SAINT LUCIA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

Claim No. SLUHCV 2004/0477

BETWEEN:

EDMUND ESTAPHANE

Claimant

AND

1. THE MINISTER OF EDUCATION
2. THE ATTORNEY GENERAL

Defendants

Appearances:
Lydia Faisal for Claimant
Brenda Portland and Jan Drysdale for Attorney General

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2005: June 14, 24

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JUDGMENT

Introduction

[1] SHANKS J: The Claimant started work as a teacher on 1 February 1989. He continued in employment until August 2003 when he received a letter from the Ministry of Education which stated that his temporary appointment had expired on 1 August 2003 and had not been renewed during the academic year 2003/4 due to overstaffing. He now claims damages for wrongful dismissal against the Minister of Education. The Attorney General says in answer to the claim (a) that the Claimant was not dismissed and that his employment was for a fixed term which came to an end by effluxion of time (b) that the damages claimed are exorbitant (and he relies on an offer of a new position

which was made to the Claimant in September 2003) and (c) that the claim is in any event prescribed by virtue of Art 2124 of the Civil Code.

Was Claimant's employment for a fixed or indeterminate period?

The legal framework

[2] It was not in dispute that a teacher cannot be removed from employment by anybody other than the Teaching Services Commission and that such removal must be for what the Commission judge to be reasonable cause (see section 93(1) of the Constitution of St Lucia and *Thomas v Attorney General* [1981] 32 WIR 375 at 384h-385b and 390b-d). Nor was it in dispute that the expiry of a contract for a fixed period does not amount to a removal and that, although the Commission is solely responsible for appointing teachers, it is the responsibility of the Government, by its contract of employment with the teacher, to specify the terms on which the teacher is employed, including whether he is employed for a fixed term (see *Thomas* at 384c-d and 386d-e). It is also clear that the only kind of temporary appointment known to the law is an appointment for a fixed term: there is no such thing as an indefinite temporary appointment and any appointment which is not for a fixed period will be for an indeterminate period (see *Jhagroo v Teaching Service Commission* [2002] UKPC 63).

[3] It seems clear that if the Claimant was employed under a contract for an indeterminate period the letter of 7 August 2003 and subsequent behaviour by the Ministry must have amounted to a termination of the contract and that that termination must have been wrongful, not least because the Ministry had no power to dismiss (or "remove") him and he could only be removed for reasonable cause as judged by the Commission (as to which there was no evidence). If, on the other hand, the contract was for a fixed term which expired on 1 August 2003 the letter did no more than remind him of this fact and it would not give rise to any claim.

[4] The critical issue in the case is therefore one of fact, namely whether the Claimant was employed for a fixed term which expired on 1 August 2003 or was employed for an indeterminate period. I note here that much of the debate at trial revolved around whether the Claimant had ever been appointed a permanent teacher: this debate may be of some relevance but it must not be allowed to obscure the real issue (ie whether

he had a fixed term or indeterminate appointment). I turn therefore to the evidence relating to this issue.

The evidence

[5] The Claimant started work as a primary school teacher in 1989 at the age of 19. Initially he worked at the La Ressource Combined School in Dennery but soon after appointment he was recruited to the staff of the newly built Grand Riviere Senior Primary School. He accepted in evidence that he would have received a letter of appointment at the outset but neither he nor the Ministry was able to produce a copy and he could not remember its wording or who it came from (Ministry or Commission). He very fairly accepted that it might have stated that the appointment was temporary.

[6] In 1990 or 1991 the Claimant was recruited to the Dennery Junior Secondary School (which later became the Clendon Mason Memorial Senior Secondary School) as a physical education teacher by the principal Egbert James. Neither side was able to produce any documents relating to the transfer.

[7] In 1992 he applied for and obtained from the Ministry a four year paid study leave to attend a course at a US university in accounting and economics, in exchange for which he had to enter into a bond to serve the Government of St Lucia for four years after his return. He must have signed documents in relation to this arrangement but neither side was able to produce them. During the course he would return to the Clendon Mason school in his summer breaks. After his course ended in 1996 he returned to the school and started to teach both accounts and physical education. He states in his witness statement that a letter was sent to him during that year informing him of his status as a teacher but again neither side was able to produce a copy.

[8] The first document which has been produced relating to the Claimant's terms of employment is a copy letter dated 12 August 1997 from the Permanent Secretary at the Ministry to the Claimant. It states that the Commission had approved the continuation of the Claimant's temporary appointment as a teacher at the Clendon Mason school with effect from 1 August 1997 to 31 July 1998. The letter then contains various terms mainly relating to remuneration and ends by saying: "Please note that your appointment is a TEMPORARY one, for the period stipulated, and that at the end

of this period, termination is automatic. Should the Ministry require your services for an additional contract period, we will advise you of this, prior to the end of your current contract. It should not, however, be assumed that the one contract will lead to another."

