

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
TERRITORY OF ANGUILLA
(CIVIL)
AD 2006

CLAIM NO. AXAHCV/2005/0031

In the matter of Section 13, 68(1) and (2) of the
Anguilla Constitution Order, 1982 as amended by the
Anguilla Constitution (Amendment) Order 1990

And

In the matter of an Application by Homer Richardson
alleging that Section 13 of the Anguilla Constitution
Order 1982 as Amended in 1990 has been
contravened in relation to him and for redress in
accordance with Section 16(1) of the said
Constitution Order

And

In the matter of the inherent Jurisdiction of the High
Court

BETWEEN:

HOMER RICHARDSON

Claimant

AND

THE ATTORNEY GENERAL OF ANGUILLA

Defendant

APPEARANCES:

Mr. Horace Frazer for the Claimant
Mr. Patrick Patterson for the Defendant.

Date: 2006, March 20th
2006, April 27th

RULING

[1] **BRUCE-LYLE, J.:** The Claimant, Homer Richardson, of the Valley in the island of Anguilla claims against the Defendant, the Attorney General of Anguilla, for the following orders:-

- (1) A Declaration that the Defendant discriminated against the Claimant when he was denied the payment of housing allowance he was entitled to, under the contracts of employment he had with the Defendant, or alternatively, a declaration that the refusal of the Defendant to pay the Claimant a housing allowance was repugnant to the Constitution as being discriminatory;
- (2) A Declaration that the Claimant had a legitimate expectation that the Governor would have renewed his contract of employment with the Government of Anguilla and in accordance with Section 68 of the Constitution;
- (3) A Declaration that the action of the Governor as regard to the non-renewal or temporary extension of the Claimant's contract of employment was unilateral, capricious and unconstitutional;
- (4) A Declaration that the Governor eroded the concept of separation of powers envisaged by Section 68 of the Constitution when he sought to have the Claimant hold the post of Magistrate on a contract for a specified period;
- (5) A Declaration that a Magistrate is a judicial officer charged with the public duty of safeguarding the rights of private citizens and in the discharge of his duties he cannot be strangled by the political will of the executive in the granting or withholding of a contract after he had been appointed to that post;
- (6) A Declaration that the appointment of a Magistrate should be for an unlimited period subject to be removed there from for cause, resignation or on the attainment of the age of retirement. (This declaration sought was withdrawn by learned Counsel for

the Claimant during the course of his reply to learned Counsel for the Defendant's preliminary points raised before the actual hearing of the substantive issues if the need arose);

- (7) A Declaration that the actions of His Excellency the Governor in relation to the Claimant's requested continued employment with the Government of Anguilla was an arbitrary and capricious abuse of power and constituted an unlawful termination of the Claimant's appointment as Magistrate;
- (8) An order that the Defendant do pay compensation/damages to the Claimant for the loss of earnings and for the inconvenience and distress suffered;
- (9) An order that the Defendant do pay the Claimant the Housing Allowance for the period involved;
- (10) Further and other relief;
- (11) Costs.

[2] Before the substantive issues emanating from these reliefs sought were heard, learned Counsel for the Defendant, Mr. Patrick Patterson, raised certain preliminary points to which learned Counsel for the Claimant, Mr. Horace Frazer, replied. I purport to deal with each point raised separately.

[3] The first point raised by the Defendant was to the effect that at Declarations 1 and 3, the Claimant, by his motion, seeks to raise what purports to be constitutional issues. By virtue of the Civil Procedure Rules (Eastern Caribbean Supreme Court 2000) (CPR) Part 56, where an administrative order of this nature is sought, the supporting affidavit of the Claimant must state the provision of the constitution under which the Claimant alleges has been or is likely to be breached. This, he contends, is a mandatory provision – CPR 56.7(4)(c). He further submitted that the Claimant has failed properly to comply with this provision in the CPR 2000, and also that the grounds on which the relief is sought, namely, the Constitutional ground on which the relief is sought, CPR 56.7(4)(d) are grounds which

are different from the facts on which the claim is based. He referred the Court to CPR 56.7(4)(e).

[4] A glance at the relevant Sections of CPR 2000 referred to above reveal thus:-

“56.7(4) – The affidavit must state: – (emphasis mine)

(c) in the case of a claim under the relevant Constitution the provision of the Constitution which the Claimant alleges has been or is likely to be breached;

(d) the grounds on which such relief is sought;

(e) the facts on which the claim is based”

It is my view from a review or analysis of these sections of Part 56 of CPR 2000, that the Claimant has a mandatory duty to provide certain information as specified in the relevant Subsections of Part 56. The word “**must**” imposes or connotes an imperative or mandatory duty on the Claimant. I cannot interpret the word “**must**” any other way. The Oxford Dictionary of Current English Revised Second Edition, edited by Catherine Soanes, defines the word “**must**” as – “(1) be obliged to; should; (2) expressing insistence; (3) expressing an opinion about something that’s very likely.” As a noun it is defined as something that should not be overlooked or missed. It is clear therefore, that the Claimant was under a mandatory duty to properly comply with this provision. This, he has failed to do. He concedes that their affidavit filed does not comply with that provision in Part 56.7(4)(c) but submits that the provision or requirement there is clearly for the purpose of informing the Court and the Defendant of what provisions of the Constitution have been allegedly breached.

