

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

ANTIGUA AND BARBUDA

ANUHCVP2020/0009

BETWEEN:

BRENDA GILLIAN FURLONGE

Appellant

and

[1] HONOURABLE MINISTER OF PUBLIC SAFETY AND LABOUR
[2] THE ATTORNEY GENERAL

Respondents

Before:

The Hon. Mde. Margaret Price Findlay
The Hon. Mde. Vicki Ann Ellis
The Hon. Mde. Esco L. Henry

Justice of Appeal
Justice of Appeal
Justice of Appeal

Appearances:

Ms. Brenda Furlonge in person
Ms. Joy Dublin and Ms. Alicia Aska for the Respondents

2024: April 30;
2026: February 24.

Civil Appeal – Judicial review – Public employment – Non established employee – Revocation of appointment and transfer to another ministry – Cabinet Decisions Nos. 105 and 106 – Whether the collective agreements applied to the appellant and were enforceable as contractual terms – Whether the learned judge erred in treating the collective agreements as applicable and enforceable – Sections K25 and K27 of the Antigua and Barbuda Labour Code – Management Clause and Government’s discretion to transfer non established employees without consent – Whether the Government’s discretion to transfer was constrained by good faith, rationality, and the duty to act fairly – Procedural fairness – Retrospective implementation of the Cabinet decisions -Short or absent notice – Lack of consultation and reasons – No meaningful opportunity to be heard – Whether the manner of implementation rendered the Cabinet decisions unlawful – Malice and victimisation – Whether a sufficient causal connection was established between the appellant’s complaint of sexual assault and the transfer decisions – Relief – Whether the

Cabinet decisions should be quashed or declared unlawful – Whether declaratory relief was appropriate – Damages.

In an amended fixed date claim form filed on 25th March 2015 (“the Claim”), the appellant challenged Cabinet Decisions Nos. 105 and 106 dated 31st July 2014 by which the Government of Antigua and Barbuda purported to revoke her appointment as a Prison Officer and transfer her to the Clarevue Psychiatric Hospital as a Field Officer without her approval or consent. She contended that she had been employed by the Government in a non-established capacity from 1st June 2002. She also asserted that, prior to the impugned Cabinet decisions, she had been subjected to a series of indefinite transfers to other departments and assignments, which she disputed and maintained constituted breaches of her contract of employment. The appellant further contended that, as a non-established employee assigned to a specific post within a named department, she could not be permanently transferred to a new and different position in another department without her consent; that such transfer amounted to a new contract of employment with different duties and functions; that there was no express or implied term in her employment permitting transfer at will to a different position without consent; and that her employment was governed by the provisions of the Antigua and Barbuda Labour Code. Consequent to this, the appellant sought declarations that Cabinet Decisions Nos. 105 and 106 dated 31st July 2014 were null and void; an order of certiorari quashing those decisions; declarations that earlier temporary transfers constituted a breach of her contract of employment; an order permitting her to resume duties as a Prison Officer without loss of benefits; damages, including aggravated or vindictory damages; and costs.

By a judgment delivered on 21st February 2020, the learned judge found that the appellant’s employment was governed by the applicable collective agreements relating to non-established employees, in particular the Management Clause of the First Collective Agreement which conferred on the Government the sole right to manage its business, including the discretion to transfer non-established employees without their consent. The judge held that the appellant’s transfers, including those effected by Cabinet Decisions Nos. 105 and 106, were lawfully exercised within that discretion and did not constitute a breach of her employment rights. The claim for judicial review was accordingly dismissed.

Being dissatisfied with that decision, the appellant filed a notice of appeal, later amended on 6th October 2020. The issues on the appeal concerned: (i) the applicability and enforceability of the collective agreements; (ii) the scope of the Government’s discretion to transfer non-established employees and the requirements of procedural fairness; and (iii) the lawfulness of transferring the appellant to a different position involving different duties and functions.

Held: allowing the appeal in part; granting declaratory relief; setting aside the decision below; no award of damages; each party to bear its own costs.

1. The Government, acting as employer under a valid collective agreement, enjoys a managerial discretion to transfer non-established employees without their consent. However, that discretion is not unfettered and must be exercised within recognised

legal constraints. These authorities, read together, confirm that while the Government enjoys managerial discretion to transfer employees under the collective agreement, that discretion is not unfettered. It must be exercised in good faith, for proper administrative reasons, and consistently with the common law duty of fairness. Accordingly, the Government, acting as employer under a valid collective agreement, possesses the discretion to transfer a non-established employee without that employee's consent, provided that the discretion is exercised honestly, in good faith, rationally, and in accordance with the principles of procedural fairness.

Sections A6, C7 and K27 of the **Labour Code Cap. 27 of the Laws of Antigua and Barbuda** applied; **Braganza v BP Shipping Ltd** [2015] UKSC 17 applied; **Claude Gerald v The Governor of Montserrat et al** Territory of Montserrat Civil Appeal No. 2 of 2003 (delivered 29th March 2004, unreported) followed; **Judy Benoit v Her Excellency the Governor-General Dame Cécile La Grenade and The Attorney General** GDAHCV2022/0196 (delivered 11th October 2022, unreported) followed.

2. Although the power to transfer was correctly recognised by the trial judge, the central issue on appeal concerned not the existence of that power but the legality of the manner in which it was exercised. This Court accepts that the trial judge's conclusion on power to transfer is correct, there being no provision which curtailed the Government's discretion. The issue which nevertheless arises for this Court to determine is not merely whether the appellant was amenable to transfer, but whether the manner in which those transfers were effected complied with the requirements of legality and procedural fairness.
3. A claim that the transfers were motivated by victimisation requires proof of a causal connection between the protected complaint and the impugned decision. The burden fell on the appellant to establish a causal connection between the transfers and her complaint. No such connection was demonstrated. No independent material capable of supporting the conclusion that the transfers were tainted by victimisation was produced, and the claim of victimisation therefore cannot be sustained.

