



IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
COLONY OF MONTERRAT
(CIVIL)
A.D 2015

CLAIM NO: MNIHCV2013/0031

BETWEEN:

THOMAS WINSTON BUFFONGE

Applicant

and

(1) THE DEPUTY GOVERNOR
(2) THE ATTORNEY GENERAL

Respondents

Appearances:

Mr. Sylvester Carrott for the Applicant
Ms Karen Reid for the Respondents

2015: July 01
2015: July 24

Judgment

Whether the Applicant was granted study leave after 1984. Whether the Applicant was granted early retirement. Whether the Applicant is entitled to a pension. Whether the Applicant abandoned his post.

[1] **Redhead, J. (Ag):** The Applicant by this Action is seeking the following reliefs:

- (1) A declaration that he Winston Thomas Buffonge is entitled to be paid a pension in accordance with Pensions Act.
- (2) An Order of Mandamus requesting (compelling) the Respondents to pay according to law the Applicant's past and current pension with interest upon the past payments at the rate of 10% per annum or such rate as this honourable court considers fit and proper.
- (3) Interim Order that the Respondents forthwith pay to the Applicant the sum of \$50,000.00 on account of his pension entitlement.

- (4) An interim Order that the Respondent do forthwith disclose all documents in their possession relating to the Applicant's employment with the Government of Montserrat between the years 1959 and 1997 including any instruction by any officer that the Applicant's pension should be paid.
- (5) In so far as the Respondents have made any decision that the Applicant is not entitled to payment of his pension an order of Certiorari quashing the same.
- (6) Damages for breach of statutory duty.
- (7) An Order that the Respondents do pay the costs of the application.

[2] The Grounds upon which the reliefs are sought are as follows:

- (a) Between the years 1959 and 1987 the Applicant was continuously employed by the Government of Montserrat.
- (b) The Applicant was granted early retirement in 1987 and was thereby statutorily entitled to a pension when he reached the age of 55 years.
- (c) In 1987 in acknowledgment of the fact that the Applicant had been granted early retirement, the then assistant to the Permanent Secretary of Administration, Mrs. Veronica Walker sought to obtain details of the amount of his pension contribution.
- (d) A query arose as to the Applicant's entitlement during 1994 (although the Applicant is unaware of the nature of the same) and the advice of the then Attorney General, Mrs. Gertel Thomas was sought. The Attorney General explicit as to her instructions as to the payment of the Applicant's Pension and the then Permanent Secretary of Administration sent a memorandum to the Permanent Secretary of the Ministry of Agriculture concerning the Applicant's Secondment to various departments and reiterating the advice of the Attorney General as to the payment of the Applicant's pension. Again the Permanent Secretary of Administration accepted that the Applicant had been granted early retirement.
- (e) Notwithstanding the same, the Respondents have failed or alternatively refused to make such payment to the Applicant. Such failure or refusal to make payment is unlawful.

(D At some point following the volcanic eruptions in 1997, the Applicant's employment file with all documents confirming his appointment was lost.

I wish to make some observations on some of the reliefs sought by the Applicant in light of grounds advanced by him.

[3] In relation to relief 4 above, in which the Claimant claims an interim order for disclosure of all documents in the Respondents' possession. Having regard to paragraph (D above; how can the Applicant make application for disclosure? Moreover the manner in which the Claimant's Counsel prosecuted the claim; he was in cross examination pressing respondents' witness, in particular Mrs. Daphne Cassell for an admission that the claimant's file was lost. It is clear to my mind that the Claimant has accepted the fact that his (the claimant's) file on which all the documents would have been filed was lost.

[4] Moreover, I find it passing strange that the Claimant is able to disclose documents which were exchanged between heads of Department for example Attorney General and were not carbon copied to him.

[5] I refer for instance to letter dated 11 February 1990 from Permanent Secretary Manpower and Administration to General Manager DFML / MIEL. That letter was carbon copied to Accountant General, Director of Audit, not to the Claimant. There is a memorandum of 24th July 1978 from the Permanent Secretary Manpower and Administration to Manager Development Finance and Marketing Co-operation. There is no indication that this was carbon copied to the Claimant. There are others. My difficulty is this: if the Claimant's file was lost as agreed by both sides, how was the Claimant able to produce these documents in evidence?

