidate has been duly vetted and has been successful in the vetting.' It continues that 'the vetting should be in accordance with the Vetting Standards recommended by the Commissioner of Police and approved by the Ministry of Home Affairs and National Security.' Assuming I am incorrect and the Promotions Guidelines did apply to Mr. James, section 4.8 does not assist. The defendant contended that the vetting referred to in this section refers to polygraph testing. The section refers to vetting standards approved by the Commissioner of Police and the defendant has provided no evidence that polygraph testing is a vetting standard approved by the Commissioner for the purposes of the Promotions Guidelines. I do not accept that the Promotions Guidelines speaks to polygraph testing as a requirement. In any event as I indicated above, I do not accept that the Promotions Guidelines were applicable in the case of the recommendation in relation to Mr. James.

[30] The defendant contended that the requirement for the polygraph testing was a matter which was before Cabinet prior to the 3rd June 2013 when the recommendation was received from the COP. However, they do not say when this matter was before Cabinet and it will be noted that Mr. James had been acting in

¹ Cap. 1.01, Revised Laws of Saint Lucia 2008.

the position of Assistant Commissioner of Police for periods prior to 3rd June 2013 memo, the last period being from 1st January to 30th June 2013.

[31] The requirement for mandatory vetting and polygraphing for Gazetted Officers was approved by the Cabinet Conclusion No. 724 of 2013 and that is dated 30th December 2013. The memo from PS-Public Service to the PSC dated 10th February 2014 advising of the approval by the Cabinet of the requirement for mandatory vetting and polygraphing clearly shows that this was not a requirement prior to that date. The fact that the PSC by memo dated 2nd April 2014 requested a meeting to clarify the process and manner in which the vetting process as administered clearly shows that this had not been a requirement which the PSC applied or knew of. I therefore find that when the memo of 3rd June 2013 was submitted by the COP, there was no requirement for mandatory polygraph testing for Gazetted Officers in order for appointments to be made to these positions. It became a requirement by virtue of Cabinet Conclusion No. 724 of 2013 dated 30th December 2013 and not before that. There is no evidence proving otherwise.

[32] I therefore find in the circumstances of this case that the PS-Home Affairs did not have the authority to refuse to transmit the recommendation of the COP for the acting appointment of Mr. James as Assistant Commissioner of Police to the PS-Public Service for the reasons given i.e. based on the Promotions Guidelines and the fact that Mr. James had failed the polygraph test. These were not legitimate considerations for non-submission of the recommendation to the Ministry of the Public Service at the time when the recommendation was made in June 2013.

Whether the decision of the PS-Home Affairs to refuse to transmit the recommendation of the COP for the acting appointment of Mr. Moses James as acting Assistant Commissioner of Police to the PS-Public Service was arbitrary, oppressive, unfair, manifestly unlawful and in violation of the Saint Lucia Constitution

[33] The defendant contended that this declaration cannot be sustained as Mr. James has failed to plead and particularize the constitutional breach/es which he alleges.

In the affidavit in support of the claim, in the relief sought reference was made to violation of section 86 of the Constitution. However, section 86 of the Constitution refers to appointments of public officers, not police officers and even then there is nothing in the affidavit which indicates what the breach was in relation to the section.

[34] Mr. Alberton Richelieu ("Mr. Richelieu"), counsel for Mr. James in his written submissions submitted that the PS-Home Affairs in failing to transmit the recommendation of the COP to the PSC exceeded its authority, by usurping the powers of the PSC vested in it by section 85(12) of the Constitution. Firstly, the practice as seen from the evidence and which was not contradicted in any way is that the PS-Home Affairs does not transmit recommendations to the PSC. It is the Ministry of the Public Service who transmits recommendations to the PSC. Secondly, section 85(12) does not vest any powers in the PSC but simply states that **in the exercise of its functions**, the PSC shall not be subject to the direction and control of any other person or authority.

[35] I therefore conclude that there has been no violation of the Constitution and this declaration cannot be granted.

Whether the directives of the PS-Home Affairs to the PS-Public Service were for an unlawful purpose, done in bad faith, specifically with the objective of usurping the functions of the PSC

[36] There is no evidence that the PS-Home Affairs issued any directives to the PS-Public Service. There is no evidence that the PS-Home Affairs usurped the functions of the PSC. Recommendations for appointments are submitted to the line ministry, in this case, Ministry of Home Affairs who goes through the process of vetting these recommendations and if they meet the criteria submitting them to the Ministry of the Public Service. It is not in dispute that it is the Ministry of the Public Service who submits recommendations to the PSC for its consideration. This is not a usurpation of the PSC's powers.

