

**IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE COLONY OF MONTSERRAT**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

Civil Claim No. 10 of 2007

Between

GERALDINE CABEY

Claimant

And

**HIS EXCELLENCY, THE GOVERNOR OF MONTSERRAT
THE ATTORNEY GENERAL**

Defendant

Appearances:

Mr. Jean Kelsick for the Claimant

Mrs. Sheree Jermotte-Rodney for the Defendants

2012: April 7

JUDGMENT

- [1] **REDHEAD J. (Ag.)** The Claimant in this action, is an Accountant by profession. She holds a Bachelor of Science degree and a MBA degree in finance from the University of the West Indies. She joined the Civil Service of Montserrat on or about 21st October 1982. In 1993 the Claimant joined the Treasury and from 1994 she was responsible for the preparation of the annual accounts in the Treasury Department.
- [2] In 1997 because of the volcanic crisis which led to massive evacuations of Montserratians from the Island, Delta, the main supplier of petroleum products to the Island eased operations on that Island. The Government of Montserrat undertook to manage the supply of fuel in Montserrat through the Emergency Department fuel operations.

[3] In or about 2000 there were queries relating to monies paid into the Emergency Department fuel operations. In April 2002 The Governor of Montserrat set up a Commission of Inquiry to enquire into this matter. It is apparent to me, that as a result of the report of that enquiry the Claimant was prosecuted on a four count indictment of theft of \$19,540.00 and four counts of false accounting. She was convicted by a jury of her peers on four counts of theft of \$13,360.00 and five counts of false accounting. Mrs. Cabey was sentence, to three months imprisonment on each count. The Claimant served her sentence. The Claimant appealed her conviction. The Court of Appeal allowed her appeal and consequently quashed her conviction. It seems that the Court of Appeal allowed the Claimant's appeal on the ground that at her trial no direction was given to the jury on the Claimant's good character.

[4] On 23rd February 2006, Mr. John Skerritt, Financial Secretary, wrote to the Permanent Secretary, Administration inter alia, as follows:

" ... In 2000 the Auditor General raised audit queries relating to the Emergency Department fuel operations queries and monies collected in respect of these operations by the Treasury Department. In response to those queries Mrs. Cabey submitted cash summeries/sheets which were found to be false and misleading and by her response dated 25th July 2001, submitted bogus photocopied treasury receipts cashier receipts. Several attempts were made by the Auditor General to obtain satisfactory explanations to these queries. They were unsuccessful and referred the matter to the Financial Secretary. The Accountant General was asked to respond satisfactorily to the Auditor or an independent Commission would be set up to provide the explanations. She did not reply and the matter was referred to the Governor as Head of the Public Service. She eventually responded but the explanations were still unsatisfactory. A commission of Inquiry was set up to look into this matter and Mrs. Cabey was placed on leave as of 28th March 2002. The Commission of Inquiry interviewed all parties to confirm whether the queries were valid and to provide an opportunity to Mrs. Cabey and other officers connected with the fuel operations to provide explanations with respect to these queries. The Report of the Commission was submitted to the Honourable Attorney General's office to determine whether there was a cause for criminal or disciplinary proceedings. Criminal proceedings were instituted against the Claimant.

".....Her trial lasted from 5th May to July 2004 the jury returned an unanimous verdict of [guilty] of nine out of the ten counts on the indictment. She was acquitted of one [count] of theft of \$6000.00. Mrs. Cabey was sentenced to three (3) months imprisonment on each of the other nine (9) counts. Mrs. Cabey served her sentence but appealed to the Court of Appeal on 18 grounds of appeal, she applied to the Court of Appeal to add a further ground making a total of 19 grounds of appeal. She was successful on the 19th ground in the appeal because her lawyer failed to produce evidence of Mrs. Cabey's good character."

Notwithstanding this result, the evidence regarding bogus receipts and false accounting remain real and valid and is important in terms of the management of Public monies and in holding public office. This matter alone makes it impossible to return her to the post of Accountant General because the public trust would have been severely eroded and could not be easily restored.

The second issue relates to the conduct and expressions of the officer with respect to her colleagues, staff at the Treasury and Senior Officers within the civil service. Examples of this can be gleaned from the record of the Court and to continue her employment could only make a hostile and untenable work environment.

In view of these circumstances, I am recommending that Mrs. Cabey be retired in the public interest under Regulation 35 of the Public Service Regulations. This recommendation is without prejudice to the entitlement of the officer to all salaries and allowances which but [for] her suspension from the performance of her duties within the Public Service, would have been paid to her.

The urgent issue to be addressed at this point is to pay all arrears of salaries and allowances due and to pay the current salary and allowances of the post until the report is duly considered by the Public Service Commission and a decision is taken as to whether or not she should be retired in the public interest. Also, efforts must be made to settle all legal costs as soon as possible after they are known.

John R. S. Skeritt
C. C. Her Excellency, The Governor
Honourable Attorney General."

[5] On 15th December 2006, Her Excellency, The Governor, Mrs. Deborah Barnes Jones, wrote:

"Dear Mrs. Cabey,

I have received from Public Service Commission (PSC) a report containing their consideration of a recommendation on the report from the Financial Secretary that in is it the public interest that you be retired from the public service.

I have carefully considered the PSC's report together with the following documents, among others, which were available to the PSC, to you (through your legal representatives), and the Financial Secretary, namely:

- a. The report of the Financial Secretary dated 23rd February, 2006 and other correspondence from him which were considered by the PSC in their deliberations.
- b. The written representations dated 26th July, 2006 and other correspondence from your legal representatives which were considered by the PSC in their deliberations.
- c. Correspondence exchanged between the Secretary of the PSC and the Financial Secretary and your legal representatives which the PSC considered in their deliberations.

