

**THE EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA**

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

SLUHCV2016/0518

BETWEEN:

CUTHBERT HENRY

Claimant

and

PHILLIP DALSOU

Permanent Secretary, Ministry of Public Service, Information and Broadcasting

Defendant

Before:

The Hon. Mde. Justice Kimberly Cenac-Phulgence

High Court Judge

Appearances:

Mr. Horace Fraser for the Claimant

Mr. Rene Williams, Senior Crown Counsel for the Defendant

Claimant present

2017: May 16;
June 7.

DECISION

[1] **CENAC-PHULGENCE, J:** Mr. Cuthbert Henry filed a fixed date claim form on 29th August 2016 against Mr. Phillip Dalsou, Permanent Secretary, Ministry of Public Service, Information and Broadcasting for the following relief:

1. A declaration that the process of selection and the recommendation by Mr. Dalsou to the Public Service Commission ("PSC") to fill the post of Manager at

the Boys' Training Centre are ultra vires the Collective Bargaining Agreement 2010 and therefore null and void.

2. A declaration that the process of selection and the recommendation by Mr. Dalsou to the PSC to fill the post of Manager at the Boys' Training Centre were conducted in breach of the rules of natural justice.
3. A declaration that the process of selection and the recommendation by Mr. Dalsou to the PSC breached the rules of fairness.
4. Damages for loss of chance.
5. Punitive or aggravated damages.
6. Costs.
7. Such further or other relief as the Court deems just.

[2] Mr. Henry was appointed to act as Manager of the Boys' Training Centre from 26th October to 31st December 2015. Thereafter, he was appointed to act as Manager from 4th January to 29th February 2016, 1st March to 29th April 2016 and 1st May to 31st May 2016. Mr. Henry acted in the post until 14th June 2016 when he received a letter directing him to report to the Ministry of Home Affairs and National Security effective 1st June 2016.

[3] Mr. Henry's case is that appointments to vacant posts within the Public Service are subject to preferential consideration pursuant to the Collective Bargaining Agreement ("the Agreement") between the Government of Saint Lucia and the Civil Service Association for the period 1st April 2010 to 31st March 2013. He claims that in accordance with the Agreement, he was entitled to preferential consideration or confirmation in the post of Manager, having acted in the post for over seven (7) months. It is Mr. Henry's case that the Agreement seeks to give protection to public officers who act in vacant posts for a period of six (6) months.

[4] It is this part of Mr. Henry's case which I believe gave rise to the preliminary issue which is the subject of this decision. On 30th November 2016, the Court made an

order for a preliminary issue to be argued before any further proceedings in the case. That preliminary issue is as follows:

'Whether Article 41 of the Collective Bargaining Agreement between the Government of Saint Lucia and the Civil Service Association can be construed to give preferential consideration to a person who is eligible and who has applied to be appointed to a post in the Public Service after acting in the said post.'

- [5] Mr. Henry's claim is that he was invited by the Ministry of the Public Service to attend an interview in March 2016 for the post of Manager which he attended along with another candidate. According to Mr. Henry, that interview was 'scrapped'. However, Mr. Dalsou in his affidavit in response to the claim filed on 28th October 2016 averred that the interview was not 'scrapped' but that the interview panel did not make a recommendation in favour of any of the two candidates.
- [6] Mr. Henry was invited to attend another interview by the Ministry of the Public Service which he attended on 12th May 2016. However, he claims that he thought it strange that he was being made to compete with other candidates for the post when the Agreement has sought to protect his interest in the said post. Mr. Henry wrote to Mr. Dalsou by letter dated 10th May 2016 raising his right to be confirmed in the post. Mr. Dalsou responded by memo dated 6th June 2016 indicating that due consideration was given to Mr. Henry as he had been interviewed for the post.
- [7] Mr. Henry claims that his name only appeared on the short-list for the second interview after the Permanent Secretary in the Ministry of Social Transformation, Local Government and Community Empowerment expressed her concerns about its absence. Mr. Dalsou however indicates that Mr. Henry did not apply the second time the post was advertised but after the Permanent Secretary of Social Transformation indicated Mr. Henry's interest in the post, he indicated that Mr.

