

SAINT LUCIA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

Claim No. SLUHCV2004/0256

BETWEEN:

HORACE FRASER

Claimant

AND

(1) THE ATTORNEY GENERAL
(2) JUDICIAL & LEGAL SERVICES COMMISSION
(3) SECRETARY, JUDICIAL & LEGAL SERVICES
COMMISSION

Defendants

Appearances:

Leonard Ogilvy for Claimant

Georgis Taylor – Alexander and Deale Lee for Attorney General

Sydney Bennett QC and Patricia Augustin for Judicial and Legal Services Commission
and its Secretary

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2005: June 6, 10
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JUDGMENT

Introduction

[1] **SHANKS J:** The Claimant was a Magistrate in St Lucia until January 2004. In these proceedings he claims a declaration pursuant to section 105 of the Constitution of St Lucia that he was removed from his post by the Government and/or the Judicial and Legal Services Commission in contravention section 91 of that Constitution. The latter section vests in the Commission the exclusive power to appoint, exercise discipline over and remove persons holding the office of magistrate and certain other judicial or quasi-judicial offices. There was also a claim for judicial review of the decisions of the Government and the Commission to remove him which has effectively been superseded by the constitutional claim.

Factual background

- [2] The Claimant was originally appointed Magistrate for a one year term with effect from 6 September 2000. His appointment was renewed in each of the three succeeding years. He was notified of the last renewal by a letter from the Ministry of Justice dated 26 September 2003 which stated that the Commission had approved his re-appointment as a Magistrate with effect from 6 September 2003 for a period of one year. In accordance with the normal procedure he then signed a standard form employment agreement with the Government of St Lucia. The agreement is dated 27 October 2003. It states that he undertakes to diligently and faithfully perform the duties of Magistrate for the term of the engagement and, perhaps surprisingly, that he "...will act in all respects according to instructions and directions given to him by the Government" (cl 1). It provides for a basic salary of \$54,508 (cl 2).
- [3] There are further detailed terms in the Schedule. Para 1 states that the term of the engagement is one year from 6 September 2003. Para 3 provides that the salary shall be liable to income tax. Para 4 provides (in a rather round about way) for termination on grounds of ill health if a duly constituted Medical Board issues a suitable certificate. Para 5 provides that the Government can terminate the engagement at any time forthwith if he neglects his duties, fails to comply with any order, discloses any Government information to any unauthorized person or misconducts himself in any way. Para 6(1) provides that the Government may at any time determine the engagement on three months' notice or on paying one month's salary. Para 7 provides that in the event of any damage resulting from any failure to comply with instructions or neglect the Government can deduct from his salary to make good the damage an amount fixed by the Director of Finance and Planning. Para 8 provides for leave of 23 days which must be taken during the "tour of service". Para 9 provides that the Government can require the lodging of security for the faithful and honest discharge of his duties. Para 10 provides for a 25% gratuity on a satisfactory completion of the term. Para 11 provides for the person engaged to give notice if he wishes to be re-engaged six months before the completion of the tour of duty and provides that the Government shall thereupon decide whether to offer him "further employment".

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- [4] By a letter of 14 September 2003 the Chairman of the Commission notified the Claimant that he had appointed a retired judge to investigate allegations of corruption against him. The investigating judge concluded his investigation by expressing the view that only one charge of "gross incompetence" could be laid against the Claimant. The Commission considered the matter at a meeting on 19 December 2003 and decided not to bring a charge but instead to terminate the Claimant's engagement under para 6(1) of the agreement.
- [5] Following the meeting the Commission wrote to the Permanent Secretary in the Ministry of Public Service on 5 January 2004 (letter is misdated 2003). The Permanent Secretary was informed of the investigation and that a finding had been made of "improper conduct" which justified the laying of charges which could result in the Claimant's dismissal. He was informed that the Commission had considered the matter and decided to "recommend" that para 6 should be invoked and the contract determined with immediate effect upon payment of one month's salary. The letter enclosed a copy of the investigating judge's report and ended by saying: "The Commission should be grateful for your immediate attention and action".
- [6] The Permanent Secretary wrote to the Claimant on 15 January 2004. The letter referred to a report received from the Commission and stated that, having read it, the Government had "found the...charges substantiated". The letter then referred to "acts of misconduct" and quoted para 5 of the Schedule to the agreement. It stated that the Government had no alternative but to terminate the contract with effect from 19 January 2004. Finally it stated that in accordance with para 6 he would be paid a month's salary in lieu of notice. On 16 January 2004 the Permanent Secretary wrote another letter which was said to supersede the one of 15 January 2004. This stated that the Commission had advised the Ministry that due to "improper conduct" the contract should be determined with immediate effect and that on the basis of this advice it was determined effective 19 January 2004. There was no mention of payment of salary in lieu or para 6. Such payment has never been made.

