

SAINT LUCIA

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

CLAIM NO. SLUHCV 2009/0762

BETWEEN:

[1] **FIRE SERVICE ASSOCIATION**
[2] **SHANE FELIX**

Claimants

and

[1] **PUBLIC SERVICE COMMISSION**
[2] **CHIEF FIRE OFFICER**
[3] **THE ATTORNEY GENERAL**

Defendants

Appearances:

Mrs. Cynthia Hinkson-Ouhla for the Claimants;
Mrs. Grace Ward-Glasgow for the First Defendant, Mrs. Brenda Portland-Reynolds and with her
Mr. Dwight Lay for the Second Defendant and Third Defendant.

.....
2010: February 15th
March 15th
.....

RULING

[1] **WILKINSON, J:** The Claimants filed on September 3rd 2009, pursuant to CPR 2000 Part 56.3 an application for leave to apply for judicial review of the decision of the First Defendant to appoint Mr. Fernando James to the position of sub-officer effective April 1st 2009, in the Fire Service and for other matters connected therewith. At paragraph 5 of the application the Claimants stated that there were no alternative forms of redress.

[2] I have stated it orally before, and now state it again in writing. The application must be in the prescribed format of Form 6 of the CPR 2000. I refer counsel to the judgment of Barrow JA in **Beach Properties Barbuda Ltd. et al v. Laurius Master Fund Ltd et al**. Civil Appeal No. 2 of 2007 where Barrow J stated that the practice of not setting out the grounds of the application on the notice of application is "a completely unacceptable practice. It is an abuse of the process of the court that should attract condign consequences."

[3] The application was supported by an affidavit made by the Second Claimant, and filed September 3rd 2009. He deposed that he was making the affidavit on both his own behalf, and on that of the First Claimant. He described himself as a Leading Fire Fighter and secretary of the First Claimant. He deposed that the procedure for appointment was not followed and sought to describe the procedure that ought to have been followed. He also deposed to other irregularities connected with the appointment of Mr. James, particularly his work roster and the fact that he lacked a driver's licence, a matter which was contrary to policy. In the affidavit the relief sought was as follows:

- (1) An order appointing First Claimant or alternatively himself as a Representative Party.
- (2) A declaration that the Chief Fire Officer's power to promote under section 17(2) of The Fire Services Regulations is unconstitutional.
- (3) A declaration that the appointment of Mr. Fernando James by the Public Service Commission to the position of sub-officer is a nullity.
- (4) Certiorari quashing the Public Service Commission's appointment of Mr. Fernando James based on the Chief Fire Officer's recommendation.
- (5) Mandamus compelling the First and Second Defendants to follow the procedure for promotions specified under Section 17(8) et seq. of The Fire Service Regulations to select and appoint a sub-officer.
- (6) Costs
- (7) Any other relief the court deems fit

[4] I made an order granting leave to apply for judicial review on December 21st 2009. The Order stated:

- "(1) That the said application be allowed and that the said applicants do have leave to apply for Judicial Review for certiorari and injunction in respect of the appointment of Fernando James to the position of sub-officer.
- (2) That the First Claimant/Applicant be appointed as Representative Party.
- (3) The Court further orders that the applicants must file their claim within 14 days of receipt of this order granting leave.

- (4) The first hearing of the claim is fixed for March 10th 2010.
- (5) The Court further directs all proceedings in the said appointment be stayed until after the hearing of the claim for judicial review herein or until further order.”

[5] The Claimants on January 6th 2010, filed a fixed date claim form supported by the affidavit of the Second Claimant. The affidavit largely repeats the matters deposed to in the Claimants’ affidavit of September 3rd 2009, with a few additions and sets out the relief sought. The relief as set out in the claim form and affidavit is as follows:

- (1) A declaration that the Chief Fire Officer’s power to promote persons within the Fire Service and to set exams for promotions under sections 17(2), and 17(10) (a) of the Fire Services Regulation is unconstitutional.
- (2) A declaration that provisions sections 17(3), 17(4), the proviso of 17(7), 17(9), 17(10)(a) permitting the Chief Fire Officer to set the exams, and 17(11) are a usurpation of the functions of the Public Service Commission and are therefore unconstitutional.
- (3) A declaration that section 9 of the Fire Services Act which engages cabinet in appointments procedure of Fire Services Officers is unconstitutional.
- (4) A declaration that the Chief Fire Service Officer acted ultra vires when he made the recommendation to the Public Service Commission that Mr. Fernando James be appointed to the position of sub-officer without first following the procedure laid down under section 17(8) of the Fire Services Regulations.
- (5) A declaration that the Public Service Commission by appointing Mr. Fernando James as sub-officer based on the recommendation of the Chief Fire Officer allowed itself to be under the direction or control of another which is contrary to section 86 (12) of the Saint Lucia Constitution.
- (6) A declaration that the appointment of Mr. Fernando James by the Public Service Commission to the position of sub-officer based on a recommendation of the Chief Fire Officer is ultra vires, void, and a nullity.
- (7) An order of certiorari quashing the Public Service Commission’s appointment of Mr. Fernando James based on the Chief Fire Officer’s recommendation.
- (8) An order for mandamus compelling the Public Service Commission and the Second Defendant to follow the procedure for promotion specified under section 17(8) of the Fire Service Regulations to select and appoint a sub-officer.
- (9) Costs
- (10) Any other relief the court deems fit.

