

SAINT LUCIA

Claim No: SLUHCV 2009/0730

Between:

Roland Browne

Claimant

and

**(1) The Attorney General
(2) The Public Service Commission**

Defendants

Appearances:

**Mr. Horace Fraser for the Claimant
Mr. Rawlston Glasgow for the First Defendant
Mrs. Grace Ward-Glasgow for the Second Defendant**

**2010: January 4th, March 11th,
August 6th**

RULING

- [1] **WILKINSON, J.:** The Claimant filed an application on August 21st 2009, seeking leave to file a claim for judicial review against the decision of the Second Defendant to effect his transfer from the Department Probation and Parole to the Bordelais Correctional Facility and which transfer was procured in bad faith and with procedural impropriety by the First Defendant. At the time the application was filed the Supreme Court Registry was not fully functional due to ongoing refurbishment and I am informed that only urgent applications, and similar matters were being attended to. When the application first came up for leave at 26th October 2009, I informed counsel that there had not been compliance with CPR 2000 Part 56.3(3). Thereafter at 4th January 2010, I made the following order:

“IT IS HEREBY ORDERED:

1. Leave be granted to Applicant to file a claim for judicial review against the decision of the Second Defendant to effect the transfer from the Department of Probation and Parole to the Bordelais Correctional Facility.
2. The Court further orders that the time for making application for judicial review is 14 days from the date of this order.
3. The Court further directs all proceedings connected to the said decision be stayed until after the hearing of the matter or until further order.
4. The Court further directs that the hearing of the said fixed date claim form is fixed for March 11th 2010. “

[2] Notwithstanding that I did not grant leave to join the First Defendant in the application for judicial review, the Claimant joined the First Defendant as a party. Mrs. V. Georgis Taylor-Alexander filed an affidavit on 27th January 2010, on behalf of the First Defendant and which in short objected to the joinder of the First Defendant because no leave had been granted to join the First Defendant in the order of 4th January 2010, and secondly, the First Defendant was not the decision maker in the matters about which there was complaint.

[3] Ms. Valerie Orie, the secretary of the Second Defendant, on its behalf filed two affidavits, the first on 11th February 2010, and the second on 8th March 2010. I have extracted for the purposes of this ruling the matters deposed which are relevant. She said that the transfer complained of was a lateral transfer classified as Grade 14, and that the transfer was with effect from 1st September 2008, and the Claimant became aware of the transfer at or about 16th September 2008. The Claimant by letter dated 1st October 2008, and issued by his attorneys-at-law, stated his objection to the transfer on the basis that the post of clinical social worker II was a non-existent, non-travelling position, there existed no job description for the position, and informed of the Claimant's intention for initiate legal proceedings against the Second Defendant at the expiration of one month thereof if the Second Defendant failed to do as demanded and review its decision. That the Second Defendant responded on 20th October 2008, to that letter informing the Claimant through his attorneys-at-law, that the post of clinical social worker II was an established public office which was part of the structure of the Ministry of Home Affairs and National Security, that officers are liable to be transferred to any post of equivalent grade in the public service, and that the post of probation officer III and clinical social worker II are posts of the same grade.

[4] In her second affidavit Ms. Orie focused on the substantial hardship, and detriment to good administration that would be brought about if the Claimant was allowed to pursue his claim for judicial review. She said:

“7...and interference with the decision to transfer shall be detrimental to good administration and shall cause substantial hardship and prejudice the rights of the officer who was appointed to replace the Claimant as Probation Officer III as well as the rights of

other officers who replaced the Claimant's successors at the Probation and Parole Services. In fact with the transfer of the Claimant there was a "domino" effect in the appointments at the Probation and Parole Services as other officers were appointed to the vacant positions as they arose....

8. There are only two positions of Probation Officer III at the Probation and Parole Services and neither position is vacant. These two positions are held by officers by the names of Terrence Louisy and Yolanda Jules-Louis who were appointed and assumed the positions from September 2008 and who have been paid the salary attached to those positions from that date.

9. ...that by application dated 10th December 2008, approximately three (3) months after becoming aware of the Commission's decision, the Claimant attempted to appeal the decision of the Commission to the Public Service Board of Appeal....

10. ... that the Public Service Board of Appeal found, and with which the Claimant agreed, that it lacked jurisdiction to hear the appeal....