Henry could apply notwithstanding that the deadline had passed.¹ Mr. Dalsou states that the Human Resources Department invited Mr. Henry to re-apply which he did. Mr. Dalsou also states that Mr. Henry was short-listed after it was conveyed that he was interested in the post and was desirous of being interviewed. Mr. Henry was subsequently interviewed. Mr Dalsou further states that he did not make any determination concerning Mr. Henry's eligibility for the post and it was at all times open to Mr. Henry to apply for the job and he did not in any way preclude or prevent Mr. Henry from doing so.²

[8] At the end of the second interview, a recommendation was made to the PSC for the appointment of Mr. Son Son to the post. Mr. Henry says the recommendation was made to the PSC by Mr. Dalsou. Mr. Dalsou states at paragraph 26 of his response that, a recommendation was made by him to the PSC for the appointment of Mr. Son Son to the post of Manager of the Boys' Training Centre on the advice of the interview panel.

[9] Mr. Dalsou in his affidavit in response at paragraph 15 states:

"Further, in my view the Collective Bargaining Agreement does not provide for preferential consideration to be given to the Claimant for appointment to a vacant post. The Government of Saint Lucia may make recommendations to fill vacancies from existing staff and in the event that these vacancies cannot be filled from existing staff, the Government of Saint Lucia will make recommendation to fill these posts from the outside. The Claimant acted in the post of Manager of the Boys' Training Centre and was eligible for consideration for appointment to the vacant post and was duly considered."

Mr. Dalsou further states that Mr. Henry has not complied with and/or exhausted the procedure for dealing with complaints, conflicts and differences between Employer and Employees as set out in the Agreement.

¹ Para. 17 of affidavit in response filed on 28th October 2016.

² Para. 25 of affidavit in response.

[10] The Article at the root of this matter is Article 41 of the Agreement. That Article reads as follows:

“Article 41-APPOINTMENTS

41.1 The Employer agrees to make recommendations to fill existing vacancies from existing staff. In the event that these vacancies cannot be filled from existing staff, the Employer will make recommendations to fill these posts from the outside.

41.2 ...

41.3 If the higher position becomes vacant, then the employee who acted for six (6) months in that vacant post shall be **eligible for consideration for confirmation**, provided that he/she is in possession of the requisite qualifications and has met the required standard as per the appraisal report in respect of the six (6) months acting period.

41.4 ...” (Emphasis mine).

[11] Assuming that an officer meets the qualifiers in Article 41.3, then this matter turns on the interpretation to be placed on the words ‘eligible for consideration for confirmation’. It would appear that Mr. Fraser, counsel for Mr. Henry interprets this to mean the right to be first recommended for confirmation in a post in which one has been acting without the requirement for any interview. His submission is therefore that Mr. Dalsou ought to have recommended Mr. Henry’s confirmation in the post of Manager of the Boys’ Training Centre to the PSC in the first instance. If the PSC did not accept this recommendation, then they could go on to interview. The crux of this matter is to see whether on an interpretation of Article 41.3 this is what is meant by eligible for consideration.

[12] Mr. Rene Williams, Senior Crown Counsel for Mr. Dalsou on the other hand submitted that Mr. Henry was eligible and he was considered for the post in that he was given an opportunity to interview for the position.

[13] In the preliminary question, the Court asked whether Article 41 can be construed to give preferential consideration to a person who is eligible and who has applied to be appointed in a post in the public service after acting in that post. However, as I understand it Mr. Henry's contention is that he was to have preferential consideration to be confirmed without being interviewed. Therefore, he is not even getting to the point of applying for the job because as I understand it, he is saying that he did not need to apply. Is that what the Article means?

[14] **The nature of the Agreement**

Whether the Agreement is legally binding

Section 370 of the **Labour Act**³ ('the Act') states:

"A collective agreement shall remain in force until a new agreement is signed by the certified trade union and the employer."