- [6] Having done so, I have come to the determination that in all the circumstances, it is in the public interest that you should be retired from the Public Service. Accordingly, in the exercise of the powers conferred upon me by Section 16(1) of the Constitution of Montserrat and all the powers enabling me in that behalf, I hereby retire you from the Public Service, effective 31st December, 2006. You are entitled to three months salary in lieu of notice, your last day of service for computation is 31st December 2006.
- [7] Your retirement is without prejudice to any outstanding benefits to which you may be entitled including in particular your pension which in accordance with regulation 37 of the Public Service Commission Regulations shall be dealt with under the provision of the pension law.
- [8] I have reached my decision on the basis that the necessary mutual trust and confidence required for you to remain in post no longer exists. I have laid out below in more detail how I come to this decision.

Criminal Prosecution

- [9] I have in particular carefully considered and determined that as far as your criminal prosecution was concerned.
- (a) You were entitled to defend yourself vigorously within the permissible limit of the law, including attacking the character and credibility of the prosecution witnesses, and that in doing so, you should neither be punished nor be in fear of being punished.
 - (b) The quashing of your convictions by the Appeal Court in the eyes of the law, meant that you did not commit any of the fraud offences for which you were convicted by the jury of the High Court.
 - (c) In line with these facts, I note that every effort has so far been made to ensure that you did not, as a result of the criminal prosecution referred to above, suffer any loss of financial benefits otherwise accurable to you within the Public Service.

Public Interest Public Confidence and the Accountant General

- [10] I have considered the power and duties of the Accountant General under the Finance (Administration) Act and note that in addition that being the custodian and manager of public moneys, stamps, securities and other accountable documents, the Accountant General is the officer charged among things with –
- (a) Compilation and management of the accounts of Government
 - (b) Receiving of revenue and other monies into and making payment from the consolidated funds.

- (c) Giving of general and special accounting instructions in relation to public monies and accounts etc.
 - (d) Authorizing and maintaining all public and official Bank accounts of Government.
- [11] In the due and efficient execution of these statutory pecuniary duties, the Accountant General must of necessity work very closely with the Financial Secretary, in particular and with all other Accounting Officers of the different Ministries and Departments.
- [12] The nature of the office, the powers and duties of the Accountant General require the maintenance of public confidence not only in the office itself but also in the office holder. I am clear in my mind that what happens to the office of the Accountant General and how it is run is of great public interest. I have considered that it is of utmost public interest that the public confidence should not for any reason whatsoever be eroded or shaken. It is equally of utmost public interest that the Accountant General carries out her/his duties confidently and in an environment of mutual trust and respect with colleagues.
- [13] Given all that has happened in this matter, I have determined that it is reasonable that this will not (not) be the case if you, were to continue in the Public Service as the Accountant General.
- [14] I have come to this conclusion, notwithstanding the final outcome of the criminal prosecution, in respect of which your rights have been fully recognized and preserved. There have been consequences arising from the long drawn out process. The dynamics of the situation are not such that the clock can be turned back. Relationships have been damaged and confidence undermined. It is very unfortunate, but these matters cannot be ignored from the perspective of ensuring an environment conducive to the Accountant General's duties being carried out effectively and efficiently.

Other Relevant Considerations

- [15] In addition to the above, I also considered that prior to his report that you be retired in the public interest, the Financial Secretary asked that the possibility of your transfer to another department be explored. This was requested with a view to establishing whether there was any way in which a transfer could be managed in a way that would not amount to a demotion or otherwise be disadvantageous to you. This was done but without success in identifying such a post.

Ancillary Matter

- [16] I note from the Commissioner's report, that the post of Accountant General was briefly advertised. I consider this advertisement a regrettable administrative error. It had no bearing whatsoever on my determinations. I am comforted by the commission's indication that they were not part of that advertisement, and that it did not have any bearing on their deliberations and recommendation."

Yours sincerely,

Deborah Barnes Jones
Governor

Cc Mr. Jean Kelsick"

[17] On 6th May 2009, the Claimant filed a Fixed Date Claim Form which was pursuant to an application for judicial review of the decision made by the Governor on 15th December 2006 to retire the Claimant from the Public Service in the public interest.

[18] Mrs. Jermotte-Rodney argued that:

Judicial Review is a review of the decision making process itself; it is not an appeal of a decision on the merits. As Lord Brightman expressed in the case of **Chief Constable of North Wales Police v Evans...**¹ "Judicial Review is concerned not with the decision but the decision-making process."

[19] The Claimant claims against His Excellency, the Governor and the Attorney General the following declarations and orders:

- (a) A declaration that the decision to retire the Claimant as aforesaid is void.
- (b) A further declaration that the Claimant's retirement is ultra vires the provisions of the Public Service Commission Regulations or alternatively that it is contrary to the principles of natural justice and fairness
- (c) An order quashing the said decision;
- (d) An order reinstating the Claimant to the position of Accountant General with full back pay and benefits, including seniority for pension and other purposes
- (e) In the alternative damages for the 1st Defendant's illegal conduct, misfeasance in public office and breach of duty, consisting of full pay and benefits including all entitlement based on seniority from 18th day of January 2007 to the date of the Court's order granting damages and beyond.
- (f) Damages for anxiety, worry, distress inconvenience and loss reputation and financial loss sustained by the Claimant as a result of her retirement.

¹ 1982 3 ALL ER 141

Regulation 35(1) of the Public Service Regulations Stipulates as follow:

Retirement in the public interest

"Where it appears it is in the public interest that an officer should be retired from the Public Service, the Permanent Secretary or Head of Department (by letter forwarded through his Permanent Secretary) shall report the matter together with the reasons therefor to the Deputy Governor for consideration by the commission or authorized officer shall recommend to the Deputy Governor whether or not such officer should be called upon to retire."

