

SAINT LUCIA

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

CLAIM NO. SLUHCV2004/0035

BETWEEN:

LAMBERT NELSON

Applicant

and

THE MAYOR AND CITIZENS OF CASTRIES

Respondent

Appearance:

Mr. Dexter V. O. Theodore for the Applicant

Mr. Hilford Deterville QC with him Ms. Diana Thomas for the Respondent

2004: July 09

2005: January 04

JUDGMENT

Introduction

1. **HARIPRASHAD-CHARLES J:** This case raises questions of interest as to (i) whether Mr. Lambert Nelson, Town Clerk of the Castries City Council could have been suspended with full pay pending the findings of an investigation into alleged mismanagement by him of the Respondent's Corporation (ii) whether the Respondent violated the principles of natural justice in not giving Mr. Nelson an opportunity to be heard and to make representations when the decision was taken to suspend him and (iii) whether the Respondent was biased.
2. Mr. Nelson applies for judicial review of the decision made by the Mayor and Citizens of Castries on 29th December 2003 and communicated to him by letter dated 5th January 2004("the decision") suspending him with pay from his employment as Town Clerk with immediate effect.

3. He seeks among other things, an order of certiorari to quash the decision. The grounds of the Application are:
 - (i) That the decision was arrived at in violation of the principles of natural justice in that he, having been statutorily appointed was denied (a) the right to a fair hearing in that he was not given an opportunity to be heard and to make representations at the meeting at which the decision was taken to suspend him and (b) the Respondent was biased in that the Respondent decided his suspension prior to the meeting of Monday, 29th December 2003 and before hearing contrary evidence from him.
 - (ii) That two of the councillors namely Amos Cyril and Arlette St. Ville are not qualified to be councillors pursuant to section 9 (c) of the Castries Corporation Act because they live outside the City limits, do not own any property in Castries nor are they tenants of any house, building or other erection in the City.

Summary of Relevant Facts

4. Mr. Nelson was appointed to the post of Town Clerk of the Castries City Council on 1st June 1999 pursuant to section 15 of the Castries Corporation Act 1967.
5. On or about 1st October 2003, a new Council was appointed for the Castries City Corporation with Mr. Peter Foster as the Chairman. At the time of such appointment, Mr. Nelson was on vacation leave and was due to return on 8th October 2003 but was instructed by the Minister for Social Transformation, Culture and Local Government to continue to take leave due to him until 7th January 2004.
6. On 29th December 2003, the new Council convened a meeting and took the decision to suspend Mr. Nelson with pay pending the findings of an investigation by the Respondent into apparent irregularities surrounding Mr. Nelson's management of the Castries City Corporation. Mr. Nelson was informed of this decision via letter dated 5th January 2004 which he received the following day. At the time, he was still entitled to vacation leave.
7. Mr. Nelson was also informed of and invited to a hearing to be held on 15th January 2004. The letter then itemized eleven matters for which Mr. Nelson would be required to answer at the said hearing. He was also informed of his right to have someone present with him to advise him if he so desires.

8. On 14th January 2004, Mr. Nelson sought, among other things leave to apply for judicial review of the decision made by the Respondent which purports to suspend him as Town Clerk with immediate effect and a Declaration that the Respondent's Council is not properly constituted.

The issues

9. Three issues fall to be determined namely:
 - (i) Whether the Respondent's Council was properly constituted?
 - (ii) Whether Mr. Nelson was entitled to proper notice of and an opportunity to be heard before the decision was taken to suspend him? and
 - (iii) Whether the Respondent was biased?

Was the Respondent's Council properly constituted?

