

**THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV2012/0702

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN:

NINA C. JOSEPH

Claimant

And

THE ATTORNEY GENERAL OF ANTIGUA AND BARBUDA

Defendant

Appearances:

Ms. E. Deniscia Thomas for the Claimant

Mr. Kendrickson H. Kentish and Amaya Athill for the Defendant

2015: March 17

Decision

- [1] **HENRY, J.:** The claimant is an Attorney-at-Law called to the Bar of the Eastern Caribbean Supreme Court in Antigua and Barbuda on 27th October 2006. She was appointed by the Governor-General with the advice of the Judicial and Legal Services Commission as Crown Counsel 11, Legal Aid & Advice Centre with effect from the 11th day of April 2007. The appointment was subject to a one (1) year probation. The claimant states that by virtue of her employment with the Government of

Antigua and Barbuda, she fell within classification 85 of the First Schedule of the Civil Service Act, Cap 87 of the 1992 Revised Laws of Antigua and Barbuda.

- [2] The defendant is made a party by virtue of the provisions of the Crown Proceedings Act, Cap 87. He is also the person having charge over the Ministry of Legal Affairs, the Ministry to which the claimant was assigned by virtue of her attachment to the Legal Aid & Advice Centre.
- [3] According to the claimant, from since 2009 and continuing without cessation up to and including Friday 26th October 2012, when she was barred from entry into her office and the subsequent refusal of the defendant to allow her access to the said office, the defendant, through its public officers within the Ministry of Legal Affairs, has caused her to suffer directly by its breaches of the principles of natural justice and the doctrine of legitimate expectation.
- [4] By Fixed Date Claim filed 29th November 2012, the claimant seeks judicial review of various decisions. Specifically she seeks:
 - (1) An order of certiorari to quash the oral decision of the defendant - whether by itself or through its other public officers within the Ministry of Legal affairs namely Jose Laurent as the director of the Legal Aid & Advice Center, and or Worthene George as the permanent secretary of said ministry to effectively bar the claimant from entering into or having access into the claimant's office situate within the Ministry of Legal affairs on Friday, 26th October 2012 at approximately 1:00 p.m. and continuing thereafter.
 - (2) A Declaration that the defendant- whether by itself or through its other public officers within the Ministry of Legal affairs namely Jose Laurent as the director of the Legal Aid & Advice Center, and or Worthene George as the permanent secretary of the said ministry - had no lawful authority to bar the claimant from entering into or having access into the claimant's office.
 - (3) A Declaration that the defendant's decision - whether by itself or through its other public officers within the Ministry of Legal affairs namely Jose Laurent as the director of the Legal Aid & Advice Center, and or Worthene George as permanent secretary of said ministry - to bar the applicant by replacing the door lock to the claimant's office door with a new lock and further by failing to notify the claimant in any respect of the said change and the reason for the said change and to provide her with any key or access to any key for the new lock and further by refusing to unlock the office door for the claimant (to not only regain entry for the purpose of reporting and re-instating herself after returning from the high court of justice to collect her possessions in the office) was illegal, capricious, procedurally irregular, unfair and unreasonable.
 - (4) An order of Certiorari to quash the oral decision of the defendant- whether by itself or through its other public officers within the Ministry of Legal affairs namely Jose Laurent

as the director of the Legal Aid & Advice Center, and or Worthene George as the permanent secretary of said ministry, and or Joan Joseph as the former permanent secretary of said ministry (now transferred to another ministry) - to re-investigate the claimant in or around July 2012 and continuing thereafter on allegations of misconduct which very allegations were subject of an investigation addressed by a committee empanelled under the hand of the said former permanent secretary and which said committee concluded its report and submitted the same to the permanent secretary during the last week of February 2012 and which said committee admittedly absolved the claimant of any wrongdoing and recommended her transfer.

- (5) A Declaration that the defendant whether by itself or through its public officers had no lawful authority to re-investigate the claimant on the very allegations she had been absolved of.
- (6) A declaration that the defendant's failure or refusal - whether by itself or through its other public officers within the Ministry of Legal affairs namely Jose Laurent as director of the Legal Aid & Advice center, and or Worthene George as permanent secretary of said ministry, and or Joan Joseph as the former permanent secretary within the Ministry of Legal Affairs (now transferred) - to, duly notify the claimant that she was the subject of re-investigation and to disclose and identify the particulars of and matters under re-investigation was capricious, illegal, unfair and procedurally improper.
- (7) A Declaration that the defendant's failure or refusal - whether by itself or through its other public officers within the Ministry of Legal affairs namely Jose Laurent as director of the Legal Aid & Advice center, and or Worthene George as permanent secretary of said ministry, and or Joan Joseph as the former permanent secretary within the Ministry of Legal Affairs (now transferred) - to provide the claimant with a copy of the report of the committee empanelled in December 2011 to investigate the claimant on allegations of misconduct and/ or to provide the claimant with any statement of the findings of the said committee was capricious, illegal, unfair and procedurally, improper.
- (8) A Declaration that the claimant was entitled to know of and be served with a copy of the report of the said committee within a reasonable time of it being submitted to the defendant - whether it was submitted to the defendant personally or through its other public officers within the Ministry of Legal Affairs namely Joan Joseph who was the permanent secretary within the Ministry of Legal Affairs at the time of the submission of the said report.
- (9) A Declaration that the decision of the defendant - whether by itself or through its other public officers within the Ministry of Legal Affairs namely Jose Laurent as director of

the Legal Aid & Advice center, and or Worthene George as permanent secretary of said ministry, and or Joan Joseph as the former permanent secretary within the Ministry of Legal Affairs (now transferred), and Donald Edwards as the former permanent secretary within the Ministry of Legal Affairs (now retired) "" to remove all files and other work equipment and utensils from the defendant's office (save and except the computer and desks and chairs) and to refuse to give the claimant any work to perform from since November 2010 and continuing to Friday, 26th October 2012 on which date she was effectively barred from her office without just cause was capricious, illegal, unfair and irrational .