[9] Letters in similar form were sent to the Claimant dated 10 August 1998 (relating to the period 1 August 1998 to 31 July 1999) and 18 October 1999 (relating to the period 1 August 1999 to 31 July 2000). There are then shorter form letters dated 15 September 2000, 13 August 2001 and 3 January 2003 relating to the years 1 August to 31 July 2000/1, 2001/2 and 2002/3 respectively which simply record that the Commission has "approved the continuation of [his] temporary appointment" until the following 31 July. The Claimant accepted that he did not raise any issue about any of these letters at the time save for one occasion where he vaguely recalled going to the Ministry but getting no response. He said that he just disregarded the letters because they made no sense.

[10] It is common ground that from about 2000 relations between the Claimant and Mr James became progressively more strained, in large measure because of disagreements over facilities for physical education at the school and how much time the Claimant should spend teaching it. Various acts by the Claimant led to Mr James deciding in 2002 to start the "process of getting the Ministry of Education to consider a recommendation for [his] termination" (see: para 26 of his statement) and in due course to a meeting with the Chief Education Officer in July or August 2002. These events may explain the fact that the letter of appointment in respect of the year 2002/3 was not sent to him until 3 January 2003.

[11] In the course of his evidence Mr James explained that when he referred to a process of "…getting the Ministry to consider a recommendation for termination" what he meant was a process whereby the Claimant's services would not be renewed in the ensuing year. In this he was ultimately successful: although the Claimant was renewed for the year 2002/3, in about April 2003 Mr James was informed by the Ministry that appointments of three existing temporary teachers at his school could not be renewed for manpower reasons and he therefore suggested that the Claimant and two others

should not be renewed which duly led to the Claimant's "non-renewal" in August 2003 and the Ministry's letter of 7 August 2003.

[12] Ms Fortuna Anthony-Husbands, who was the Chief Education Officer from May 2002 to April 2005, gave evidence in general terms about the annual exercise whereby the Ministry consults with schools in order to make recommendations to the Commission as to renewals or non-renewals of temporary staff for the forthcoming academic year. She also gave evidence to the effect that in order to be classed as a permanent teacher an individual had to obtain a diploma or certificate in teaching. This evidence was presumably designed to show that the Claimant could never have been given a permanent appointment. The flaw in that argument was that this system was not introduced until the mid-1990s as was effectively accepted by Mr James in cross-examination and as emerges from Ms Anthony-Husbands's own witness statement at para 10.

[13] Mr James gave evidence to the effect that he always regarded the Claimant as a temporary teacher though he had received no document which expressly said so. He stated that by the time the Claimant would first have been considered for a permanent appointment in 1996 on his return from the US the teaching qualification was a requirement which he did not satisfy. He stated in the course of re-examination that no-one is given a permanent post when first appointed and that it requires the recommendation of the principal; it followed that if the Claimant was ever appointed to a permanent post it must have been in the short period during which he was at the Grand Riviere Senior Primary School. This point was not put to the Claimant in cross-examination and in any event relates to the question of whether the Claimant was ever formally given a permanent appointment (rather than whether he was employed on a series of fixed term contracts or for an indeterminate period) and is not even determinative on the former question.

[14] The only other relevant document produced to the court was a form which appears at p158 in the trial bundle. The Claimant accepted that he had filled in this form and had written against the entry "Condition of service" the word "Temporary". He stated in cross-examination that when he had first seen this document he had put the word "Permanent" in the relevant box; Mr James had returned the form stating that he

(James) had not been told the Claimant was permanent and that he could not therefore send the form to the Ministry and it should be filled in again. The Claimant said that the second time he left the box blank. Again Mr James returned the form to him and asked him to fill it in again. Because he was being asked to do so by his principal in the end he considered that he had no choice but to insert the word "Temporary" and so he just did so. When this account was put to Mr James in cross-examination he said that he did not remember ordering the Claimant to change the form but, curiously, he admitted that when he had been looking at the documents a few weeks before trial his first thought on seeing p158 had been that the Claimant would say that he (James) had told the Claimant to change the form. Since I found the Claimant a generally honest and reliable witness and in the light of Mr James's evidence about his thoughts I accept the Claimant's evidence about p158. In my view it negates the impact of any admission arising from the document.

