

ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO 2005 OF 0226

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

AND

IN THE MATTER OF A DECISION OF THE ACTING PERMANENT SECRETARY IN THE OFFICE OF THE PRIME MINISTER MADE THE 20TH DAY OF MAY 2005 WHEREBY THE CLAIMANTS WERE DIRECTED BY LETTER SIGNED BY THE ACTING PERMANENT SECRETARY THAT THEY SHOULD PROCEED ON NINETY (90) DAYS VACATION LEAVE WITH IMMEDIATE EFFECT

BETWEEN:

OLSON HECTOR AND PHILIP ISAAC

As Representatives of Deputy Commissioner James Hill, Assistant Commissioner Philip Isaac, Inspector Conrad Kellman, Inspector Claudette Braithwaite-Mason, Senior Sergeant Emmanuel Attley, Sergeant Mary Greenaway-Davis, Sergeant Ineta Martin, Sergeant Warren Christopher, Corporal Ray John, Corporal Juliene Brown and Olson Hector

Claimants

And

THE ATTORNEY GENERAL

First Respondent

THE PERMANENT SECRETARY IN THE OFFICE OF THE PRIME MINISTER

Second Respondent

THE CHAIRMAN OF THE POLICE SERVICE COMMISSION

Third Respondent

Appearances:

Mr. Cosbert Cumberbatch and Mr. Hugh Marshall Jnr for the Claimants
Honourable Attorney General Mr. Justin Simon QC and Mrs. Carla Brooks-Harris Crown Counsel I for the Respondents

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2006: July 13th 14th 26th
November 8th
.....

JUDGMENT

- [1] **Blenman: J**; These are judicial review proceedings brought by police officers in the Royal Antigua and Barbuda Police Force in which they are challenging the decision of the Acting Permanent Secretary (Acting Permanent Secretary) in the office of the Prime Minister to send them on 90 (ninety) days accumulated leave. The decision was communicated by virtue of letter dated 30th May 2005 (the decision).
- [2] Corporal Olson Hector and Assistant Superintendent Phillip Isaac are the Claimants in these proceedings in which they represent Deputy Commissioner James Hill, Assistant Commissioner Conrad Kellman, Inspector Claudette Braithwaite–Mason, Senior Sergeant Immanuel Atlec, Sergeant Mary Greenway–Davis, Sergeant Ineta Martin, Sergeant Christopher Warren, Corporal Ray John, Corporal Juliene Browne and themselves. The proceedings are instituted against the Honouable Attorney General as representing the Government of Antigua and Barbuda, the Acting Permanent Secretary in the Office of the Prime Minister and the Police Service Commission.
- [3] The officers allege that by the letter dated 30th May 2005 the Acting Permanent Secretary directed that they proceed on 90 (ninety) days accumulated leave in circumstances where they did not apply for any leave. The officers contend that the Commissioner of Police (the Commissioner) is the sole person who is authorized to grant leave to Constables and Corporals and in the case of the more senior officers, the Commissioner must signify his/her approval before the leave form can be signed by the Chief Establishment Officer.
- [4] They further allege that the Acting Permanent Secretary's decision is arbitrary, unlawful and ultra vires. They have sought the Court's intervention through these proceedings and seek a number of reliefs including an order of certiorari quashing the Acting Permanent Secretary's decision. The officers also request the Court to grant them a number of declarations including that the Acting Permanent Secretary has acted in bad faith, abused her power and was motivated by political considerations. Finally, the officers say that the Acting Permanent Secretary's decision amounts to disciplinary action, and they claim to have been humiliated by the decision; accordingly, they seek both exemplary and aggravated damages.

- [5] In defence, the Respondents contend that the Acting Permanent Secretary acted lawfully when she directed the officers to proceed on accumulated leave. The Respondents also contend that the officers are not entitled to any of the reliefs for which they have prayed.
- [6] Further, the Respondents say that the Acting Permanent Secretary neither abused her power or acted in bad faith when she directed the officers to proceed on 90(ninety) days accumulated leave.
- [7] The Respondents further contend that the decision of the Acting Permanent Secretary is not amenable to judicial review.
- [8] All of the officers deposed to affidavits in support of their claim and were cross-examined. Acting Commissioner Ms. Delano Christopher (Ms Christopher) and Mrs. Eusalyn Lewis (Ms Lewis) former Chief Establishment Officer filed affidavits in support of the Respondents and they were cross examined.
- [9] In addition, the officers filed a series of interlocutory applications that were heard by the Court before the hearing of the substantive matter.
- [10] The issues that arise for the Court's determination are as follows:
- (a) Whether the officers have established that the Commissioner is the sole person who is authorized to grant leave to constables and corporals and therefore the Acting Permanent Secretary's decision is ultra vires;
 - (b) Whether the officers have established that the Commissioner must signify his or her approval for leave to be granted to senior officers;
 - (c) Whether the officers have established that the Acting Permanent Secretary acted ultra vires;
 - (d) Whether the officers have established that the Acting Permanent Secretary has acted in bad faith and/or was motivated by political considerations;

- (e) Whether the officers are entitled to the reliefs they seek.