Moriba Baker v The University of Trinidad and Tobago Trinidad and Tobago Equal Opportunity Tribunal No. 004 of 2016 (delivered 19th November 2016, unreported) considered; **Phonographic Performance Ltd v Ellis (t/a Bla Bla Bar)** [2018] EWCA Civ 2812 followed.

4. Even where no retaliatory motive is established, the duty to act fairly remains operative. The absence of improper purpose does not relieve a decision maker of the obligation to comply with the requirements of natural justice. Notwithstanding the absence of a retaliatory motive, the decision maker is not absolved from the obligation to act fairly, and legitimate administrative reasons do not discharge the

duty to ensure that the process by which the transfers were effected was procedurally fair. Procedural fairness requires meaningful engagement with the affected employee before implementation of a prejudicial decision. The evidence shows that the appellant was notified of transfers on very short notice, with no indication that her objections were ever considered or that she was provided with any explanation prior to implementation. Such an absence of engagement or explanation demonstrates a clear breach of procedural fairness.

Montrope v The Public Service Commission and The Attorney General of Saint Lucia SLUHCv2017/0385 (delivered 4th May 2018, unreported) distinguished; **Judy Benoit v Her Excellency the Governor-General Dame Cécile La Grenade and The Attorney General** GDAHCv2022/0196 (delivered 11th October 2022, unreported) followed.

5. The breach was compounded by the retrospective and immediate implementation of Cabinet Decisions Nos. 105 and 106. Those decisions were applied retrospectively and without prior notice and were implemented with such immediacy that genuine engagement was impossible. The appellant was deprived of any realistic opportunity to respond, and the retrospective implementation together with the absence of prior notice constitutes a breach of procedural fairness. Accordingly, the Court finds that Cabinet Decisions Nos. 105 and 106 were procedurally unfair and allows the appeal on this ground. It was the appellant's inability to respond to the decisions which constituted the core breach of natural justice, and procedural fairness was therefore violated in respect of those decisions.
6. Where procedural unfairness is established, the appropriate public law relief is to reflect the nature of the unlawfulness found. In the present case, the appropriate relief ought to be declaratory in nature, as Cabinet Decisions Nos. 105 and 106 are vitiated by procedural unfairness.

JUDGMENT

[1] **PRICE FINDLAY JA:** This appeal arises from the decision of the learned judge in the court below dated 21st February 2020 whereby the appellant's claim for judicial review was dismissed.

[2] The proceedings below concerned the applicability and interpretation of two Collective Agreements, dated 5th May 2000 (the "First Collective Agreement") and 31st December 2004 (the "Second Collective Agreement") respectively, concluded

between the Government of Antigua and Barbuda (the “Government”) and the Antigua Trades and Labour Union and the effect of those Agreements on non-established employees.

- [3] The learned judge found that the Government retained the sole right and function to manage its business, including the right to transfer non-established employees per the Management Clause of the First Collective Agreement. The claim for judicial review was accordingly dismissed.

Background

- [4] Ms. Brenda Furlonge, the appellant, had been employed by the Government of Antigua and Barbuda from 1st June 2002 as a Junior Prison Officer at Her Majesty’s Prison. Upon the commencement of her employment, the appellant was classified as a non-established employee.
- [5] By Cabinet Decision No. 105 dated 31st July 2014, the appellant’s appointment as a Junior Prison Officer at Her Majesty’s Prison was revoked with effect from 15th July 2014. By Cabinet Decision No. 106 also dated 31st July 2014, she was transferred to the Ministry of Health as Field Officer – Training and Safety at Clarendon Psychiatric Hospital, also with effect from 15th July 2014.
- [6] The appellant’s employment history prior to the 2014 Cabinet Decisions discloses a series of transfers. On 11th December 2007 she was temporarily assigned to the Central Board of Health pursuant to verbal instructions.
- [7] On 27th February 2012, the Permanent Secretary of the Ministry of National Security and Labour issued a letter assigning the appellant to the Accounts Unit at the Ministry’s headquarters.
- [8] On 21st January 2013, the Permanent Secretary of Health issued a further letter directing the appellant to report to Clarendon Psychiatric Hospital, pending the

outcome of an investigation into her working environment and its alleged adverse effect on her health.

- [9] Thereafter, by Cabinet Decisions Nos. 105 and 106, the appellant was permanently transferred from her post at Her Majesty's Prison to Clarevue Psychiatric Hospital. Both decisions were made retroactive to the date made.

Judgment in the court below

- [10] On 5th March 2015, the appellant filed an application for leave to apply for judicial review of Cabinet Decisions Nos. 105 and 106 effectively revoking her appointment as a Junior Prison Officer and transferring her to the Clarevue Psychiatric Hospital as a Field Officer. The appellant was granted said leave conditional upon the appellant filing a Fixed Date Claim for judicial review within 14 days of the order granting leave. The Fixed Date Claim form was filed on 25th March 2015.
- [11] In the court below, the learned judge identified the singular issue for determination as whether or not Ms. Furlonge who was hired as a prison officer and classified as a "non-established employee" within the Ministry of Labour, Co-operatives and Public Safety could be transferred with or without her consent from Her Majesty's Prison to any other Ministry.
- [12] In a judgment delivered on 21st February 2020, the learned judge found that the appellant's employment was captured by the Collective Agreements which governed non-established employees, in particular the First Collective Agreement's Management Clause which states that the Government retained the sole right and function to manage its business, including the discretion to transfer non-established employees without their consent. The judge held that the appellant's transfers, including those effected by Cabinet Decisions Nos. 105 and 106, were lawfully exercised within that discretion and did not constitute a breach

of her employment rights. The application for judicial review was accordingly dismissed, with no order as to costs.