The Montserrat Constitution Order 1989 provides inter alia:-

"16 The Governor acting in his discretion shall be responsible for the conduct, subject to the provisions of this Constitution, of any business of the Government of Montserrat with respect to the following matters –

(a)

(b)

(c)

(d)

(e) "The appointment of any person to any public office, **the suspension, termination of appointment dismissal or retirement of any public officer**, or the taking of any disciplinary action in respect of such an officer, the application to any public officer of the Terms or Conditions of employment of the public service (including salary scales allowances, leave, passages or pensions) for which financial provisions has been made, or the organization of the public service in so far as it does not involve new financial provisions." **[my emphasis]**

[20] I am firmly of the view that section 35 (1) of the Public Service Commission Regulations conflicts with Section 16 (1) (e) of the Montserrat Constitution Order. Section 35 (1) suggests that the Deputy Governor is tasked with the responsibility for retiring an officer in the public interest whereas Section 16 (1) (e) provides among other things "that the Governor, acting in his discretion, shall be responsible for conduct of the retirement of any public officer" Although the phrase "in the public interest" is not spelt out in that provision, it seems to me that the retirement of any public officer must embrace retirement in the public interest.

- [21] If this is so, and in my considered opinion, this must be correct. There is therefore a clear conflict between **Section 35 (1) of the Public Service Commission Regulations and section 16 (1) of the Montserrat Constitution Order**. The Constitution of Montserrat is the Supreme Law of Montserrat and to the extent that any other law is in conflict with the constitution, the Constitution prevails. Neither Learned Counsel for the Claimant nor Counsel for the Defendants has addressed this point.
- [22] It seems to me that Mr. John Skerritt, the Financial Secretary as Head of the Claimant's Department wrote to the Permanent Secretary Administration recommending that the Claimant be retired from the Public Service in the public interest. The Commission considered the report and made recommendations. The Governor considered the report and recommendations and retired the Claimant in public interest. It seems, to me, therefore, that the Deputy Governor, as suggested by Service 35 (1) of the Public Service Regulations, had no part to play in the retirement of the Claimant.
- [23] Mr. Kelsick, Learned Counsel for the Claimant in paragraph 17 of the statement of claim alleges:
- "The 1st Defendant's decision to retire the Claimant was illegal. The 1st Defendant interpreted the public interests requirement contained in Regulation 35(1) of the Public Service Regulations 1980, in a manner that was ultra vires the said Regulations in that the first Defendant applied a subjective instead of an objective test when construing the said requirement thereby ignoring the principles enunciated in the case of **R v Sussex Confirming Authority** and the principles of natural justice and fairness. Further or in the alternative, by applying a subjective test ignoring the said principles the 1st Defendant committed an error of law."
- [24] First of all, I make the observation that so far as section 35 (1) of the Public Service Commission Regulations (PSCR) is concerned, Learned Counsel for the claim is of the view that when the question arises for the retirement of an officer in public interest the matter should be addressed to the Governor and not the Deputy Governor.
- [25] The Public Service Commission Regulations CAP 01.06 amended S.35 and provides that the recommendation must be made to the Governor I was unaware of that amendment until I conclude writing this judgment. S 35 of the old law was referred to in submissions presented to me, and not CAP 01.06.

[26] I now address the contention by Learned Counsel for the Claimant that the first Defendant's (the Governor's) decision to retire the Claimant was illegal. I am of the view that this contention of Learned Counsel is that according to him, the first Defendant interpreted the public interest requirement contained in Section 35 (1) in a manner that was ultra vires the said Regulation in that the first Defendant applied the subjective rather than the objective test. In support of his contention Learned Counsel referred to **R v Sussex confirming Authority Ex parte Tamplin & Sons Brewery**².

[27] Learned Counsel referred to a part of the judgment of **Du Parcq J**³; in which he said:

"I agree, however, with Mr. Maurice Headley, that if the justices were to impose a condition which in the view of this court no reasonable person could honestly say was in the interests of the public. It would be a condition which the justices had no right to impose. I think it is plainly impossible to say that this has occurred here. It is fallacious to say that a condition is not in the public interest, or may not be in the public interest, if it is the case that a great many of those person who constituted the public are not directly affected by it and it is equally fallacious to say that a condition cannot be in the public interest if a great many members of the public neither know nor care anything about it"

[28] The above was clearly obiter. The facts in that case were as follows:

"The licencing justices confirmed the grant of a licence for the sale by retail of any intoxicating liquor which might be sold under a spirit (or retailer's) licence for consumption on or off the premises subject to certain conditions, one of which was in the following terms: 'There shall be no sale on the premises to any person other than travellers who hold current tickets issued by South Down Motor Services Ltd' who were the owners of the premises in respect of which the licence was granted. Objection was taken on the ground that a condition could not be attached to a justices' licence whereby the licensee was prohibited from serving intoxicating liquor to any but members of a limited class, and therefore, in imposing such a condition, the confirming authority was acting without jurisdiction."

[29] The Court unanimously rejected the objection holding that there was no excess or Usurpation of jurisdiction as the condition imposed after proper consideration by the confirming authority of the relevant facts of the particular case and the proper exercise of discretion under the **Licencing (Consolidation) Act 1910 s.14 (1)** which provides:

² AER 1937 Vol. 4 at page 106

³ At page 112

"The licensing justices, on the grant of a new justices on-licence, may attach to the grant of the licence such conditions, both as to the payments to be made and the tenure of the licence and as to any other matters as they think proper in the interests of the public ..."

