

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA**

CLAIM NO. ANUHCV 2010/0461

BETWEEN:

BINNO MERCHANT

Claimant

AND

**THE ATTORNEY GENERAL
THE PUBLIC SERVICE COMMISSION**

Respondents/Defendants

Appearances:

Dr. David Dorsett for the Claimant
Ms. Luann De Costa for the Defendants

2012: September 17

RULING

- [1] **REMY J.:** The Claimant Binno Merchant (Mr. Merchant) is employed with the Government of Antigua and Barbuda as an un-certified teacher at the Antigua Grammar School.
- [2] By Order of the Court dated the 12th June 2012, the Permanent Secretary in the Ministry of Education was substituted as the 1st Respondent in place of the Attorney General. The 2nd Respondent is the Public Service Commission.
- [3] Mr. Merchant was arrested and charged on the 25th March 2006 for the attempted murder of 25 year old Hilroy Jno Baptiste on 19th March 2006. By letter dated 30th May 2006, Mr. Merchant was interdicted by the 1st Respondent pending the outcome of his trial for

attempted murder. The charge of attempted murder was downgraded to wounding with intent.

[4] By Notice of Application filed on 16th July 2010, Mr. Merchant applied for leave to apply for Judicial Review. By Order dated 26th July 2010, Harris J. granted leave to Mr. Merchant to apply for judicial review. A Fixed Date Claim was filed on the 9th August 2010. An Affidavit in Support was also filed on the 9th August 2010.

[5] In his Affidavit, Mr. Merchant deposed that by letter dated 30th May 2006, he was interdicted by the Permanent Secretary in the Ministry of Education pending the outcome of his trial for attempted murder. He states that no such trial has ever occurred as the charge of attempted murder was downgraded to wounding with intent. He states that the charge of wounding with intent was subsequently dismissed by the Magistrate in 2008. He states that currently, there are no criminal charges pending against him. He further deposed that by a letter dated 25th July 2006 from the Permanent Secretary in the Ministry of Education, he was informed that the Public Service Commission (the Commission) had decided that he should receive no salary whilst he was on interdiction. He has remained on interdiction since 30th May 2006.

[6] Mr. Merchant contends that the Public Service has acted and is acting unlawfully in withholding his salary when his continued interdiction is unlawful. He seeks the following remedies:-

- a) An order of certiorari quashing the decision of the Permanent Secretary in the Ministry of Education by letter dated 30th May 2006 to interdict the Applicant.
- b) An order of certiorari quashing the decision of the 2nd Respondent to withhold the salary of the Applicant whilst on interdiction.
- c) An order that the Applicant be restored forthwith to his office.
- d) An order that all salary due to the Applicant from the time of his interdiction on 30th May 2006 be paid.
- e) Damages
- f) Interest pursuant to section 27 of the Eastern Caribbean Supreme Court Act;

- g) Costs
- h) Interest pursuant to section of the Judgments Act;
- i) Any other relief that the court deems fit.

[7] Mr. Merchant also made an application for interim remedies on the 18th October 2011; however, since some time had elapsed before the hearing of that application was scheduled, the same application was no longer pursued.

[8] According to Albert Fiadjoe, "...the power of judicial review may be defined as the jurisdiction of the superior courts to review laws, decisions, acts and omissions of public authorities in order to ensure that they act within their given powers. Broadly speaking, it is the power of the courts to keep public authorities within proper bounds and legality."¹

[9] A decision by a public authority may be found to be invalid on a number of grounds, but, as stated in Blackstone, "a commonly used classification is the tripartite distinction in **Council of Civil Service Unions v Minister for the Civil Service**² between:-

- a) illegality
- b) irrationality
- c) procedural impropriety"³

ILLEGALITY

[10] Mr. Merchant alleges that the Defendants have acted illegally. "Illegality" or "unlawfulness", arises where a decision-maker who must understand correctly the law that regulates his or her decision-making power and must give effect to it fails to do so. According to Blackstone (supra), at page 1157 paragraph 74.7 "an action or decision is said to be tainted by illegality if:

- a. It was purportedly taken under legislation which does not contain the requisite power or

¹ Albert Fiadjoe, Commonwealth Caribbean Public Law 3rd Edition p. 15

² [1985] AC 374

³ Blackstone Civil Practice 2011, page 1157 paragraph 74.6.