- (10) A Declaration that the defendant - whether by itself or through its other public officers within the ministry of legal affairs namely Jose Laurent as director of the Legal Aid & Advice Center, and or Worthene George as permanent secretary of said ministry, and or Joan Joseph as the former permanent secretary within the ministry of legal affairs (now transferred)), and Donald Edwards as the former permanent secretary within the ministry of legal affairs (now retired) - through its systematic and unending decisions to engage in the prejudicial, egregious, acrimonious and unwarranted treatment of the claimant undertook acts tantamount to the claimant's constructive dismissal and further that said dismissal was concretized on Friday, 26th October on which date she was effectively barred from her office without more.
- (11) A Declaration that the defendant - whether by itself or its public officers - had no lawful authority to constructively dismiss the claimant whatsoever.
- (12) A Declaration that the claimant be re-instated to her post of crown counsel IL
- (13) A, Declaration that all non-appearance by the claimant for duties at the Ministry of Legal Affairs from Monday, 29th October 2012 and continuing until the final determination of this matter shall not be capable of been treated as or amounting to an abandonment of her job.
- (14) An order of Prohibition to prohibit the defendant whether by itself or through its public officer, or whether or otherwise howsoever from committing any or further unlawful acts against the claimant;
- (15) A Declaration that the claimant is permitted to include in her application for judicial review, a claim. for any other relief or remedy that arises out of, or is related or connected to the subject matter of her application for judicial review.
- (16) General damages for constructive dismissal.

(17) Special damages for constructive dismissal to include the loss of earnings for the month of November 2012 and continuing each and every month thereafter until the claimant is re-instated to her post as crown counsel II.

(18) Aggravated damages for constructive dismissal.

(19) Compensation for accumulate vacation days amounting to ninety-two (92) days.

(20) General damages for breaches of natural justice and, the doctrine of the legitimate expectation.

- [5] The Fixed Date Claim is supported by an Affidavit of the claimant in which she states that she seeks the relief of judicial review as the primary form of redress. Whereas, a claim for other relief namely, damages (general, special and aggravated) for constructive dismissal is included in the claim, the alternate remedy of damages for constructive dismissal will not resolve the issues in the matter fully and directly. Further, the alternate remedy will not be anywhere so convenient, beneficial or effectual as the procedure for judicial review.
- [6] According to her affidavit in support, the grounds for seeking judicial review are that the defendant, through its public officers within the Ministry of Legal Affairs, in reaching its decisions concerning, relating and against her acted in contravention of principles of legality, fairness and rationality with elements of excess or absence of jurisdiction, and breaches of the rules of natural justice and the doctrine of legitimate expectation. Further, the decision-making process systematically adopted by the defendant was laden with procedural impropriety and egregious errors and caused immense harm, prejudice and damage to her rights and interests.
- [7] The claim is opposed by the affidavits of Worthene George, Jose Laurent and Joan Joseph.
- [8] Ms. Jose Laurent is the Director of the Legal Aid and Advice Centre (LAAC). In her affidavit filed on 6th February 2013, she states as follows:
- [9] In June 2008, she had occasion to speak to the claimant regarding her treatment of a LAAC client, and the relationship between them began to deteriorate.
- [10] In regard to the computers within LAAC, Ms Laurent states that the claimant has never been denied access. The use of office equipment in the general office after hours, the absence of the relevant staff and the subsequent virus infection on the main database compromised and infected by the claimant's own equipment, necessitated that proper security measures be implemented.
- [11] In January 2010, Ms. Laurent informed the claimant that she had some matters for her to deal with; the claimant told Ms. Laurent that she would not do the work.
- [12] In the first quarter of 2010 there were two complaints, made by colleagues at the bar, about the claimant. Ms. Laurent again attempted to speak with the claimant concerning her behavior. This caused a further deterioration of the relationship between the two.