The appeal

- [13] Being dissatisfied with the ruling of the High Court, the appellant filed a notice of appeal against the decision of the learned judge which was later amended on 6th October 2020. The appellant's Amended Notice of Appeal asserts eight grounds of appeal, which are outlined as follows:

"a. The Learned Judge misdirected herself as to the facts and the evidence when she either failed to consider and or take into proper account, the uncontroverted evidence of the Appellant that it was only after she had been sexually assaulted by a senior prison officer, and had made a complaint to her Employer, that she was 'unceremoniously transferred out of the Prison'; in fact, no evidence was presented to the Court by the Respondents to refuse the employee's statement that the employer conducted no thorough or proper investigation into such an egregious complaint and took no punitive action, whatsoever, against the senior officer reported to be involved. There, therefore provides clear and uncontroverted evidence of an act of malice and victimization by the employer, in having the employee transferred, against her will, which the Learned Judge failed to consider in coming to a decision in the matter.

b. The Learned Judge erred in law when she failed to take in proper account of the fundamental principles of the Antigua and Barbuda Labour Code and good industrial relations practices in not coming to a finding of fact that the employer had acted out of malice and not out of necessity or the interest of public administration, when it took the unilateral decisions to transfer the employee from the prison to the central board of health and subsequently, to the Clarevue Psychiatric Hospital (without identifying any seating accommodate and/or duties), because of her complaint against the senior prison officer.

c. The Learned Judge erred in law when she ignored the fact that non established government employee as is the case with all private sector employees – cannot be transferred at the whim and fancy of an employer and in particular without their expressed consent and/or core competencies in a 'new' area of employment.

d. The Learned Judge erred when she failed to consider that no proper evidence was before the court to verify whether or not all clauses of the said Collective Agreement had been certified” as legal and of proper effect, as in accordance with section K25(1), (2) (a-e) and Section K27 (1) of the Antigua and Barbuda Labour Code.

e. The Learned Judge erred when she reached a factual conclusion in the Judgment by way of inference but without proper consideration of facts, that the said Collective Agreements referred to in paragraph 22 of the Judgment, had been consistent with section K25 of the Labour Code.

f. The Learned Judge misdirected herself on the evidence and the facts when she failed to consider that the employee was trained as a Prison officer and had no other particular skill set or other training or core competencies that would have adequately prepared her or make her a prime candidate for consideration for transfer to work in the Accounts Unit at the Central Board of Health and, ultimately, at the Clarevue Psychiatric Hospital, where she is not assigned any duties.

g. The Learned judge misdirected herself in the matter when she failed to determine or consider, from the evidence at trial, that the Employer had, in fact, acted arbitrary, unlawful and without proper, or any consideration for the right of the employee, as enshrined in law and in accordance with good industrial relation practice, to be consulted in advance about any transfer or reassignment and for her to, ultimately, make a decision as to whether she should consent or otherwise, in accordance with her right as a citizen and employee.

h. The Learned Judge erred when she ignored the submission/admission, of Senior Crown Counsel representing the Respondent at trial, that the Government does not have “an unfettered right” to transfer its non-established employees, as it does in the case of its established Employee (i.e. Civil Servants).”

- [14] At the hearing of the appeal on 30th April 2024, this Court ordered that the parties file and serve supplemental submissions with authorities on ‘the legal basis upon which non-established employees can be transferred at will or involuntarily; and whether this issue is circumscribed by reference to the common law and/or other authorities, with particular emphasis on procedural grounds, including the duty to act fairly with respect to a transfer to an office below the current status of the employee.’

- [15] The appellant's grounds of appeal, while separately advanced, overlap in material aspects. For convenience, I shall address them under grouped headings, and not in the order in which they appear in the Notice of Appeal.

Grounds d and e – The applicability and enforceability of the Collective Agreements

- [16] It is convenient to begin with the question of whether the Collective Agreements applied to the appellant. This is a preliminary and determinative issue, for if the Collective Agreements did not extend to her, the respondents' reliance upon them would lack any proper foundation. The appellant contended on this appeal that the learned judge erred in proceeding on the assumption that the Collective Agreements were applicable to her employment and further erred in treating them as having legal effect pursuant to sections K25 and K27 of the **Antigua and Barbuda Labour Code** (the "**Labour Code**").¹
- [17] The appellant contended that the Collective Agreement does not apply to her because her position was not listed in Schedule 1 of the Agreement. That contention, however, does not withstand scrutiny. As the learned judge in the court below correctly held, the mere absence of a particular position from a list does not, of itself, exclude an employee from the scope of a collective agreement. The learned judge relied on **Sundry Workers v Attorney General of Antigua and Barbuda**,² which endorsed the approach taken by Remy J in **Antigua Trade and Labour Union v The Attorney General of Antigua and Barbuda**.³ Those authorities confirm that where parties have proceeded on the basis of a settled course of conduct between the parties recognising coverage, it would be unconscionable to hold that positions or a category of workers not explicitly listed in a collective agreement were excluded. The learned judge in the court below

¹ Cap 27 of the Laws of Antigua and Barbuda.

² Antigua and Barbuda Industrial Court Reference No. 12 of 2017 (delivered 26th August 2019).

³ ANUHCV2011/0201 (delivered 18th June 2012, unreported).

adopted the same reasoning, noting that the absence of a position from a list or from any other document identifying categories of workers does not, in practice, determine the question of coverage.