- b. It was purportedly taken under legislation which contains precise limits on the circumstances in which a power or duty can be used, and the action or decision in question either exceeds these limits or fails to perform the power or duty in a proper way."

[11] In her Affidavit filed on the 8th July 2011, the Chairperson of the Public Service Commission (the Commission), Mrs. George-Alexander deposed inter alia as follows:-

"The decision of the Commission was made in accordance with the powers and authority conferred by the Antigua and Barbuda Constitution and the Regulations made pursuant thereto and that I do believe the Commission acted properly and in accordance with those powers and authority."

[12] The Public Service Commission was established under section 99 of the Constitution of Antigua and Barbuda. Section 100 of the Constitution vests in the Commission the power, inter alia, "to exercise disciplinary control over persons holding or acting" in offices in the public service.

[13] The relevant sections of the Regulations made pursuant to the Constitution which are applicable to the instant case are as follows:-

"Second Schedule

Regulation 2 -

"If criminal proceedings are instituted against a public officer in any Court, proceedings for his dismissal upon any grounds involved in the criminal charge shall not be taken until the conclusion of the criminal proceedings and the determination of any appeal therefrom."

Regulation 5 -

5. (1) If the Permanent Secretary considers that the interests of the public service require that such public officer should cease forthwith to exercise the powers and functions of his office, he may interdict him from the exercise of those powers and functions, if proceedings for his dismissal are being taken or are about to be taken or if

criminal proceedings are being instituted against him. The Chief Establishment Officer should be informed of any interdiction as expeditiously as possible.

(2) An officer who is interdicted shall receive such emoluments as the authority empowered to dismiss him shall think fit.

(3) If the disciplinary proceedings do not result in the officer's dismissal or other punishment, the whole of the emoluments withheld from him shall be restored to him when the final decision is made. If the punishment is other than dismissal, he may be refunded such proportion of the emoluments withheld from him as the authority empowered to dismiss him shall think fit.

Regulation 6

"A public officer adjudged by a Court to be guilty of a criminal charge shall not receive any emoluments from the date of such judgment pending the decision of the authority which is empowered to dismiss him."

Regulation 8

(1) The following are the punishments which may be ordered as a result of the proceedings under this Part of these Regulations:

- Dismissal;
- Removal from the service
- Reduction in rank; reduction in salary
- Suspension of Increment
- Deferment of Increment
- Stoppage of Increment;
- Reprimand"

[14] The Permanent Secretary's letter to Mr. Merchant dated 30th May 2006 is hereby reproduced:-

"Dear Mr. Merchant

This serves to advise that you have been interdicted from the performance of your duties as Uncertified Teacher at the Antigua Grammar School with effect from 25th March 2006, as a result of your been arrested and charged for the attempted murder of Hilroy Jn- Baptiste, pending the outcome of your trial in the courts.

Please be guided accordingly,

Yours sincerely,

(sgd)
Permanent Secretary"

[15] A further letter dated 25th July 2006 addressed to Mr. Merchant is hereby reproduced:-

"Dear Mr. Merchant

Further to my letter of 30th May, 2006, interdicting you from the performance of your duty.

Please be advised that the Commission has decided that you should not receive any salary while you are on interdiction.

Yours truly,

(sgd)
Permanent Secretary"

[16] In his Affidavit filed on the 16th July 2010, Mr. Merchant deposed at paragraph 5 that the charge of wounding with intent was subsequently dismissed by the Magistrate in 2008. In paragraph 10, he deposes further: "I am advised by my Attorney, ... that the Permanent Secretary in the Ministry of Education has acted and is acting unlawfully in keeping me on interdiction when there are no criminal charges pending against me."

[17] In his Affidavit filed on the 7th July 2011, Mr. Kayode O'Marde, Crown Counsel II in the Office of the Director of Public Prosecutions in Antigua and Barbuda, deposed that Mr. Merchant's above statement that there are no criminal charges pending against him is untrue. Mr. O'Marde deposed as follows:-

Paragraph 3 - "On the 9th day of November 2009, the High Court Criminal Matter ANUCHR 2009/0068 – The Queen v Binno Merchant, was dismissed for want of prosecution. This was in relation to a charge of Wounding with Intent and in the alternative Unlawful Wounding.