- [13] Twice in May 2010, the claimant accompanied the Director of LAAC to court to represent a claimant in a matter and at the commencement of the matter, the claimant declared that she was representing the defendant in the same matter at bar. This was reported to the Attorney General but no action was taken.
- [14] In May 31, 2010, the claimant applied to the Chief Establishment Officer for an immediate transfer. After that there was no direct communication between the claimant and Ms. Laurent. In July 2012 Ms. Laurent assigned a client to the claimant and the claimant refused to deal with the client.
- [15] Ms Laurent also characterizes as untrue any allegation that all necessary files, work utensils and equipment were removed from the claimant's office while she was on sick leave in November 2010 or at any other time. The claimant, she states, had on 5th November 2010, dropped a box of files on the floor of the general office, declaring to the office staff that she no longer wished to work at LAAC. Ms Laurent then instructed the Legal Clerk to secure the files, and proceed to take follow-up action where necessary on such of the files where matters were pending.
- [16] The claimant returned from sick leave on 25th November 2010. According to Ms Laurent, the claimant has never reported to her for duty at the LAAC, and has never communicated with her on any matters touching and concerning the work and her duties at the LAAC. Although the claimant has been seen on the Ministry premises from time to time, according to Ms Laurent, she has maintained a non-communicative posture.
- [17] On February 14, 2011, the Attorney General convened a meeting with the claimant, the Permanent Secretary and Ms. Laurent. It was recorded that the claimant had not done any work assigned by LAAC for some time. Ms. Laurent describes the claimant as belligerent and noted that she left the meeting prematurely.
- [18] Also the claimant was asked to produce a list of matters that she was handling. There was no immediate reply, but eventually the list produced showed no matters that had been processed through LAAC. It was evident that the claimant had not done any work authorized by LAAC from November 2010 to October 2012. The claimant was written a letter that directed her to report to Ms. Laurent or disciplinary action for gross insubordination would be instituted.
- [19] She further avers that the claimant was never blocked from the computers at LAAC and that she had her own printer at her disposal. Files were removed from the claimant's office because she was on sick leave and the files were reviewed for follow up action on pending matters.
- [20] Attached to Ms. Laurent's affidavit is extensive correspondence between herself and the claimant.
- [21] Ms. Joan Joseph, former Permanent Secretary in the Ministry of Legal Affairs, filed an affidavit on February 7th, 2012. In it she avers that she empanelled a committee to investigate the work and the conduct of the claimant in December 2011. She did not authorise a second investigation as alleged by the Claimant. Senior Crown Counsel, Ms. Bridget Nelson, was asked to advise on disciplinary charges which could be preferred against the claimant.

- [22] On May 9th, 2012, Ms. Joseph wrote a letter to the claimant instructing her to report to the Director and to submit the information on her work as requested. Following receipt of the report from the committee Ms. Joseph wrote the Chief Establishment Officer recommending the pursuance of the appropriate disciplinary action against the claimant. She noticed that there was a letter in the file of the claimant, from the previous Permanent Secretary to the Chief Establishment Officer, recommending that the claimant be referred to the Judicial and Legal Services Commission for disciplinary action.
- [23] Ms. Joseph avers that the claimant's failure to report to the Director or perform any work assigned by LAAC, while accepting payment monthly, was a fundamental breach of her employment contract.
- [24] Attached to her affidavit are copies of three letters written by the permanent secretary addressed to the Chief Establishment Officer concerning the behavior of the claimant, the final one dated June 6th, 2012, and copies of three letters from the permanent secretary to the claimant, the final one dated May 9th, 2012.
- [25] The defendant submits that this claim does not give rise to any remedies in public law. In any event, the claimant is not entitled to salary if she absents herself from work. Further that she has no absolute right to a key to the office allocated to her.
- [26] Judicial review is the procedure whereby the High Court is able, in certain cases, to review the legality of the decisions made by a wide variety of bodies which affect the public. Judicial review is concerned with the legality of the decision made, not with the merits of the particular decision. The task of the judge is to make sure that exercise of any power delegated to the Ministers or administrative bodies is lawful according to the power given them by Parliament. Judicial review is however confined to matters of public as opposed to private law. The main issue raised by the claimant involves claims by an employee of a public body. Lord Wolf LJ in **McClaren v Home Office**¹ had this to say on the subject:
- "In relation to his personal claims against an employer, an employee of a public body is normally in the same situation as other employees. If he has a cause of action and he wishes to assert or establish his rights in relation to his employment he can bring proceedings for damages, a declaration or injunction (except in relation to the Crown) in High Court or the county Court in the ordinary way. The fact that a person is employed by the Crown may limit his rights against the Crown but otherwise his position is very much the same as any other employee. . . Not only will it not be necessary for him to seek relief by way of judicial review, it will normally be inappropriate for him to do so."
- [27] The claimant submits however, that for the defendant to advocate that this is not a fitting case for judicial review at this stage is to ask the court to appeal its own decision. She cites from the text

¹ [1990] ICR 824

De Smith's Judicial Review where the authors state that "questions as to whether a claimant should have used another type of redress process should arise on the application for permission and not at or after the substantive hearing of the judicial review claim. The claimant points out that the application for leave was heard and granted and that the Attorney General appeared in person on behalf of the defendant and did inform the court that he had no objection to the granting of the Order. The claimant endorses the views of Gordon JA in **Gary Nelson v The Attorney General et al**² that having failed to challenge the grant of the application for leave or to appeal the order granting leave, the defendant cannot now mount a collateral attack on the original grant of leave.

[28] In the court's view, this claim arises out of an employee's tumultuous relationship with her employer in which she asserts certain rights in relation to her employment. It would have been better and more appropriately dealt with as a private law action for damages and declaration. In the words of the Privy Council in **Antigua Power Company Ltd v Attorney General**³, "what are essentially common law claims should not be dressed up in constitutional or public law clothes unless there is a very good reason to do so." However at this stage, after the matter has been heard, indeed it is not open to the court to require the claimant to utilize another form of redress.

[29] There is one further matter that the court ought to address at this point and that is the nature of the evidence in this matter. The factual contentions of the parties are, as stated by the defendant, 'in sharp contrast to each other.' Further, there has been no cross examination of the witnesses. The court in **R (on the application of McVey and others) v Secretary of State for Health**⁴ gives some guidance in regard to the correct approach to contested evidence in judicial review proceedings: The court stated the legal principles as follows:

"i) The basic rule is that where there is a dispute on evidence in a judicial review application, then in the absence of cross-examination, the facts in the defendants' evidence must be assumed to be correct;

ii) An exception to this rule arises where the documents show that the defendant's evidence cannot be correct; and that

iii) The proper course for a claimant who wishes to challenge the correctness of an important aspect of the defendant's evidence relating to a factual matter on which the judge will have to make a critical factual finding is to apply to cross-examine the maker of the witness statement on which the defendant relies."