[18] The appellant further contended that her employment is governed by the **Labour Code**. That proposition was not disputed. The respondents accepted that the appellant's employment is indeed subject to the **Labour Code** while maintaining that her employment was also subject to the applicable Collective Agreements. There is no inconsistency in that position.

[19] The more substantial issue raised under these grounds concerns the legal enforceability of the Collective Agreements. The appellant submitted that there was no evidence before the court below that the Collective Agreements had been certified by the Labour Commissioner's stamp and that they are inconsistent with the terms of the **Labour Code** and consequently, the Collective Agreements are a nullity. The appellant refers to section K25 of the **Labour Code** which as far as is relevant states:

"(1) With respect to all collective agreements filed by trade unions under section G20 it shall be the duty of the Labour Commissioner, acting through the Labour Relations and the Statistical Services of the Labour Department, to analyze said agreements for whatever information may be derived with respect to the employment conditions of workmen covered by collective agreements.

(2) (i) With respect to all collective agreements filed by registered bargaining agents under section H8 (9) it shall be the duty of the Labour Commissioner, acting through the Labour Relations Service, to analyze said agreements to ensure that the provisions thereof are not inconsistent with the provisions of this Code.

....

(v) Should he find no inconsistency with the Code in the collective agreement as originally submitted, or as resubmitted from time to time under paragraphs (iii) and (iv), he shall certify that the collective bargaining agreement is a lawful contract in all respects."

[20] It is also useful to set out section K27 which states as follows:

"(1) Every collective agreement between registered bargaining agents which has been certified as a lawful contract under the provisions of

section K25 (2) shall thereupon be a legally enforceable contract to the extent the parties thereto intended it to be enforceable, as noted in section K26.”

- [21] The threshold obstacle to the appellant’s challenge on enforceability is that she did not raise the issue of non-certification in the court below. It is well-established that an appellate court cannot be invited to consider arguments not pursued before the court of first instance. As Henry JA observed in **Zinna Zimbanni (as Personal Representative of the Estate of Adelaide Joseph, deceased) v Compultron**:⁴

“[70] The problem that learned counsel faces is that by her submissions she has invited this Court essentially, to formulate causes of action... She asks the Court to do so merely by reference to vague and speculative assertions in the pleadings... It is trite that fraud... must be expressly pleaded... the court cannot consider [it] unless it is expressly pleaded... Moreover, it is notoriously known that a litigant will not be permitted to introduce at the appellate level issues which were not before the lower court.”

- [22] Accordingly, in circumstances where the appellant did not challenge the enforceability of the Collective Agreements in those proceedings, it was both legally sound and procedurally appropriate for the learned judge to proceed on the presumption that the Collective Agreements were enforceable despite not being duly certified. The appellant cannot now seek to advance this point for the first time on appeal.

- [23] In any event, even if the point was properly before this Court, there was no evidence before the court below establishing whether the Collective Agreements had or had not been certified pursuant to section K25. No certification stamp was produced, nor was there any affirmative evidence addressing the issue one way or another. The learned judge therefore proceeded in the absence of any clear evidential foundation on certification.

- [24] In those circumstances, the correct starting point is the common law position. At common law, a collective agreement is presumed not to be legally enforceable as

⁴ SLUHCVP2019/0017 (delivered 10th January 2022, unreported).

between employer and employee unless there is cogent evidence that the parties intended it to have contractual effect. That principle was authoritatively stated in **Ford Motor CO Ltd v Amalgamated Union of Engineering and Foundry Workers**,⁵ where it was held that collective agreements are ordinarily intended to regulate industrial relations rather than to create legally contractual obligations, absent clear evidence to the contrary.

[25] Accordingly, in the absence of clear evidence of certification under section K25, the enforceability of the Collective Agreements could only be properly established by demonstrating a contractual intention to be bound. That inquiry necessarily turns on the terms of the appellant's contract of employment and the surrounding circumstances.

[26] On the evidence before the court below, the learned judge was entitled to conclude that such intention existed. The appellant's contract expressly incorporated the terms and conditions of the applicable Collective Agreement. That express incorporation constituted cogent evidence that both parties intended the Collective Agreement to regulate their legal relationship. On that basis, the Collective Agreements were enforceable as contractual terms, irrespective of the unresolved question of statutory certification.

[27] Moreover, the enforceability of these very Agreements in the absence of proof of certification has already been affirmed in **Antigua Trade and Labour Union v The Attorney General of Antigua and Barbuda**,⁶ where Remy J observed that:

“...the fact that a (previous) Labour Commissioner has signed the Collective Bargaining Agreement ... combined with the fact that the Claimant has been paid monies by the Government Treasury ... created or encouraged a belief on the part of the Claimant that it was entitled to act as the sole bargaining agent”

⁵ [1969] 2 All ER 481.

⁶ ANUHCv2011/0201 (delivered 18th June 2012, unreported) at paragraph 40.

[28] Also significant was the fact that there is no evidence that the Labour Commissioner has taken any steps to "decertify" the Union. The learned judge as a result concluded that in the absence of the Labour Commissioner's official announcement that the Union, which has been acting as sole bargaining agent, has been "decertified", it was entitled to continue to hold the view that it represented the Non-Established Workers of Antigua and Barbuda as their sole bargaining agent.

[29] In those circumstances, the learned judge was entitled to proceed on the basis adopted. Her decision not to revisit the issue of certification was entirely proper, particularly where the appellant had not raised any challenge to certification in the proceedings below and now seeks to advance that point for the first time on appeal. It is well established that an appellate court will not entertain arguments that were not pursued before the court of first instance. In any event, and as a complete answer to the appellant's submission, the terms of the appellant's contract of employment clearly demonstrated an intention to be bound by the provisions of the applicable Collective Agreement.