[30] Lord Hewart LCJ at page 107 of the judgment in considering the above provision opined:

"It is therefore, quite obvious that the legislature contemplated that apart from the topic of payments to be made, and the topic of tenure of this licence, there might be generically different **matters by reason of which the licensing justices in the exercise of their reasonable discretion would think fit to impose conditions in the interest of the public.** Those words are manifestly very wide words and it seems to me to be exceedingly difficult to maintain that the condition cannot rightly be in the interest of the public unless it is held to be in the interest of the whole public ..." (my emphasis)

[31] I have great difficulty in appreciating how the above case could to be advanced for the proposition that the decision of the Governor was illegal because she interpreted the public interest requirement contained in the Regulation 35 (1) of the Public Service Regulations in a manner that was ultra vires the Regulations and that she applied a subjective instead of an objective test thereby ignoring the principles enunciated in the **Sussex Confirming Authority** case and the principles of natural justices. In my opinion the above case is only authority for the determination of "when a matter is in the public interest."

[32] In my opinion Section 35 (1) Public Service Commission Regulations and S 16 (1) of the Constitution under which the Governor acted do not impose a condition on the Governor for retiring the officer in the public interest.

[33] S. 35 (1) says in part

"where it appears it is in the public interest that an officer should be retired from the Public Servicethe Head of Department (by letter through his Permanent Secretary) shall report the matter together with the reasons therefor to the Deputy Governor [In my view this should read Governor] for consideration by the Commission and the Commission shall recommend to the Deputy Governor [Governor] whether or not such officer should be called upon to retire..."

[34] (2) Any such officer shall be afforded an opportunity of submitting to the Commission ... any representations he may wish to make regarding his proposed retirement and such representations shall be forwarded to the Deputy Governor [the Governor] sub section (2)

referred to above in my view addresses the question of the issue of natural of justice which was complied with.

[35] Section 16 (1) of the Montserrat Constitution Order provides – “The Governor acting in his discretion shall be responsible for conduct of any business of the Government of Montserrat to the following matters [and so far as is applicable to this matter]” –

[36] (e) the “appointment of any person to any public office the suspension, termination of appointment, dismissal or retirement of any public officer”

[37] It should be noted that neither in section 35 (1) PSCR nor in S 16 (1) of the Constitution of Montserrat imposes a condition on the Governor in the exercise of his discretion as was the situation in the case of **Sussex Confirming Authority (Supra)**. The law under which the justices acted, they were empowered to “attach to the grant of the licence such conditions as they think proper in the interest of the public....”

[38] In the instant case the Governor in receiving and reviewing the report from the Commission is tasked with using his/her discretion in determining whether or not the officer in question should be retired from the Public Service in public interest, nothing else.

[39] In my judgment the exercise of his discretion could only be challenged successfully on the ground that that discretion was improperly exercised, for instance, on the ground of improper motive, bias, bad faith or a breach of the rules of natural justice etc.

[40] On 3rd May 2006 Mr. Kelsick wrote to the Secretary of the Public Service Commission complaining that only 3 full working days were given for his client to submit her written representation, Mr. Kelsick in that letter wrote:

“It would therefore be prudent for the PS to allow us ‘sufficient time’ to research and prepare a detailed written submission for its consideration. To do otherwise would be contrary to the laws of natural justice. In the premises, we request that the date for submitting a written representation be extended to 26th May 2006....”

[41] By letter dated 4th May 2006 the Secretary to the PSC replied to Mr. Kelsick's letter agreeing to extend and extended the time to 26th May 2006 to submit written

representation. The allegation by Learned Counsel for the Claimant that the 1st Defendant in making her decision ignored the principles of natural justice cannot be sustained.

[42] Mr. Kelsick in his skeleton arguments submitted that the emanation of the recommendation that 'the Claimant be retired in the public interest' from John Skerritt personally was a clear breach of the requirement and corrupted the process from inception. Mr. Kelsick further submitted that Mr. John Skerritt's involvement in the Criminal trial, his admission in cross examination that he was embittered towards the Claimant disqualified him from any involvement in the matter.

[43] The first observation I wish to make is that my notes do not reflect that Mr. John Skerritt said before me, that he was embittered towards the Claimant. In addition, I do not recall Mr. John Skerritt saying any such thing. In fact Mr. John Skerritt said in cross examination.

"I think that she, Mrs. Cabey, was treated fairly by the Public Service. I do not personally bear your client any it will."

Again, he said in cross –examination:

"The recommendation [ie to the Public Service Commission] could only have been made by me. I think I was objective. I was not bitter..."

[44] In my view these statements are quite the opposite to what Learned Counsel is attributing to Mr. John Skerritt. In addition the Commission had this to say about Mr. John Skerritt:

"The correspondence from the Financial Secretary to the Permanent Secretary Department of Administration dated 21st February, 2006 inquiring whether there was any comparable position in the public service to which the officer may be transferred....

The Financial Secretary's quest to first explore whether the officer could be transferred should be commended....."

[45] This is to my mind is a demonstration of objectivity and impartiality on part of the Financial Secretary in dealing with issue of the Claimant's retirement from the Public Service. Moreover in my view as a demonstration of objectivity and impartiality Mr. John Skerritt wrote:

"The urgent issue to be addressed at this point is to pay all arrears of salaries and allowances due and to pay the current salary and allowances of the post until the report is duly considered by the Public Service Commission and a decision is

taken as to whether or not she should be retired in the public interest. Also, efforts must be made to settle all legal costs as soon as possible after they are known."

[46] Mr. Kelsick argued

"While it is considered that Section 35 of the Public Service Regulations permitted and required Mr. John Skerritt, as department head, to recommend the Claimant's retirement, the rules of fairness took precedence over the said section and called on him, in view of his irreconcilable conflict of interest, to recuse himself from any involvement in the process."

