

SAINT LUCIA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

Claim No. SLUHCV2005/0301

BETWEEN:

ANTONIA MARTIAL

Claimant

AND

THE PUBLIC SERVICE COMMISSION

Defendant

Appearances:

Horace Fraser, Leonard Ogilvy, Gerard Williams for Claimant
Grace Ward-Glasgow for Defendant

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2005: July 21, 29
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Introduction

[1] **SHANKS J:** The Claimant holds a post as an accountant in the Ministry of Home Affairs and Internal Security and was attached to the Police Department. She was suspended from duty by the Public Service Commission on 19 December 2003 pending the outcome of investigations into alleged misconduct. By letter dated 10 January 2005 she was informed of 44 alleged acts of misconduct and she was later summoned to a disciplinary hearing to be held on 3 March 2005 to answer those allegations. Various objections were raised by her counsel at that hearing and the matter was adjourned. By letter of 20 April 2005 the Commission indicated that notwithstanding counsel's objections the hearing would proceed on 28 April 2005. That decision led to these proceedings for judicial review which were launched on 27 April 2005.

[2] The case for which the Claimant was granted permission to apply for judicial review at the without notice hearing on 30 May 2005 is that it would be unfair of the Commission to proceed with the disciplinary hearing for three reasons:

- (1) that there has been excessive delay amounting to an abuse of power;
- (2) that the Commission has failed to disclose witness statements and all relevant documents;
- (3) that the Commission has been prejudiced by a legal opinion from the Attorney General's Chambers in the form of a memo to the Chairman of the Commission dated 2 March 2004.

The legal position of the Commission

[3] This is well established. Under the Constitution the Commission has sole power to discipline and remove civil servants (section 86(1)). The Commission is meant to be independent of both the executive and the legislature. The purpose of this arrangement is to insulate civil servants from the political influence of the government of the day. The Commission is responsible for regulating its own procedure and (save to a limited extent in the case of the court) must not be subject to direction or control by any other person or authority (see sections 85(12), 85(13) and 124(11) of the Constitution). The Commission must, however, only act for reasonable cause, not act whimsically or arbitrarily, apply the constitutional provisions and its own rules and act fairly and in accordance with the principles of natural justice (see: *Duncan v Attorney General* [1998] 3 LRC 414 at 423). The duty to act fairly includes a duty of disclosure and a duty not to pre-judge (per Byron CJ and *Philbert Bertrand v PSC* (CA 27.3.00) paras [10]-[18]).

Delay

[4] There is no express rule requiring the Commission to hold a disciplinary hearing within a certain time. But I agree with the submission of Mr Fraser for the Claimant that the principles enunciated by Lord Bingham in *Attorney General's reference no 2 of 2001* [2003] UKHL 68 should be applied by analogy. If the court is satisfied that there has been excessive delay in bringing disciplinary proceedings such as to cause serious prejudice to the civil servant to the point where no fair hearing can be held, or if the Commission and/or (I would say) the Government are shown to have acted in such a

way as to render the continuation of the disciplinary proceedings unfair in the circumstances the court should restrain the abuse and prevent the proceedings from going ahead (see para 3.6 of Mr Fraser's submissions and para 17 of the judgment of Lord Bingham).

[5] The delay in this case was about 15 months. The reasons for the delay given by the Commission are that it took until 15 July 2004 for the Government to respond with any evidence to substantiate the original allegations and that the number and complexity of the allegations meant that the Commission needed further evidence and clarification before the charges could be drawn up (see Judith Joseph affidavit paras 13 to 16). I have no idea why the government took so long to respond with the evidence and I do not find the excuse which has been raised very compelling but, while 15 months is longer than one would hope, I think it is probably not excessive in all the circumstances.

[6] But even if I am wrong about that, it is necessary for the Claimant to show that she will suffer serious prejudice by reason of the delay such that she cannot receive a fair hearing before the court will stop the disciplinary procedure on grounds of mere delay. All that is said in this connection is that the Claimant cannot be expected to remember all the facts to rebut the 44 charges at this stage. Some of the charges relate to events going back to 2001 but most appear to relate to the second half of 2003. Without some specific evidence of prejudice I do not think that the passage of a few years can be said to be so long as to prevent a fair hearing on this ground.

[7] Mr Fraser also points out that the Claimant has suffered the stigma of suspension during the period of delay and has been prevented from taking advantage of any opportunities for promotion. I accept his submission that a prolonged suspension pending an investigation may amount to an abuse of power (see *Durity v Attorney General of Trinidad and Tobago* [2002] UKPC 20 para 38) and I would also accept that such an abuse may mean that it was unfair to continue the disciplinary proceedings. However, it was clearly right to suspend the Claimant in the first place and the length of the suspension, while not ideal, is nowhere near long enough in my view to amount to an abuse or to make it unfair to proceed with the disciplinary proceedings. I note in this context that the relevant delay in Mr Durity's case was three and a half years,

nearly three times as long as here (see paras 5 to 8 of the judgment: suspension was in August 1989 and disciplinary tribunal was established in February 1993) and that the charges against Mr Durity were relatively straightforward.

[8] I therefore reject the case based on delay.