10. It is argued on behalf of Mr. Nelson that the Respondent's Council is not properly constituted in that two of the Councillors namely Mr. Amos Cyril and Ms. Arlette St. Ville do not meet the qualifying criteria set out in section 9 (c) of Castries Corporation Act of 1967 ("the 1967 Act"). Consequently, any decision it makes including the decision to suspend Mr. Nelson is without legal effect.
11. The Respondent maintains that the Council is duly constituted in that the present Council was appointed and not elected. The Respondent further contends that the present Council was appointed pursuant to section 4 (3) of the Castries Corporation (Termination of Council) Repeal Act No. 4 of 1982 ("the 1982 Act") and not under the 1967 Act.
12. According to section 9 (c) of the 1967 Act, a person qualified to be elected as a Councillor must either reside within the City for a period of 12 months immediately preceding the date of his nomination for election or owns or rents immoveable property within the City limits. It is uncontroverted that Mr. Cyril and Ms. Ville do not meet those requirements for election.
13. Section 1 of the 1982 Act expressly provides that "the Castries Corporation (Termination of Council) Repeal Act 1982 shall be read as one with the Castries Corporation Act of 1967." Looking at the two Acts, it is clear that the 1967 Act speaks of the qualification for the election

of Councillors. The 1982 Act is silent on the qualification for appointment of a new Council. However, section 9 of the 1967 Act makes provision for qualification for election and section 10 provides for disqualification for election.

14. In the case of **Bishop v Deakin**¹, a clear distinction was made between disqualification from being elected and from being a member. Section 59 of the Local Government Act 1933 was considered. It provided that "a person shall be disqualified from being elected or being a member of a local authority...."It was held that a person who would have been disqualified from being elected was not so disqualified from holding office because the Act did not make such provision. This case bears close affinity with our law. In the present case, the 1982 Act makes no provision for disqualification to hold office, being a Councillor or for appointment as a Councillor and as such, I hold that the Council is properly constituted.
15. Even if I were wrong to come to this conclusion, in any event by virtue of section 43 of the 1967 Act, "No act or proceedings of the Council or of any committee shall be invalidated by reason of any vacancy or vacancies in their body, or by any defect in the mode of appointment of such committee."
16. Therefore, the argument advanced on behalf of Mr. Nelson that the Council is improperly constituted is untenable.

Natural Justice – Right to be heard

17. Mr. Nelson alleges that he ought to have been given prior notice of and an opportunity to be heard before the decision was taken to suspend him. He argues that the failure of the Respondent to give him an opportunity of commenting on the very serious allegations levied against him was unfair and contrary to the principles of natural justice in accordance with the approach set out in **Rees v Crane**² and **Wiseman v Borneman**.³

¹ [1936] Ch. 409 at 413

² [1994] 2 A. C. 173

³ [1971] A.C. 297

18. The Respondent maintains that it acted in accordance with law and observed the rules of natural justice in taking the decision whether to suspend Mr. Nelson from his employment in that:

- (i) By letter dated 5th January 2004, Mr. Nelson was given notice of the complaints against him;
- (ii) In the said letter, Mr. Nelson was given notice of a hearing at which he was to answer to these complaints; and
- (iii) Mr. Nelson was given an opportunity at the hearing and subsequent adjournments thereto at his request, to answer the complaints against him.

19. The Respondent submits that it was under no further duty to Mr. Nelson in that it was under no legal duty to inform him of a meeting of the Council wherein the decision was taken to suspend him with full pay pending an inquiry into his management of the Respondent's Corporation.

20. In my view, there is nothing rigid or mechanical about the rules of natural justice. It is only "fair play in action."

21. The question whether natural justice applies to preliminary investigations when the person concerned would be entitled to be represented and heard at later stages was considered in the Trinidadian case of **Rees v Crane**. It was held that although in preliminary or initiating proceedings the person concerned generally has no right to be heard, particularly if he is entitled to be heard at a later stage, that was not a rigid rule and a tribunal has a duty to act fairly in deciding whether a complaint had prima facie sufficient basis in fact and when allegations are sufficiently serious the rules of natural justice applied.

