SAINT LUCIA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

SUIT NO: 904 OF 2002

BETWEEN

Neville Cenac

Claimant

v

Attorney General

Defendant

Appearances:
Ms. Cybelle Cenac for Claimant
Mr. Paul Thompson for Attorney General

2003: May 30
June 2

JUDGMENT

[1] Shanks J: This is an application by the Attorney General to strike out a claim by Neville Cenac for an administrative order in relation to his retiring allowance. I heard the Attorney General's application at very short notice but reached the clear view on the basis only of the oral submissions of Mr Thompson and Ms Cenac that it was well-founded and I indicated at the end of the hearing that I would adopt the "case management" solution set out at the end of this judgment. I was then invited by Ms Cenac to give written reasons for my decision, which I now do.

Background facts

[2] Mr Cenac was Leader of the Opposition from May 1982 to May 1987 and Foreign Minister from June 1987 to May 1992 and was a member of the House of Assembly during that whole period. In May 1992 he ceased to be a Minister and became a Senator and later President of the Senate. He ceased to be a Senator in June 1997. His salary as a Minister was $5,040 per month and as a Senator was $1,680.

[3] In May 1992 Mr Cenac was awarded a lump sum gratuity together with a monthly retiring allowance of three-fourths of one half his $5,040 salary as a Minister, namely $1,890. In May 2000, the monthly salary of ministers was increased from $5,040 to $8,624 with retrospective effect to May 1997. It is his case that the level of his gratuity and his retiring allowance should be increased to reflect the increase in ministerial salaries which took effect from May 1997.

[4] Mr Cenac first wrote to the Accountant General about the matter in July 2000. He wrote a number of letters but having received no response to his satisfaction he started these proceedings in September 2002. The proceedings take the form, as I have said, of an application for an administrative order but they do not expressly seek judicial review and no application for leave under CPR 56.3 was made before proceedings were started.

The legislation

[5] Mr Cenac's pension rights are laid down by statute (now the Retiring Allowances (Legislative Service) Act 1999, which, as I understand it, does not differ in any material

respect from earlier legislation). The relevant sections (with emphasis added by me) are as follows:

"2(1) In this Act…"legislator" means a person who has served or is serving as a member of the House of Assembly or of the Senate; "Minister" …means a legislator appointed as a Minister…

5. Subject to the provisions of this Act, a retiring allowance *shall* be paid to a legislator who [has served for a certain period, has ceased to serve as a member of the House of Assembly or Senate and has attained a certain age]…

7….(2)…(b)the retiring allowance payable to a legislator …*shall* be one half of the highest annual salary paid to the legislator.

8. (1) If a difficulty arises in connection with the application of section 7 to an exceptional case, Cabinet *may* make an Order for the purpose of removing the difficulty and the Order shall modify section 7 to the extent necessary to carry the Order into effect…

(3) For the purposes of this section, an exceptional case includes a case where a legislator has in the past occupied a post as Minister but on the day of his retirement the legislator occupies a post as a member of the House of Assembly or Senate to which is attached a salary lower than that of Minister and the prejudicial effect shall be regarded as a difficulty."

Section 9 gives the legislator the option (which I assume Mr Cenac exercised) to take, in lieu of a full retiring allowance, a gratuity and a retiring allowance of three-fourths the rate provided by section 7.

The Proceedings

[6] Mr Cenac's claim is for the following relief:

(1) a declaration that he is entitled to a re-calculation of his retiring allowance conformably with the purport of section 8(3)…

(2) a declaration that there was unreasonable delay in decision making

(3) the sum of $67,203 representing gratuity; and $58,750 being arrears of retiring allowance from 16 June 1997 to 31 August 2002

(4) damages for unreasonable delay in decision making…

[7] After proceedings were started the parties agreed (without prejudice, I think) that Mr Cenac's case was an exceptional one coming within section 8(3) and the matter should therefore be referred to the Cabinet for it to consider whether to make an Order under section 8(1). The Cabinet considered the matter and decided not to make such an Order. That decision was communicated to Mr Cenac on 5 March 2003. He has since sought to ascertain the reasons for the decision but the Attorney General has yet to supply them.

[8] Meanwhile this application to strike out the claim has been made. The Attorney General says, in effect, that Mr Cenac has no entitlement (in the strict legal sense) to an increase in pension and that his only remedy in this case is to attack the decision of the Cabinet not to make an Order which must be done by way an application for judicial review which could only be launched after 5 March 2003. So far as the complaint of delay is concerned, he says that this is now academic and that it would not in any event have given rise to any right to damages.