It is noted that the Agreement does not appear to have any provisions for the settlement of all differences arising out of the interpretation, application and administration of the agreement as required by section 378 of the Act and therefore the issue of exhausting procedures for dealing with complaints and conflicts under the Agreement cannot arise. Section 379(1) of the Act speaks to enforceability of collective agreements and provides as follows:

"(1) A collective agreement is legally enforceable on a certified trade union and an employer that have entered into it and on an employee who is a member of the recognized trade union, or member of a bargaining unit for whom that trade union has been recognized if the collective agreement—

(a) is in writing;

(b) **provides that the parties intend it to be a legally enforceable contract in its entirety.**" (Emphasis mine).

[15] Section 379(3) of the Act states:

"(3) Any party to a binding collective agreement may apply to the Tribunal to enforce the collective agreement."

³ Cap. 16.04, Revised Laws of Saint Lucia 2013.

I can find no provisions which state that the parties intend the Agreement to be a legally enforceable contract in whole or in part. I have to conclude therefore that the collective bargaining agreement is not legally enforceable in the absence of an express provision to that effect. This is supported by the case of **Ford Motor Co. Ltd. v Amalgamated Union of Engineering and Foundry Workers**,⁴ where Geoffrey Lane J held that collective agreements are:

“not contracts in the legal sense and are not enforceable at law. Without clear and express provisions making them amenable to legal action, they remain in the realm of undertakings binding in honour.”

- [16] This reasoning was adopted and followed in the case of **Shipping Association of Georgetown and Others v Ivan Bentnick**,⁵ where Crane JA held that

“...collective bargaining agreements are not legally binding; that they are not directly enforceable by action for damages, but only indirectly in court by declaration to determine their meaning and import, or by extra-judicial method of strike action. This is so, it is said, because the parties to them never do really intend to make them binding.”

This would explain the express provisions of section 379 of the Labour Act which seeks to address this very matter.

Construction of Article 41

Claimant's submissions

- [17] Mr. Fraser submitted that there is a distinction between ‘eligibility for consideration for confirmation’, ‘eligibility for appointment’ and ‘eligibility to apply for the post’. He referred to the definition of the word ‘eligible’ in the **Oxford Dictionary**, (4 ed. 1994) as (1) qualified to be chosen for a position or allowed a privilege and (2) regarded as suitable or desirable. Mr. Fraser argued further that in the spirit of the Agreement, ‘eligibility’ is a benefit or ‘entitlement’ conferred upon an office holder. He submitted that the right given to Mr. Henry as an officer acting in the post for 6 months or more is the right to be confirmed, not appointed or to be considered.

⁴ [1969] 1 WLR 339 at 356

⁵ (1969) 14 WIR 243 at 251.

Mr. Fraser submitted that eligibility for consideration for confirmation is a right which is higher than eligibility for appointment' or eligibility to apply for a post'. Mr. Fraser relied on the case of **Mc Innes v Onslow Fane et al**⁶ in support of this point.

[18] Mr. Fraser further argued that the right given to Mr. Henry crystallised into a legitimate expectation to his confirmation in the post of Manager of the Boys' Training Centre. He argued that Mr. Henry's legitimate expectation arises due to the policy which the Agreement outlines rather than from practice. He also argued that Mr. Dalsou defeated the right to confirmation in the post when Mr. Henry was made to apply for the post and vie for same with other candidates. On this point, Mr. Fraser relied on the cases of **Leacock v The Attorney General of Barbados**⁷ and **Nguyen Tuan Cuong et al v The Director of Immigration et al**.⁸

[19] Mr. Fraser referred to and relied on the statement of Mr. Mac Stephen Aubertin in the affidavit in support of the claim filed on 3rd February 2017. Mr. Aubertin states at paragraph 6 of his affidavit that in his opinion Article 41.3 speaks to 'priority being given to members of the union when certain posts in the public service become vacant and those members are first in line and are eligible for consideration for appointment to those posts.' (My highlight) But I am forced to ask, does being first in line necessarily mean that one has a right to be recommended to be confirmed/appointed without more?

[20] **Defendant's submissions**

Mr. Williams' response to the question posed by the Court is that Article 41 cannot be construed to give preferential treatment to a person who is eligible and who has applied to be appointed to a post in the public service after acting in the said post.

⁶ [1978] 3 AER 211.

⁷ (2005) 68 WIR 181.

⁸ [1996] UKPC 43.