22. In the said case, the Judicial Committee of the Privy Council also held that the Judicial and Legal Service Commission of Trinidad and Tobago acted unfairly in failing to give a Judge notice that they were considering making an application to the President to appoint a tribunal to investigate whether the Judge should be removed from office. Under the Constitution of Trinidad and Tobago, the removal of a Judge from office was a three-tier process. The decision of the Judicial and Legal Service Commission was the first or preliminary step in the

process. Lord Slynn of Hadley, delivering the judgment of the Board examined the decisions of **Lewis v Heffer**⁴, **Furnell v Whangerei High Schools Board**⁵ and **Wiseman v Borneman**⁶ and then summed up the position this way (at page 191G):

"It is clear from the English and Commonwealth decisions which have been cited that there are many situations in which natural justice does not require that a person must be told of the complaints made against him and given a chance to answer them at the particular stage in question. Essential features leading the courts to this conclusion have included the fact that the investigation is purely preliminary, that there will be a full chance adequately to deal with the complaints later, that the making of the inquiry without observing the *audi alteram partem* maxim is justified by urgency or administrative necessity, that no penalty or serious damage to reputation is inflicted by proceeding to the next stage without such preliminary notice, that the statutory scheme properly construed excludes such a right to know and to reply at the earlier stage."

23. Lord Slynn went on to say (at page 192A):

"But in their Lordships' opinion there is no absolute rule to this effect even if there is to be, under the procedure, an opportunity to answer the charges later...In considering whether this general practice should be followed the courts should not be bound by rigid rules."

24. Their Lordships in **Rees** applied the dictum of Tucker L.J. in **Russell v Duke of Norfolk**⁷ which had been approved by Lord Guest in **Wiseman** and Lord Morris in **Furnell**, that the Court must have regard to all the circumstances of the case:

"There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with and so forth. Accordingly, I do not derive much assistance from the definitions of natural justice which have been from time to time used, but, whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case."

25. Turning back to the present case. Mr. Nelson alleges that he should have been given notice of the meeting at which the decision was taken to suspend him and that he should have been given an opportunity to be heard at that meeting.

26. Learned Queen's Counsel for the Respondent, Mr. Hilford Deterville contends that Mr. Nelson was treated fairly and he was in fact informed by the letter of suspension that he would be

⁴ [1978] 1 WLR 1061

⁵ [1973] A.C. 660 P.C.

⁶ [1971] A.C. 297, H.L.

⁷ [1949] 1 All ER 109,118

given an opportunity later to be heard on the complaints. Mr. Nelson was given at least 7 clear days notice of the hearing.

27. In the careful address of Mr. Theodore, he referred to many decisions and in particular, he relied very heavily on **Rees'** case. I think that it was helpful. But ultimately, I consider that the decision depends upon whether in the particular circumstances of the case the Respondent acted unfairly so that it can be said that its procedures did not match with what justice demanded.

28. In **Lewis v Heffer**, Lord Denning quoted from **John v Rees**⁸, per Megarry J. at page 347 who said, "suspension is merely expulsion *pro tanto*. Each is penal, and each deprives the member concerned of the enjoyment of his rights of membership or office. Accordingly, in my judgment, the rules of natural justice prima facie apply to any such process of suspension in the same way that they apply to expulsion." Lord Denning went on to say (at page 1073):

"Those words apply, no doubt, to suspensions which are inflicted by way of punishment; as for instance when a member of the Bar is suspended from practice for six months, or when a solicitor is suspended from practice. But they do not apply to suspensions which are made, as a holding operation, pending enquiries. Very often irregularities are disclosed in a government department or in a business house; and a man may be suspended on full pay pending inquiries. Suspicion may rest on him: and so he is suspended until he is clear of it. **No one, so as far as I know, has ever questioned such a suspension on the ground that it could not be done unless he is given notice of the charge and an opportunity of defending himself and so forth. The suspension in such a case is merely done by way of good administration. A situation has arisen where something must be done at once. The work of the department is being affected by rumours and suspicions. The others will not trust the man. In order to get back to proper work, the man is suspended. At this stage, the rules of natural justice do not apply: see *Furnell v Whangarei Schools Board* [1973] A.C. 660."** {emphasis mine}

29. Learned Queen's Counsel for the Respondent submitted that the instant case is exactly the sort of case which falls within the class of cases recognized by the Privy Council in **Rees** where the right to be heard in preliminary proceedings is not necessary. At this stage, the rules of natural justice do not apply. The suspension is not invalid on that account.