[6] In so far as the application for disclosure, the Court ought not to make an order which cannot be complied with.

[7] The second observaiton I wish to make is that by paragraph 1 of the relief i.e. a declaraiton that "Winston Thomas Buffonge is entitled to be paid a pension in accordance with the Pensions Act". If

that relief is granted, then there is no need for the grant of Certiorari because this relief would in effect quash any decision made contrary to this ruling.

[8] I now turn to the application proper. Learned Counsel Mr. Garrott postulated in his opening that the factual issue to be determined is whether the Claimant, Mr. Buffonge has abandoned his post, if so then he would not be entitled to early retirement. Ms Reid on behalf of the Respondents, while in my view agreeing, said that there was a second issue, which is whether he was granted pre-retirement leave, if not he is not entitled to pension.

[9] In my considered opinion both issues are intertwined, because having regard to the issues in this case, if the applicant was not granted pre-retirement leave then in my view he would have abandoned his post, in so far as the issues are concerned in this case.

[10] I now consider the issue as to whether the applicant has abandoned his post. In this regard the facts as outlined by the respondents are not in dispute. In 1980 the Applicant was granted study leave to pursue a course in Management. Before I embark on this exercise, I think that it is prudent to give a brief synopsis of the Claimant's employment in the Government of Montserrat Service. The Applicant is now about 72 years old.

[11] In 1959 the Applicant commenced employment with the Government of Montserrat (GOM) as a teacher at the Cork Hill Primary School. In 1963 he moved to the St. Augustine Primary School. In 1964 he commenced employment in the Department of Labour. In 1965 the Applicant moved to Department of Electricity. In 1971 the Applicant was employed in the Department of Agriculture. In 1974 he was transferred to the Chief Minister's Office as Assistant to the Permanent Secretary. In 1975 he was employed in the Development Unit which was responsible for the Montserrat Industrial Enterprises Limited (MIEL). In 1976 MIEL and Development Finance and Marketing merged. The Applicant remained employed with that entity until 1980 when he commenced an unpaid study leave.

[12] The facts as outlined by Learned Counsel for the Respondents are that on 5th November 1980 the Claimant was advised that he was granted study leave for a period of one year with further periods

of leave to be considered on an annual basis. The Claimant's study leave was extended for successive periods until 5th December 1984. He applied for further study leave on 8th January 1985 and 18th June 1985. Learned Counsel argued that from his letter of 18th June 1985 it is evident that the Claimant had not been enrolled in any classes.

[13] By 30th July 1986, the Permanent Secretary Administration again requested that the Claimant provide an Enrolment Verification in order to process the year's study leave applied for. The Claimant did not respond nor did he provide the Enrolment Verification showing that he was in fact enrolled in a particular course of study and was attending classes in pursuance thereof.

[14] By letter dated 6th February 1986 the Permanent Secretary advised the Claimant that if they did not hear from him by 31st March 1986, they will consider his employment terminated in accordance with Montserrat Statutory Rules and Orders 1980 No. 37 Section 31(1); which provides as follows:
**31(1) "An Officer who is absent from duty without leave for a continuous period of one month, unless declared otherwise by the Governor, shall be deemed to have resigned his office and thereupon his office becomes vacant and the officer ceases to be an officer.
(2) An Officer who is absent from the territory without permission shall be liable to summary dismissal".**

[15] On 30th July 1985 the Permanent Secretary Administration wrote to the Claimant as follows:

" Dear Mr. Buffonge

We acknowledge receipt of your telegram of May 23 and your letter of June 18, 1985

2. The information has been noted.

3. Please let us have your Enrolment Verification as soon as possible so that the request for an additional four years "No Pay" Study leave could be finalised.

4. Best wishes.

Yours Sincerely

Sgd T. V. Walker

Permanent Secretary Administration (Ag)

CC: Permanent Secretary, Development

[16] On 6th February 1986, The Permanent Secretary Administration wrote to the Claimant as follows:

"Dear Mr. Buffonge,

Please refer to our letter of July 30 1985 - Copy attached for ease of reference.