Paragraph 4 - "The Virtual Complainant in that said matter, Mr. Neil Collins, however addressed the court and stated that he no longer wished to proceed with the matter, therefore causing the dismissal for want of prosecution.

Paragraph 5 - "The Applicant however has another outstanding Criminal Matter – ANUHCRCR 2011/ 00712844951873 – The Queen v Binno Merchant – in which he is again charged for Wounding with Intent. The charge states that on the 19th day of March 2006 at All Saints, the Applicant unlawfully and maliciously wounded Hilroy Jno Baptiste with intent to do grievous bodily harm. This matter was committed in the Magistrate's Court on the 7th May 2010 and all documentation was served on the Office of the Director of Public Prosecution on the 29th day of June 2011. The matter will therefore be placed on the Criminal Assizes for the upcoming term in September."

- [18] Additionally, in an Affidavit filed on the 11th July 2012, Ms. Shannon Jones, Crown Counsel II in the office of the Director of Public Prosecutions deposed that the trial of The Queen versus Binno Merchant commenced on 19th June 2012. On that same date, Mr. Merchant, through his Attorney at Law Dr. Dorsett, asked to change his plea of not guilty to one of guilty in relation to the second count on the indictment of unlawful wounding. The plea to the second count was accepted by the Director of Public Prosecutions and the first count of wounding with intent was withdrawn. The jury was then directed to return a verdict accordingly. Mr. Merchant was remanded until the 13th July, 2012, the date set for sentencing. The maximum punishment for the offence for which Mr. Merchant was convicted is five years imprisonment.
- [19] It is therefore apparent that not only did Mr. Merchant have a criminal charge pending against him, notwithstanding his assertion to the contrary, but that he has been convicted of the criminal charge.
- [20] The Court is of the view therefore, that there is no basis for concluding that the Commission acted outside of the powers conferred by the Constitution, or that it exceeded its powers in interdicting the Claimant. It is not for the Court to decide whether the decision of the Commission was right or wrong, but whether it was a decision which the Commission was lawfully entitled to make. Based on Regulation 5 (referred to in paragraph 13 above), the decision of the Permanent Secretary to interdict

Mr. Merchant was clearly within the scope of her authority and therefore lawful. The Court therefore finds that the Claimant is not entitled to an order of certiorari quashing the decision of the Permanent Secretary in the Ministry of Education by letter dated 30th May 2006 to interdict the Applicant.

[21] In light of the above, it is apposite to deal now with the third remedy sought by Mr. Merchant, namely, an order that the Applicant be restored forthwith to his office. In light of my finding in paragraph 20 above, this remedy is refused.

[22] This brings me to the second remedy sought by Mr. Merchant, namely an order of certiorari quashing the decision of the Public Service Commission (the Second Defendant) to withhold Mr. Merchant's salary whilst on interdiction. As briefly stated by Dr. Dorset in his oral submission, the issue is not what power the Public Service Commission has; it is whether the power is being exercised fairly.

[23] The Court notes that in his oral submissions before the Court on the 12th day of June 2012, Learned Counsel for Mr. Merchant did not address the issue of the illegality of the Defendants' decision. The submission of Learned Counsel was that the principal issue for the Court's determination is: "Is it fair for the public body in the exercise of its statutory authority to treat the Claimant as they did?" Learned Counsel referred the Court to page 80 of Fordham's Judicial Review, in particular to the dicta of Lord Diplock, in the case of **Bushell v Secretary of State for the Environment**⁴, namely that a public authority with a discretionary function owes "a constitutional duty to perform it fairly." Counsel contends that since the Commission is a creature of the Constitution, that duty applies to it. Counsel also referred the Court to the dicta of Lord Steyn in the House of Lords decision of **R (Anufrijeva) v Secretary of State for the Home Department**⁵, namely that "fairness is the guiding principle of our public law."