[5] He is of the view that the Claimant has complied with that requirement in that the heading of the affidavit in support of the motion clearly sets out what is required by Part 56.7(4)(c) and that the heading of the affidavit is a part of the affidavit itself and that the overriding objectives of the CPR 2000 could be applied by the Court to offset this omission because of the importance of the matter. I disagree. First of all, if this matter at hand is so important to the Claimant, as I think it is, he should have endeavoured to have complied strictly to the rules of procedure laid out to initiate his claim and raise the Court’s

jurisdiction. Secondly, the mandatory nature of Part 56.7(4)(c) leaves me with no doubt that its provisions should or must be complied with strictly before a Claimant can raise the Court's jurisdiction. The overriding objectives in my view should not be used as an excuse to come before the constitutional court in a cavalier manner, where strict provisions laid down are a requisite.

- [6] It is also clear from the Claimant's affidavit, that the facts deposed to therein are quite different from the constitutional ground on which relief is sought. It is my view, that the claim should be based on facts, which in the affidavit should support the constitutional ground and relief being sought. This is a grave area of concern for this Court, taken together with what I have already expressed above.
- [7] It was also submitted by Counsel for the Defendant that the Claimant has, in any event, named the wrong Defendant in respect of the Declarations sought at Paragraphs 2 and 7 of the Claimant's motion. He further argued that the Claimant has named the Attorney General as Defendant, by virtue of the provisions of the Crown Proceedings Act C160. He further submitted that the Crown Proceedings Act permits actions against the "Crown" to be brought in the name of the Attorney General by virtue of Sections 3 and 13 of the said Act. He contends that in the said Act, the Crown is defined by reference to a claim against the "Government of Anguilla" by virtue of Section 3(2) of the Crown Proceedings Act. I would say here that I do not agree with this line of argument. The Crown Proceedings Act is very clear in its terms. Section 3 of Part 1 of the said Act under the rubric "Substantive Law" states:-

"(1) Where after the 30th June, 1956, any person has a claim against the Crown as defined in Subsection (2) then subject to this Act, the claim may be enforced as of right, and without the consent of the Governor.

(2) The reference to a claim against the Crown in Subsection (1) shall be construed as meaning a claim against the Government of Anguilla which, if this Act had not been passed, might have been enforced subject to the consent of the Governor, in a suit instituted by the Claimant as Plaintiff against the Attorney General as Defendant in

accordance with the provisions of the Crown Suits Act F. A. 10/1907, or might have been enforced by a proceeding provided by any other statutory provision;

- (3) *Any claim against the Crown made pursuant to any statutory provision enacted after 30th June 1956, unless otherwise directed by any law, be likewise enforced as of right, and without the fiat of the Governor, by proceedings taken against the Crown in accordance with the provisions of this Act."*

[8] And Section 13 of the Crown Proceedings Act clearly states:-

- "(1) Civil Proceedings by the Crown may be instituted by the Attorney General but, where in any Act passed before 30th June, 1956, it is provided that any debt due to the Crown shall be sued for and recovered by a particular officer of the Crown, civil proceeding by the Crown for the recovery of such a debt may be instituted by that officer.*
- (2) Civil proceedings against the Crown shall be instituted against the Attorney General"*

[9] Section 22 of the Anguilla Constitution states:-

- "(1) The executive authority of Anguilla shall be vested in Her Majesty.*
- (2) Subject to the provisions of this Constitution the executive authority of Anguilla may be exercised on behalf of Her Majesty by the Governor either directly or through officers subordinate to him, but nothing in this subsection shall operate so as to prejudice the provisions of any laws for the time being in force in Anguilla whereby functions are, or may be, conferred on persons or authorities other than the Governor."*

And Section 23 of the said constitution states:-

- "(23) There shall be an executive council in and for Anguilla which shall consist of the Chief Minister, not more than three other Ministers and two Ex-Officio members, namely, the Deputy Governor and Attorney General."*

[10] All these above quoted sections of the Anguilla Constitution and the Crown Proceedings Act clearly indicate that once the Crown is sued, the Defendant has to be the Attorney General. I cannot see it otherwise. To go further, the interpretation Section, 1 of the Crown Proceedings Act of Anguilla, defines "officer" in relation to the Crown as including the Governor, a Minister, and any other servant of Her Majesty in right of Her Government of Anguilla. It stands to reason therefore, that if a person sues any of these mentioned officers of the Crown, and in this case the Governor, the named Defendant would have to be the Attorney General.