Mr. Williams cited section 87 of the Constitution of Saint Lucia⁹ (“the Constitution”) which establishes the appointing body for offices such as Manager of the Boys’ Training Centre. He also cited the Staff Orders for the Public Service which provides at section 2.1 as follows:

“(1) Save as may otherwise be provided in the Constitution of Saint Lucia or in Regulations made under the Constitution, appointments to the public service including acting and temporary appointments, and promotions shall be made by the appropriate Service Commission.”

- [21] Mr. Williams submitted that the plain meaning of ‘eligible’ as provided in the **Oxford Dictionary**, (10th ed. Completely revised) is ‘satisfying the appropriate conditions’. He also referred to **Stroud’s Judicial Dictionary** (5th ed.) and stated that ‘eligible’ as applied to a selection of persons, has two meanings, ‘legally qualified’ or ‘fit to be chosen.’
- [22] He argued that eligibility for consideration means fit to be considered. This, Mr. Williams said does not amount to giving a preferential consideration and does not preclude consideration being given to others. He submitted that the word consideration appearing before the word confirmation means that some process must be followed, in that the person acting must undergo some form of scrutiny. He also submitted that Article 41 cannot be interpreted to usurp the functions of the PSC and does not confer a right to a vacant post.
- [23] Mr. Williams submitted that the terms of the Agreement suggest that if certain criteria are met, consideration may be given to a person. It does not give *preferential* consideration. Mr. Williams cited the case of **Union of India Etc. v K. R. Tahiliani & Anr.**¹⁰ from the Supreme Court of India. In that case the question was whether a Government servant officiating in a class 1 or class II service or post could be retired compulsorily by exercising power under r. 56(j)(i) of the

⁹ Cap. 1.01, Revised Laws of Saint Lucia, 2013.

¹⁰ CA No. 2008 of 1978.

Fundamental Rules after he has attained the age of 50 years. Kriahna Iyer J said:

“An officiating hand has no right to the post and is perhaps a fleeting bird who may have to go back to the substantive post from which he has been promoted on an officiating basis. What is more to the point, a person who has been appointed de novo may begin his service on an officiating basis or on a temporary basis and it is obvious that he has no right to the post and cannot be strictly said to be in that service or post as a member of that service. In short, an officiating Government servant does not really belong to Class I or Class II service until he acquires a right thereon.”

Analysis

- [24] There is no dispute that appointments to positions in the public service are to be made by the PSC subject of course to the provisions of the Constitution. This is not disputed by counsel for Mr. Henry who agreed that a recommendation is made to the PSC but it is the PSC who ultimately makes the decision. The provisions in the Constitution dealing with appointments by the PSC speak to ‘the power to appoint persons to hold or act in offices (including the power to confirm appointments). Mr. Fraser has sought to draw a distinction between confirmation and appointment which he argues makes the difference. His argument is that Article 41 gives Mr. Henry the right to be confirmed in the post once he was eligible.
- [25] The word ‘eligible’ has been defined by both counsel and from both definitions it is clear that this word refers to meeting the specified qualifiers or conditions. In this case eligibility would be determined by: (1) the higher position being vacant, (2) the employee having acted in the vacant position for six months, (3) the employee having the requisite qualifications and (4) meeting the required standard as per the appraisal report in respect of the six months acting period. ‘Eligible’ is defined in **Black’s Law Dictionary**¹¹ as ‘capable of being chosen as a candidate for office’, ‘qualified and capable of holding office’, qualified to be elected.’ The word eligible

¹¹ 6th edition (West Publishing, 1990).

in Article 41.3 is qualified by the word 'consideration'. Put another way, it would read 'qualified to be considered'.

[26] What then does consideration mean? **Black's Law Dictionary** defines 'consider' as 'to fix the mind on, with a view to careful examination, to examine, to inspect, to deliberate about and ponder over, to entertain or give heed to.' This to my mind means that the person who has been deemed eligible must then be examined, inspected with a view to seeing whether they ought to be confirmed in the post.