[24] In his written submissions filed on the 5th April 2012, which dealt with the application for interim payments, Dr. Dorsett contended that the 2nd Respondent's (the Commission's)

⁴ [1981] AC 75

⁵ [2003] UKHL 36

discretion as it relates to the emoluments to be received by the Applicant (Mr. Merchant) is "not a licence for the 2nd Respondent to do whatsoever it will." Learned Counsel contends that "the discretion must be exercised reasonably and in a manner that is not oppressive." Further that in the exercise of its discretion, the 2nd Respondent "must exercise sound judgment and at all times act reasonably." It is the further submission of Learned Counsel that: - "the fact that the regulation speaks in terms of "shall receive" suggests that the interdicted person shall be in receipt of certain emoluments. A person who is denied all of his emoluments (both in kind and in quantum) is not in receipt of any emoluments at all. The regulation provides that the interdicted person "shall receive" but in the instant case the Applicant has not received."

[25] Dr. Dorsett also submits that the Regulation 5(2) in the Second Schedule of the Regulations is to be contrasted with regulation 6 which provides that "a public officer adjudged by a Court to be guilty of a criminal charge shall not receive any emoluments from the date of such judgment pending the decision of the authority which is empowered to dismiss him. He contends that "the law is very clear; for the interdicted person there is one regime: he "shall receive." For the convict (which the Applicant is not) there is another regime: he "shall not receive any emoluments." He contends further that "the 2nd Respondent has unlawfully regimented the Applicant to the class of a convict when he is not." It is the further submission of Learned Counsel that "the 2nd Respondent in deciding that the Applicant ought to be deprived of all his salary from the moment of his interdiction implemented a decision that was plainly oppressive, manifestly disproportionate, and wholly repugnant to compulsory public law standards."

[26] Ms. De Costa, Learned Counsel for the Respondents, in her written submissions filed on the 5th April 2012, with respect to the application for interim remedies, contends that "...the Defendant Commission, in its wisdom and discretion, and understanding of the regulations which govern them and given the grave nature of the offence, made a grant (sic) to place the Claimant on interdiction without emoluments." In developing her submissions, Learned Counsel contends that the Defendant Commission has a discretion to place the Claimant (Mr. Merchant) on any of the aforementioned

punishments; including the ordering of a reduction in salary. Further, that the law contemplates a reduction in or a proportionate part of salary, and a fortiori, arguably includes a grant of 'no salary'. To allow the Defendant Commission the right to reduce a salary to nil strictu sensu is within the contemplation of that right. If interpreted otherwise, it would be tantamount to denying an Employer the right to dismiss an employee for serious misconduct without payment. Counsel further contends that the distinction must be made regarding the level or type of misconduct. She submits that in the instant case, the Claimant has been charged with a serious offence, the nature of which allows any Employer the right to terminate forthwith. However, Counsel contends, in light of the process, the Claimant has been given an opportunity in law to undergo the process and remain on the employment roll; and where exonerated, has the right to redeem all his monies.

[27] Ms. De Costa further submits "precedent supports the position of the Defendant Commission – viz, in withholding of emolument". Counsel cites the case of **S. Lake**⁶, although she does not provide the Court with a copy of the said report. She submits further that "interdiction without pay is not a foreign concept to civil service regulations and guidelines in other territories of the region and beyond... there have been instances of interdiction without pay by Public Service Commissions in other jurisdictions in the region, of which the court should take judicial notice." Counsel does not however, refer to any of these "instances", for the guidance of the Court. The further submission of Learned Counsel is that "should there be any award of emolument, it is the prerogative, function and role of the Defendant Commission and no other entity so to do; and this by addressing its own mind to the question and determining the quantum, in accordance with the law."

[28] Counsel refers to Regulation 8 and in particular to the "punishments" which may be ordered. However, Counsel's submission that "the Defendant Commission has a discretion to place the Claimant on any of the aforementioned punishments; including the ordering of a reduction in salary", is with respect, not correct. Regulation 8 (1) lists

⁶ [2002, Antigua and Barbuda PSC Report]

the punishments which may be ordered as a result of "proceedings under this Part of these Regulations". However, Regulation 2 provides that:-

"If criminal proceedings are instituted against a public officer in any Court, proceedings for his dismissal upon any grounds involved in the criminal charge shall not be taken until the conclusion of the criminal proceedings and the determination of any appeal therefrom."