The Law

[11] The laws relevant to this matter are the Antigua and Barbuda Constitution Chapter 23 Laws of Antigua and Barbuda (the Constitution), the Police Service Act Chapter 330 Laws of Antigua and Barbuda (the Police Act) and the Police Regulations.

[12] I propose first to refer to the relevant sections of the Constitution.

The Constitution

[13] Section 71(1) of the Constitution states that:

“The Governor-General, acting in accordance with the advice of the Prime Minister, may, by directions in writing, assign to the Prime Minister or any other Minister responsibility for any business of the Government, including the administration for any department of government.”

[14] Section 78(1) of the Constitution states:

“Where any Minister has been assigned responsibility for any department of government, he shall exercise direction and control over that department; and subject to such direction and control, the department shall be under the supervision of a Permanent Secretary whose office shall be a public office.”

[15] Section 104 (1) of the Constitution states:

“There shall be a Police Service Commission for Antigua and Barbuda which shall consist of a Chairman and not less than two or more than six other members who shall be appointed by the Governor-General acting in accordance with the advice of the Prime Minister.”

[16] Section 105(1) of the Constitution states:

“Subject to the provision of this section, the power to appoint persons to hold or act in offices in the Police Force (including appointments on promotion and transfer and the confirmation of appointments) and to remove and exercise disciplinary control

over persons holding or acting in such offices shall vest in the Police Service Commission."

[17] Section 105(5) of the Constitution provides that:

"The power to appoint persons to hold or act in offices in the Police Force below the rank of Sergeant (including the power to confirm appointments) and, subject to the provisions of section 107 of this Constitutions, the power to exercise disciplinary control over persons holding or acting in such offices and the power to remove such person from office shall vest in the Commissioner of Police."

The Police Act

[18] I will now address the relevant sections of the Police Act.

[19] Section 71(1) of the Police Act empowers the Governor General "*to make regulations relating to certain specified matters including: "the leave of absence and the periods and conditions thereof which may be granted to Inspectors, subordinate police officers (sergeants and corporals) and constables."*

[20] Section 2(i) of the Police Act defines "Gazetted Police Officer" to mean "*the Commissioner of Police as well as any Assistant Commissioner of Police, Deputy Commissioner of Police, Superintendent or Assistant Superintendent."*

Persons who hold the rank of Inspector to Constables are non gazetted officers.

The Police Service Regulations

[21] The Police Service Regulations (the Regulations) were made pursuant to the Police Act. Clause 2 of the Regulations states that specific provisions of the regulations apply to Gazetted Police Officers.

[22] Regulation 26 in Part IV stipulates the vacation leave to which the non-gazetted officers who are referred to therein are entitled.

Inspectors: 42 days per annum, which may be accumulated up to a maximum of 168 days.

Senior Sergeants

and Sergeants: 36 days per annum, which may be accumulated up to a maximum of 144 days.
Corporals: 24 days per annum, which may be accumulated up to a maximum of 96 days.
Constables: 21 days per annum, which may be accumulated up to a maximum of 84 days.

Factual Background

- [23] I will now state the factual background that is pertinent to the case at Bar. Mr. Rolston Pompey (Mr. Pompey) had been acting as Commissioner for several years up to 20th May 2005 while Ms Christopher (Ms Christopher) was then Deputy Commissioner of Police.
- [24] On 20th May 2005, Mr. Pompey was directed to proceed on leave which he did and Ms. Christopher was then appointed to act in his stead as Commissioner.
- [25] On the said night of the 20th May 2005, a meeting was convened between the Prime Minister, the Deputy Prime Minister, the Acting Permanent Secretary in the office of the Prime Minister, Mr. Pompey and Ms. Christopher and other senior police officers. At that meeting, Ms. Christopher was handed letters that were authored by the Acting Permanent Secretary which letters directed the officers to proceed on 90 (ninety) days of their accumulated leave with immediate effect. Most of the officers had accumulated vacation leave in excess of the maximum leave that is stipulated in Regulation 26 of Part IV referred to above.
- [26] However, over the years, it had become the practice for officers to accumulate leave in excess of the statutory maximum. From time to time, officers who had accumulated leave in excess of the statutory maximum applied to the Government of Antigua and Barbuda and were paid in lieu of their leave. It was not unusual for some officers to have in excess of 200 days accumulated vacation leave.
- [27] Ms. Christopher having received the letters that directed the officers to proceed on leave distributed the letters to the relevant officers and they complied with the directions.