Conclusions

[15] On the basis of this evidence I must decide whether at the end of July 2003 the Claimant was employed on a fixed short term contract or on a contract for an indeterminate period. Although Ms Portland for the Attorney General naturally stressed the letters of appointment sent between 1997 and 2003 I do not think they are determinative of the issue (even ignoring for the moment the fact that they all post-date the beginning of the fixed term which they purport to institute and there is no doubt that the Claimant was employed without interruption). This is because if the Claimant was already employed under a contract for an indeterminate period as at 31 July 1997 that contract could only be brought to an end by the Commission and for reasonable cause. There is no evidence that the Commission ever brought an end to any such contract or that it had reasonable cause for doing so. Thus the contract for an indeterminate period would simply have continued in existence and the Claimant would indeed have been justified in disregarding the letters.

[16] The critical date in my view is therefore 31 July 1997. The evidence is that at that date the Claimant had already been employed as a teacher for eight years, of which he had spent four on paid study leave, and he was subject to a four year bond which had another three years to run. In the absence of any document or other positive evidence from the Government about the terms on which he was then employed (or even as to

the terms on which teachers generally were employed during the period in question, 1989 to 1997) the only sensible inference in my view would be that in 1997 he was employed under a contract (possibly implied from conduct) for an indeterminate period. In reaching this conclusion I do not ignore the Claimant's admission that his initial appointment might have been on a temporary basis: the logical inference is that there was some form of probation which he passed or that an initial short term appointment came to an end and that by his carrying on in employment an implied indeterminate contract arose.

[17] There was some speculation from Mr James and Ms Anthony-Husbands that he had been allowed to go on paid study leave because of his prowess as an athlete. I am not sure what the relevance of this speculation was: whatever the motive of the Government, the fact that they agreed to pay him for four years study leave and that he had bound himself to continue working for four years thereafter is wholly inconsistent with employment under a series of short term contracts up to 1997 and consistent with having been employed at some point under a contract for an indeterminate period, even if not formally a "permanent" contract.

[18] I therefore find as a fact that the Claimant was employed under a contract for an indeterminate period in August 2003 and that the Ministry wrongfully terminated that contract by its letter of 7 August 2003. I turn to consider the issue of damages.

Damages

[19] The Claimant's contract was, as I have said a number of times, terminable only by the Commission and for reasonable cause. There was no evidence to suggest that he would have been removed for reasonable cause by the Commission any time soon (although there were problems with Mr James the fact that he was offered a post at a school in Vieux Fort (as I mention below) indicates that he cannot have been unsuitable to continue teaching in 2003). In principle therefore his employment might have continued for many years and there is no limit on the period for which he should be compensated other than his duty to mitigate his losses.

[20] After he received the letter dated 7 August 2003 the Claimant complained about what had happened to him and a meeting was arranged in late August or early September

2003 with the Chief Education Officer, which was also attended by the District Education Officer, the President of the St Lucia Teachers' Union and Mr James. Mr James insisted at the meeting that he could no longer work with the Claimant. After three or four hours the Chief Education Officer indicated that she could not support his return to the Clendon Mason school but that she would support his appointment to another school. An interview was arranged with the principal of Vieux Fort Comprehensive Secondary School on 10 September 2003. The interview went well and the principal told him that he would support his appointment. After a few days reflection however the Claimant turned down the offer. He has not worked as a teacher or otherwise since August 2003 save that he is now a Senator.

[21] Ms Portland would say that the Claimant's failure to act on the offer from the principal of the Vieux Fort school was a failure to mitigate his losses and that he should not therefore recover any damages (at least in respect of any period after September 2003). The Claimant's evidence was that he was told by the principal in the course of the interview that the appointment would be a new one and not a transfer: he considered that this would mean he would lose all the benefit of his previous service and for that reason he refused the offer. I think the Claimant ought sensibly to have returned to the Chief Education Officer or someone at the Ministry for clarification on the terms on which he would be employed at Vieux Fort before deciding to turn down the post. However, even if he had done this and if he had been given some reassurance of continuity for the purposes of pension and such matters the fact remains that he would only have been offered an appointment for a fixed term of one academic year (because he did not have a teaching qualification) which would have been substantially less attractive than the indeterminate contract which he was working under (as I have found) when he received the letter of 7 August 2003. In those circumstances I do not think that his failure to follow up the offer was unreasonable or amounted to a failure to mitigate.

[22] Although the Claimant has not yet obtained a replacement job apart from his position as a Senator, I do not think that a man of his talent can expect to remain out of work indefinitely at the expense of his former employers albeit that it may be reasonable for him not to return to teaching in the public sector. Doing my best with the very limited material available I find that he ought to have obtained equally well remunerated

employment within nine months and I will award him damages on that basis. There was no evidence about his earnings but it seems to be admitted on the statements of case that he earned $3,100 per month as a teacher. Deducting an amount for tax I would therefore award a round $26,000.

[23] Subject to the Art 2124 defence I therefore find that the Claimant is entitled to damages of $26,000 in respect of the wrongful termination of his employment as a teacher.