[6] I have observed that although the order of December 21st 2009 made it clear that the First Claimant

in the application for leave was to be the Representative Party in the suit, Mr. Shane Felix was joined as Second Claimant. I had made the decision that Mr. Shane Felix need not be a party to the suit as indeed in his affidavit of September 3rd 2009, he deposed that he is the secretary of the First Claimant. Therefore, in my view there was no need to make the suit more cumbersome than necessary by adding him as a party hereto.

- [7] This is the second matter before me in the space of 1 week where I have specified who the Claimant ought to be in judicial review proceedings and yet counsel has set out who he or she has determined should be the parties.
- [8] For clarity, Mr. Shane Felix is struck off as the Second Claimant in this suit.
- [9] I have observed that the relief sought has been enlarged to include items (2) to (5) and which items were not included in the application for leave or the supporting affidavit. Counsel for the Defendants have not raised this as an issue and so I leave it alone.
- [10] The First Defendant filed an affidavit in response on February 5th 2010. The Second Defendant and Third Defendant filed a single affidavit in response on February 9th 2010, this affidavit was made by the Second Defendant.
- [11] The First Defendant's affidavit was made by its secretary. The affidavit raises only matters pertinent to the substantive issues and none pertaining to the matters raised for ruling before the Court concludes the first hearing of the matter pursuant to CPR Part. 56.4.
- [12] The Second Defendant amongst the matters deposed to in his affidavit were (a) no notice of intention to institute legal proceedings against him, as the Chief Fire Officer, and the Third-named Defendant had been served on them pursuant to Article 28 of the Code of Civil Procedure, (b) the Second Claimant being a member of the Fire Service Association, there was available to him an alternative dispute resolution mechanism, (c) the Claimants were seeking constitutional redress in a claim for judicial review, and (d) the application for judicial review was not brought in a timely manner.

[13] The Second Defendant and Third Defendant did not file any submissions on the issue of whether the Claimants were seeking constitutional redress in a claim for judicial review, and so it is taken that they are no longer pursuing that issue.

[14] When the matter came on for first hearing pursuant to CPR Part 56.4 Counsel was informed that before proceeding any further with the first hearing that I was of the view that it was necessary to dispose of the procedural issues raised in the Second Defendant's affidavit. I asked both counsel file submissions on same.

[15] The first issue for ruling on is whether the Claimant ought to have pursuant to Article 28 of the Code of Civil Procedure served notice of the suit on the Second Defendant and Third Defendant at least one month before issuing the suit. Article 28 provides:

“ 28. No public officer, or other person fulfilling any public duty or function, can be sued for damages by reason of any act done by him in the exercise of his functions, nor can any judgment be rendered against him unless notice of such suit has been given him at least one month before the issuing of the writ of summons.

Such notice must be in writing, it must specify the grounds of the action, must be served on him personally or at his domicile and must state the name and residence of the Claimant.”

[16] The Claimants submit that the point taken that service is required on the Second Defendant and Third Defendant is misconceived on two fronts. They are that firstly, the provisions contained in Article 28 are applicable only to private law cases and not public law cases, and secondly, if the public officer seeks to invoke the protection of Article 28, then the acts complained off must be within the scope of his functions and duties.

[17] In regard to the first limb of the Claimants' submission, which is that where the matter is one of public law then no notice is required, I refer to the decision in **B-Line Car Rentals v. (1) Comptroller of Customs (2) Attorney-General** SLUHCV 2006/0725 where Edwards J. sets out how the Civil Procedure Rules 2000 has made substantive changes in the jurisdiction, and approach to certain matters and procedures dealt with pursuant to the Code of Civil Procedure. The matter before

her were (a) the use of a Petition for an injunction filed pursuant to the Code of Civil Procedure, and (b) the matter of service of the Notice of Proceeding pursuant to Article 28 on the Defendants. She said:

- "(4) Though Article 841 of the Code of Civil Procedure Code provides for an application for an injunction to be made by petition, the Civil Procedure Rules 2000 PARTS 17.2(G), 11-1, and 11.6(1) stipulate that Applications for Court orders including interim injunctions, made before, during or after the course of proceedings, are to be in writing in Form 6 of the Prescribed Forms Appendix to the Rules.
- (5)
- (6) These relevant PARTS of CPR 2000 relating to Interim Injunctions, have clearly displaced Articles 841 to 849 of the Code of Civil Procedure. My Authority for saying this is the Code of Civil Procedure itself, which provides as follows by Articles 37...
- (13) Apart from this there is another hurdle to clear. Article 28 of the Code of Civil Procedures states:
'No public officer, or other person fulfilling any public duty or function, can be sued in damages by reason of any act done by him in the exercise of his functions; nor can any judgment be rendered against him, unless notice of such suit has been given to him at least one month before the issuing of the writ of summons. Such notice must be in writing, it must specify the grounds of the action, must be served upon him personally, or at his domicile; and must state the name and residence of the plaintiff.
- (14) For the purposes of the present Application, an order includes a judgment. PART 2.4 of the CPR 2000 defines the word "Order" to include an award, declaration, decree, direction or judgment. PARTS 42 and 43 also contain provisions relating to Judgments and Orders.
Based on the definition of an "Order" in the Rules, the Court would be precluded from making an order granting injunctive relief against the Respondents who are public officers where no notice has been given.
- (15)
- (16) It was held in *Castillo vc. Corozal Town Board and Another* (1983) 37 W.I.R. 86 that Section 3 (1) of the Public Authorities Protection Ordinance (similar to article 28 of the Code of Civil Procedure Cap.243) makes provision for a mandatory condition precedent to the institution of the suit. Where a Claimant fails to prove that he has given such a notice, the Judge has no discretion in the matter. On Appeal it was held that it was obligatory on the Plaintiff to give notice of the action and the claim is barred in the absence of such notice."

[18] Given Edwards J. decision on the interpretation and application of Article 28 in the light of the definition of "order" in CPR 2000, it is clear that Article 28 is applicable to Second Defendant and Third Defendant. The question that now arises is whether there is a consequence for failing to

serve the notice. Once again, Edwards J. in **Peter Clarke v. The Attorney General et al** SLUHCV1999/0475 made the consequence clear. Therein she referred to *Cumberbatch v. Weber* (1965) 9 W.I.R 143, and *Castillo v. Corozal Town Board and Anr.* (1983) 37 W.I.R 86. At paragraphs 39 and 40 she said;

“39. In the absence of any statutory modification of this Article the Ruling in the 2 authorities mentioned above apply.

40. It is evident therefore that the consequences of giving a defective Notice or no Notice is fatal to Mr. Clarke's action against all of the defendants.”

[19] I therefore rule that since there was no service of Notice upon the Second Defendant and the Third Defendant pursuant to Article 28 of the Code of Civil Procedure, the claim for judicial review against the Second Defendant and Third Defendant is dismissed. I need not trouble to look at the second limb of the Claimant's submission on Article 28.

[20] At this juncture, the sole defendant left for me to address in regards to the remaining issues raised for ruling, is the First Defendant. As stated prior, the First Defendant did not raise any of the preliminary issues raised by the Second Defendant and Third Defendant. I, however, believe that the remaining issues of (a) whether there is an alternative remedy to judicial review available, and (b) whether the application for leave for judicial review was timely, ought to be addressed since these issues are matters set out at CPR Part 56.3(1) and CPR Part 56.5 as matters for the Court's consideration on application for leave.

[21] I deal now with the matter of delay. CPR 2000 Part 56.5 provides:

“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 considered that there has been unreasonable delay before making the application.

(2) When considering whether to refuse leave or to grant relief because of delay the judge must consider whether 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.”

[22] Part 56.5 (1) provides no time-line within which an application ought to be filed and while I am

called upon to consider the matters of whether there would be any detriment to good administration and or substantial hardship or prejudice to another person, I must in this particular case also take into consideration another matter which was of public record. The memorandum setting out the decision of the First Defendant was dated April 24th 2009. It is a matter of public record that the civil court was not operational from late June, 2009 through to the end of October 2009 because of refurbishment of the building. My understanding is that during the period of refurbishment, there remained only skeletal staff at the Registry, and that only emergency applications were being dealt with. It certainly would not be correct for me to rule that there was unreasonable delay when in fact the very Registry where proceedings were to be filed, and court where they were to be heard, were not available. I therefore hold that there was no unreasonable delay in seeking leave for judicial review.

- [23] In regard to the issue of whether an alternative form of redress exists, CPR 2000 Part 56.3 (3) (e) requires the applicant for judicial review to make a statement on this. CPR 2000 Part 56.3 (3) (e) states:

“56.3 (3) The application must state –

(a)...