[47] Learned Counsel, Mr. Kelsick has advanced no authorities for his proposition that, "the rule of fairness [should] take precedence over the said section" Mr. Kelsick contended that Mr. John Skerritt's bias and bad faith towards the Claimant can be gleaned from statements made by him at trial. According to Mr. Kelsick, Mr. John Skerritt complained that the Claimant in attacking the character of the prosecution witnesses at trial was "a tactic of which she availed herself at her criminal trial."

[48] Learned Counsel, Mr. Kelsick, contended that "the choice of the words suggests that he [John Skerritt] held a grudge against the claimant "for using this tactic." By attacking the character of a witness in a criminal trial, is it a tactic? I would say it is, because in my view it is likely to cast doubt on the veracity of the testimony of the witness who is testifying against you.

[49] I, therefore, cannot accept counsel's contention that by Mr. John Skerritt saying that was a tactic employed by the Claimant suggests that he held a grudge against the Claimant. Counsel also referred to Mr. John Skerritt's affidavit in opposition to application for judicial review, he swore 'I did at the relevant time considered that a lot of hostility and ill will had been generated throughout the trial between the applicant [Claimant] and staff of the Treasury Department in addition to Senior Civil Servants and colleagues (Counsel's emphasis).

[50] Surely, in my view, that is an opinion expressed by Mr. John Skerritt from his observation. Was this a bias opinion or a hostile view? I think not. It is understandable, in my view, that if the Claimant attacked the character of a colleague, notwithstanding that it was necessary

for her, in her defence, to do so, that would engender bad feelings and perhaps hostility among her colleague towards the Claimant.

- [51] In my view there can be nothing wrong with the comment or opinion expressed by Mr. John Skerritt. Learned Counsel, Mr. Kelsick referred to the memo from Mr. John Skerritt to the Public Service Commissions in which he said:

“Notwithstanding this result (the decision of the Privy Council) the evidence regarding bogus receipts and false accounting remain real and valid and is important in the terms of management of public monies and in holding public office. This matter alone makes it impossible to return her to the post of Accountant General because public trust would have been severely eroded and could not be easily restored.”

- [52] In cross examination it was put to Mr. John Skerritt: “bogus receipts and false accounting – you were treating my client as having a criminal record?” Mr. Skerritt replied “No I was looking at the circumstances surrounding the audit queries which were raised by the auditor on whose expertise I rely.”

- [53] In cross examination Mr. John Skerritt said that Mrs. Cabey responded extensively to audit queries. She did not answer them satisfactorily. He said: “that was not my subjective opinion.” It was the Auditor General’s opinion who is the expert.

- [54] Finally on this issue Mr. Skerritt said in cross examination.

- [55] “My submission [to the PSC] was based on the observation of the Auditor General that she [the Claimant] failed to account for the funds and that she did not put the necessary system in place to safeguard government assets, that is, as it relates to fuel operations-cash assets.”

- [56] Throughout his written submission Mr. Kelsick dwelt at length on Mr. John Skerritt’s role, as head of Department, in presenting the report to PSC; this, in my opinion, was in an effort to clothe him with **mala fides** and improper motive for recommending the Claimant’s retirement from the Public Service in the public interest.

- [57] This can be gleaned from the following, among others: Mr. Kelsick argued Mr. John Skerritt harboured both bias and bad faith towards the Claimant. It was therefore contrary to the requirement of fairness for the recommendation that the Claimant be retired in the public interest.
- [58] Learned Counsel submitted that by virtue of admitting that his character had been attacked by the Claimant at the Criminal trial that he was embittered and could not work with the Claimant are instances of personal bias, according to Mr. Kelsick. I have dealt with the allegation that Mr. John Skerritt at no time said that he was embittered towards the Claimant. I cannot recall too, that Mr. John Skerritt said at anytime in evidence before me that he could not work with the Claimant. My notes do not reflect this either.
- [59] Mr. Kelsick also submitted that in law his bias automatically disqualified him from recommending the Claimant's retirement and being involved in the process that subsequently ensued.
- [60] The Commission considered the allegation of bias against the Claimant. The Commission observed:
- "The Officers written submissions hint that The Financial Secretary's recommendation and the basis given may be actuated by malice or reasons other than the need for actually retiring officer in the public interest. If this is - indeed the suggestion the commission does not agree."
- [61] Learned Counsel referred to **Judicial Review Handbook**⁴, the first point I wish to make having reviewed this authority is that Mr. John Skerritt was not the decision maker in the case at bar. He recommended and the recommendations go to PSC, an independent body. I do not perceive the PSC as a rubber stamp of Mr. John Skerritt's action or views.
- [62] In light of this observation I note that one of the members of the Commission is a lawyer of longstanding, I entertain no doubt that this Commission appreciated that it must act independently impartially, and did so. In this regard the Public Service Commission in its report wrote:

⁴ By Michael Fordham 4 Ed at page 1044

"It must be emphasized that the Public Service Commission is a statutory body which is distinct from the executive branch of Government. The Public Service Commission Regulations authorize the Commission to make recommendation to retire the officer in the public interest. This recommendation does not fall in the domain of the executive branch of Government."

[63] The Commission also addressed the question of alleged bias.

In its report the Commission again wrote:

"In his correspondence of 11th October 2006, the Officer's representative indicated that the post of Accountant General has been advertised since the recommendation for retiring the officer was made. This information came as surprise to the commission. This is a very important point, since the logical inference seems to be that the deliberations and the entire process may have been tainted with bias"

"The advertisement of the post of Accountant General would have been made by the Department of Administration and not the Commission. While it is accepted that advertising the post was somewhat impetuous and improper, the commission had absolutely nothing to do with the exercise and it had no bearing on its deliberations."