2. To date we have not had any response from you. If we do not hear from you by March 31 1986, we will assume that you are no longer interested in being granted study leave and your Services will be considered terminated in accordance with Montserrat Statutory Rules and Orders 1980 No. 37 Part 1. Section 31(1) and we quote. [The Provision of the Section was referred to above]

Yours faithfully

T. Veronica Walker

Permanent Secretary, Administration

CC: Hon. Financial Secretary

P.S. Development"

[17] On 19th February 1986 the Claimant responded to the Permanent Secretary's letter of 30th July 1985, that is 7 months later, enclosing the Enrolment Verification.

[18] Learned Counsel for the Respondents questioned, in my words, its authenticity with justification as in my view it is doubtful, whether this Enrolment Verification really supports the Claimant's assertion that he was enrolled in a Class at College.

[19] On the Enrolment Verification form dated February 18, 1986

"Expected degree date"- N.A: "Class of"- N.A

[20] In my considered opinion, I glean from the document that the expected date of completion of Claimant's degree according to the form was not applicable or unknown. Class to which the Claimant was assigned was not applicable- unknown.

- [21] As Learned Counsel for the Respondents in her written Submission contended that the enrolment verification dated 18th February 1986 does not identify a Course of Study, it purports to be for the winter term and so was not for the current period and most telling stated "N.A." where the institution was to indicate the expected degree date.
- [22] Ms. Reid argued that it is unsurprising that this information was not sufficient and the letter of 30th October, 1986 requesting information by 30th November was sent to the Applicant. The Claimant by his own admission did not respond, instead he attempts, according to Learned Counsel to "plaster" this sore omission on paragraph 15 of his affidavit by stating that he telephoned Mrs. Walker in November 1986 because he did not want to lose his entitlement to pension.
- [23] The Claimant left Montserrat in 1980 to pursue a Course in Management. In cross-examination he said that in 1986 he was at Northeastern University. But remarkably he said that he cannot recall what course he was taking then. Yet a year earlier in 1985 he can recall as he said in cross-examination he was at Rosberry Community College taking low level classes in English etc. The Claimant also said in cross-examination that from 1981 he pursued employment in the United States because he had to support his family.
- [24] Mr. Buffonge admitted in cross-examination that that when he obtained Study leave from the Government of Montserrat, he understood that he must return to work at the end of leave. The Claimant admitted in cross-examination that he never attempted to resume duty because schooling was part time and he could not finish the course. Then the Claimant made what I consider to be this alarming statement. He said the approval was never denied in 1986 "I never got a letter saying approval was denied". So he assumed that he was granted the additional study leave or the Court should so assume.
- [25] The Claimant's application for Study leave was granted in 1980 for a period of one year with further periods of leave to be considered on a yearly basis. By this, I understand that at the end of every year the Claimant if he wishes to extend the period must make an application for an extension and if granted then his leave would be extended, if not he should return to his employment in Montserrat.

[26] Mr. Buffonge admitted in cross-examination that "I cannot say that after 1984 I received any more approval for study leave". The Claimant admitted in cross-examination when he wrote in a letter to the Permanent Secretary on 26th July 2000 that he was granted study leave from December 5th 1980 and had renewals up to December 1990; that it was a mistake. The Claimant's assertion made to Permanent Secretary Administration by letter dated August 4, 2000; I am sure - but cannot prove at this time - "that I was granted an additional four years no pay study leave in 1996..." is clearly incorrect.

[27] I now examine the Claimant's Claim that he was granted early retirement and therefore was entitled to a pension. In a letter dated 12th September 1986, Mr. Buffonge wrote to the Permanent Secretary. In that letter he wrote that due to financial constraints he was only able to pursue the programme on a part time basis and that it would take him another **2112** years to complete the programme. Continuing in that letter he wrote:

"This time could be significantly reduced if I were able to enter a full time programme. The possibility I am now looking into.

I understand that Government would make study loan available to interested Montserratians pursuing educational programme abroad. If this is so, I would like to be considered for such a loan. If not then I request that my study leave be extended for a further period to December 31, 1988.

The documents to substantiate this request will be forwarded to you as soon as they become available. If neither of the above are (sic) acceptable, I would like to enter into discussion with you regarding early retirement from the service as indicated in your letter under reference.

I look forward to hearing from you.

Sincerely

Thomas W. Buffongë .

