

MONTSERRAT

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 2 OF 2003

BETWEEN:

CLAUDE GERALD

Appellant

and

[1] THE GOVERNOR OF MONTSERRAT
[2] THE PUBLIC SERVICE COMMISSION
[3] THE ATTORNEY GENERAL

Respondent

Before:

The Hon. Mr. Albert Redhead	Justice of Appeal [Ag.]
The Hon. Mr. Brian Alleyne, SC	Justice of Appeal
The Hon. Mr. Michael Gordon, QC	Justice of Appeal [Ag.]

Appearances:

Mr. Sydney P. Christian QC, Mr. Jason Martin with him for the Appellant
Mr. Glenford Hamilton and Mr. Jason Hamilton instructed by Walwyn Law for the Respondents

2004: January 27;
March 29.

JUDGMENT

[1] **ALLEYNE, J.A.:** The appellant Claude Gerald was Director of Agriculture in the Ministry of Agriculture of Montserrat on December 15th, 1999. He had held this post for in excess of two and a half years. He had been a public officer for in excess of 20 years. He was admittedly extremely well qualified in the field of agriculture and was well suited for the post which he held. On that day the Ministry held an agricultural exhibition at which Mr. Gerald gave the welcoming remarks. He was fulsome in his praise for the former Minister of Agriculture, but

failed to mention the newly appointed Minister of Agriculture, who was present at this, the first public event of his Ministry since he assumed office. Mr. Gerald was charged by the Department of Administration with the offence of general misconduct contrary to General Orders Order 311(iv), in that:

“you spoke in public on a matter reasonably regarded as of a political or administrative nature, namely the appointment of the Honourable P. Meade as Minister in place of Honourable P.A. Bramble.”

- [2] The letter by which the charge was laid, dated 5th January 2000, required Mr. Gerald to state in writing by Wednesday 19th January 2000 any reasons why disciplinary proceedings should not be instituted against him. Mr. Gerald replied in writing on 6th January. He denied the charge and stated that his remarks sought to offer praise and commendation to the two individuals who were instrumental in the planning and execution of the exhibition. He said that he did not seek to nor indulge in any reference to the appointment or replacement of the respective Ministers.
- [3] On 17th January Mr. Gerald appeared before the Public Service Commission in respect of this charge. He admitted that he had omitted to mention the name of the new Minister in his opening remarks at the exhibition, and offered to write a letter in that regard. The Public Service Commission administered a severe reprimand. In addition the Commission requested that he submit a draft of his proposed letter, which he did. On 19th January, he met with a sub-committee of the Commission to review the draft, and was instructed to make some amendments to the draft. He complied, and the revised draft was found to be satisfactory, as he was informed by the Assistant Permanent Secretary (Administration). He thereupon, on January 21st 2000, sent the approved letter of apology to the Honourable Minister who had been offended by his remarks, and considered the matter to be at an end. He received no further communication from the Public Service Commission in connection with that incident. It is apparent that the Public Service Commission considered the matter closed.

[4] On 18th April 2000 the Permanent Secretary of Administration wrote to Mr. Gerald advising him that His Excellency the Governor of Montserrat had decided that the interests of the public service required that he be transferred from the Ministry of Agriculture, and by letter dated 6th June 2000 he was informed that effective 5th June he had been removed from the post of Director of Agriculture and appointed to the position of Principal Assistant Secretary in the Ministry of finance, a position subordinate to that of Director of Agriculture and for which, moreover, he says he has no training, experience or qualifications.

[5] Mr. Gerald filed a claim for judicial review by which he sought the following relief:

- (a) A Declaration that the charge of "general misconduct contrary to General Orders 311 (iv)" made against the Plaintiff in that the matters about which the Plaintiff spoke on 15th December, 1999 in his official capacity of Director of Agriculture were not capable of being regarded as of political or administrative nature."
- (b) A declaration that the Plaintiff has not been treated fairly in accordance with the rules of natural justice by the Governor and/or by the Public Service Commission and/or that there has been no adjudication on the disciplinary charge brought against the Plaintiff.
- (c) A declaration that the act of transferring the Plaintiff out of the Ministry of Agriculture was not effected in due course of law, was arbitrary and was without justification.
- (d) An order directing the Governor to transfer the Plaintiff back to the Ministry of Agriculture as Director of Agriculture.
- (e) A declaration that the Governor has no power to transfer the Plaintiff out of the Ministry of Agriculture without his consent and that the Governor and/or the Public Service Commission failed to show any or any

sufficient cause for transferring the Plaintiff against his will from the Ministry of Agriculture to the Ministry of Finance.