(b)...

(c)...

(d)...

(e) whether an alternative form of redress exists and, if so, why judicial review is more appropriate or why the alternative has not been pursued.”

- [24] The application for leave to file the claim for judicial review stated:

“(10). The relief being sought: An order for Certiorari quashing the appointment of Fernando James to the position of Sub-Officer, An Order for Mandamus compelling the Defendants to follow the procedure for promotions specified under section 17 of the Fire Service Regulations is on the grounds that there is no alternative form of redress.”

- [25] The Second Defendant and Third Defendant disclosed that there exists a Collective Agreement between the Government of Saint Lucia and the Saint Lucia Fire Service Association for the period April 1st 2007 to March 31st 2010.

[26] The Second Defendant and the Third Defendant referred the Court to the **Commonwealth Trust Limited v. Financial Services Commission** BVIHCV2008/0051. Here the Financial Services Commission Act 2001 as amended at section 44 gave any person aggrieved by any decision of the Financial Services Commission a right of appeal to the Financial Services Appeal Board that was created by section 42 of the said Act. At the material time when the Financial Services Commission issued its decision, which was the subject of judicial review, the Financial Services Appeal Board, was not properly constituted and so was unable to function. Olivetti J state:

“ [27] The law is well established. Judicial review is a discretionary remedy and cannot be pursued without a claimant first obtaining leave of the court. In determining whether or not to grant leave one of the factors the court is called upon to consider is whether or not the claimant has an alternative form of redress and if so why judicial review is more appropriate or why the alternative remedy has not been pursued. See CPR 56.3(3)(e). And, on considering whether or not to grant the actual application this is also one of the factors the court will bear in mind but it does not follow that because there is an alternative remedy the court will automatically refuse the application. If the court is satisfied that the alternative remedy exist and is suitable in the particular case then it would deny the application. This approach is borne out by ex part Ferrero and the Court of Appeal in Civil Appeal No.14 of 2003 – (1) The Attorney General of St. Lucia (2) Comptroller of Customs v. Vance Chitolie.”

[27] I have reviewed the Collective Agreement and noted in particular Article 3. Association Membership, Article 6. Consultation and Democratization, Article 31. Job Description, Article 32.2 Grievance Procedure.

[28] All of the provisions cited are clearly applicable to the relationship and decisions flowing between the parties who executed the Collective Agreement. Nothing in the document leads me to believe that it pertains to decisions from a third party, in this instance the First Defendant, and secondly, there is no provision that the decision of a third-party could be brought under the purview of the parties to the Collective Agreement.

[29] In **Gary Nelson v. The Attorney General, Colin Derrick, Minister of Justice, and The Police Service Commission** ANUHCv 2008/0522 counsel for the Defendants/Respondents submitted that the Claimant who was terminated by the Police Service Commission ought not to be allowed to

pursue judicial review when the conjoined provisions of section 105, 106, and 107 of the Antigua and Barbuda Constitution Order 1981 set up a Public Service Board of Appeal, and the Claimant ought to resort to this Board prior to approaching the Court for judicial review. Blenman J in giving the decision stated:

"[41] In the substantive matter, Mr. Nelson seeks several administrative orders which are akin to the orders that are in judicial review proceedings. In fact, one of the orders that is sought is that of certiorari to quash the decision of the Commission to terminate his appointment, he also seeks an order that he has a legitimate expectation to be treated fairly, both of which are orders that are clearly within the exclusive purview of public law and have no relevance to private law. I do not share the view that the matters of which Mr. Nelson complains falls within the power of private law. Certiorari is one of the other prerogative remedies which was always available against public bodies and officers of the state. While it is true that an application for damages would generally indicate a claim in private law, looking at the pleadings in the round, it is apparent that the substantive claim is one that is based on allegations of breaches of public duties. It has always been the law that the actions of public or statutory bodies are amendable to judicial review."

[30] And so having regard to the fact that the Collective Agreement makes no provision for third parties and to the type of remedies sought in the fixed date claim and affidavit in support for judicial review by the Claimant, I hold that application for judicial review is the correct approach in the circumstances.

[31] The Order of this Court is as follows:

- (a) Shane Felix is struck out as a Claimant there being no leave given in the order of the Court on December 21st 2009 to add him as a Claimant
- (b) The Second Defendant and Third Defendant are to cease to be parties in the suit there being no notice served on them pursuant to Article 28 of the Code of Civil Procedure.
- (c) The first hearing of this matter pursuant to CPR 2000 Part 56.11 is fixed to continue on May 27th 2010.


Rosalyn E. Wilkinson
High Court Judge