[28] The Permanent Secretary, Administration in a letter of reply to the Claimant on 30th of October 1986 reminded the Claimant of the need for him to produce to the Government definite evidence from the school or university that he was attending to show that he would have completed his

degree programme within 4 years. In the absence of this evidence your alternate option would be to consider early retirement. If no answer is received from you by 30th November 1986 we will have no alternative but to terminate your employment. I note that the alternative was to terminate the Claimant's employment; not to enter into discussion regarding early retirement as requested by the Claimant in his letter to which the Permanent Secretary was responding.

[29] On 21st February 1987 (nearly 4 months past the deadline.....), the Claimant responded to the letter of the Permanent Secretary referred to above. In this letter he wrote that following discussions with the Permanent Secretary Development and the Personnel Office during his visit to Montserrat on January 6, 1987 he had decided to take early retirement from the service and asked that this letter be considered as his formal request for early retirement.

[30] On 11th August 2000 the Permanent Secretary, Department of Administration wrote to the Claimant as follows:

"Dear Mr. Buffonge,

Please refer to your letters of 26th and 28th July 2000 along with attachments in support of your claim for terminal benefits. As you are aware, your case was referred to the Legal Department for advice. The matter has been carefully reviewed and provided below is a Summary of the Attorney General's opinion on the matter.

(1) From the records shown, it appears you left to follow a study program abroad until December 1984. In January 1985 you applied for further four years study leave and was required to submit evidence of your course of study and the progress made, along with expected completion date. You were reminded again in July 1985, after a 6 month period and again in February 1986, and of the consequences of your failure to reply. You then produced a document from Northeastern University purporting to verify your enrolment for a full time program for the winter semester, a document which did not give the content of the course or the qualification it led to.

(11) There is no evidence to show you were granted approval for a further four years of study leave from 5th December 1989. You did not report for work and we

have no explanation of what you were doing between December 1989 and your emergence in 1997 to make a claim.

(111) It is clear that you do not qualify under any of the paragraphs in Subsection (1) of section 6 of the Pensions Ordinance, unless you can satisfactorily explain your reason(s) for failure to resume duties in 1984, it must be concluded that you abandoned your post some ten years.

I am sorry to send you what I know is a disappointing reply.

Yours Sincerely,

Claudia C. Roach (Mrs.)

Permanent Secretary"

[31] After a clear and well reasoned opinion by the Attorney General. There comes a document exhibited in the Affidavit sworn to by Mr. Clinton Irish and filed on 10th January 2014.

[32] By paragraph 5 of Irish's affidavit he swore inter alia:

"There is now produced and shown to me marked exhibit AEI-1. A true copy of a memo which was written and signed by me on behalf of the Permanent Secretary of Administration... I should point out that the reference 4/2-111 contained within the memo refers specifically to the Claimant's file." The deponent, Arnold Irish made application for early retirement in 2002. He was retired from Government Services in 2003.

[33] The million dollar question is, how did he come in possession of this document to exhibit it to his affidavit? It is agreed by both sides that the Claimant's file went missing after the volcanic eruptions. Exhibit AEI-1 was a memo from Permanent Secretary Agriculture to Permanent Secretary Administration. There is no indication on the document that it was carbon copied to the Claimant. In fact, I would be most surprised if it was. Was this document extracted from the file after it went "missing" or before? As one cannot imagine that the deponent Mr. Irish would have walked off the job with that document to have possession of it eleven years after he left the Department of Administration. Insofar as is relevant to this matter, the document says on the face of it. **The Attorney General's Letter; copy attached, is quite explicit as to the payment of Pension to Mr. Buffonge.**

Your urgent attention to this matter is requested.

Signed : E. Daley"

[34] The Attorney General's letter is not available. One thing however is clear, that document does not say on the face of it that pension should be paid to the Claimant. Even if it did, that advice could not bind this court.

[35] Mr. Irish himself in cross-examination said that the document does not say the Claimant is to be paid a pension, but rather he is inferring that is what it says. Mr. Irish admitted in cross-examination that he made application for early retirement to the Governor. He said that his letter of request was sent to the Governor on 26th September 2002. He had to wait for approval. He could not walk off the job before he was granted approval. He was then paid his pension and gratuity.

[36] The Claimant could not establish that he made application to the Governor for approval of his early retirement.

