

ANTIGUA AND BARBUDA

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)**

CLAIM NO ANUHCV2012/0661

BETWEEN

LESTROY LEON CHARLES

Applicant

AND

THE FINANCIAL SECRETARY

Respondent

Appearances:

Dr David Dorset for the Applicant

Ms Bridget Nelson for the Respondent

.....
2012: November 13; 21
.....

RULING

INTRODUCTION

- [1] **LANNS, J [Ag]:** On 11th October 2012, the Applicant Lestroy Leon Charles filed a Notice of Application seeking leave to apply for judicial review pursuant to CPR 56.3 in order to challenge the refusal of the Financial Secretary to implement the recommendation of Cabinet that the Applicant be upgraded to the level of Superintendent of Public Works with effect from 1st May 2003. The Applicant swore to an affidavit in support of his application.

BASIS OF APPLICATION

- [2] The grounds on which relief is sought are as follows:

- (a) The Applicant is a non-established worker in the government service employed as an Inspector of Works in the Ministry of Public Works. On 30th April 2003, the Cabinet of the Government of Antigua and Barbuda agreed to accept a recommendation that Mr Rupert Edwards and the Applicant be upgraded to the position of Superintendent of Works with effect from 1st May 2003;
- (b) The Respondent gave partial effect to the recommendation of Cabinet to the extent that Mr Edwards was upgraded to the level of Superintendent of Works and paid the uplift in salary associated with the position of Superintendent of Works. The Respondent did not give effect to the recommendation of Cabinet as it relates to the Applicant.
- (c) The Applicant had a legitimate expectation that he would be treated in the same manner as Mr Edwards. The Respondent has acted in breach of this legitimate expectation. The Respondent has not given any explanation for the partiality shown Mr Edwards and the manifest prejudice visited upon the Applicant.
- (d) The Respondent is under an obligation to treat like cases alike but this the Respondent has failed to do and has accordingly acted unfairly.
- (e) The Respondent has no lawful authority to treat the Applicant unfairly.

DIRECTIONS/FIRST HEARING/ADJOURNMENT

- [3] Upon the direction of the court, notice of the hearing of the Application was given to the Respondent in pursuance of CPR 56.4 (3) (a). The Application first came on for hearing in open court on 25th October 2012, but it was adjourned to allow the Respondents an opportunity to peruse the Application, it having been short served. The Respondents' Counsel did not indicate at that time, that she intended to contest the application.

- [4] When the matter came back before me on 13th November 2012, Ms Nelson indicated that she had been instructed to oppose the application. Following the presentation of the application, I heard oral submissions in support of, and in opposition to the application.

OPPOSITION TO THE APPLICATION

- [5] Ms Nelson opposed the application on two grounds. First, she submitted that the very foundation of the application is flawed on the basis that it was the salary of the Applicant that was to be updated and not his position as stated in the first ground upon which relief is sought.¹
- [6] The second ground of objection advanced by counsel was that of delay in making the application. In this regard, Counsel pointed to CPR 56.5 (1) and submitted that the application is being made eight years after the Cabinet decision was made. In Counsel's view, there was unreasonable delay before making the application and this delay is detrimental to good administration of justice.
- [7] In support of that submission, counsel referred to, and produced the recent decision of Thom J in the St Vincent and the Grenadines case of **Germison Griffith v Senior Magistrate Donald Browne**² wherein the issue of delay was addressed. In **Griffith**, the Senior Magistrate dismissed Mr Griffith's claim for assault. Griffith wrote to the Magistrate requesting written reasons for reaching the decision to dismiss his case. The Magistrate failed to comply with Griffith's request. Two and a half years after the Magistrate made the decision, Griffith applied for judicial review for an order of mandamus to compel the Senior Magistrate to give written reasons for his decision. The application was refused. In refusing the application, the Learned Judge adopted the words of the Court of Appeal in **Ronald Browne v The Public Service Commission**³ to the effect that she found the application to be a "stale claim"

¹ See paragraph 12 of the Application for the first ground.

² Claim No 3 20 OF 2011

³ HCVAP2010/023

- [8] Learned counsel for the Respondent concluded her submissions by emphasizing that the Applicant has sat on his rights for eight years, and made two efforts to remedy the situation, the first being in 2004, when he wrote to the Ombudsman and the other in 2012 when he caused his Union to intervene. Counsel reasoned that even if the correspondence to the Ombudsman were to be taken into account, still, it took eight years after that for the Applicant to make his application to the Court. She submitted that detriment to good administration would be brought about if the application for judicial review is granted, since the court is called upon to countenance the bringing of a stale claim which it should not do.