⁸ [1970] Ch. 345

30. In **Wiseman v Borneman**, Lord Reid at page 308 had this to say:

"It is, I think, not entirely irrelevant to have in mind that it is very unusual for there to be a judicial determination of the question whether there is a prima facie case. Every public officer who has to decide whether to prosecute or raise proceedings ought first to decide whether there is a prima facie case, but no one supposes that justice requires that he should first seek the comments of the accused or the defendant on the material before him. So there is nothing inherently unjust in reaching such a decision in the absence of the other party."

31. The same question whether natural justice applies to preliminary investigations was tested in the Barbadian case of **Narsham Insurance (Barbados) Limited v The Supervisor of Insurance et al.**⁹ The applicant sought judicial review of a decision by Supervisor of Insurance to revoke the applicant's operating licence for alleged breaches of the Insurance Act. More particularly, the applicant accused the Supervisor of Insurance of conducting his investigations without offering the applicant an opportunity to be heard. Chase J. stated:

"... depending on the circumstances, fairness is not limited to the person who alleges unfairness in the decision making process, but where the public interest is affected, fairness extends to the community at large....To my mind, fairness may also include the existence of a just system to ensure that the ends of justice are met."

32. It is clear from the numerous authorities cited that Mr. Nelson had no right to be given notice of the said meeting, nor was it necessary to hear him on the issues before the decision was taken to suspend him. The purpose of the suspension was to give Mr. Nelson an opportunity to be heard before a decision was taken whether to dismiss him. The suspension was one of administrative necessity and sound management practice especially since many serious charges including financial impropriety were leveled against him. In my opinion, it would have been wrong for Mr. Nelson to return to work and carry on business as usual and at the same time, the Respondent carries out investigations into alleged mismanagement by him. The only proper thing to do and which was done was for Mr. Nelson to continue his vacation leave until the allegations surrounding his mismanagement were thoroughly investigated. In my judgment, the suspension was necessary and justified in the circumstances and the rules of natural justice do not apply.

⁹ Suit No. 265/1996 decided 1st July 1996, Ht. Court Barbados

33. The Respondent emphasized that Mr. Nelson was given his full pay while on suspension so that he suffered no financial detriment. The Respondent submits that the Council could have simply requested Mr. Nelson to continue his vacation leave since he had 33 days leave still due to him. Instead, in an effort to be fair and to observe the rules of natural justice, the Council informed him of the reason why he was not to return to work and told him that he would be given an opportunity to answer allegations made against him and that if he so desires, he could also bring along his adviser.

34. Learned Counsel Mr. Theodore argued that the suspension with pay is neither punishment nor penalty as it is too simplistic an approach. He contended that when considerable nationwide publicity accompanies a decision this is bound to raise suspicion or conviction that the Respondent was satisfied that the charges were made out. Lord Slynn in **Rees** at page 194 said:

“If the Respondent had had a chance to reply to charges before the representation was made this suspicion and damage to his reputation might have been avoided.”

35. I think that although the same principles apply, the facts of **Rees** are clearly distinguishable from the instant case. In the instant case, the first step taken by the New Council after it was discovered that Mr. Nelson was implicated in those irregularities was to invite him to answer to those discrepancies. At the time Mr. Nelson was due to return to work and the Council acted as swiftly as it could have. It was obvious that Mr. Nelson's resumption of his duties would be inimical both to his discharge of them as the discrepancies were in relation to the discharge of his duties, and to the Council's investigations. That was not the case in **Rees**.