- [28] At no time did the officers, who were directed to proceed on leave, apply for any leave out of their accumulated vacation leave. However, the officers having proceeded on leave were paid all of the relevant remuneration to which they were entitled and received other pertinent benefits.
- [29] Other officers who had accumulated leave were not directed by the Acting Permanent Secretary to proceed on leave.
- [30] As stated earlier, the officers having proceeded on the leave as directed challenged the Acting Permanent Secretary's authority to direct them to proceed on leave.
- [31] Over the years, two separate practices had developed in relation to the granting of vacation leave for police officers. There was one practice in relation to officers from the rank of Constable to Inspector (non-gazetted officers) and another for that of gazetted officers (that is officers who hold the rank above Inspector). In both of the procedures, that were previously adopted in relation to vacation leave, the applicant initiated the process by applying for the leave on standard application form.
- [32] More specifically, the procedure adopted in relation to Constable to Inspector (non-gazetted officers) is that the officer would apply to his head of section and then the application is forwarded to the Deputy Commissioner who affixed his/her signature on the application form and transmitted it to the Commissioner. The Commissioner would approve or disapprove of the leave of the officers. In relation to the officers who held the rank above Inspectors, the officer would apply for vacation leave on the prescribed form which is forwarded to the Commissioner who in turn sent the application to the Permanent Secretary in the Ministry responsible for the Police. The form is then sent to the Chief Establishment Officer for approval. The Chief Establishment Officer is the person who approved the vacation leave for officers above the rank of Inspector.
- [33] At no time prior to the 20th May 2005 has the Permanent Secretary sent any officer on leave.

- [34] In Antigua and Barbuda, there is no specific legislative provision that addresses the leave entitlement of gazetted officers. Indeed, the regulation that addresses the leave entitlement of the non-gazetted officers is silent in relation to the gazetted officers.
- [35] However, over the years the leave entitlement of persons who hold offices in the Police Force above the rank of Inspectors have always been computed in accordance with the Civil Service Regulations, Part II of the Schedule which is based on the officer's grade. Previously, gazetted officers received 27 working days annual vacation leave. By Cabinet decision of August 27, 1992, the officers were granted 42 working days to put them on par with Inspectors.
- [36] After the officers had proceeded on leave, the Honourable Prime Minister made speeches on matters that related to the Police Force, Justice and Security of Antigua and Barbuda. These speeches are the ones, for the most part, that the officers rely on in support of their contentions that the decision to send them on leave was rooted in politics.
- [37] Further, the officers view the Acting Permanent Secretary's decision to send them on leave as a disciplinary measure and felt that they were specifically targeted for disciplinary action due to their political or other affiliations.
- [38] The officers have placed leave application forms that were previously used to obtain leave in evidence and rely on them in support of their contention that the Commissioner is the sole authorized functionary who is clothed with the power to approve or disapprove applications for leave of constables and corporals.
- [39] A perusal of the application forms indicate that there is provision for the forms to be signed by the Assistant Superintendent of Police, then recommended by the Deputy Commissioner of Police and finally approved by the Commissioner.

**Ultra Vires
Officers' Submissions**

- [40] Learned counsel, Mr. Cosbert Cumberbatch submitted that the Commissioner is the sole authorized person to approve the leave of constables and corporals and this can only be done in circumstances where the officer has applied for vacation leave. No one has the authority to direct an officer to proceed on leave where that officer has not applied for leave. In the case of senior officers, the Commissioner must signify his/her approval before the Chief Establishment Officer can sign the leave form.
- [41] Mr. Cumberbatch further argued the method of police officer applying for vacation leave is well settled. Vacation leave is applied for by police officers on prescribed forms which are submitted to the Commissioner. The Commissioner, as head of the Police Department, must signify his/her approval of any leave sought. This procedure was not followed. In the case of constables and corporals, the Commissioner alone is empowered to grant leave. In the case of senior officers, the Commissioner must signify his/her approval
- [42] Next, Mr. Cumberbatch said that in the case of gazetted officers the vacation leave forms are forwarded to the Permanent Secretary and then to the Chief Establishment Officer the latter who is authorised to sign the application forms, however the Commissioner must first signify his/her approval. Mr. Cumberbatch stated that it is not uncommon for police officers to have in excess of 90 (ninety) days accumulated leave due to the exigencies of work. On several occasions, previously, the officers have been directed to defer their vacation leave.
- [43] Mr. Cumberbatch further stated that the Acting Permanent Secretary has no power or authority to do any act in relation to the police. The Acting Permanent Secretary has no authority to send officers on leave, as a consequence her decision is ultra vires. In support of his contention Mr. Cumberbatch referred to **R v Hull University [1993] AC 682; Attorney General's Reference No 2 of 2001 UKHL 68; CCSU v Minister for Civil Services [1985] 1AC 375; Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] IKB 22**