Grounds c, g and h – Scope of the Government's discretion to transfer and procedural fairness

[30] Before the Court of Appeal, the appellant advanced three principal contentions. First, that the respondent acted *ultra vires* in purporting to transfer her between departments without statutory or contractual authority. Secondly, the transfer was without lawful basis and consequently void. Thirdly, the process adopted in effecting the transfer was procedurally unfair, in that the appellant was not notified nor afforded an opportunity to be heard. These grounds were not pursued in this form before the court below. During the hearing of the appeal, however, the Court considered that the question of procedural fairness required further ventilation, and accordingly directed that supplemental submissions be filed by both parties addressing the legal basis upon which non-established officers might be

transferred at will or without consent, and whether the exercise of such a discretion is circumscribed by the common-law duty to act fairly.

[31] The appellant's contentions thus extended beyond the bare existence of a power to transfer and encompassed the manner of its exercise. The allegation of want of notice and opportunity to be heard raised a distinct question of procedural fairness. These are separate though related inquiries: the issue of authority concerns the lawfulness of the act itself, whereas procedural fairness engages the safeguards that govern the exercise of that authority.

[32] Procedural fairness constitutes an independent ground of judicial review and is not ancillary to questions of legality. Although not argued below, the issue has now been brought squarely into focus by the Court's own direction for further argument. The Court invited submissions as to whether the legal foundation upon which non-established officers may be transferred at will or involuntarily is constrained by reference to the common law or analogous principles, with particular emphasis on the duty to act fairly where the transfer results in diminution of status or conditions of employment.

Appellant's submissions

[33] The appellant contended that, as a matter of common law and fundamental principle, an employer cannot transfer a member of the workforce against his or her will, for only a person in a state of servitude could be compelled to serve elsewhere without consent. It was submitted that, in the case of Government employment, such power exists only in respect of Civil Servants, members of the Police Force, the Military, and the Diplomatic Corps.

[34] The appellant further submitted that although it is well established that the Government possesses the power to transfer any civil servant or established officer without consent, that principle does not extend to non-established employees.

[35] It was argued that there is no express or implied term in the appellant's contract of employment, as a non-established government employee, permitting her to be transferred at will to another post involving different duties or functions without her consent. The appellant is not appointed to public office and does not fall within the definition of "civil servant" as set out in section 3(2) of the **Civil Service Act**⁷. Accordingly, she cannot lawfully be transferred at will. Her employment, it was submitted, is governed by the provisions of the **Labour Code**, and by the industrial agreements negotiated by the Antigua Trades and Labour Union on behalf of non-established employees of the public service.

Respondents' submissions

[36] The respondents submitted, and the learned trial judge so found, that to deprive the Government of its discretion to transfer employees would lead to an untenable position within the public service. It was observed that such a restriction would enable employees to determine for themselves whether, or to what post, they would consent to be transferred, thereby frustrating the efficient administration of the service.

[37] In their supplemental submissions, the respondents drew attention to a number of decisions within the region concerning transfers in the public sector undertaken to promote efficiency and to deploy human resources where most required. Reference was made to **Shields Furniture Ltd v Goff**,⁸ in which it was held that employees subject to transfer were entitled only to a reasonable opportunity to consider whether to accept a variation of employment arising from reassignment. Reliance was also placed on **The Public Service Union v The Permanent Secretary, Ministry of National Security**,⁹ where the court upheld a transfer intended to avoid a conflict of interest after the officer's son had been committed to

⁷ Cap 87 of the Laws of Antigua and Barbuda.

⁸ [1973] ICR 187.

⁹ Claim No. 0175 of 2007 (dated 10th January 2010, unreported).

custody. Further reliance was placed on **Dornella Seth v Attorney General**,¹⁰ in which the claimant, a non-established worker, alleged that her transfer was oppressive and arbitrary. The court there observed that a transfer effected without a written statement of duties might constitute a breach of contract but dismissed the claim upon finding that the defendant's action was neither arbitrary nor oppressive.

- [38] The respondents submitted that these authorities illustrate that transfers within the public service fall within the discretion of the Government as employer and are not dependent upon the concurrence or participation of the employee.

Discussion

- [39] The first sub-issue can be disposed of fairly easily. The appellant contended that, as a non-established employee, she could not lawfully be transferred without her consent. This argument, however, is unsustainable when the statutory and contractual framework governing the employment relationship is properly considered.

- [40] First and foremost, the relationship between the parties is governed by the provisions of the **Labour Code**. Section A6 draws a clear distinction between established and non-established employees of the Government and defines the extent to which the provisions of the **Labour Code** apply to each category. Section A6 provides:

“A6. (1) To the extent that provisions of this Code apply to employers, they shall apply to all employers operating or doing business in Antigua and Barbuda, including the Government as the employers of its established employees; but they shall not bind the Government as the employer of its other employees.

(2) To the extent that provisions of this Code apply to employees, they shall apply to all employees of employers operating or doing business in

¹⁰ SVGHCV2018/0086 (dated 5th July 2018, unreported).

Antigua and Barbuda, including the non-established employees of the Government; but they shall not apply

- (a) established employees of the Government;
- (b) persons in the naval, military, or air forces of the Government;
- (c) the Police Force;
- (d) persons holding the status of diplomatic agents; or
- (e) persons employed by the United Nations or its specialised agencies.”

[41] By virtue of section A6(2), the appellant, as a non-established employee of the Government, is expressly brought within the category of employees to whom the **Labour Code** applies. Her employment relationship is therefore governed by the statutory regime established by the **Labour Code**, and any analysis of her rights and obligations must proceed on that basis.