Section 91 of the Constitution

[7] As I have said, section 91 vests in the Commission the power to appoint, exercise disciplinary control over and remove from office those holding the office of magistrate and certain other judicial and quasi-judicial offices in St Lucia. It is quite clear that the purpose of the section is to protect the independence of such office holders and to insulate them from political control or influence by the government of the day.

[8] A similar provision in the Constitution of Trinidad and Tobago (namely section 99(1) dealing with the removal of police officers) was considered at length by the Privy Council in *Thomas v Attorney-General* (1981) 32 WIR 375. From that case two propositions about section 91 which are not in contention emerge very clearly:

- (1) The power to appoint, discipline and remove lies *exclusively* with the Commission (see page 381j-382a);
- (2) "Remove" in the section must be construed as "remove for reasonable cause" (of which the Commission is constituted the sole judge) and does not include a power to remove at whim (see page 384j-385a).

Two other points should be noted:

- (3) Removals for "reasonable cause" include not only removals for misconduct but also removal for such reasons as ill-health; but, whatever the cause, the Commission must exercise its own independent judgment (see page 390 a-d)
- (4) The Government remains the employer and is responsible through its contract of employment for agreeing terms of service, including the duration of the contract (e.g. fixed term or until retirement age) and remuneration (see pages 385 c and 386 c-e)

Was the Claimant removed from office?

[9] Mr Bennett QC for the Commission conceded that the Commission could not maintain that the Claimant had been removed for reasonable cause given that it had not even purported to follow its own disciplinary procedure; indeed, he went further and stated that the one charge of "gross incompetence" which the investigating judge had proposed could not possibly have constituted reasonable cause for removal even if it had been properly proved. His position was that the Commission had not removed the

Claimant at all. He submitted that all they had done was to recommend (or “induce” as he put it at another stage in the argument) the Government to exercise its contractual right to terminate under para 6 and that a termination under that provision did not amount to a removal of the Claimant from his office. Although in the event the Government appear (no doubt inadvertently) not to have relied on para 6 it seems to me that the case against the Commission really turns on whether Mr Bennett is right in the submission that a para 6 termination does not amount to a removal.

[10] In *Thomas v Attorney-General* Lord Diplock said this at p384c:

“To “remove” from office in the police force in the context of section 99(1), in their Lordships’ view, embraces every means by which a police officer’s contract of employment (not being a contract for a specified period), is terminated against his own free will, by whatever euphemism the termination may be described, as, for example, being required to accept early retirement.”

Were it not for the words in parentheses I do not really see how it could even be argued that a termination under para 6 could be anything other than a removal from office as that term is explained by Lord Diplock. In *Thomas v Attorney-General* there was no issue that the claimant had been removed from office and he was not employed on a fixed term contract so those words are strictly speaking *obiter*. But, in any event, I am confident that what Lord Diplock intended to convey was simply that the termination of a fixed term appointment by effluxion of time was not a removal. He was not intending to say that an earlier termination of a fixed term appointment by the exercise of an option like the one provided by para 6 was not a removal. If I was wrong in this conclusion the whole purpose of section 91 could easily be undermined by the simple expedient of the Government using only fixed term contracts and including in them provisions like para 6 (which might require any period of notice or indeed none) and making use of those provisions whenever they wished to get rid of a magistrate.

[11] Mr Bennett submitted that a termination under para 6 was a consensual termination (and therefore not “against the free will” of the Claimant) because the Claimant had agreed to the term at the outset. This seems to me an unrealistic contention, not only because at the time of signing the agreement the Claimant almost certainly had no real choice in the matter if he wished to accept the appointment, but also because at the

time that the termination option was exercised by the Government it was most certainly acting against the Claimant's will. Further, Mr Bennett was unable to give any satisfactory justification as to why this argument should apply in relation to fixed term appointments but not in relation to indefinite appointments. If a para 6 type clause produces a consensual termination in a fixed term appointment I can see no reason why it would not do so in an indefinite appointment. Further if a termination under para 6 is not a removal because the term is consensual then a provision by which the magistrate agreed in advance that the Government could terminate his appointment at any time forthwith simply by letter would equally not be a removal. Indeed a termination under para 4 or 5 of the agreement in question, notwithstanding that it was by the Government and on grounds of ill-health and misconduct respectively, would not be a removal so long as the relevant contractual provisions (agreed in advance) applied. At the risk of repeating a point, if Mr Bennett was right the Government could, by relying on such provisions, completely oust the Commission and take back control over the removal of magistrates.

- [12] For these reasons I am quite satisfied that a termination under para 6 of the Schedule to the agreement amounts to a removal and that the Claimant was removed from office on 19 January 2004 and would have been removed even if the Government had faithfully followed the instructions in the letter from the Commission sent on 5 January 2004 and properly applied para 6.

Who removed him from office?