[27] The Article does not expressly say how that consideration should take place. Mr. Fraser seeks to say that it should be by way of a recommendation for confirmation in the post from the Permanent Secretary, Public Service to the PSC and then if the PSC does not accept that recommendation, then and only then can they proceed to interview. I am of the view that, that is reading much more into the Article than is required. In any given case, the question has to be, was the employee considered? Was he/she examined, carefully examined, pondered over?

[28] The word 'confirm' according to the **Collins Concise Dictionary and Thesaurus**¹² means to approve. In the context of employment, confirmation refers to making an employee's employment permanent after they have satisfactorily completed their probationary period. This cannot be what confirmation in Article 41.3 refers to as there is no reference to probation in this section. In the context of Article 41.3, I take 'confirmation' to mean making an appointment permanent. This can clearly be done where someone who is acting in a post is considered at an interview and is successful. Their appointment in the position would be confirmed and would no longer be an acting one.

¹² Third edition, (Collins, 2003).

- [29] The question posed by the Court was whether Article 41 confers preferential consideration. 'Preferential' according to the **Collins Concise Dictionary and Thesaurus** means 'showing preference'. Preference is defined as 'a liking for one thing above the rest' or 'a person or thing preferred' and 'prefer' as 'to like better' or 'to promote over another or others'.
- [30] What I believe Article 41 was intended to do was to ensure that when there are vacant posts to be filled, that a person who has acted for 6 months in that post is not side-lined or not given an opportunity to be considered. The Article to my mind can only be said to give preference in terms of eligibility in that a person who has acted and meets the qualifiers as set out is automatically eligible. It cannot be said that such a person is not eligible. That does not and cannot mean that they are to be considered exclusively first. Nor can it to my mind amount to preferential consideration. I say so because where there are two employees who have acted in the vacant position for 6 months, which one then must be automatically recommended for confirmation by the Permanent Secretary, Public Service? The interpretation which Mr. Fraser places on the Article could inevitably lead to an unfair situation. If A and B are both competent and capable of acting in a vacant post and then B is appointed to act in the post, would it be fair that because B acted in the post that he should just be recommended for appointment. That would mean that A would never get the chance to vie for the post even if he/she may be the better candidate.
- [31] Based on the definitions of the words, eligible, consideration and confirmation and looking at the context of Article 41, I have come to the conclusion that Article 41 does not and cannot be construed as giving preferential consideration to a person who has been acting in a vacant post and then applies for the post. What I am prepared to say is that Article 41 is intended to ensure that a person who is acting in a vacant post is given every opportunity to be considered. It is almost an automatic right to be short-listed if consideration is by way of advertisement of the

post. Consideration can take various forms. What is critical is that such an employee is given the opportunity and is considered, whatever form the consideration may take.

- [32] Given this finding, the sole question would be 'was Mr. Henry considered for the post of Manager of the Boys' Training Centre? The answer has to be in the affirmative. He was considered. He was interviewed not once but twice. In fact, on the second occasion that the post was advertised, he was afforded the opportunity to apply after the deadline and was short-listed for the interview. Article 41 gives him these guarantees as he would have been eligible to be considered for the post. I therefore cannot see how the declaratory reliefs claimed by Mr. Henry can survive.
- [33] The claimant's claim for declaratory relief that the process of selection and the recommendation by Mr. Dalsou to the PSC to fill the post of Manager at the Boys' Training Centre were conducted in breach of the rules of natural justice and fairness cannot be sustained as it is clear that the claimant was afforded the opportunity to be considered for the post which is what Article 41 provided for. In addition, the claim for a declaration that the process of selection and the recommendation by Mr. Dalsou to the PSC were ultra vires the collective bargaining agreement is also not sustainable as the Agreement does not set out any powers to be exercised by Mr. Dalsou which the claimant is claiming he exceeded.
- [34] Even if I am incorrect in my conclusion and the Article can be construed to give preferential consideration to a person who is eligible and who has applied to be appointed to a post in the Public Service after acting in the said post, that does not advance the matter any further because the ultimate question will still remain, was Mr. Henry considered for the post? And the answer has to be a resounding yes.

[35] In these circumstances, I am constrained to dismiss the claim filed on 29th August 2016. There shall be no order as to costs.

Justice Kimberly Cenac-Phulgence
High Court Judge

By the Court

Registrar