[42] The **Labour Code** itself contains no provisions which expressly regulate the transfer of employees or require employee consent to such transfers. Likewise, the appellant’s individual contract of employment does not address transfers nor confer any contractual right to refuse them. In those circumstances, the appellant’s contention finds no support in either the **Labour Code** or her individual contract of employment, and the analysis accordingly turns to the Collective Agreements governing her employment, which make express provision in relation to transfers.

[43] The legal effect of collective agreements is addressed in section K27 of the **Labour Code**, which provides:

“K27. (1) Every collective agreement between registered bargaining agents which has been certified as a lawful contract under the provisions of section K25(2) shall thereupon be a legally enforceable contract to the extent the parties thereto intended it to be enforceable, as noted in section K26.

(2) Such contracts to the extent intended to be enforceable, **shall be enforced in the Courts in the same manner as any other enforceable contracts.**” (Emphasis added).

[44] The effect of this provision is to recognise that the rights and obligations of non-established employees are derived from, and governed by, the terms of the

collective agreement once duly certified, subject to the overriding requirements of the **Labour Code**. In that regard, section C7 makes clear that while individual contracts of employment may be lawfully entered into, any provision which falls below the minimum employment standards established by the **Labour Code**, or which, to the employee's disadvantage, conflicts with the terms of a collective agreement in force, is rendered null and void. It follows that the relationship between the Government and such employees is one regulated by a binding contractual instrument, not merely by the general principles of common-law employment upon which the appellant seeks to rely.

[45] The appellant's attempt to draw a rigid distinction between established and non-established employees, and to limit the power of transfer to the former, finds no support in principle or in authority. The relationship between the Government and a non-established employee is contractual in nature, and the rights and obligations of the parties are governed by the terms of that contract. Where those terms are embodied in a collective agreement having statutory effect, the Court's duty is to give effect to that bargain according to its tenor. It is not for the Court to imply restrictions which the parties themselves have not chosen to include.

[46] As observed in **Braganza v BP Shipping Ltd**¹¹, contractual provisions which confer a discretion upon one party are common, and:

"It is not for the courts to re-write the parties' bargain for them, still less to substitute themselves for the contractually agreed decision-maker. Nevertheless, the party who is charged with making decisions which affect the rights of both parties to the contract has a clear conflict of interest... The courts have therefore sought to ensure that such contractual powers are not abused... not only must the discretion be exercised honestly and in good faith, but... it must not be exercised arbitrarily, capriciously or unreasonably."

[47] The same principle applies where the discretion arises under statute or the Constitution. In **Claude Gerald v The Governor of Montserrat et al.**,¹² this Court

¹¹ [2015] UKSC 17.

¹² Montserrat Civil Appeal No. 2 of 2003 (delivered 29th March 2004, unreported).

accepted that the Governor possessed legal power to transfer Mr. Gerald but held that procedural deficiencies rendered the transfer unlawful. The Court declared the transfer null and void, confirming that the Governor's discretion, though wide, must be exercised in accordance with the principles of legality and fairness.

- [48] Likewise, in **Judy Benoit v Her Excellency the Governor-General Dame Cécile La Grenade and The Attorney General**,¹³ the Governor-General's constitutional power to remove the Supervisor of Elections "at her sole discretion" was found to be constrained by the duty of procedural fairness. The Court observed that:

"The principles of fairness dictated that **Ms Benoit ought to have been afforded a reasonable opportunity to address those complaints or allegations prior to the decision being taken to remove her.**"

- [49] While the Court notes that the **Judy Benoit** case merely serves as a persuasive authority, the Court is of the view that the principles enunciated and applied in that case are just as applicable in the instant case. These authorities, read together, confirm that while the Government enjoys managerial discretion to transfer employees under the collective agreement, that discretion is not unfettered. It must be exercised in good faith, for proper administrative reasons, and consistently with the common-law duty of fairness.

- [50] Accordingly, this Court finds that the Government, acting as employer under a valid collective agreement, possesses the discretion to transfer a non-established employee without that employee's consent, provided that the discretion is exercised honestly, in good faith, rationally, and in accordance with the principles of procedural fairness.

Procedural Fairness

Appellant's submissions

¹³ GDAHCV2022/0196 (delivered 11th October 2022, unreported).

[51] The appellant relies on the constitutional guarantee of procedural fairness, contending that in arriving at its decision to revoke her appointment and to effect her transfers, the Cabinet was bound to observe and comply with the rules of natural justice. It is submitted that the respondent acted in breach of those principles by failing to give reasons for its decisions. At no time, it is said, was the appellant informed of the grounds upon which her appointment was revoked or of the reasons for her subsequent transfers. The appellant further asserts that the transfers were not grounded in any proper administrative purpose but were actuated by victimisation, being connected to her report of sexual assault by a senior officer. To be real and effective, it must include the right of the affected person to know the case made against her, to be apprised of the material and statements relied upon, and to be afforded a fair opportunity to correct or contradict them. It was further contended that compliance with procedural fairness in this context necessarily required prior consultation, an opportunity to make representations, and the provision of reasons sufficient to enable the appellant to understand the basis of the decision and, if necessary, to challenge it.

Respondents' submissions

[52] On the issue of procedural unfairness, the respondents submitted that one transfer was effected in response to concerns raised directly by the appellant regarding her working environment, and that a subsequent transfer arose from the potential conflict between her duties as a prison officer and the incarceration of her son within the same facility. It was contended that the allegation of victimisation is without foundation and that the appellant suffered no adverse consequence as a result of the transfers, noting in particular that there was no diminution of salary or rank.