Disclosure

[9] In considering this point it is important to keep in mind that the Commission in exercising its disciplinary jurisdiction over civil servants is not acting as a court of law and is not subject to the very detailed and tight rules of procedure and evidence that govern a civil or criminal case in the High Court. It must act fairly and in accordance with natural justice but the precise scope of those obligations always depend on the circumstances. The nature and extent of the obligation of disclosure in relation to disciplinary proceedings before the Commission is discussed at paras [11] to [13] of the judgment of Byron CJ in the *Bertrand* case: in summary, the Commission must disclose in advance all the material on which any decision is likely to be based in order to give the civil servant an opportunity to controvert, correct or comment on it

[10] In this case the Commission's letter of 10 January 2005 stated that it enclosed "all relevant reports and documentation pertaining to the allegations". The Secretary of the Commission confirms on affidavit that the Commission did indeed disclose all such reports and documentation in its possession and Ms Ward-Glasgow for the Commission assured me that that material would be the totality of the material taken into account by the Commission in deciding the charges against the Claimant. I accept that assurance although I note the obvious point that if a witness is called before the Commission to confirm a report or statement and is cross-examined by the Claimant further material might emerge which the Commission cannot be expected to exclude from its deliberations.

[11] In the light of Ms Ward-Glasgow's assurance I cannot see that the Claimant has any case that there has been a breach of the obligation to disclose. However, Mr Fraser submitted that the quality of the material disclosed (which I have not seen) was such that he could not work with it; in particular he seemed to be saying that there were no witness statements in the form he would expect when conducting a criminal trial. I

repeat the point I have made that the proceedings before the Commission are not a criminal trial with a jury. Provided the Claimant has an opportunity to controvert, correct or comment on any material to be taken into account by the Commission the requirement of fairness is satisfied. If indeed the material is of such poor quality that the charges are not made out then it is open to Mr Fraser to say so to the Commission.

The Advice from the Attorney General

[12] Among the documents disclosed by the Commission is a long memo from the Attorney General's Chambers to the Chairman of the Public Service Commission dated 2 March 2004 concerning the Claimant. There is no evidence before the court as to how and why this memo came to be made. It states on the second page "We are asked to advise the Public Service Commission on the appropriate action to be taken to address the various incidents detailed" but it does not state who asked for the advice to be given. The memo then examines the allegations against the Claimant and reaches various adverse conclusions. It then states this under the heading Conclusion:

In conclusion and on reviewing the incidents and conduct above referred to a necessary consideration would be whether it is conduct which justifies dismissal.

Any decision for dismissal can only be made after a hearing and after the subject has been given the opportunity to justify her position. However, and that being said it is submitted that the allegations adduced above once proven justify dismissal.

The actions above mentioned are clearly an abuse and misconduct satisfactory to justify dismissal
(author's emphasis).

[13] Mr Fraser says that the existence of this memo means that there is a risk that the Commission is biased against his client and in particular that it has pre-determined the case. The test to be applied in relation to risk of bias is now well established: the question is whether a fair-minded and informed observer, having considered the relevant facts, would conclude that there is a real possibility that the tribunal in question is biased. If there is a risk of bias in this sense then I think Mr Fraser must be right to say that the disciplinary proceedings cannot go ahead

[14] It seems to me unfortunate to say the least that the Commission, which, as I have said, is meant to be independent of the executive, is receiving something that looks like an internal memo from the Attorney General containing advice about a case pending before it. This may create precisely the impression that should not be created, namely that the Commission is in some way linked to and under the control of the government. I would suggest that in future the Commission only take *advice* (my emphasis) from their own legal counsel.

[15] However, although unfortunate, I do not think that a fair-minded and informed observer would on consideration of all the facts conclude that there was a real possibility that the Commission had already decided the case in the way suggested by the Attorney General or that it would otherwise be biased towards the Government. I base this conclusion on the following considerations:

- (1) the fair-minded observer would note the terms of the advice: in particular, that the Attorney General made clear to the Commission that there must be a hearing at which the civil servant was given an opportunity to justify herself before any conclusion could be drawn and that the allegations must be proved and that it was *submitted* (my emphasis) that the proper sanction was dismissal;
- (2) he or she would assume that the members of the Commission would abide by their oaths of office and be aware of their constitutional duties and be aware that they were subject to nobody's direction or control (save that of the court to a certain extent);
- (3) he or she would appreciate that the initial complaint and the evidence of misconduct would inevitably come from the civil servant's employer, namely the Government, so that it was inevitable that the material before it would emanate from that source and that the Government, having raised the complaint, would wish to support a case for disciplinary action and that the members of the Commission would also appreciate this;
- (4) most importantly he or she would note that the advice itself had been disclosed in its entirety to the Claimant: this would undermine any suspicion that the Commission were secretly acting on the "say-so" of the Government and would re-assure the fair-minded observer that

the Claimant would have a full opportunity to controvert, correct and comment on anything said by the Attorney General's Chambers in the memo.

[16] For these reasons I also reject the Claimant's case on bias.

Judge in own cause

[17] Mr Fraser attempted to resurrect a point that I had expressly ruled at the permission stage could not be relied on, namely that the Commission were judges in their own cause since they were both laying and deciding the charges. This point remains in my view utterly misconceived and takes no account of the realities of the situation. The Commission are solely responsible for disciplining civil servants. The Commission must inevitably consider allegations made against civil servants, decide whether they require to be answered by the civil servant, and, if so, hold a hearing for that purpose. That is the way the system is meant to work. If Mr Fraser was correct on this point it could not operate at all.

Result

[18] For all these reasons I dismiss the application for judicial review and direct that the hearing of the charges raised against the Claimant shall now proceed at the earliest convenient date. I will hear the parties on costs.

Murray Shanks
HIGH COURT JUDGE (Ag)