- (f) A declaration that the charge brought against the Plaintiff for his remarks at the exhibition on 15th December, 1999 was an invalid charge, and as a result it amounts to a hindrance to his right to freedom of expression guaranteed under section 60 of the Montserrat Constitution 1989 and is an improper and invalid restriction upon him as a public officer.
- (g) A declaration that the Plaintiff is entitled to compensation for the manner in which he has been treated since his return to work in June, 2000.
- (h) Alternatively, a declaration that the Plaintiff has been constructively dismissed from the Public Service, and is entitled to substantial damages for the arbitrary manner of such dismissal.
- (i) The cost of and incidental to this application may be paid by the third named Respondent.

[6] The matter came on for hearing before the High Court and in the details of an order appealed in his Notice of Appeal, the Appellant complains of the following, among other things:

- (a) That the act of transferring the Appellant out of the Ministry of Agriculture was effected in due course of law and was not arbitrary or without justification and accordingly the order in directing (sic) that the Governor transfer the Appellant/Claimant back to the Ministry of Agriculture as Director of Agriculture is refused;
- (b) That the Appellant/Claimant was not constructively dismissed and/or he is not entitled to damages and/or compensation;

- (c) That the transfer of the Appellant/Claimant was not punitive and/or nor “unreasonable.”
- (d) That there was no evidence of procedural unfairness.
- (e) That there was no requirement in law that the Governor should have consulted with the Appellant/Claimant before his transfer.
- (f) That there was no evidence from the Appellant Claimant that he had a legitimate expectation that he would be consulted before transfer.

[7] The Appellant has appealed against these findings, as well as against the learned Judge's findings of fact and law as follows:

Details of Findings of Fact

- i. That the transfer of the Appellant from the Department of Agriculture to the Ministry of Finance was not effected as a punitive measure.
- ii. That the Appellant was transferred because the Governor was of the opinion that it was in the best of interests of the Ministry of Agriculture and the wider Montserratian community.

Details of Findings of Law

- i. That General Order 311(iv) of the Montserrat General Orders is unconstitutional.
- ii. That the charge of general misconduct contrary to General Order 311(iv) made against the Appellant was an invalid charge as it amounted to a hindrance of his right of freedom of expression guaranteed under section 60 of the Constitution of Montserrat

1989 and is an improper and invalid restriction upon him as a public officer.

- iii. That alternative remedies were not available to the Appellant under General Orders 1001, 1002 and 1003 and as such he was free to seek relief by way of judicial review.

[8] The grounds of appeal relate to a number of purported errors which I can summarise as:

- (1) That the transfer of the Appellant from the Ministry of Agriculture to the Ministry of Finance was not effected as a punitive measure.
- (2) That the trial Judge erred in not finding that the said transfer was a penalty which the Governor substituted for the penalty of reprimand originally imposed by the Public Service commission.
- (3) That the Governor had the power to transfer the Appellant in the manner that he did, and in refusing to transfer him back to the Ministry of Agriculture as Director of Agriculture or some equivalent position.
- (4) That the decision to transfer the Appellant was not unreasonable in the sense of *'Wednesbury unreasonable'*.
- (5) That the trial Judge erred in not finding that the decision to transfer the Appellant was in breach of the rules of natural justice.
- (6) That the trial Judge wrongly admitted into evidence the affidavit of the former Governor filed and served on the Appellant on the very day of the trial, and beyond the time stipulated in the order of the Court directing the dates by which affidavits, lists of documents and lists of witnesses were to be filed.

- (7) That the trial Judge erred in relying on the contents of the said affidavit when the former Governor was not available for cross-examination and the Minister to whose alleged attitude to the Appellant the former Governor purported to depose did not give evidence and was also not available for cross-examination.
- (8) That the trial Judge erred in finding that the contents of the Appellant's speech could properly and reasonably have caused a breakdown in relations between the Minister and the Appellant, or could have caused the Minister to lose confidence in the Appellant.
- (9) That the Appellant was not entitled to damages for the manner in which he was treated.

[9] Learned Counsel for the Appellant argued that, the learned trial Judge having ruled that the charge brought against the Appellant was invalid being a hindrance to his constitutional right to freedom of expression guaranteed under section 60 of the Montserrat Constitution 1989 and an improper and invalid restriction upon him as a public officer, his later determination that the Appellant was in breach of General Orders is inconsistent and irrational. I have been unable to find any such determination in the judgment, and in my view there is no merit in that submission.