[53] The respondents relied on the decision in **Moriba Baker v The University of Trinidad and Tobago**,¹⁴ in which the Court held that the claimant had failed to

¹⁴ Trinidad and Tobago Equal Opportunity Tribunal No. 004 of 2016

adduce credible evidence establishing a connection between his dismissal for disciplinary reasons and the lodging of a complaint. By analogy, the respondents argued that the appellant in this case has not produced credible evidence linking her transfer to the complaint of sexual harassment made against her supervisor. It was submitted that each transfer was undertaken for legitimate administrative reasons and with the intention of ensuring that the appellant's working conditions remained satisfactory. However, the respondents did not directly address the procedural aspect of the transfers, particularly whether the appellant was afforded an opportunity to respond or to be heard prior to the decision being made.

Discussion

[54] The issue determined by the court below concerned the lawfulness of the transfers of the appellant on 11th December 2007 to the Central Board of Health and subsequently to the Accounts Unit in the Ministry of National Security, and on 31st July 2014 to the Clarevue Psychiatric Hospital, in particular, whether the transfers could lawfully have been made in the Government's sole discretion. The learned judge dismissed the appellant's claim for judicial review of the decisions transferring her. Although that conclusion is challenged on this appeal, this Court accepts that it is correct, there being no provision in the **Labour Code**, the appellant's contract of employment, or the applicable collective agreement which curtailed the Government's discretion to effect those transfers. The issue which nevertheless arises for this Court to determine is not merely whether the appellant was amenable to transfer, but whether the manner in which those transfers were effected complied with the requirements of legality and procedural fairness. It is to that question I now turn.

[55] With respect to the issue of legality, the appellant claims that her transfer to the Clarevue Psychiatric Hospital was as a result of victimisation borne out of her complaint of sexual assault/harassment by a senior prison officer. The Tribunal in **Moriba Baker** cited above made clear that such a claim cannot succeed in the

absence of a credible evidential connection between the alleged act of victimisation and the protected act giving rise to the complaint. Therefore the burden fell on the appellant to establish a causal connection between the transfers and her complaint of sexual assault. In the present case, no such connection was demonstrated. Beyond reliance on the chronology of events and the appellant's own assertions, no evidence was adduced from which an inference of retaliatory motive or malice could properly be drawn. The appellant's account stood entirely uncorroborated, and there was no independent material capable of supporting the conclusion that transfers were tainted by victimisation. In those circumstances, the evidential threshold identified in **Moriba Baker** was not met, and the claim of victimisation therefore cannot be sustained.

[56] However, notwithstanding the absence of a retaliatory motive, the decision-maker is not absolved from the obligation to act fairly. Likewise, the fact that there may have been legitimate administrative or operational reasons for certain transfers does not, in itself, discharge the duty to ensure that the process by which those transfers were effected was procedurally fair.

[57] The evidence shows that the appellant was notified of transfers on very short notice, in some instances on the same day or the day prior to effect. Although she expressed objections, there is no indication that her objections were ever considered or that she was provided with any explanation before implementation. Such an absence of engagement or explanation demonstrates a clear breach of procedural fairness, even if the underlying motive was administratively legitimate.

[58] This is readily distinguishable from authorities such as **Montrope v The Public Service Commission and The Attorney General of Saint Lucia**.¹⁵ That case is not relied upon for its jurisdictional equivalence but rather as an illustration of what procedural fairness in this context ought to look like. There, the Public Service Commission engaged in a sustained process of communication with the officer

¹⁵ SLUHCV2017/0385 (delivered 4th May 2018, unreported).

over several weeks. The officer was invited to make representations, provided with reasons for the proposed transfer, afforded the opportunity to seek clarification, and received responses showing that his objections were expressly considered. Although the officer ultimately disagreed with the decision, the Court found that he had nonetheless been afforded a meaningful opportunity to be heard.

[59] By contrast, the circumstances in the present matter are materially different. Cabinet Decisions No. 105 and No. 106 were applied retrospectively and without prior notice, and the transfers were implemented with such immediacy that genuine engagement was impossible. The appellant was deprived of any realistic opportunity to respond or to make representations in advance.

[60] The retrospective implementation of Cabinet Decisions No. 105 and No. 106, together with the absence of prior notice and the practical impossibility of engagement, constitutes a breach of procedural fairness. This aligns with the principle in **Benoit**, where the individual was effectively precluded from addressing a prejudicial decision prior to its implementation.

[61] Accordingly, the Court finds that Cabinet Decisions No. 105 and No. 106 were procedurally unfair and allows the appeal on this ground. By way of obiter, the Court notes that the other transfers, though also effected rapidly and contested by the appellant, involved some degree of explanation or post-transfer engagement. Nevertheless, even in those instances, the extremely short notice periods raise concerns as to whether the appellant could effectively be heard. While the Court rejects the allegation of victimisation as unsupported by evidence, it nevertheless finds that the process by which the transfers were effected fell short of the procedural standards required by natural justice. Even in instances where explanations were provided, the extremely short notice periods rendered effective participation impossible, revealing a systemic deficiency in procedural fairness across the series of decisions. This conclusion, however, is not intended to suggest that every government transfer must be preceded by lengthy notice and

sustained and prolonged engagement with the officer concerned. The learning that ought to be derived here is that what would constitute a reasonable period of the notice and/or consultation period, must be determined by the factual circumstances in each case.

[62] Where notice is inadequate and meaningful engagement impossible, the exercise of discretion crosses the threshold into procedural unfairness. In the present case, it was the appellant's inability to respond to the decisions, rather than any retaliatory motive, which constituted the core breach of natural justice. The Court therefore confirms that procedural fairness was violated in respect of Cabinet Decisions No. 105 and No. 106 and identifies broader concerns as to the adequacy of notice and engagement across the other transfers, while affirming that no evidential link has been shown between the transfers and the complaint of sexual assault.