[11] Counsel for the Defendant goes further to argue that however, the Claimant's case or complaint is made at Declarations 2, 4 and 7 regarding the action of the Governor in an area in which the Governor is constitutionally entitled to exercise his discretion and in respect of which the matter cannot be enquired into by any Court, and he refers the Court to Sections 68, 78 and 28(3) of the Anguilla Constitution Order, 1982, and prays that these Declarations mentioned, 2, 4 and 7 be struck out. Section 68(1) states:- (Power to appoint, etc. to judicial officers)

"(1) Power to make appointments to the offices to which this Section applies and to remove and exercise disciplinary control over persons holding or acting in such offices shall vest in the Governor, acting after consultation with the Judicial Service Commission.

(2) This Section applies to the office of Magistrate, to any office in the public service of any Registrar or other officer of the High court who is required to possess legal qualifications and to such other offices in the public service, for appointment to which persons are required to possess legal qualifications, as may be prescribed by any law for the time being in force in Anguilla."

Section 78 of the said Constitution states:- (Discipline)

"(78) (1) Subject to the provisions of any law in force in Anguilla, the Governor may for cause shown to his satisfaction, dismiss or

suspend from the exercise of his office any person holding a public office or take such disciplinary action as may seem to him to be desirable.

(2) *The reference in this section to the power to dismiss any person holding a public office shall be construed as including a reference to any power to require or permit a person to retire."*

[12] Section 28(3) states:-

"28(3) Where the Governor is directed by this Constitution to exercise any function in accordance with the advice of or after consultation with any person or authority, the question whether he has so exercised that function shall not be inquired into in any court."

This Section clearly speaks for itself. On the face of it, I could end my judgment or ruling right at this stage. The Constitution of any state is the Supreme Law of the land. So is the Anguilla Constitution Order 1982 to Anguilla. It specifies and provides for wide powers for the Governor, which I have elucidated just recently in this ruling. It is my view, that I cannot go behind these provisions in Section 28(3) to inquire into the exercise of the Governor's wide powers of discretion as provided for in the said Section unless there is a manifest, glaring and capricious abuse of the exercise of that discretion. That exercise will therefore require an examination of the evidence and material placed before me by the Claimant in support of his prayers for Constitutional redress. I shall come to that later.

[13] I prefer to deal with the fourth preliminary point raised by learned Counsel for the Defendant, and that deals with the issue pertaining to Abuse of Process. The Defendant submits that the Claimant's claim should properly be viewed as an allegation of a breach of a common law contractual right and as such it is improper for a Claimant to seek to use a constitutional motion to seek redress for alleged breaches of common law rights. The case of the *AG v. Luciano Valley Vue Hotel 4d* (1998) 2001 61 WIR at 406 is a case on point. In that case, emanating from the Court of Appeal of Trinidad and Tobago with de la Bastide C.J., Permanand and Nelson JJA, it was held per curiam:-

"It has become fashionable for anyone with a complaint, of whatever nature, against some organ of the State, to bring an action as a constitutional

motion alleging a breach of constitutional rights. The obvious attraction of this course is that in this way pleadings may be dispersed with and an early date of hearing obtained. This abuse of using constitutional motions for the purpose of complaining of breaches of common-law rights should be stopped. The only effective way of doing so is for the Courts at first instance to dismiss summarily any process which on the face seeks to force into the mould of a constitutional motion a complaint of some tort or other unlawful act for which the normal remedy is an action at common law for damages or injunctive relief.”

[14] I cannot agree more, especially with regard to Section 16(1) of the Anguilla Constitution Order 1982. That section states:-

“16(1) If any person alleges that any of the provisions of Section 2 to 15 (inclusive) of this constitution has been, or is being, contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress.....”

(2) The High Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of Subsection (1) of this Section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of any of the provisions of the said Sections 2 to 15 (inclusive) to the protection of which the person concerned is entitled; provided that the High Court may decline to exercise its powers under this Subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law.....”

[15] It stands to reason therefore, that any attempt to use the procedure under Section 16 as a general substitute for normal procedures which were available, constitutes an abuse of process. In the case of *Thaku Persaud Jaroo v. AG* (2002) 59 WIR at 519, Section 14(1) of the Constitution of Trinidad and Tobago was quoted as follows:-

"For the removal of doubts it is hereby declared that if any person alleges that any of the provisions of this chapter (dealing with fundamental rights and freedoms) has been, is being, or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress by way of originating motion."