Art 2124

[24] Art 2124 of the Code provides:

> "Actions against public officers in respect of acts done by them in good faith and in respect of their public duties are prescribed by six months."

Art 2129 provides:

> "In all the cases mentioned in article…2124, the debt is absolutely extinguished and no action can be maintained after the delay for the prescription has expired…"

As to "good faith" Art 2066 says:

> "Good faith is always presumed. He who alleges bad faith must prove it."

[25] The cause of action in this case accrued in August 2003 but the claim was not filed until June 2004. The First Defendant who is the party alleged to have dismissed the Claimant was the Minister of Education who is clearly a public officer. The Defendants therefore say that the claim cannot be maintained by virtue of Art 2124.

[26] Ms Faisal for the Claimant submitted that the Defendants could not rely on Art 2124 because of bad faith. Although this was not pleaded I allowed her to take the point in view of the fact that the Attorney General had, as I mention below, indicated that the Art 2124 defence was not being pursued at the case management stage. The nature of the bad faith alleged by Ms Faisal was that the Ministry was acting outside its powers and unlawfully when it terminated the Claimant's employment. I cannot accept that this in itself means that there was bad faith. If the fact that a public officer was acting unlawfully meant that he was automatically acting in bad faith there would be no point in Art 2124. I am willing to assume that if the Minister or his officials actually knew that they were breaching the law but nevertheless chose to take that course that

might amount to bad faith. However, the question whether the Claimant was employed on a short fixed term contract or for an indeterminate period was a moot one (as demonstrated by this trial) and there is no reason to believe that the Minister or his officials knew that they were breaching the law. I therefore reject the allegation of bad faith.

[27] However, in my view the Art 2124 defence does not work for two other reasons. First, as I have mentioned, Ms Drysdale (who appeared with Ms Portland for the Attorney General at trial) very properly accepted that at the case management conference she had expressly indicated that the Defendants did not intend to pursue the point and on the strength of this indication directions were given for trial without the point being considered and the Claimant incurred costs in preparing for trial. On the face of it this must operate as a waiver or estoppel against the Attorney General preventing him raising the point at trial.

[28] Ms Portland made the point that Art 2124, unlike the English limitation provisions, removes the right as well as the remedy and that a party is not obliged to choose whether to plead the defence (see: *Walcott v Serieux* Court of Appeal of the Eastern Caribbean 20.10.75). However, in my view, just because a defence relates to a claimant's right rather than his remedy and the defendant does not have to plead it to rely on it, does not mean that it cannot be waived. Indeed, it appears from Arts 2048 and 2049 that the Code expressly contemplates the "tacit renunciation of prescription": it seems to me that this is a case in which the prescription has been tacitly (or perhaps expressly) renounced. Ms Portland also reminded me that want of jurisdiction in a court cannot be cured by consent. It does not seem to me that the Art 2124 defence goes to jurisdiction. It may introduce additional factual issues into certain claims if the Claimant is to establish his right (eg is the defendant a public officer? was the act complained of done in bad faith? was it done in respect of his public duties?). But these are factual issues which the court must resolve just as it must resolve other factual issues on matters which the Claimant must prove in order to establish his right, whether by normal evidence or by admission or by the raising of an estoppel. I therefore conclude that the Art 2124 defence was waived at the case management conference and cannot now be revived by the Attorney General.

[29] Second, Ms Portland rightly pointed out that the claim ought not to have been brought against the Minister of Education at all. The Claimant was employed by the Crown (in the sense of the Government or the executive) not the Minister himself and there was no evidence that the Minster personally had any part in the termination of his employment. Proceedings against the Crown must be instituted against the Attorney General (see section 13(2) of the Crown Proceedings Ordinance) and the Attorney General was therefore rightly named as a defendant. Art 2124 gives a measure of protection to "public officers" who are sued "in respect of acts done by them…in respect of their public duties". It is clear that the Crown itself cannot be a "public officer" (it is significant that the Code expressly refers to the Crown in the context of prescription at Art 2075). It is also clear that the Attorney General is not being sued in respect of any act done by him at all but as a representative of the Crown. Art 2124 therefore has no application in this case. It is designed in my view to protect individual public servants from being sued after six months in respect of their acts as public servants, the paradigm case being a policeman executing an arrest which, though arguably wrongful, was carried out in good faith. It is not designed to give additional protection to the Crown in respect of claims for breach of contract against it. I therefore reject the defence based on Art 2124.

Result

[30] The claim against the Minister of Education shall be dismissed and there shall be judgment for the Claimant against the Attorney General for $26,000 plus interest at 6% from the beginning of 2004 (ie 18 months), giving a total judgment sum of $28,340. Subject to any submissions to the contrary I shall award him prescribed costs which I calculate as $8,502.

Murray Shanks
High Court Judge (Ag)