[64] Mr. Kelsick contended that the Governor erred in her letter to the Claimant by informing, the Claimant of her compulsory retirement shows that the Governor relied on the PSC's report, inter alia in arriving at her decision. In doing so she erred as the reasons given by the PSC for retiring the Claimant, where not in fact those relied on by her, [the Governor] according to Learned Counsel.

[65] Mr. Kelsick argued that the PSC's decision was grounded in the need to re-structure and reorganize the treasury and a breakdown in relationship between the Claimant and the Head of the Department ie. John Skeritt.

[66] The PSC determined three issues namely:

- (1) "Whether in all the circumstances the pecuniary duties and responsibilities of the officer would trigger sufficient interest from the public to qualify it as "public interest."
- (2) "Whether the need to restructure and recognize the treasury department to ensure effective management, efficient, use of resources and maintaining the public confidence and trust in the department and government is a basis for retiring the officer in the public interest."

(3) "Whether the alleged damage done to the relationship between the officer and her employer make unreasonable and counter productive to continue the employment relationship thus warranting retiring the officer in the public interest."

[67] In reference to the number 1 issue the commission was of the view, having analysed the meaning of public interest, "had no doubt that the pecuniary duties and responsibilities of the officer [the Claimant] are such that sufficient interest in the subject would be reasonably perceived from the public as a whole."

[68] On issue number one additionally the commission concluded: "Put simply, the Officer serves as the custodian of public moneys and there can be no doubt that the public would share a significant interest in such matters."

[69] In addressing the second issue, "the commission was of the view that where a decision is taken by the Government to restructure or reorganize a particular department, it should not be left to a public servant or even a body representing all the public servants to decide whether such restructuring or reorganization is necessary." Surely this is a decision which must be made by government of the day

[70] The argument advanced by the Officer's legal representative seemed to urge the commission to second guess the Financial Secretary, and by extension the Government. The commission is not equipped with the relevant information to do so, and arguments presented by the Officer's representative on this point were not convincing. The commission does not view the proposed reorganization as arbitrarily perceived.

[71] In considering the final issue, the commission understands that a significant degree of subjectivity is involved. Similarly, the objections raised by the officer in her written submissions are to a large extent subjective. From an objective standpoint, the Commission does not find it unreasonable that the continued relationship between the officer may be counter productive, the correspondence from the Financial Secretary to the Permanent Secretary in the Department of Administration dated 21st February 2006 inquiring whether there was any comparable position in the public service in which the officer may be transferred to some extent speaks to the issue. The Financial Secretary's

quest to first explore whether the officer could be transferred should be commended. It is significant, that the exploratory step was made before the recommendation to retire the officer. One needs only to look at paragraph 1.2 of the submissions dated 11th October 2006 from the officer's legal representative where it is stated:

[72] "1.2 Any suggestion that our client is under qualified would also apply to the FS himself. According to what he has written, his professional standing will have to be improved if he is to supervise this AG properly."

[73] The Commission commented as follows:

"These remarks do not provide comfort to the commission, that the officer truly believes that her continued employment will not affect the relationship between the head of her department and herself."

The commission having considered all the issues before it concluded:

In light of the foregoing the Commission recommends that the officer be accordingly retired in public interest.

[74] One of the issues that commission considered was whether the damage to the relationship between the **officer** and her **employer** make it unreasonable and counter productive to continue the Claimant's employment. Mr. John Skerritt, the Financial Secretary was not the Claimant's employer. The Government of Montserrat was.

[75] In this regard, what was before the commission Mr. John Skerritt in his memorandum to the Permanent Secretary Administration which went before the Commission wrote:

"The Second issue relates to the conduct and expressions of the officer with respect to her colleagues, **staff at the treasury and Senior Officers within the Public Service...**" [my emphasis]

[76] In my considered opinion the Financial Secretary was commenting on what he perceived to be the strained relationship between the Claimant and members of the staff in her department and other Senior Officers within the Public Service. The comment was not directed specifically towards his relationship with the Claimant.

[77] It is the Claimant, through her counsel, who suggested that there may be difficulty in supervising, working, with the Financial Secretary, if he did not improve his professional standing. This prompted the commission to make the observation that those remark did not provide it with comfort that the Claimant truly believes that her continue employment will not affect the relationship between her and the head of her department.

[78] I do not agree with Mr. Kelsick that the Commission's decision was based on the breakdown of the relationship between the Claimant and the head of her department – Mr. John Skerritt.

[79] What did the Governor consider before retiring the Claimant from the Public Service, in public interest? Her Excellency in her letter to the Claimant said that she carefully considered the PSC's report together with documents which were available to the PSC and to her (through her counsel) and the Financial Secretary. Among the documents looked at by the Governor are:

- (a) "The report of the Financial Secretary dated February 23rd, 2006 and other correspondence from him which were considered by the PSC in its deliberations.
- (b) The written representations dated 26th July, 2006 and other correspondence from your legal representatives which were considered by the PSC in their deliberations.
- (c) Correspondence exchanged between the Secretary of the PSC and the Financial Secretary and your legal representatives, which the PSC considered in their deliberations."

[80] In the Financial Secretary's report of 23rd February, 2006 to the Permanent Secretary, Administration which was considered by the PSC, the Financial Secretary wrote, inter alia:

"...the evidence regarding bogus receipts and false accounting remain valid and is important in terms of management of public monies and in holding the office. This alone makes it impossible to return her to the post of Accountant General because the public trust would have been severely eroded and could not be easily restored."

"...The second issue relates to the conduct and expressions of the officer with respect to her colleagues, staff at the Treasury and Senior Officers within the Public Service. Examples of this can be gleaned from the record of the Court and to continue her employment could only make for a hostile and untenable work environment."