11. I am further advised by Legal Counsel that notwithstanding the attempted appeal to the Board of Appeal there was unreasonable delay in making the application for judicial review as the initial process was wrong and useless and not a valid reason for failing to apply to have the decision of the Commission reviewed judicially. I am further advised by Legal Counsel and verily believe that based on the Claimant's letter of October 1st 2008, the Claimant was aware that he had recourse available to him by virtue of judicial review proceedings which he failed to avail himself of without delay."

[5] It is not doubted that the Claimant recognized that he had the hurdle of delay to crossover in his application for leave for judicial review. In his affidavit filed 21st August 2009, he said:

" 7. That from September, 2008 to the 30th July, 2009, I protested the said transfer at the Department level and at the Public Service Commission. I also got the union involved in the negotiations when that failed. (O) on the 10th December 2008 I filed an application before the Public Service Board of Appeal for an extension of time to appeal the Public Service Commission's decision to transfer me. On the 16th June, 2009 I withdrew that application because I was at the wrong forum. On the 16th June 2009 I requested permission of the Public Service Commission to bring a civil claim against that body and they responded to that request on the 26th June, 2009.

8. That the delay in making this application for leave to make a claim for judicial review of the decision of the Second Respondent and the role of the First Respondent in procuring the making of the said decision was largely due to the matters outline in paragraph 7 of this affidavit. The delay was not intentional or deliberate and at any rate inordinate in the circumstances of the case.

9. That I am advised by counsel and verily believe that I have no alternative redress available to me within the Public Service or at the level of the Public Service Commission."

[6] The Claimant's attorneys-at-law letter of 1st October 2008, stated:

"TAKE FURTHER NOTICE that if the Commission fails to do as is demanded, the Commission is hereby advised that our client intends to initiate legal proceedings against the Commission at the expiration of one month of the date first above-written to review the Commission's decision to transfer him to the extent that his service within the Public Service has been made redundant."

[7] At 11th March 2010, the First and Second Defendants argued their positions outlined in their affidavits. I indicated that I continued to hold the view that the First Defendant ought not to be a party to the suit since the First Defendant was not the decision maker. Counsel for the Claimant continued to argue at length that the First Defendant ought to be joined because of the matters pleaded in the Claimant's affidavit. I eventually gave Counsel leave to file submissions to support his position on or before April 16th 2010. The submissions were filed on April 15th 2010. Therein counsel concluded that his research revealed that the courts have only resorted to his position when it proved difficult to review a decision in the normal way because of the presence of an ouster clause, or the presence of some limitation in reviewing the power of the Crown, both of which were absent from the Claimant's case and thus the Claimant's argument for joinder of the First Defendant was not sustainable. There is therefore only left the issue of delay for the court to address.

Issue

[8] Whether there has been "unreasonable delay" by the Claimant in filing his application for leave for judicial review.

Law

[9] When considering an application for leave to file a claim for judicial review, CPR 2000 Part 56.5 provides the following:

"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.(Emphasis is mine.)

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

- (a) **be detrimental to good administration;** or
- (b) **cause substantial hardship to or substantially prejudice the rights of any person.**
(Emphasis is mine.)

[10] In regard to the specific issue of delay, The Civil Court Practice 2005 paragraph CPR 54.5[2] states:

" Delay at the permission stage. The limit given by CPR 54.5(1) is promptitude: the reference to an application being within three months appears secondary to that requirement. Permission may be refused on the basis of delay under CPR 54.5 (1) even though the application is made within three months. This was recognized in *R (on the application of Burkett) v. Hammersmith and Fulham London Borough Council* [2002] 3 All ER 97, in which LORD STEYN at paragraph 18 recognized the good sense of the approach of MR. DAVID PANNICK QC (sitting as a deputy judge of the High Court) in *R. v. Rochdale, ex p B, C and K* [2000] Ed CR 117. In that case MR.PANNICK had said that, absent very exceptional circumstances, it was absolutely essential that judicial review proceedings in respect of the allocation of school places be heard and determined before the school term started....*R v. Independent Television Commission, ex p TVNI Ltd.* (1991) Times, 30th December, CA supports the proposition that the facts in context reveal whether an application has been made promptly or whether or not three months have elapsed.

CPR 54.5[3] **When do ground to make the claim first arise?** *Burkett's* case supports the proposition that the resolution to grant planning permission is not the moment at which time begins to run but, rather time begins to run from the grant of permission (which has legal effect whereas a resolution does not)....a body which knows of but fails to alert another body to the potential error of law by that body may find the court exercising a strict control over its process after the formal decision or grant has come to be made and challenged."