[30] No application was made in this matter for the cross-examination of any of the defendant's witnesses.

² ANUHCv2008/0552

³ [2013] UKPC 23

⁴ [2010] EWHC 437

[31] Accordingly, the court will apply the above principles and unless there is documentary evidence to the contrary, the court will assume defendants' evidence to be correct where the evidence of the claimant is in dispute.

[32] As a matter of convenience, the court will deal with the various requests for relief by the claimant under four headings:

1. The alleged decisions by the Director of the LAAC to remove files and equipment from the claimant's office and to refuse to give the claimant any work to perform since November 2010.
2. Issues surrounding the preliminary investigation and the alleged decision to re-investigate the claimant
3. Legitimate expectation
4. The alleged lockout and relief for constructive and unlawful dismissal

The alleged removal of files and equipment and the refusal to give the claimant work

[33] The claimant alleges that during her tenure as Crown Counsel II, the defendant through its public officers has undertaken malicious acts designed not only to frustrate her in the performance of her duties but further to render nugatory any reasonable ability for her to discharge her duties and to render her and her services inconsequential. These acts, according to the claimant, include barring her in 2009 from using the computers within the LAAC to print her work and to complete and execute duties for the said centre, to removing all files and necessary work utensils and equipment from her office while she was on sick leave in November 2010, to refusing and failing in every respect to return the said files and work equipment to her to perform and execute her duties.

[34] The claimant therefore seeks a declaration that the decision of the defendant - whether by itself or through its other public officers within the Ministry of Legal Affairs, namely Jose Laurent, Director of LAAC, and or Worthene George as the Permanent Secretary of the said Ministry and others - to remove all files and other work equipment and utensils from the claimant's office and to refuse to give the claimant work to perform without just cause was capricious, illegal, unfair and irrational.

[35] Section 56.5 (1) provides that in addition to any time limit imposed by any enactment, the judge may refuse to grant relief in any case in which the judge considers that there has been unreasonable delay before making the application.

[36] When considering whether to refuse to grant relief because of delay, the judge must consider whether the relief would be likely to be detrimental to good administration or to cause substantial hardship to or substantially prejudice the rights of any person.

[37] The claimant complains of being barred from using the computer and equipment from 2009 and the Director refusing to give her work from November 2010. The pleadings and evidence indicate that she has done no work assigned to her by the LAAC for upwards of two years while during this period she continued to receive her full salary. The claim herein was filed in November 2012. While there is no specific time limit in the rules for filing a claim, a claimant must act promptly after the

grounds for bringing the claim first arose. The delay of two years is an unreasonable delay in taking legal action.

- [38] What is meant by detriment to good administration has not been exhaustively defined. However, Lord Goff provides a starting point in his statement in **R v. Fairy Produce Quota Tribunal, ex p Caswell**⁵. His Lordship was of the view that the relevant section recognizes that there is an interest in good administration independently of hardship, or prejudice to the rights of third parties. He stated:

"In the present context, that interest lies essentially in a regular flow of consistent decisions, made and published with reasonable dispatch; in citizens knowing where they stand, and how they can order their affairs in the light of the relevant decision..

- [39] The evidence in the matter, demonstrates the breakdown of communication and an acrimonious relationship between the claimant and the Director of the LMC, both before the claimant's departure on sick leave and after her return. The evidence, which the court accepts is that the claimant, on her return from sick leave in December 2010, did not report to the Director. While she was seen on the premises from time to time, she spent most of her time at the court, even though she was not there to attend to business assigned to her by the Director of the LAAC. There is further evidence that the claimant herself dumped a box of files in the general office indicating her displeasure.
- [40] The court is satisfied that any decisions taken by the Director of the LAAC with regard to the office equipment and the flow and assignment of files during that period prior to the claimant's absence on sick leave and after her return were made and published with dispatch so that the affairs of the LAAC could continue. The relief sought, at this juncture if granted, would not be in the interest of good administration and in fact would be detrimental to same.
- [41] Accordingly the court refuses to grant this aspect of the relief requested based on delay.

The Preliminary Investigation and the Alleged Re-investigation of the Claimant

- [42] The claimant complains that the former Permanent Secretary, Joan Joseph, empanelled a Committee to commence investigation into her alleged misconduct on the 11th January 2012. On 10th January 2012 she was given a letter informing her of the investigation. The letter however failed to disclose the matters to be addressed by the investigation. It was only on the 11th January 2012, when she appeared before the Committee with Legal Counsel that her Legal Counsel was given the particulars. The claimant further complains that Joan Joseph acted without any semblance of rationality, authority, and legality when she penned what the claimant perceives as a warning letter in January 2012 when the claimant was already under investigation by the committee set up to investigate her. According to the claimant, the committee absolved her of all wrong doing and recommended that she be transferred from LMC to another department.