[37] In the letter of 12th September 1986 to the Permanent Secretary Administration the Claimant put forward an application for a loan from Government to enter into full time education. Extension of his study to December 1988. Then he wrote, "if neither of the above are (sic) not acceptable, I would like to enter into discussion with you regarding early retirement."

[38] In so far as I am aware, there was nothing else regarding early retirement. What I have just referred to cannot be regarded as an application by the Claimant for early retirement. I am of the view that an application must be made to the Governor in order to be granted early retirement .

[39] Section 34¹ provides:

(1) An officer whether holding a pensionable or non-pensionable post will be required to retire on attaining the age of 55 years ; Provided that in exceptional circumstances and in the public interest, a public officer may be recommended by the Commission or authorized

¹ Public Service Regulations

officer to be re-employed in the public service after he has attained the age of compulsory retirement.

(2) Any officer may at any time after he has attained the minimum age specified in the pension law for retirement, apply to the Governor for permission to retire and shall in his application state the grounds on which it is based.

The minimum age specified in the Pensions Act is 45 years ²

[40] At paragraph 10 of his affidavit, the Claimant swore that in January 1987 he travelled to Montserrat and had a meeting with the Permanent Secretary Administration who informed him that if he made formal request for early retirement, it would be granted. The records reveal that the Permanent Secretary at the time was Mrs. Theodora Veronica Walker between 1985 and 1987.

[41] In re-examination he said that it was Mrs. Walker he met in person. Mrs. Walker in her testimony said that she did not recall having any meeting at all with the Claimant in January 1987.

[42] Learned Counsel, Ms. Reid in her Written Submissions contended that the alleged letter of 21 February, 1987 references alleged conversations with the Permanent Secretary of Development and not with the Permanent Secretary Administration. Ms. Reid argued that it is clear that the alleged telephone conversation and visit were manufactured by the Claimant solely to try to explain away why he never responded to the letter of 30th October and to avoid the consequence of being absent without leave which is the abandonment of one's post

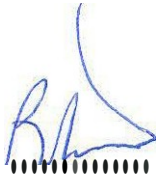
[43] I am entirely in agreement with this argument.

[44] Mr. Garrott in his Skeleton Submission argued "the Court may no doubt view Mrs. Walker as being not only an impressive witness but in fact a model witness. She was and is wholly impartial. She had no interest in the outcome of the proceedings. I entertain no doubt as to her impartiality. However, unfortunately I cannot classify her as model or impressive witness. Through no fault of her own, I suppose it was because of her age, she was unable to recall most of the events surrounding this case.

² See Section 6 I (a) of the Pensions Act Cap 184

- [45] Learned Counsel for the Claimant Mr. Garrott argues that paragraphs 3 to 5 of Mrs. Walker's affidavit which was never challenged, is the nub of Claimant's case.
- [46] In paragraph 3 of Mrs. Walker's affidavit, she deposed "I also saw from the correspondence that Mr. Buffonge applied for early retirement as he was entitled to do and this was an option that was put to him by the Permanent Secretary.
- [47] Moreover I see that I myself was engaged in the correspondence concerning his pension contributions with another Department in 1987. I can say that I would not have been instructed to write such correspondence concerning his pension contributions unless the Applicant had indeed been granted early retirement.
- [48] In my considered opinion this is a matter of conjecture by Mrs. Walker. The problem that the Claimant has in my view is that he alleges that he had early retirement. Mr. Irish, the Claimant's witness says he made application for early retirement to the Governor. He had to wait for approval from the Governor. That approval from the Governor, in my opinion must be obtained in a document sent to the Applicant. It would not have been on the file, a copy may have been on the file. Where is that Document? The Claimant has failed to produce any document showing that he was granted early retirement by the Governor.
- [49] I find as a fact that the Applicant was never granted early retirement.
- [50] Finally, Learned Counsel for the Applicant argued that there are no records to indicate whether the Permanent Secretary within the Department of Administration replied to Claimant's request for early retirement or whether his request for early retirement was granted by the Governor.
- [51] As I have noted above, if that was so, then the Claimant should have been able to produce that document in order to show that he was granted early retirement. He failed to do so and in my opinion he could not do so because he was never issued with such a document because he was never granted early retirement by the Governor.

[52] The Application of the Claimant fails.
Costs to the Respondents to be agreed.

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Albert Redhead
High Court Judge