- [29] In the instant case, there have been no disciplinary proceedings taken against Mr. Merchant. Therefore the "ordering of a reduction in salary" or any other punishment listed in Regulation 8(1) does not apply.
- [30] In addressing the issue as to whether or not the Commission exercised its power fairly, the Court must not lose sight of its role and function in judicial review. As stated by Gordon J.A. in the Court of Appeal decision of **Hugh Wildman and The Judicial and Legal Services Commission of the Eastern Caribbean States**⁷:- "The function of the court in judicial review is not to act as an appellate forum from the body whose decision is being challenged. If the process was fair and the decision not deviant, then the order sought under the judicial review must be refused."
- [31] Judicial review is concerned with the lawfulness rather than the merits of the decision in question, with the jurisdiction of the decision-maker and the fairness of the decision making process rather than its correctness.⁸
- [32] The concept of fairness is a common thread running through the grounds of illegality, irrationality and procedural impropriety.
- [33] "Fairness" in the context of judicial review proceedings does not mean that the Court is making a moral judgment on the rightness or wrongness of the decision or act. To do

⁷ (Civil Appeal No. 9 of 2006)

⁸ Caribbean Civil Court Practice 2011 – page 431.

so would be outside the remit of the Court. Fairness means, among other things, that the decision –maker must not violate the rules of natural justice. This includes allowing the Applicant an opportunity for a fair hearing when it is necessary to do so. It means giving reasons for decisions if the circumstances demand it. If, in the process of arriving at a decision, the decision-maker abuses his jurisdiction or discretion, excludes from his consideration matters which he is bound to consider and takes into account matters which are irrelevant, and does not act with procedural fairness towards those who will be affected by his decision, or fails to take into account the rules of natural justice, the decision will not be fair.

[34] It appears to be the submission of Ms. De Costa that the Commission, in the exercise of its discretion, is not subject to the supervision of the Court. With the greatest of respect, I disagree with her submission. According to Supperstone and Goudie⁹:-

“A Statute may confer a discretion without any apparent limits on its exercise: but the Court will not merely ascertain whether the act done is within the express words of the statute. It will strike down an act at common law if it is done in breach of the well-established principles of fairness (as they fall to be applied in the context of the case), reasonableness (as in the *Wednesbury* sense) or so as to run counter to the policy and objects of the act.”

[35] In similar vein, the learned writers of *De Smith's Judicial Review*¹⁰, state thus:-

“Where discretion is conferred on the decision-maker the courts also have to determine the scope of that discretion and therefore need to construe the statute purposefully.....Where the statute gives power to the decision-maker to act as “thinks appropriate”, or as he “believes” or “thinks fit”, the courts nowadays tend to require those thoughts or belief to be “reasonably and objectively justified by relevant facts.....Although in judicial review the courts should not put themselves into the position of the primary decision-maker and reassess the facts or decide the merits of the original decision...there is a growing “culture of justification” where even the broadest discretionary formula will not justify an arbitrary decision, or one that is not demonstrably justified (or at least demonstrably unjustified.)”

⁹ *Judicial Review* Fourth edition, page 108, paragraph 6.1.4

¹⁰ 6th edition, page 235, paragraph 5-021

[36] Regulation 5(2) in the Second Schedule of the Regulations provides that:-

"An officer who is interdicted **SHALL RECEIVE SUCH EMOLUMENTS** as the authority empowered to dismiss him **SHALL THINK FIT.**" (my emphasis). The Regulation clearly states that the officer "shall receive". It does not state that the officer "may receive". The word "shall" is mandatory. The Regulation clearly confers a discretion on the Commission with respect to the amount of emoluments as "the authority empowered to dismiss him" shall think fit. The authority in the instant case is the Commission (the 2nd Respondent). In the exercise of its discretion, the Commission must act fairly. It must act reasonably; it must not act contrary to the policy and objects of the Regulation. In the view of the Court, the highlighted words "shall receive", and "such emoluments" cannot reasonably be taken to mean that the officer "shall receive **NO** (my emphasis) emoluments."