⁵ [1990] 2AC 739,HL,748

- [43] The Claimant continues that, notwithstanding the findings of the committee, the defendant decided to reopen the investigation against her without any notice to her and to reinvestigate the very matters that she had been absolved of. The named public officers requested her termination and removal from the Ministry of Legal affairs without any notice being given to her and without the claimant being first given a hearing and adjudged of wrongdoing.
- [44] Joan Joseph in her affidavit states that she began her duties as Permanent Secretary (P.S.) in the Ministry of Legal Affairs from July 18, 2011. She states that she knows the claimant. The claimant's appointment predates Ms. Joseph's appointment as Permanent Secretary. The claimant however, has a personal file in which is kept all correspondence relating to the claimant's job duties and her performance therein. Ms Joseph, as Permanent Secretary is the custodian of the file. Ms. Joseph states that from the file, it was apparent that long before her term as P.S. there had been issues with the claimant relating to her work attitude, her performance at work, and her relationship with the Director, who was her direct supervisor as head of the LAAC. Her role as Permanent Secretary (Ag) was an administrative and financial accounting one, and in the ordinary course of things she would have no direct contact with the claimant.
- [45] Ms. Joseph denies that she has acted with illegality, irrationality, and impropriety in the decision-making process, and in reaching or making decisions which touched and concerned the claimant in the execution of her duties. She also denies that she has acted in excess of jurisdiction, in breach of the rules of natural justice, with prejudice or in error and that her actions have caused the claimant harm, whether personally or professionally.
- [46] Ms Joseph relates that in reviewing the claimant's file, her attention was drawn to a Minute dated June 3, 2011 from the Attorney General and addressed to the P.S. wherein the Attorney General requested that the issues surrounding the acrimonious relationship between the Director of the LAAC and the claimant, and the claimant's non-performance at work be referred to the Judicial & Legal Services Commission for disciplinary action.
- [47] Ms Joseph admits that after reviewing the claimant's file, on August 15, 2011, she dispatched a Minute to the Chief Establishment Officer (CEO) summarizing the complaints and recommending that disciplinary action be taken. The Minute formed part of the evidence.
- [48] The Minute refers to a meeting held with the claimant, the Attorney General, Ms Jose Laurent, Director, LAAC and Mrs Esther Powell, then acting Permanent Secretary. According to the Minute, at the meeting the claimant indicated that she had done work for the centre relating to referrals and walk-in clients despite allegations made of her non-performance of duties. The claimant was asked to supply a list of matters that she had dealt with from November 2010 to that point. However, on 9th August, 2011 the claimant advised that she never received the minute. She was verbally requested to do so. On 10th August 2011, the claimant submitted the list of matters she claimed that she had been working on to the acting Permanent Secretary. Upon review by the Director of LAAC it was observed that work was done by the claimant but without the knowledge of

the LAAC. The work was not done in accordance with LAAC protocol. Among other things representation was made by the claimant at the Magistrate court for an individual, not a client of the LAAC. Representation was made by claimant for other persons without the knowledge of the center.

[49] The last two paragraphs of the Minute reads:

"From all indication Miss Joseph does not wish to work at the Legal Aid and Advice Centre. In fact, she has categorically stated on several occasions that she would not be communicating with the Director of the center. See my minute of even number dated 21st December 2010 as well as correspondence from Miss Joseph's Lawyers.

In light of the above and Miss Nina Joseph's blatant refusal to follow required procedure, I recommend that the Judicial and Legal Services Commission take disciplinary action against her with a view towards termination of her appointment."

[50] Joan Joseph admits that by Minute dated December 21, 2011 she appointed a panel of three persons to conduct a preliminary investigation into the work and conduct of the claimant. Their report was issued on March 26, 2012. The Report forms part of the evidence. The Report shows that the members of the Committee heard evidence from 10 persons including The Attorney General, two former and the then current permanent secretaries, the Director of LAAC and the claimant. The recommendation of the committee was as follows:

"The panel recommends that serious consideration is afforded the request of Crown Counsel II, and which was advocated by the Director, for a transfer to another Division, if she can be accommodated."

[51] Following the receipt of the Report, Joan Joseph forwarded a Minute dated May 22, 2012 to the CEO. The Minute summarized some of the findings of the Committee. She concludes her Minute as follows:

"The Committee has advised that "the findings have implications for the staff and the functions of the Legal Aid Centre." Also, "the less than cordial relationship, evidenced by lack of communication and cooperation, and tense environment does not augur well for the efficient functioning of the centre and by extension. the Ministry of Legal Affairs." The Committee therefore felt that it seems impossible for Miss Joseph to continue to function at the Legal Aid and Advice Centre.

The Committee therefore recommends that serious consideration is afforded the request of Crown Counsel II, and which was advocated by the Director for a transfer to another Division, if she can be accommodated.

Regarding the Committee's recommendation, I wish to advise that there is no available position in any of the departments of the Ministry of Legal Affairs to which Miss Nina Joseph could be transferred.

Enclosed for your information is a copy of the intake process for the Legal Aid and Advice Centre.

Please be advised that despite directives given, Crown Counsel II, Nina Joseph has not reported to the Director, Legal Aid and Advice Centre. Also, Miss Joseph has not been denied access to files.

In light of the above, I recommend the pursuance of the appropriate disciplinary action against Miss Joseph."