[11] In *R. v. Stratford-on-Avon DC ex parte Jackson* [1985] 1 W.L.R. 1319 at p.1319 Ackner L.J. said:

"... we have concluded that whenever there is a failure to act promptly or within three months there is undue delay (and) even though the Court may be satisfied... that there is good reason for that failure nevertheless the delay, viewed objectively, remains "undue delay" The Court therefore retains a discretion to refuse to grant leave...."

[12] In *Jones and Others v. Solomon* [1991] LRC (Const.) p.646 at p.679 Sharma JA said:

"It is well established, and all the authorities speak with one voice, that where an application for judicial review is sought it is fundamental and critical to this sort of relief that it should be made promptly; and that the power to grant leave is discretionary and not as of right.

In *R. v. Senate of the University of Aston, ex p Roffrey* [1969] 2 All ER 964 at 976 Donaldson J said:

"The prerogative remedies are exceptional in their nature and should not be made available to those who sleep on their rights."

In the same case Blain J said at 979:

"This court does not lightly exercise its discretion to grant prerogative orders – not only is real injustice a necessary ingredient ... but it should in my view only be granted where diligence is shown by an applicant in real need of the remedy."

- [13] In relation to the second limb, Part 56.5(2) (a) and (b) which I must consider, in the present case, I find *R. v. Dairy Produce Quota Tribunal for England and Wales Ex.p Caswell* [1990] 2 A.C 738 at p.749 to be very instructive. Lord Bridge states:

"Lord Diplock pointed out in *O'Reilly v. Mackman* [1983] 2 A.C.237, 280-281:

'The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision.' I do not consider that it would be wise to attempt to formulate any precise definition or description of what constitutes detriment to good administration. This is because applications for judicial review may occur in many different situations, and the need for finality may be greater in one context than in another. But **it is of importance to observe that section 31(6) recognizes that there is an interest in good administration independently of hardship, or prejudice to rights of third parties, and that the harm suffered by the applicant by reason of the decision which has been impugned is a matter which can be taken into account by the court when deciding whether or not to exercise its discretion under section 31(6) to refuse the relief sought by the applicant. In asking the question whether the grant of such relief would be detrimental to good administration, the court is at that state looking at the interest in good administration independently of matters such as these. In the present context, that interest lies essentially in a regular flow of consistent decisions, made and published with reasonable dispatch; in citizens knowing where they stand, and how they can order their affairs in the light of the relevant decision. Matters of particular importance, apart from the length of time itself, will be the extent of the effect of the relevant decision, and the impact which would be felt if it were to be re-opened.'**(Emphasis is mine.)

Findings

- [14] Notwithstanding the difference in language in the Rules governing the grant of an application for leave to file judicial proceedings, the authorities cited make it abundantly clear that the Claimant was duty bound to act with promptness in filing his application. That the Claimant understood the need to act with some measure of promptness, is to be gleamed from his letter of October 1st 2008, wherein he, himself, sets up the time-frame within which he would commence legal proceedings. His letter, I dare to state, was in the nature of an ultimatum to the Second Defendant.
- [15] On the important matters which I am required to consider, when delay is an issue, that is whether there is likely to be any detriment to good administration, or cause of substantial hardship or substantially prejudice to the rights of any person, I am guided by Lord Diplock in this regard. The evidence of Ms. Orie is clear. A number of persons have already been appointed following the transfer of the Claimant, therefore the Second Defendant would have to reopen all of the transfers and other connected matters and especially so in light of the fact that there are only two probation officer III posts, and both are presently filled. Then of course, there would be the effect on the individuals themselves, and amongst the issues arising in relation to them would be removal of benefits including salary increases which they may have obtained.
- [16] Although the Claimant in his affidavit sought to address the issue of delay, he did not address the matters good administration, substantial hardship, or substantial prejudice likely to be suffered by third parties
- [17] After setting his time-table for when he would commence legal proceedings, the Claimant appears to have had a change of mind and sought resolution through other avenues. Unfortunately for him, this did not stop time from running against him in relation to filing his application for leave to file judicial review proceedings. He therefore has to bear the consequences.
- [18] Having now heard counsel inter parties on the matter of leave which I had previously granted, having regard to the facts, and in particular the Claimant's own undertaking to commence legal proceedings within one month of 1st October 2008, I find that there has been unreasonable delay by the Claimant and which delay would be a detriment to good administration, could cause substantial hardship and substantially prejudice the rights of third parties. I must therefore reverse myself. The Claimant's claim form filed 11th January 2010, is struck out.


Rosalyn F. Wilkinson
High Court Judge