SUBMISSIONS IN REPLY

- [9] In his reply submissions, Dr Dorset stated that the Applicant made certain efforts to remedy the situation, and when those efforts failed, he came to the court for redress. He did not indicate any efforts other than those mentioned herein earlier. Counsel stressed among other things that a decision was made in favour of two persons and one person has had the advantage of that decision, while the other has not had the benefit of that decision for an extended period and that this would have caused substantial hardship and prejudice to the Applicant.
- [10] Learned counsel makes the further submission that if the court were not to grant leave, the substantial hardship and substantial prejudice visited upon the Applicant will continue unabated and the court must give serious consideration to that. Counsel did not indicate what those hardships were and the Applicant's Affidavit provided no detail as to what hardships have been experienced by him.
- [11] In relation to the case of **Griffith**, Dr Dorset does not agree that that case is applicable to the case at bar. He sought to make a distinction between **Griffith's** case and the instant case. He submitted that there is no indication that the Applicant in **Griffith's** case had alternative means of trying to get his matter addressed and simply ignored them. So far as counsel was concerned, that is a clear distinctive feature in the instant case. Dr Dorset apparently ignored or overlooked the fact that the Applicant in **Griffith's** case could have

appealed the decision of the Magistrate, but when he made the application for judicial review the time for appealing had long expired.

DISCUSSION AND DECISION

[12] CPR 56.3 governs applications for leave for judicial review. The Applicant has satisfied the requirements of that rule.

[13] CPR 56.3 is procedural. It sets out how the hearing of an application for judicial review should proceed.

[14] CPR 56.5 concerns delay. It reads:

"56.5 (1) In addition to any time limit imposed by any enactment, the judge may refuse leave or to grant relief in any case in which the judge considers that there has been unreasonable delay before making the application.

(2) When considering whether to refuse leave or to grant relief because of delay the judge must consider whether granting of leave or relief would likely to –

(a) be detrimental to good administration; or

(b) cause substantial hardship to or substantially prejudice the rights of any person.

[15] As previously indicated, the Respondent contested the application on two grounds, the main one being unreasonable delay; the other ground being that the application is flawed because there was no decision to upgrade the position of the Applicant. Rather, the decision was to upgrade his salary to the level of the salary of Superintendent of Works. So far as Ms Nelson was concerned, there is a distinct difference. Dr Dorset did not offer any submission in relation to that submission. At this juncture, it will be convenient to refer to, and reproduce two documents exhibited to the Applicant's supporting Affidavit.

[16] Exhibit "LLC1" is a copy of Cabinet Decision number 55 of 2003. Here is Exhibit "LLC 1".

" IN THE CABINET OF ANTIGUA AND BARBUDA

Wednesday 30th April 2003

The Ministry of Public Works –
Staff of"

"55. Cabinet agreed to the recommendation that the **salary** of Mr Rupert Edwards and Mr Leron Charles (Non-Established employees) should be up-graded to the level of Superintended of Works, with effect from 1st May, 2003." (Emphasis mine)

[17] Exhibit LLC 2" is a copy of a Minute dated 4th September 2003 from the Permanent Secretary in the Ministry of Works to the Respondent seeking permission to upgrade the position of Mr Rupert Edwards and the Applicant. It reads in part:

"MINUTE

FROM: Permanent Secretary, Ministry of Works, Communications, Insurance and
St John's Development

TO: Financial Secretary, Ministry of Finance

DATE: September 4 2003

REF: NE/P13/5/E

Please refer to Cabinet Decision No 55 of Wednesday 30th April 2003 on
the subject of Ministry of Public Works Staff. ...

The Cabinet agreed to recommend that Mr Rupert Edwards and Mr Leon Charles both Non established Superintendent of Works, Ministry of Public Works, be upgraded to Non-Established Superintended of Works effective 1st May 2003.

At present, there are (sic) no other Non-Established Superintendent of Works in the Ministry of Public Works. However, the annual salary of the established Superintendent of Works is Thirty-six Thousand, six hundred and ninety-six dollars (\$36.696.00). Mr Charles and Mr Edwards will be paid at the same rate which amounts to Seven hundred and five dollars and sixty-nine cents (\$705.69) weekly.

Permission is hereby sought to upgrade the position of Mr Leon Charles and Mr Rupert Edwards to that of Superintendent of Works effective 1st May 2003.

Funds are available under E 40 B, Programme: 36 Road Streets and Drains, Activity: 168 Drainage, 30207 wages.

Grateful for your kind approval.

Cordell Weston
Permanent Weston

- [18] It is clear to me, from a review of those two Exhibits, that Cabinet Decision No 55 of 2003 did not expressly approve or authorise an upgrade of the Applicant's position from "Non-Established Inspector of Public Works" to "Non-Established Superintendent of Public Works". Rather, it approved and authorised an upgrade of the Applicant's **salary** to that of

Superintendent of Works. Based on these two bits of inter-departmental communiqué, I find that there is merit in the first ground of Ms Nelson's objection.