- [52] Joan Joseph's position is that the claimant's continued failure to accept the Director's supervisory role and directives, and perform any duties at all under the auspices of the Center yet accepting her monthly remuneration was, in her view a fundamental breach of her employment. Joan Joseph's last correspondence on the issue was a Minute dated June 5, 2012 to the CEO in which she quoted from letters written by the claimant to Joan Joseph and the Director, which Ms Joseph considered disrespectful. The Minute also forms part of the evidence.
- [53] The claimant however submits that the direct authorization of Joan Joseph as the former Permanent Secretary, to cause the investigation of the claimant on allegations of personal and professional misconduct and to appoint a tribunal to investigate the claimant; to cause the re-investigation of the claimant and to cause Bridget Nelson as Senior Crown Counsel to effect such re-investigation and to proffer charges against the claimant was illegal unreasonable and procedurally improper.
- [54] Further, the inducement of Joan Joseph to seek the claimant's termination or removal from the employ of the Government. of Antigua and Barbuda by advancing said requests to the Chief Establishment officer is also illegal.
- [55] The claimant points to the fact that her appointment was made in accordance with section 103 of the Constitution which applies to any public office in the department of the Attorney General, for appointment to which persons are required to be qualified to practice as a barrister or solicitor. That section provides that the power to exercise disciplinary control over persons holding or acting in such offices and the power to remove such persons from office shall vest in the Governor-General acting in accordance with the advice of the Judicial and Legal Services Commission.
- [56] Claimant submits that by virtue of her appointment under section 103 of the Constitution, she fell within the ambit of established workers within the Government service. Her appointment kept her outside of the control and ambit of the Public Service Commission and any perceived direct disciplinary control of the Permanent Secretary, Director of Legal Aid and or the Attorney General. Therefore the powers that Joan Joseph, Jose Laurent, Worthene George and the Attorney General

- undertook were in palpable contravention of the clear provisions and mandate of section 103 of the Constitution. The claimant posits that if it was felt that disciplinary controls were to be exercised against the claimant, such disciplinary controls could only be lawfully authorized and implemented by the Governor General Acting on the advice of the Judicial and Legal Services Commission.
- [57] Section 103 (2) of the Constitution which applies to the lower judiciary and other public officers including any public office in the department of the Attorney General (other than the public office of Attorney General) provides:
- "(2) The power to appoint persons to hold or act in offices to which this section applies (including the power to confirm appointments) and, subject to the provisions of this Constitution, the power to exercise disciplinary control over persons holding or acting in such offices and the power to remove such persons from office shall vest in the Governor-General acting in accordance with the advice of the Judicial and Legal Services Commission."
- [58] This section mandates that the exercise of disciplinary control over persons to which the section applies and the power to remove such persons from office reside with the Governor General on the advice of the JLSC.
- [59] Section 78 (1) of the Constitution provides:
- "(1) Where any Minister has been assigned responsibility for any department of government, he shall exercise direction and control over that department; and subject to such direction and control, the department shall be under the supervision of a Permanent Secretary whose office shall be a public office."
- [60] Notwithstanding the provisions of section 103 (2), the claimant, as a public officer in the department of the Attorney General was by virtue of section 78 subject to the direction and control of the Minister assigned responsibility for that department and was under the supervision of the Permanent Secretary. Section 103 was not intended to allow members of the legal staff in a ministry to operate without supervision. Dealing with issues arising between members of staff, especially those which adversely impact the proper functioning of the department or ministry is within the purview of the Minister and Permanent Secretary. The Minute dated June 3, 2011 from the Attorney General to the Permanent Secretary⁶ and the Minute of Joan Joseph to the C.E.O. dated August 15th, 2011 clearly recognized the jurisdiction of the Judicial & Legal Services Commission in the ultimate exercise of any disciplinary action to be taken against the claimant.
- [61] The preliminary investigation empanelled by the permanent secretary did not violate section 103. No disciplinary action was taken and no charges issued by the panel. Although the claimant complains of the late notification of the hearing, there is no allegation that she was hampered in

⁶ Paragraph 8 of the Affidavit of Joan Joseph

any way and the court is satisfied that the claimant was given an opportunity to be heard and that she was represented by Counsel of her choice.

The Report

- [62] The court must however bear in mind the sound principle **Bushell v Secretary of State for the Environment**⁷ that in the conduct of a local inquiry, there is a requirement of procedural fairness to all concerned. Furthermore, with regard to administrative decisions, constitutional principle requires that such decisions which are adverse be communicated to the individual concerned before it could have the character of a determination with legal effect.
- [63] The panel having concluded its hearings, issued a Report dated March 26, 2012. Under Minute dated 22nd May 2012, Joan Joseph forwarded the Report to the Chief Establishment Officer. In her Minute, Ms Joseph summarized the findings of the Committee, and noted the recommendation made by the committee. While the recommendation was not necessarily adverse to the claimant in the sense that the recommendation was that serious consideration be given to the request of the claimant for a transfer to another department, some of the findings made by the committee can be considered adverse.
- [64] The claimant complains that she was never notified that the Committee had issued its Report, nor was she notified of the findings and recommendation of the committee.
- [65] The court has already indicated that in the court's view some of the findings of the committee were adverse to the claimant, including a finding that she had not worked on any case files since her return in December 2010. The claimant was entitled to be notified of the findings and recommendation of the committee so that, if she desired, she could have an opportunity to challenge the said findings. The court will therefore make the requested declaration to that effect.

The Re-investigation

- [66] With regard to the re-investigation alleged by the claimant, she seeks an order and two declarations as follows:
- An order of Certiorari to quash the oral decision of the defendant to re-investigate the claimant in or around July 2012 and continuing thereafter on allegations of misconduct which very allegations were the subject of an investigation addressed by a committee empanelled under the hand of the former Permanent Secretary.
- A declaration that the defendant had no lawful authority to re-investigate the claimant on the very allegations she had been absolved of.
 - A declaration that the defendant's failure to duly notify the claimant that she was the subject of re-investigation and to disclose and identify the particulars of and matters under re-investigation was capricious, illegal, unfair and procedurally improper.