This is on all fours with Section 16(1) of the Anguilla Constitution Order 1982. Where facts are not in dispute and only questions of law arise then the constitutional motion procedure under Section 16(1) becomes appropriate. Any attempt to use the procedure under Section 16(1) as a general substitute for normal procedures which were available constitutes an abuse of process. This was again the learning or position in the case of *Kemrajh Harrikissoon v. Attorney General* (1979) 31 WIR at 348, where it was stated that:-

"The holder of a public office who does not avail himself of a remedy provided by legislation when he was aggrieved by an order for his transfer from one post to another cannot obtain redress under the Constitution on the ground of entitlement to the protection of the law (Section 1(b) of the 1962 Constitution.)"

At page 349 of the said case, Lord Diplock delivering the opinion of the Board (Privy Council) opined:-

"The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter 1 of the Constitution (Trinidad and Tobago) is fallacious. The right to apply to the High Court under the Section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those

rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under Section 6(1), the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the Court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the Court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.”

Need I say more?

- [16] It is pellucidly clear that the Claimant, in terms of his claim, had an alternative means of seeking redress for what he felt were breaches of his contractual rights.
- [17] Frankly speaking, the argument or submissions in reply raised by learned Counsel for the Claimant do not convince me. If, as he says, that this issue of Section 28(3) in relation to Section 68 of the Constitution is not an open and shut case and that the Court is called upon to delve into the conduct of the Governor, before it can decide to use the ouster clause or need for an enquiry, a glance at all the documents filed by the Claimant show that the Claimant was afforded due process in accordance with the principles of Natural Justice. Nowhere did I find any evidence of any unilateral, capricious and highhanded use or exercise of the Governor's discretion as provided for in Section 68 of the said Constitution. At every turn the Claimant was informed of what was taking place and invited to state his side of the case right up to when disciplinary proceedings were instituted by the Judicial Service Commission.
- [18] It is very clear from the affidavit evidence and the exhibits filed by the Claimant himself that there is nothing pertaining to procedural impropriety. It is my view that the procedural

requirements were in fact observed. By extension therefore, this Court finds no need to delve into the actions of the Governor and the Court is therefore ousted from enquiring into the actions of the Governor in accordance with Section 28 of the Constitution.

[19] I wish to return to the first preliminary point raised by learned Counsel for the Defendant and also replied to by the learned Counsel for the Claimant. The second limb of that preliminary point raised the issue that the Claimant had failed properly to comply with this provision as related to Part 56.7(4)(c) (d) (e), in that the grounds on which the relief is sought, namely, the Constitutional ground against discrimination, are grounds which are different from the facts on which the claim is based – CPR Part 56.7(4)(e).

[20] The Anguilla Constitution Order 1982 at Section 13, which deals with protection from discrimination on the grounds of race, place of origin, political opinions, colour, creed or sex, states:-

“13(3) In this Section, the expression “discriminatory” means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions, colour, creed, or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.”

The Claimant seeks in the second part of this first Declaration, an alternative Declaration, namely, that the refusal of the Defendant to pay housing allowance was repugnant to the Constitution, particularly Section 13, and was discriminatory. It is my view that the Constitutional protection against discrimination is to be strictly construed and is limited to protection against discrimination in relation to matters of race, place of origin, sex, political opinions, colour, and creed. The Claimant, to my mind, failed to identify in his motion or by evidence that he had been discriminated against in respect of any of the particular matters specified in Section 13(3) of the Anguilla Constitution.

[21] To go further, the Declaration sought by the Claimant (i.e. Declaration 1) fails to particularize the basis on which this claim is said to be repugnant to the Constitution. He

has not shown how it is that he, the Claimant, falls within the protective provisions of the Constitution, and is therefore in clear breach of Part 56.7(4) of CPR 2000. Subsequently, I hold that the claim for a declaration cannot be maintained as sought, for non-particularization, for the Court to make such declaration. I wish to state here that in situations where there are no clear rules specified as a route or process to approach the Court in its constitutional jurisdiction, the Courts, having considered the merits of the case, would not shut the door in the face of an aggrieved person who feels his constitutional rights have been breached.

[22] This is not the case in the instant matter. In this instance, our CPR 2000 Part 56.7(4) lays down specific rules regulating the approach of litigants who allege breaches of their constitutional rights to the Constitutional Court. These rules are mandatory for reasons already spelt out in this ruling. The Claimant has not complied with these rules among other reasons also spelt out earlier in this ruling. I see no need therefore to deal with the third preliminary point; It is neither here nor there.

ORDER :- For these reasons spelt out, I hold and rule that the Claimant's claim is not properly constituted and therefore presents no reasonable cause of action for this Court to consider. The claim is struck out accordingly. Each party to bear their own costs.

.....
Frederick V. Bruce-Lyle
High Court Judge