Decision

[9] As I have said, it seems to me that the Attorney General's submissions are well-founded. It is clear beyond argument that Mr Cenac is in receipt of all the pension allowance to which he is *entitled* under section 7(2)(b) of the 1999 Act; the interesting question as to the effect of a retrospective pay increase on the working of the subsection does not arise in this case because he ceased to be a Minister

long before the pay increase retrospectively took effect. It also seems fairly clear that his case is to be regarded as an "exceptional case" under section 8(3), although I confess I remain baffled as to the rationale for the sub-section given that the retiring allowance payable under section 7(2)(b) is in any event based on the *highest* annual salary paid to a legislator at any time while he has been a legislator. (Mr Thompson for the Attorney General was not able to assist as to exactly why the subsection was framed as it is, although I understand that it was passed to deal with one specific case which I understand Mr Cenac regards as similar to his.)

[10] In any event, assuming Mr Cenac's is an exceptional case and that a difficulty has arisen, the Cabinet was under a public law duty to consider whether to make an Order under section 8(1). They have now done so and have decided not to make an Order. The court has no jurisdiction to come up with its own solution to the difficulty or to make an order of its own. The only way for Mr Cenac to pursue his grievance is by an application for a judicial review of the decision of the Cabinet not to make an Order, which could lead to an order of the court quashing the decision and requiring the Cabinet to reconsider the matter. The complaints of delay in the claim form, although *prima facie* valid when made and potentially the subject of a judicial review claim brought in 2002, are now indeed academic and would not in any event have given rise to any damages: the proper remedy against a public authority which is failing to carry out a public duty is an order that the authority carry out its duty, not a claim for damages.

[11] In the circumstances it would have been open to me to dismiss Mr Cenac's claim on the basis that paragraphs (1), (3) and (4) were unsustainable and that paragraph (2) was now academic and should in any event have been brought by way of judicial review (leave having been obtained) rather than by going straight to an application for an administrative order. However, it seemed to me that, in the interests of good case management, this was not be the best way to proceed and, since Mr Thompson stated that the Attorney General would not be seeking an order for costs (at least at this stage), it did not seem to me that the Attorney General would be prejudiced if I allowed the claim to remain in being.

[12] Keeping the claim in being allows me (in my judgment) to exercise my power under CPR 56.6(3) to allow the matter to proceed as if leave had been given for a judicial review of the Cabinet's decision not to make an Order under section 8(1) without the need for a further hearing to decide whether such leave should in fact be given. I am fully conscious that it must be highly unusual to exercise this power in relation to a claim for judicial review which has not yet been articulated and had not arisen at the time proceedings were issued but I think it right to do so in this case for the following reasons:

(1) Mr Cenac clearly has *locus standi* to challenge the decision of 5 March 2003 and he would not be too late if he now moved fairly quickly.

(2) Although no grounds for judicial review have yet been formally articulated, Ms Cenac appearing for her father indicated that it would be their case that in light of section 8(3) and the earlier case I

mentioned the Cabinet were almost bound to make an Order to increase his pension, and it seems to me very likely that such grounds could be articulated (I make no comment as to their strength of course) based on failing to take account of relevant factors or legitimate expectation or some other ground for judicial review.

(3) If, once the claim has been articulated, the Attorney General took the view that the claim was unsustainable it would still be open to him to apply to strike it out at the first hearing and this would not involve any additional court time as compared with a contested leave application.

(4) Finally, the Cabinet's consideration of the matter was intimately connected with the existing claim that there had been delay in the decision making process which had already arisen and the decision not to make an order under section 8(1) arose out of an agreement between the parties made in the context of the existing claim.

[13] I have therefore not dismissed the claim but instead make the following case management order:

(1) the matter may proceed as if the Claimant had made an application under CPR56.3 for leave to apply for judicial review of the Cabinet's decision of 5 March 2003;

(2) the claim form dated 20 September 2001 is struck out;

(3) the Claimant may by 27 June 2003 file a new claim form and affidavit complying with CPR56.7 seeking judicial review of the decision of 5 March 2003;

(4) If the Claimant fails to file such a new claim form, his claim is dismissed;

(5) If the Claimant does file such a claim form, the court office is to fix a date for first hearing and notify the Defendants in accordance with CPR 56.7(7).

Murray Shanks
High Court Judge (Ag.)