¹ [1981] AC 75

[67] The claimant addresses the issue of the alleged re-investigation in paragraph 23 of her affidavit in support of her claim. She states as follows:

"I was made aware of the fact that I was under investigation by the very Joan Joseph in August 2012 just days before she was transferred from her post within the Ministry. Her disclosure came at a time when I put her to task for her incompetent handling of my matter and told her that she had exposed herself and the Government of Antigua and Barbuda to disrepute and its coffers to compensate me for all the travesties committed against me by the defendant. Joan Joseph blatantly refused to provide me with any documentation of this new investigation, refused to address whether the Committee empanelled by her in December 2011 had submitted its Report, refused to reprise me of its findings and informed me that it was none of my business, and confessed that Legal Counsel Bridget Nelson was the person assigned to re-investigate me and that re-investigation had commenced."

[68] In her affidavit in response Joan Joseph indicates that Ms Bridget Nelson, whom the claimant alleges was charged with the conduct of this re-investigation, was simply asked to advise on disciplinary charges which could be preferred against the claimant. She denies there was a re-investigation.

[69] While the claimant in her reply affidavit states that she is "aware" that Bridget Nelson phoned and contacted potential witnesses requesting that they come to her office to give testimony on the allegations against the claimant as she, Bridget Nelson, was investigating the matter, none of the alleged potential witnesses gave evidence nor was their identity disclosed. At the end of the day the court was left with the unsubstantiated allegation of a decision to reinvestigate, which is sharply and soundly contested by the defendant.

[70] With regard to the allegations of a re-investigation, the court finds as follows:

1. There is no evidence of a decision by the defendant to reinvestigate the claimant.
2. The affidavit of Joan Joseph disputes any such re-investigation.
3. It is for the claimant on an application for judicial review of a decision, to put before the court cogent evidence, not only that a decision was taken by the defendants, but the nature and scope of the said decision the claimant seeks to challenge. The claimant has failed to do so.

[71] The court therefore refuses to grant this aspect of the relief prayed for. .

Legitimate Expectation

[72] The claimant seeks damages for breach by the defendant of the doctrine of legitimate expectation.

[73] . The claimant's contentions are that she and other Crown Counsel within the Ministry of Legal Affairs were each allocated their own office within the said Ministry. They were granted keys to

their own offices and were permitted to personally retain the same for their convenience. The policy within the Ministry of Legal Affairs was that persons who held keys to their respective offices would retain the same and be personally responsible for its safe-keeping. The claimant had the legitimate expectation that she would continue to not only have access in and to and from her office but further that she would be seized with the key to effect the same. That without any notice to her, and without communicating to her some rational ground for locking her out of her office, and without providing her with an opportunity to comment and without providing her with any opportunity to access the same, the defendant barred the claimant from having any access to her office.

- [74] While the defendant's position has been that his intention was not to deprive the claimant, at least not permanently, of the key to her office but rather to get her attention. In fact the lock having been changed and the Permanent Secretary having been unable to convey the message to the claimant to report to the Attorney General's office, the claimant was left with an unexplained deprivation. Having a key to her own office was an advantage that the claimant had, in the past, been permitted to enjoy and which she could have legitimately expected to continue until there was communicated to her some rational ground for withdrawing it, on which she was given an opportunity to comment. The court is of the view that in the absence of such communication and opportunity for comment, a breach of the doctrine has taken place. The court will therefore make the appropriate declaration.

The alleged lockout and constructive dismissal

- [75] According to the claimant, on Friday 26th October 2012, she reported for work at 8:10am. She unlocked her office door and entered. She remained in her office until 9:00am when she left briefly and returned. She remained in her office until approximately 12:00 noon when she visited the High Court. She returned to her office at about 1:00pm where she discovered that the lock on her office door had been replaced with a new lock. She tried her key in the lock, the key did not fit. She realized that she was locked out of her office. She describes what followed in these words:

"I immediately walked down the corridor to the office of the Permanent Secretary, Worthene George. I knocked on the door and went in. I informed her that I recognize that the "powers that be" have changed my lock and that I am locked out of my office. I asked for the key to enter the office. The Permanent Secretary said and did nothing. I asked to retrieve my personal effects. The Permanent Secretary said and did nothing. I cautioned the Permanent Secretary that I will be treating the development as my constructive dismissal, I further notified her that the "powers that be" will be in receipt of my lawsuit at the commencement of the upcoming week, I left the Ministry of Legal Affairs."

- [76] From the record, the claimant did not return to work nor did she seek to discuss the incident with her employer thereafter. The instant action was filed on 29th November 2012.
- [77] The claimant states that she believes that, whether looked at in isolation or in conjunction with the defendant's antecedent treatment, it is most clear that the defendant had a finality of purpose as

against her. That purpose according to her was to subject her to unjustifiable and degrading treatment and to injure her both personally and professionally.