[81] In my judgment it is quite obvious that the Governor did not only consider the PSC report in coming to the decision to retire the Claimant from the Public Service in the interest of the public.

[82] The question in my opinion is whether the Governor was, in law, permitted to consider anything other than the report in exercising her discretion to retire the Claimant from the Public Service.

[83] In my view there is nothing under the Public Service Commission Regulations which debars the Governor from considering anything other than the report of the PSC.

"It appears it is in the public interest that an officer should be retired from the Public Service [so far as is material] the Head of Department (by letter forwarded through his Permanent Secretary) shall report the matter together with reasons therefor to the Governor for considerations by the Commission or Authorized Officer shall recommend to the Governor whether or not such officer should be called upon to retire."

[84] I am fortified in my view, because if the Head of Department is required to forward the report together with reasons to the Governor for considerations by the Commission or Authorized Officer and the Commission or authorized shall make the recommendation to the Governor whether or not the officer should be called upon to retire.

[85] It, seems to me, that although the Commission or the Authorized Officer must make the recommendation to the Governor whether or not the Officer should be called upon to retire. It is obvious to me that the Governor is expected to consider the report. If not, why would the Governor be made a conduit for a report to the PSC.

[86] If the Governor is entitled to look at the report submitted by the Head of the Department, then it follows that the Governor in exercising her discretion under S 16 of the Montserrat Constitution is not confined to the consideration of the report to the Commission or the Authorized Officer in deciding whether or not to call upon the officer to retire. Once the Commission or the Authorized Officer, recommends the Officer's retirement, the Governor, in my view is entitled to look at other matters, in particular matters which were placed before the Commission, as in this case.

[87] An Authorized Officer is defined under the PSCR as:

"Authorized Officer" means one or more members of the Commission or any authority or a public officer to whom the powers of the commission have been delegated pursuant to section 5 of the Act."

[88] Mr. Kelsick submitted that:

"...for the PSC's inquiry to have been fair and regular, it was necessary for it to consider the allegations of dishonesty by looking at the queries made by the Auditor General and the answers provided by the Claimant and to receive independent evidence of break down of relationships. This material was not placed before it evidently because Mr. John Skerritt assumed there was no need to do so. (This is to my mind is highly speculative). He took the view that the conclusions he had drawn several years earlier respecting the said queries and answers and his more recently formed opinion on the breakdown of relationships were enough and therefore there was no need for the PSC to receive this evidence independently and adjudicate upon it. The PSC erred in accepting this. The First Defendant in turn (and much more seriously as she had the final say) adopted Mr. John Skerritt's error. This failure on the part of both the PSC and the 1st Defendant is fatal to their defence."

[89] One of the pegs, in my opinion, on which Learned Counsel for the Claimant hang his submission was, that it was necessary for the commission to consider the allegations of dishonesty in order for the inquiry to be fair and regular is that the answers provided by the Claimant regarding the allegations of dishonesty should have been before the Commission.

[90] It is patently obvious to me that the Claimant's answers were before this Auditor General in considering the queries which were found to be unsatisfactory. In my considered opinion, the PSC did more than just having the same unsatisfactory answers before it. Mr. John Skerritt in his recommendation that the Claimant should be retired from the Public Service wrote:

"Several attempts were made by the Auditor General to obtain satisfactory explanation to the queries. They were unsuccessful and referred the matter to the Financial Secretary. The Accountant General was asked to respond satisfactorily to the Auditor She did not reply and the matter was referred to the Governor as Head of the Public Service. She eventually responded but her explanations were still unsatisfactory."

- [91] As I said above the commission did more than just having the same unsatisfactory answers placed before it.
- [92] According to the Financial Secretary in his Memorandum to the Permanent Secretary Administration said:
- "The Commission of Inquiry interviewed all the parties to confirm whether the queries were valid and to provide an opportunity to Mrs. Cabey and the other officers connected with the fuel operations whether the queries were valid and to provide explanations with respect to these queries"
- [93] In my considered opinion having regard to what I have just referenced above it cannot be seriously argued that the commission did not consider the question of dishonesty.
- [94] Mr. Kelsick, Learned Counsel for the Claimant also contended that it was necessary for the Commission "to receive independent evidence of breakdown of relationship." This is, in my opinion, obviously in response to the reference by the Financial Secretary's memorandum to the Permanent Secretary Administration recommending the retirement of the Claimant from the Public Service Mr. John Skerritt wrote:
- "...the conduct and expressions of the officer with respect to her colleagues, staff at the Treasury and Senior Officers within the Public Service ... could only make for hostile and untenable work environment."
- [95] This, in my view, is what Mr. Kelsick was referring to as the breakdown of relationship. It should be observed that the Financial Secretary never said that there was a breakdown of relationship. He said "**her (the Claimant's) employment could only make a hostile and untenable work environment.**" (my emphasis)
- [96] In my judgment the Financial Secretary was, as Head of the Department, expressing a professional opinion which he was entitled and competent to do. It is either that, this opinion was accepted or rejected by the Commission and ultimately by the Governor. I am unable to appreciate therefore, what independent evidence could have been led in this regard to refute, if that is what the evidence is meant to do, the professional opinion of the Financial Secretary. Learned Counsel contended that there was ill will against the Claimant, I suppose he is alleging that ill will was demonstrated by the First Defendant and

Mr. John Skeritt because, in my view this is not spelt out by the Claimant. Learned Counsel for the Claimant in his Skeleton Argument submitted that:

"The Court is asked to infer that these allegations of ill will (ie arresting the Claimant at a time when she had young children and at a time when she was pregnant) are true and that they provide evidence of 1st Defendant's ill will towards the Claimant. It must be remembered that under the Montserrat Constitution order 1989 the 1st Defendant had ultimate responsibility for and control of the police. The Court is asked to infer that he abused his authority to punish the Claimant for asking legitimate question about the financial propriety of his office."