- [13] Ms Taylor for the Government conceded that termination under para 6 did amount to a removal and for the reasons indicated I am confident that she was right to do so. It followed that she had to accept that the Claimant had been removed from office by the Permanent Secretary's letters of 15 and/or 16 January 2004 (and would have been so removed even if he had properly relied on para 6). She denied, however, that the Government had acted in breach of section 91 of the Constitution because, she said, the Government was acting (and always acts) only on the Commission's instructions and purely as its agent. Having no power to remove a magistrate the Government could only exercise its option under para 6 on such instructions and to disobey them would have been unconstitutional.

[14] It seems to me that the position must be either that the Government removed the Claimant from office because it was induced to do so by the Commission or that the Commission itself removed the Claimant from office through the agency of the Government. Either way the Commission will be responsible for a contravention of the Constitution but the Government's responsibility depends on which analysis is correct. I have considerable sympathy with the Government's position that they had no choice but to accept the Commission's instructions but the fact is that the Government is the party which contracts with the magistrate and which chooses to insert a number of provisions in the contract which allow it (or purport to allow it) and not the Commission to terminate the engagement prematurely. Since the engagement was terminated in reliance on one or more of these provisions it seems to me the Government must bear legal responsibility for that termination albeit they were induced to act by the Commission.

[15] Given those conclusions it seems to me clear that I should declare pursuant to section 105(2) of the Constitution that the Government were acting in contravention of section 91 in removing the Claimant from his office as a magistrate and that the Commission, by inducing the Government to act in this way when there was no reasonable cause to remove, were also acting in contravention of the section.

Damages

[16] Under section 105(3) I have a discretion when I make such a declaration to grant any other appropriate remedy to the Claimant. It seems clear that the only other appropriate remedy here is damages.

[17] If the Claimant had not been removed from office unconstitutionally he would probably have been able to continue in office until 5 September 2004 and receive his salary and 25% gratuity. His unchallenged evidence was that he was not able to set up his office in private practice until October 2004 so there is no question of mitigation during this period. On the other hand I do not think there is any reasonable prospect that the appointment would have been renewed again in the light of the Commission's decision of 19 December 2003. I will therefore say that he should recover as damages the

amount he would have received under the contract (after deducting income tax) up to 5 September 2004 including the gratuity. I do not have the precise figures to hand and will invite the parties to agree them. I will not award anything in respect of the leave entitlement since this had to be taken during the currency of the engagement.

[18] I was also invited to make an award for inconvenience and distress and for damage to reputation and the loss of a "bright judicial future". I accept that in principle these heads of damage may be recoverable for a contravention of the Constitution (see: *Durity v Attorney-General of Trinidad and Tobago* Gobin J (5.11.04). I accept that the Claimant may have been caused some distress and inconvenience by the action of the Commission and the Government in removing him summarily from his office without reasonable cause. Given my conclusion that he would not have had his contract renewed in September 2003 I do not accept that the Claimant lost a bright judicial future and I do not see how the mere fact of the contravention of the Constitution could have harmed his reputation. I can only approach the quantum of damages for inconvenience and distress "in the round" (as Gobin J puts it at p21 of her judgment in *Durity*). I am satisfied for the reasons identified by Mr Bennett that *Durity's* case was very much more serious than this one. I therefore award a round \$10,000 under this head.

[19] The award of damages under section 105(3) is clearly a discretionary remedy and I have considered whether it is appropriate to make the award against both the Commission and the Government. It seems to me that although the Permanent Secretary made a number of errors in carrying out the Commission's instructions when he wrote his letters of 15 and 16 January 2004 they made very little difference to the overall result and that, it is right to say that the Government is in practice obliged to take its instructions from the Commission. I do not therefore think it would be fair to award damages against the Government even though it is the Government which is normally responsible for the salaries of magistrates and I propose to make the award only against the Commission.

Outcome

[20] I make the following declarations and orders:

- (1) The Judicial and Legal Services Commission contravened section 91 of the Constitution of St Lucia when it induced the Government by its letter dated 5 January 2003 (error for 2004) to remove the Claimant from his office as a magistrate without having reasonable cause to do so;
- (2) The Government of St Lucia contravened section 91 of the Constitution by removing the Claimant from that office by its own letters of 15 and/or 16 January 2004 when it had no power to do so;
- (3) The Judicial and Legal Services Commission shall pay damages to the Claimant in respect of its contravention equal to the sum of (a) his net loss of salary and other benefits (including gratuity) for the period 19 January 2004 to 5 September 2004 to be assessed if not agreed and (b) \$10,000 for distress and inconvenience.

I make no order against the Third Defendant who is the Secretary to the Commission. I cannot understand why she was joined in the proceedings. I will hear the parties on costs.

Post Script

[21] Although it was not raised for direct decision in this case, it may be that consideration should be given to the question whether it is consistent with the Constitution for provisions like para 4, 5, 6, 7, and 9 of the Schedule even to remain in the contracts of employment of magistrates.

Murray Shanks
High Court Judge (Ag)