- [19] As to the issue of unreasonable delay, the court is mindful of the decision in **Griffith's** case wherein the learned Judge held that the period of two and one half years was unreasonable delay. The Court is also mindful of the decision in **Roland Brown's** case wherein the Court of Appeal declared that "There is no rule in our CPR 2000 that is comparable to the English Order 53, Rule 4 (1) which stipulates that an application for leave to apply for judicial review shall in any event be made within three months from when grounds for the application first arose. Consequently, the absence of any rigid time limit for invoking the supervisory jurisdiction in St Lucia is salutary, subject of course to the court's insistence on reasonable promptness in all the circumstances of each particular case and rejection of stale claims."⁴
- [20] There can be no doubt that the statement of the Court of Appeal in **Roland Brown's** case, applies with equal force to Antigua and Barbuda. I am cognizant of the fact that even though the CPR does not stipulate a time limit within which to bring an application for judicial review, the court "still retains a discretion to refuse leave for the making of an application on the grounds of undue delay if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person, or would be detrimental to good administration."⁵
- [21] As I have said, Dr Dorset submits that the refusal is likely to cause substantial hardship, and would substantially prejudice the rights of the Applicant. Ms Nelson, on the other hand contends that granting leave would be detrimental to good administration. It is her contention that the Applicant has sat on his rights and has thus prejudiced his own rights.
- [22] Looking at the grounds of the application, and the supporting affidavit and other filings, and upon considering the arguments put forward by counsel for the parties, I am of the view

⁴ Ibid, paragraph 21

⁵ Ibid, paragraph 22

that prima facie, the Applicant does not have an arguable case in that his case is based on the premise that on 30th October 2003, the Respondent agreed to accept a recommendation that the Applicant be upgraded to the position of Superintendent of Public Works. The Applicant repeated that allegation in paragraph 3 of his supporting Affidavit.

[23] The Exhibits tendered by the Applicant show that the Cabinet agreed to uplift the Applicant's salary to the level of Superintendent of Works. In this regard, it is arguable that the failure to implement the decision of Cabinet to uplift the Applicant's salary was unreasonable and unfair, and that he continues to suffer from the non implementation of the Cabinet Decision. However, I tend to agree with learned Counsel for the Respondent that the Applicant's Application is flawed in so far as it alleges that the Cabinet agreed to upgrade his post to that of Superintendent of Public Works. It is arguable that if the Applicant's salary were upgraded the technical effect would be an upgrade of his position to that of Superintendent of Public Works. However, I consider that if leave were granted to the Applicant, it would be on an erroneous allegation so far as the upgrade of the Applicant's post is concerned. The Application would require amendment. I do not think that this is a matter that can be rectified by invoking CPR 26.9 which gives the court the power to rectify a procedural error. This error cannot be classified as a procedural error. In any event, an amendment to the application may not suffice. The Applicant still has to cross another hurdle – that of delay.

[24] In relation to the issue of delay, I am also in agreement with counsel for the Respondent that there has been undue delay in bringing the application. Efforts to remedy the situation were made eight years ago with letters to the Ombudsman in 2004 and from the Applicant's Union in January 2012. But the Applicant took no further steps until October 2012 – nine years after the Cabinet decision was made. This delay, in my judgment is inordinate and unreasonable.

[25] The court is concerned with doing justice – justice to all litigants, not one, and thus an application for judicial review nine years after the Cabinet Decision was made would require the Applicant to show why he should have leave for judicial review at this late hour.

A period of over nine and one half years elapsed between 30th April 2003 when the decision was made to uplift the salary, and 11th October 2012 when the application for judicial review was filed. During this period, as clearly appears from the supporting affidavit of the Applicant, the Applicant sent a letter to the Ombudsman Dr Haden Thomas in December 2004, requesting his intervention. Additionally, a letter dated 19th January 2012 from the Antigua Trades and Labour Union, on behalf of the Applicant, was sent to Mr Whitfield Harris, Financial Secretary, seeking to have the matter favourably dealt with.

[26] No where in the Affidavit is there any evidence of any steps taken between April 2003 and December 2004; or between December 2004 and January 2012; or between January 2012 and 10th October 2012. As stated above, the application was not filed until October 11, 2012. In the premises, the court finds the delay in applying for judicial review to be inordinate and detrimental to good administration of justice.

[27] That being said, there is to my mind another consideration and it is this. If leave were granted, the court would be required to order that a Fixed Date Claim Form be filed within 14 days. This may not be prudent or appropriate, as there is a probability that such claim would be caught by the strictures of the Public Authorities Protection Act Cap 352 which requires claims against a public authority to be brought within six months next after the ceasing thereof. In this regard, I note that CPR 56.5 (1) stipulates that leave may be refused because of a statutory limitation of time which the application for judicial review may be made.

[28] If I am wrong to refer to the Public Authorities Protection Act, I still nevertheless find and hold that there was undue delay in making the application.

[29] I am deeply sympathetic to the Applicant, but I am not persuaded that I should exercise my discretion in his favour. I must refuse leave because of his unreasonable and inordinate delay in making the application to apply for judicial review. In my judgment, a detriment to good administration of justice will be brought about by the granting of such leave.

- [30] In coming to this determination, I am guided by **Roland Brown's** case, for its interpretation of CPR 56.5 (2); and which was applied by Thom J in **Griffith's** case.

CONCLUSION

- [31] In the foregoing premises, it is hereby ordered that the Applicant's application for leave to apply for judicial review be and the same is hereby refused with no order as to costs.
- [32] Notwithstanding my ruling, and although it is not necessary for my decision, I would encourage the Respondent to take necessary action to honour and or implement Cabinet Decision No 55 of 2003 in relation to the uplift of the Applicant's salary, with all convenient speed.


Pearlita E. Lanns
High Court Judge [Ag]