If this were the intention, the Regulation would have said so in clear, precise and unambiguous language.

[37] I am fortified in my view by the wording of Regulation 5(3) which provides thus:-

"If the disciplinary proceedings do not result in the officer's dismissal or other punishment, the **WHOLE** of the emoluments withheld from him shall be restored to him when the final decision is made. If the punishment is other than dismissal, he **MAY** be refunded **SUCH PROPORTION OF THE EMOLUMENTS WITHHELD FROM HIM** as the authority empowered to dismiss him **SHALL THINK FIT.**" (my emphasis.)

[38] Surely, the public officer could not be refunded "such proportion of the emoluments withheld from him", should the relevant authority choose to do so, if he had received no emoluments in the first place! In the view of the Court, Regulation 5(3) clearly envisaged that the public officer would be paid some emolument.

[39] By way of contrast, Regulation 6 states quite clearly and unequivocally, that:-

"A public officer adjudged by a Court to be guilty of a criminal charge **SHALL NOT RECEIVE** (my emphasis) any emoluments from the date of such judgment pending the decision of the authority which is empowered to dismiss him."

[40] In the view of the Court, the intention of the Statute (Regulations) is for a clear distinction to be made between the situation where a person is interdicted but not convicted, and where a person has been convicted, or "adjudged by a Court to be guilty of a criminal charge." This certainly accords with a principle fundamental to our law, namely, that a person is presumed innocent until proven guilty. This principle is enshrined in section 15(2) (a) of the Antigua and Barbuda Constitution Order 1981 (the Constitution) which provides that:

"15 (2) Every person who is charged with a criminal offence –
(a) shall be presumed to be innocent until he is proved or has pleaded guilty."

[41] With respect to the words "shall think fit", Lord Wrenby in **Roberts v Hopwood**¹¹, had this to say:-

"... Thirdly and lastly, I point to the word "fit". That word means, I think, "fitting" or "suitable". The words "as they think fit" do not mean "as they choose." The measure is not the volition of the person vested with the discretion, it is the suitability or adequacy or fitness of the amount in the reasonable judgment of the person vested with the discretion."

[42] Based on the above, the Court is of the view that the highlighted words "as the authority ...**SHALL THINK FIT**" in Regulation 5(2) are referable to the **AMOUNT** of the emoluments which the Commission considers, in its judgment, to be suitable or adequate, taking into account all the circumstances of the case.

[43] The Court cannot dictate or fix the quantum of the emolument which the Applicant is to receive. To do so would be to usurp the authority of the Commission. As correctly submitted by Ms. De Costa, this is purely "the prerogative, function and role of the Defendant Commission and no other entity so to do." The Commission alone is vested with that authority. While the Court cannot usurp the Commission's authority to determine the quantum of emoluments, it can ensure that the Commission exercises its

¹¹ [1925] AC 578 at 613

discretion reasonably, fairly and in accordance with the statute under which it derives its authority, as well as with the principles of natural justice.

- [44] The Court notes further that since Mr. Merchant pleaded guilty to the criminal charge on the 19th June 2012, (see paragraph 18 above), by virtue of Regulation 5(2), his entitlement to the receipt of "such emoluments as the Commission shall think fit" would be up to that date. He would not be entitled to receive any emoluments from that date.

ORDER

- [45] In all the circumstances of this case, my Order is as follows:-

- a) The application for the order of certiorari quashing the decision of the Permanent Secretary in the Ministry of Education by letter dated 30th May 2006 to interdict the Applicant is refused.
- b) The application for the order of certiorari quashing the decision of the 2nd Respondent to withhold the salary of the Applicant whilst on interdiction is granted. This is subject to paragraph 44 above. Since it is not for the Court to make the decision as to the quantum of emoluments, the quashed decision is remitted to the Commission for its consideration.
- c) The application for the order that the Applicant be restored forthwith to his office is refused.

- [46] Costs to be agreed between the parties within 14 days, or otherwise to be assessed.


JENNIFER REMY
Resident High Court Judge
Antigua and Barbuda