36. In terms of the nationwide publicity, Learned Queens Counsel agreed that possible damage to reputation is one of the incidental results of a person being suspended, it is also true that whenever adverse allegation is being made against any person, his reputation is always at stake. Damage to reputation is therefore inconclusive. In the instant case, the decision to suspend Mr. Nelson was taken by Council. All members are sworn to secrecy by their oath. The decision was communicated to Mr. Nelson directly. It was only when Mr. Nelson filed his claim on 14th January 2004 that the decision which was made on 29th December 2003 was made public. In any event, Mr. Nelson was not suspended while performing his duties. He was

on vacation leave and was requested not to resume his duties. The difference with **Rees** is that the public was informed of the proceedings even before the Judge.

37. Looking at all the circumstances of the case, in my considered judgment, Mr. Nelson was treated fairly in the circumstances. The decision to suspend him was purely preliminary. Mr. Nelson was not being investigated after 24th November 2003. The Chairman was investigating the irregularities he found on assuming the office of Mayor. Mr. Nelson was given an opportunity to be heard at a later stage and to deal fully with the complaints levied upon him. The decision to suspend was required as a result of administrative necessity and urgency. No financial penalty was inflicted upon Mr. Nelson as he was suspended with full pay. Any damage to reputation came about after Mr. Nelson filed his claim. The Council cannot be held culpable for that. The case fits squarely into the circumstances accepted by the Privy Council in **Rees** which justify preliminary hearings without the necessity for observing the principles of natural justice.

Natural Justice - Bias

38. Mr. Nelson's third line of attack is that the hearing which took place on 21st May 2004 was a sham and that he was treated with bias. He bases his allegations on the following grounds:

- (i) That the Council has instituted disciplinary proceedings against him for failure to produce Minutes when Minutes of a meeting held on 29th December 2003 were not yet produced as at 15th January 2004.
- (ii) That a former Councilor whom he claims to be a confidante of the present Deputy Town Clerk was invited to the meeting on 15th January 2004 where he was present.
- (iii) That a newspaper report contained adverse comments about him regarding his suspension and that the Chairman is the retained lawyer for such newspaper.

39. It is trite law that a hearing should be before an unbiased decision maker. In **R v Gough**¹⁰, it was held that the test for biasness was whether there was "a real danger of bias."

¹⁰ [1973] A.C. 646

Council being biased

40. Mr. Nelson alleged that the Council was biased because it prejudged an issue.

41. Section 15 of the Castries Corporation Act of 1967 states "the Corporation may appoint ...and the Corporation may remove." The Respondent contends that the Act is clear that the Corporation can remove Mr. Nelson. In the circumstances, any claim that the Council who brought this claim is biased is bound to fail.

Councillor being biased

42. Mr. Nelson alleges that former Councillor Bakie who is a confidante of the present Deputy Town Clerk was invited to the meeting of 15th January 2004. There is however no evidence to show that Councillor Bakie participated in the decision to suspend him. In fact, the Minutes show that Councillor Bakie was not present at the meeting on 29th December 2003. There is no real danger of bias.

Chairman being biased

43. Mr. Theodore vehemently argued that the Chairman, Mr. Peter Foster was biased. He stated that Mr. Foster admits in paragraph 17 of his affidavit filed on 5th March 2004 that he believed that the allegations against Mr. Nelson were serious and if proved, warranted immediate dismissal for gross misconduct and therefore, he should have relinquished the chair at the meeting of 29th December 2003 where the decision to suspend Mr. Nelson was made. He argued also that even before the meeting, Mr. Foster had already intimated to Mrs. Esther Greene-Ernest that Mr. Nelson should resign.

44. In my opinion, Mr. Foster has shown no evidence or reason that he had a pre-disposition to disfavour or dislike or feel any animosity towards Mr. Nelson unlike the position in **Lewis v Attorney General**.¹¹

¹¹ Civil Appeal No. 12 of 1997 {Saint Lucia}

45. The appearance of the letter in the newspaper, the fact that the said Chairman is retained by that particular newspaper is not evidence of pre-disposition to disfavour Mr. Nelson and I so find.

Conclusion

46. In the premises, I will dismiss the application for judicial review with Costs of \$12000.00 to the Respondent.

Indra Hariprashad-Charles
High Court Judge