- [78] The then Permanent Secretary Worthene George gives a radically different account of the encounter with the claimant on that Friday afternoon. According to her, on 26th October 2012, she was advised by the Attorney General that he would be changing the lock on the door to the office assigned to the claimant. The Attorney General informed her that the non-working relationship between the claimant and the Director could not continue indefinitely and that she should direct the claimant to him when she enquired of the change of locks to her office. She was handed one law book and a letter addressed to the claimant which she was advised should be given to the claimant. As to what transpired next she states:

"I was sitting at my desk in my office on Friday October 26 2012 at around 2:00pm when there was a knock on my door. The claimant appeared in the door way and said to me "I have been locked out of my office; I take that as a constructive dismissal, you will be hearing from my attorneys on Monday; you will receive a lawsuit, you and the A.G." Before I had a chance to respond, the claimant turned her back and left. I then called out to her, but she kept on going. She never entered my office."

- [79] Ms. George states that she immediately had her secretary who was then in her office record what the claimant had said, which the secretary did on her computer.
- [80] Her evidence is that since then she has not seen the claimant, nor spoken to her. She however inquired of the receptionist and the staff at the centre as to how she could contact the claimant. She was given a telephone number but there was no response when the secretary called.
- [81] The claimant seeks various relief in regard to the incident including a declaration that the defendant through its systematic decisions to engage in the prejudicial, egregious, acrimonious and unwarranted treatment of the claimant undertook acts tantamount to the claimant's constructive dismissal and that the said dismissal was concretized on the 26th October 2012, the date the claimant was effectively barred from her office without more.
- [82] Constructive dismissal can be described as the termination by the employee of his employment with his employer, in circumstances in which, because of the conduct of the employer, the employee was or would have been entitled, or it was or would have been reasonable for the employee, to terminate the contract of employment without giving notice of the termination to the employer.
- [83] In **Western Excavations v Colin John Sharp**⁸, two tests are mentioned by Lord Denning: the contract test and the unreasonableness test.

⁸[1977] EWCA Civ 165

- [84] The contract test which provides that if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; then the employee is entitled to treat himself as discharged from any further performance. But however, the conduct must be sufficiently serious to entitle him to leave at once. What is conduct on the part of the employer showing an intention not to be bound by the contract will depend on the circumstances of each case.
- [85] However, an employee must be careful not to leave his employment prematurely, that is, before the employer has actually committed 'repudiation.
- [86] The unreasonableness test is based on the principle that the employer must act reasonably in his treatment of his employees. If he conducts himself or his affairs so unreasonably that the employee cannot fairly be expected to put up with it any longer, the employee is justified in leaving.
- [87] In either case the court ought to consider not only the circumstances which are alleged to justify the employee's departure, but also the circumstances of the response of the employee to the employer's conduct. Therefore, the conduct of both parties has to be looked at in coming to a determination of whether the employer's conduct was such that the employee was entitled to leave.
- [88] The defendant admits to changing the lock on the office occupied by the claimant. But he asserts that his intention was not to repudiate the employment relationship, but rather to get her attention so that she would come to his office to discuss the unbearable situation. The defendant submits that no employee within a public department has an absolute right to a key to their office. If the action was intended as a dismissal then the claimant would not have been paid beyond 26th October, 2012. However, she was paid up until January 2013. Lastly, defendant submits that the claimant did not take the opportunity to speak to the defendant about the issue. She immediately concluded that there was a constructive dismissal.
- [89] Steven D. Anderman in his text Unfair Dismissal notes that closures of workplaces whether temporary or permanent have been held to amount to contractual repudiation. In the Law of Dismissal in Canada by H. Levit, the author gives examples which have justified successful constructive dismissal claims. Among the examples listed is a refusal to allow the employee to work. Does the changing of the lock to claimant's office fall within the same category?
- [90] The office of the claimant is where she performs her work. The action by the defendant of changing the lock, was tantamount to refusing to allow her to work. It is not simply denying her the right to have a key to her office, it is barring her from the place designated for the performance of her work. Because of the very nature of the act, despite the declared intention to the contrary, it amounted to a constructive dismissal. Even under the circumstances of this case, the action by the defendant went beyond what was reasonable necessary to summon the claimant to a meeting. There was no evidence that letters or telephone calls had failed to get her to attend. Notwithstanding that there was no subsequent communication by the claimant or any further refusal by the defendant to allow

the claimant access, the initial changing of the lock was sufficient to amount to constructive dismissal, for which the claimant is entitled to damages.

[91] The claimant has peppered her pleadings with words such as egregious in describing the actions of the defendant. However, in the court's view, the claimant has been rude and disrespectful in her interaction with her superiors⁹. The record clearly demonstrates the utter frustration of the defendant in attempting to restore some semblance of order from the havoc caused by the persistent non-working relationship between the claimant and the Director of LAAC. The facts do not give rise to an award of aggravated damages, the request for same is therefore refused.

[92] The claimant has also sought a declaration that she be re-instated to her post of Crown Counsel II. Given the acrimonious relationship between herself and the Director, the court will decline to order reinstatement. The claimant can be adequately compensated in damages.

Conclusion

[93] Accordingly the court makes the following declarations and orders:

1. A declaration that the defendant's failure to provide the claimant with a copy of the Report of the committee empanelled in December 2011 or to provide the claimant with any statement of the findings of the said committee was unfair and procedurally improper.
2. A declaration that the defendant's decision to bar the claimant from her office by replacing the lock to the door with a new lock without giving the claimant an opportunity to be heard was procedurally irregular, and a violation of the doctrine of legitimate expectation.
3. General damages for constructive dismissal to be assessed.
4. All other declarations and orders sought are refused.
5. Cost to the claimant to be assessed if not agreed.


CLARE HENRY
High Court Judge
Antigua & Barbuda

⁹ See for example exhibit JJ3 to the affidavit of Joan Joseph