[10] Learned Queen's Counsel for the Appellant submitted that the transfer of the Appellant to a grade lower than the grade of the office which he formerly held was by its nature punitive and a violation of General Orders 219 and 220. There is no dispute that the office of Principal Assistant Secretary, to which Mr. Gerald was transferred, is an office subordinate in grade to the office of Director of Agriculture from which he was transferred. That fact is admitted by the Respondent.

[11] General Order 219 provides that public officers are liable to be transferred to any post *of equivalent grade*. The Permanent Secretary Administration said in evidence that she 'did not find a position of Director that (Mr. Gerald) could be

transferred to. ... The grade he got was Principal Assistant Secretary. It would have been a little lower than Director.' Learned counsel submitted that this is quite evidently in breach of General Order 219. I agree.

[12] The Respondent takes the position that the transfer was not punitive. The clear implication is that the disciplinary process had been completed with the severe reprimand of Mr. Gerald by the Public Service Commission, and the issue to the Minister of the letter of apology, which had been vetted and approved by the Public Service Commission. I entirely agree.

[13] It is not disputed, I think, that if it is held that the transfer was punitive, the rules of natural justice would apply, and were not observed in this case. What then are the implications of a non-punitive transfer of a senior public officer to a post in the public service subordinate to the post formerly held by that public officer, in effect a unilateral and non-consensual demotion without cause?

[14] Lord Diplock, in **Council of Civil Service Unions & Ors. v Minister for the Civil Service**¹, having opined that there is no reason why 'simply because a decision-making power is derived from a common law and not a statutory source, it should *for that reason only* be immune from judicial review', went on to classify under three heads the grounds upon which administrative action is subject to control by judicial review; illegality; irrationality; and procedural impropriety. His Lordship defined 'irrationality' as:

"what can by now be succinctly referred to as "*Wednesbury* unreasonableness" (*Associated Provincial Picture Houses Ltd. v Wednesbury Corporation*²). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."

[15] By this standard it seems to me that the decision, in effect, to demote the Appellant Mr. Gerald from the very senior, important and responsible position of

¹ [1985] 1 A.C. 374 at 410

Director of Agriculture to the subordinate position of Principal Assistant Secretary without cause was arbitrary, without justification, and thus '*Wednesbury* irrational'.

[16] It is my view that to demote a public officer in these circumstances is to remove him from office. In **Thomas v Attorney-General**³ Lord Diplock had this to say:

"It may be worthwhile adding as a footnote that even under the successive pre-Independence Constitutions of Trinidad and Tobago, between 1924 and 1950, the power of dismissal of Crown servants in the colony that was delegated to the Governor by the royal letters patent was not the unfettered power to dismiss at pleasure but was restricted to dismissal upon sufficient cause to him appearing".

It is inconceivable that a lesser standard should be held to apply today in Montserrat in the interpretation and application of the Governor's discretion conferred by section 16 of the **Montserrat Constitution Order 1989**.

[17] Learned counsel for the Respondents Mr. Hamilton, while arguing that the power to make transfers in the public service or to direct that transfers be made resides in the Governor, and that the Governor was authorised to make the transfer, conceded that "there may have been some procedural deficiencies in the way that things were done", although he argued strenuously that there was a sufficiency of power residing in the Governor to act as he did. Counsel ultimately conceded that the effect of the transfer was punitive and 'perhaps cannot be supported.'

[18] I hold that the purported transfer of Mr. Gerald from the post of Director of Agriculture in the Ministry of Agriculture to the subordinate post of Principal Assistant Secretary in the Ministry of Finance was null and void and that, to use the words of Adams J. in **Marie Dyer v Eluid Williams, Public Service Commission and The Attorney-General**⁴ Mr. Gerald 'is, and never ceased to be entitled to hold the office' of Director of Agriculture in the Ministry of Agriculture of Montserrat.

² [1948] 1 K.B. 223

³ (1981) 32 WIR 375 at 385

⁴ Unreported Civil Suit # 4/1991, Commonwealth of Dominica

[19] In my view that finding disposes of the appeal and it is unnecessary to consider the other grounds. I would allow the appeal, remit the matter to the High Court for a hearing to assess damages properly due to the Appellant, and award costs here and below to the Appellant, to be determined on the basis of prescribed costs based on the amount of damages assessed.

Brian Alleyne, SC
Justice of Appeal

I concur.

Albert Redhead
Justice of Appeal [Ag.]

I concur.

Michael Gordon, QC
Justice of Appeal [Ag.]