[63] Having made the foregoing findings, the Court turns to the question of relief. While procedural unfairness has been established, it does not follow that every form of relief sought by the appellant must be granted. The remedies available in public law proceedings are discretionary and must be tailored to the nature of the unlawfulness identified. In the present case, the breach arises from a failure of process rather than from any improper motive or deliberate abuse of power. In those circumstances, the Court must consider whether relief beyond a declaration is justified, including whether any award of damages is properly available.

[64] In considering whether any award of damages is properly available, the Court notes that general and aggravated damages are sought in the Fixed Date Claim Form, however the supporting affidavit does not plead or particularise the basis upon which such damages are claimed. The affidavit filed in support of the Fixed Date Claim Form merely refers to the affidavit filed in support of the application for leave to seek judicial review. That earlier affidavit does not advance any pleaded case of loss or damage.

[65] As to an award for aggravated damages, Lewinson LJ in **Phonographic Performance Ltd v Ellis (t/a Bla Bla Bar)**¹⁶ stated:

“Aggravated damages are damages awarded for a tort as compensation for the claimant’s mental distress, where the manner in which the defendant has committed the tort, or his motives in so doing, or his conduct subsequent to the tort, has upset or outraged the claimant. Such conduct or motive aggravates the injury done to the claimant, and therefore warrants a greater or additional compensatory sum.”

[66] The evidence in this case discloses no improper motive or deliberate abuse of power, but rather a failure to afford the appellant sufficient time and opportunity to respond. Moreover, the appellant remained in receipt of her full salary and benefits throughout, and there is no suggestion of any material diminution in rank or remuneration. In those circumstances, and in the absence of any evidence from which loss could be identified or quantified, the Court is unable to assess quantum or to make any award of compensation. Accordingly, the Court is of the view that the appropriate relief ought to be declaratory in nature, to reflect that the appellant’s right to procedural fairness was infringed and that Cabinet Decisions Nos. 105 and 106 are vitiated by procedural unfairness.

Grounds c and f – Transfer to a different position

[67] The appellant contended that she could not be permanently transferred to a new and different position in another department without her consent. Implicit in this argument is the assumption that any transfer should be to a position equivalent in responsibility, status, and remuneration, skill and competency.

[68] The Collective Agreement governing the appellant’s employment confers upon the respondent a broad discretion in relation to the transfer of employees. It does not, in express terms, condition the exercise of that discretion upon the maintenance of equivalence in the post. By way of comparison, there are instances where in

¹⁶ [2018] EWCA Civ 2812.

employment contracts it is common to include express terms providing that transfers must be to posts of equivalent grade or responsibility, as observed in **Rachel Glenna M. Roberts v The Public Service Commission**.¹⁷ In that case, the court considered whether a transfer could be unconstitutional due to the absence of an assigned office or an equivalent position. The court, referencing Blenman JA in **Bain-Thomas**, emphasised that the assessment of equivalence extends beyond remuneration to include responsibility, status, rank in the public service hierarchy, challenges inherent in the post, and qualifications.

[69] These authorities seem to reflect the position in common law that the concept equivalence may be relevant when assessing the lawfulness of a transfer. Additionally, those authorities illustrate that, at common law, a transfer which results in a material alteration of an employee's status or conditions may attract closer scrutiny. The present case is, however, distinguishable in that the Collective Agreement expressly vests the employer with a wide discretion in relation to transfers, including reassignment to different roles.

[70] Bearing the foregoing findings of this Court as to the procedural fairness of the appellant's transfer in mind, it is neither necessary nor appropriate in this appeal to determine definitively whether, or to what extent, the common law requirement of equivalence operates where such contractual arrangements exist. In fact, had the appellant been afforded reasonable notice and opportunity to be heard, this issue may have arisen for consideration in a different procedural context. However, that hypothetical scenario does not arise on the present appeal, which is properly resolved on procedural grounds alone.

[71] It follows that the appellant's contention that any transfer must, as a matter of law, be to a position of equivalent status does not require final determination in these proceedings. Even if the authorities may be said generally to support such a proposition, the appeal may be resolved on other grounds. In particular, the

¹⁷ GDAHCV2019/0116 (delivered on 1st July 2022; re-issued on 18th July 2022, unreported).

manner in which the transfers were effected deprived the appellant of the opportunity to make representations as to the nature and suitability of the positions to which she was assigned, a matter which bears directly on the lawfulness of the decisions under challenge.

Disposition

[72] Having considered the submissions and the record, the Court is of the view that procedural fairness was not observed in respect of Cabinet Decision No.105, which revoked the appellant's appointment, and Cabinet Decision No.106, which effected her transfer. By reason of that breach of natural justice, both decisions are thereby void in law. The appeal is therefore allowed. This Court, however, is mindful that setting aside those decisions outright would carry practical and administrative consequences, particularly in circumstances where the Court does not have the benefit of up to date information as to whether the appellant remains in her post or can presently be accommodated at His Majesty's Prison. In those circumstances, and notwithstanding that not all grounds of appeal have succeeded, the Court considers it more appropriate to grant declaratory relief.

[73] The Court orders as follows:

- a) It is hereby declared that the appellant's right to procedural fairness was infringed and that the Government's decision to transfer the appellant is unlawful. Consequently, the appellant did not lawfully cease to hold the office of prison officer.
- b) The appeal is allowed and the decision of the learned judge below is hereby set aside.
- c) Each party shall bear their own costs of the appeal.

[74] Based on the order made at paragraph 73 a) above, it is only left for this Court to note that it is in the hands of the Attorney General, acting on the advice of Cabinet, to determine the appropriate steps to regularise the appellant's position in light of this judgment.

I concur.
Vicki Ann Ellis
Justice of Appeal

I concur.
Esco L. Henry
Justice of Appeal

By the Court

Chief Registrar