A declaration that the decisions and acts of the PS-Home Affairs were not in accordance with the basic principles of fairness

- [37] Mr. James has not shown how the acts of the PS-Home Affairs offended the basic principles of fairness. The evidence shows that the PS-Home Affairs acted in accordance with the established practice albeit the basis for the decision not to transmit the recommendation to the PS-Public Service was flawed and he took into account matters which were not relevant. There is no basis for the grant of this declaration.

An order quashing the decision of the PS-Home Affairs to refuse to transmit the recommendation of the COP to the Ministry of the Public Service. An order that the recommendation of the COP be permitted to proceed to the PSC for their determination

- [38] The recommendation made by the COP in respect of Mr. James was in relation to an acting appointment as Assistant Commissioner of Police. However, an appointment has since been made to the position and therefore transmission of the said recommendation for someone to act in the position is no longer a possibility and to grant any of these orders will serve no real purpose.

Mandatory Polygraph Testing

- [39] Mr. Richelieu submitted that the requirement for the polygraph test has no basis in law. However, this was not raised on the pleadings and so cannot now be raised in submissions. What was pleaded is that at the time of the COP's recommendation there was no mandatory requirement for polygraph testing. The requirement for the polygraph test was set by Cabinet as a condition of employment in relation to Gazetted Officers and until a Court makes a determination as to the lawfulness or otherwise of the requirement, it is presumed to be lawful. I decline to make any pronouncement on the matter of the lawfulness or otherwise of the polygraph test as that was not a matter which was before me on this claim.

[40] Mr. Richelieu referred to a letter dated 19th September 2002 in which the Attorney General advised the then COP, Mr. Brian Barnard that the procedure for the appointment of gazetted officers was to be established by the PSC. Procedure here does not refer to the terms and conditions of employment but rather to the process by which gazetted officers are appointed. It appears to me that counsel for Mr. James may be of the view that the PSC is the one to set the conditions of employment but the role of the PSC is to appoint in accordance with the terms and conditions set by the Executive, not to set the terms and conditions.²

Comments

[41] This matter although academic in its outcome raises some very important points. The lack of communication on the part of the PS-Home Affairs to the COP indicating the reasons for his decision not to transmit the recommendation in relation to Mr. James once he determined that Mr. James did not meet the relevant criteria is of some concern. Had the COP been advised that the recommendation was not being transmitted and the reasons, it would have afforded the COP an opportunity to address the matter instead of being left in the dark. It cannot be right that a recommendation is made and is not transmitted but the recommender has no idea why this is the case. There seems to be a bad practice in the Public Service of correspondence not being responded to or even acknowledged at all levels of the Service and the appropriate authorities need to address this as a matter of urgency.

[42] This case suggests that there is a need for a clearly established protocol on how recommendations made by department heads to line ministries are to be dealt with. There should also be clear guidelines for recommenders as to how they should treat situations where a recommendation has not been transmitted to Ministry of the Public Service and no reason has been advanced or absolutely no communication has been received to indicate the status of the recommendation or where the recommender may have concerns that several recommendations are

² See *Thomas v The Attorney General* [1982] AC 113.

being made but seem not to be transmitted to the Ministry of the Public Service. There is also a need for permanent secretaries to be cognizant of the importance of responding to correspondence to avoid speculation and suspicion on the part of the recommender and the person recommended.

Conclusion

[43] In conclusion, I make the following order:

(a) A declaration is granted that in the circumstances of this case, the PS-Home Affairs did not have the authority to refuse to transmit the recommendation for the acting appointment of Mr. Moses James as Assistant Commissioner of Police to the Public Service Commission through the Ministry of the Public Service.

This declaration is not to be seen as a general statement of the position as relates to the PS-Home Affairs' authority to refuse to transmit a recommendation received but is made solely in relation to the facts and circumstances of the instant case.

(b) All other relief sought at paragraphs 2-8 of the fixed date claim are refused.

(c) There shall be no order as to costs.

**Kimberly Cenac-Phulgence
High Court Judge**

By the Court

Registrar