[97] I do not understand what Learned Counsel was alleging when he asked the court is asked to infer "that he abused his authority to punish the Claimant for asking the legitimate question about the financial propriety of his office.

[98] However, I am absolutely clear in my mind that the cross examination of Superintendent Charles Thompson was an attempt by Learned Counsel for the Claimant to show improper motive on behalf of the police officer in dealing with the Claimant. For instance it was put to the officer that after the arrest of the Claimant he left his office and was ordered back by his superior to the office and grant bail to the Claimant. The officer denied the suggestion. As I understand it, this was put to the officer to show that it was improper to arrest the Claimant on 23rd December 2002 in light of the fact that the Claimant had young children and at the time was pregnant. It was also suggest to the officer that the Claimant was put in a cell. This officer denied.

[99] The bottom line is that the Claimant was granted bail the night of her arrest, undoubtedly all these questions and suggestions were put to Mr. Thompson to show that he had a bias towards the Claimant. Even if I were to accept that, and I do not, I cannot see how the Police Officer's bias affect the Governor's, decision in this matter? Unless in my view that it can be shown that the officer was acting under the dictates of the Governor and was carrying out the orders of the Governor.

[100] I make the observation, that if that were to be true, it would have a serious indictment on the conduct of the Governor and the Police Officer who should act independently, instead

would have been carrying out the dictates of the Governor thereby causing a serious infraction between the executive and a branch of the law enforcement.

- [101] In fact it was put in cross examination to Superintendent Charles Thompson by Mr. Kelsick that he was in communication with the Governor with regard to the investigation of the Claimant. A suggestion stoutly denied by Superintendent Charles Thompson.
- [102] I make the observation that it would be a sad day for democracy in Montserrat, a young thriving democracy, if a Governor could dictate to Police Officers what course of action they should take in respect to any person suspected of a Criminal Offence.
- [103] I go further to say that such allegations of impropriety on the part of the Governor in this regard should not be made lightly unless there is cogent evidence to support this. To do otherwise, in my view, is to undermine the sanctity and the very fabric of the democratic society.
- [104] Finally, I address one final issue the Claimant in my view has suggested that she was treated unfairly, that she was singled out for harsh treatment, when other Officers in Government were accused of Criminal offences and were allowed to remain in their respective posts. The names of the Officers were mentioned by the Claimant. But in my view, for this judgment is not necessary to mention their names. All I wish to say is this every case must depend and must be decided on its own particular and circumstance.
- [105] In the case at bar, it was stressed by everyone concerned in favour of the application for the retirement of the Claimant, that because of her post as Accountant General having regard to all that has transpired, the public confidence in the Claimant and in her office would have been seriously undermined and therefore it was in the public interest to call upon the Claimant to retire. In fact, it is my opinion, that the moving force behind the retirement of the Claimant as expressed by the Governor th at "the mutual trust and confidence required for you to remain, in the post no longer exists.
- [106] Nothing that has been advanced before me, including the authorities which I have mentioned and also the following which I have consulted –

Angelia Iniss v Attorney General of Saint Christopher and Nevis ⁵
Three Rivers District Council and Others v Bank of England ⁶
Fraser v Judicial and Legal Services ⁷

— persuaded me that the Governor's decision was illegal or ultra vires Regulation 35 (15) of the Public Service Commission Regulations.

[107] For example if a teacher is charged with a case of abusing children. The evidence against that teacher is strong. That teacher is tried but for some reason or another that teacher is acquitted of all the offences of child abuse, I do not think it would be prudent to put that teacher back to teach children.

[108] While I accept that an acquittal is tantamount to the person being charge as having committed no offence particularly when there is no retrial. However, in the case at bar it made no sense to order a retrial as the Claimant had served her sentence. However an acquittal is not a declaration of innocence.

[109] I address **Section 43 of the Public Service Regulations**

“An Officer acquitted of any court of a criminal charge shall not be dismissed or otherwise punished in respect of any charge of which he has been acquitted, but nothing in this regulation shall prevent his been dismissed unless otherwise punished in respect of any other charge arising out of his conduct in the matter, unless such charge is substantially the same as that in respect of which he has been acquitted.”

[110] Mr. Kelsick submitted on behalf of the Claimant “as the charge reasons of dishonesty and false accounting relied on by both Mr. John Skerritt in making his recommendation and the 1st Defendant in retiring the Claimant were substantially the same as the criminal charges of which the Claimant was acquitted (sic) her retirement/dismissal was ultra vires this provision and therefore illegal.

[111] Mrs. Jermotte-Rodney in her written submissions argued that there were no disciplinary proceedings instituted and no disciplinary action was taken against the Claimant and the Claimant was not dismissed nor was she punished in respect of any charge of which she

⁵ Privy Council No. 29 of 2007

⁶ 2000 3 ALL ER 1

⁷ 2009 UK PC 16 May 2005

was being acquitted. A decision was taken to retire her in the public interests under Regulation Section 35. I agree with this submission by Learned Counsel for the Defendants.

[112] In my view a distinction must be drawn between dismissal and retirement in the public interest. When one is dismissed from the Public Service because of wrongs committed by the officer while in office, that officer loses everything, so far as I am aware. The Officer loses his pension rights and gratuity. In the case at bar, the Claimant's pension and gratuity remain intact. There is therefore no punishment.

[113] In view of the foregoing the declarations and orders claimed by the Claimant are refused. Each party to bear his/her own Costs.


Albert Redhead
High Court Judge