[44] Mr. Cumberbatch further submitted that none of the respondents have the unfettered power to direct police officers to go on leave as they do not possess operational command of the Police Force. The Police Force though falling under the ministerial portfolio of the Prime Minister is not under the operational conduct of the Prime Minister or the Acting Permanent Secretary but under the operational command of the Commissioner of Police.

Respondents' Submissions

[45] The learned Attorney General Mr. Justin Simon QC denied that the Acting Permanent Secretary acted in an ultra vires manner in directing the officers to proceed on leave. Mr. Simon QC took issue with the officers' contention that the Commissioner has the sole authority to approve leave of constables and corporals and stated that the Acting Permanent Secretary is authorized to grant the leave. Mr. Simon QC stated that the proper person to grant leave in the case of Gazetted Officers is the Chief Establishment Officer.

[46] Mr. Justin Simon QC submitted that the Police Service Commission has no power to lay down terms of service for police officers; this is for the Legislature and, in respect of matters not dealt with by legislation, it is for the Executive to deal with in the contract of employment, whether expressed or implied, with the individual police officer. Terms of service would include such matters as (a) the duration of the contract, (b) remuneration and pensions, (c) leave entitlements, (d) powers and duties, (e) offences and discipline, and (f) a code of conduct that the police officer is under a duty to observe. Mr. Simon QC referred to **Endell Thomas v Attorney General of Trinidad and Tobago (1982) Ac 113 at page 128 B – D**. He stated that an analysis of the legislation must of necessity be conducted in order to determine which of these matters, if any, have been left to the Executive.

[47] Further advancing his arguments, Mr. Simon QC said that the Police Force is established and shall be maintained under the provisions of the Police Act, Cap. 330. Section 71(1) of the Act empowers the Governor General to make regulations relating to certain specified matters including: "(d) the leave of absence and the periods and conditions thereof which may be granted to Inspectors, subordinate police officers (sergeants and corporals) and

- constables," "Gazetted Police Officers" is defined in section 2 (1) of the Act to mean "the Commissioner of Police as well as any Assistant Commissioner of Police, Deputy Commissioner of Police, Superintendent or Assistant Superintendent" are significantly not included in that empowering statutory provision nor are their leave entitlements addressed elsewhere in the Act.
- [48] Pursuant to section 71(1) of the Police Act, Police regulations were promulgated (Cap. 330 in volume 12 of the Laws of Antigua and Barbuda) and specifically state in clause 2 that only certain provisions of the regulations apply to Gazetted Police Officers. The regulations dealing with leave do not apply to the gazetted officers. Regulation 26 in Part IV thereof specifically addresses vacation leave and stipulates the annual vacation leave and the maximum amounts to which such leave may be accumulated. The Regulations which have the force of law (being in the nature of subsidiary legislation) govern definitively the leave entitlements of police officers from the rank of Inspectors downwards.
- [49] However, Mr. Simon QC posited that in respect of Gazetted Officers, that in the noted absence of legislative provisions or regulations, their leave entitlements are a matter for the Executive as judicially stated by the Privy Council in **Thomas v A-G of Trinidad and Tobago (ibid)**. In addition the uncontroverted evidence of Ms. Lewis is that the leave entitlements of civil servants as laid down in **Part IX of the Civil Service Regulations (No 1 of 1993)** have been adopted and applied, and the annual vacation entitlement was 27 days (reg. 89 (2) and part II of the Scheduled to the Regulations) until August 1997 when the Executive by Cabinet decision increased that entitlement to 42 days.
- [50] Next, Mr. Simon QC next stated that the Police Force is a department of government. It falls under the portfolio of the Hon. Prime Minister, assigned to him by the Governor General pursuant to section 71(1) of the Constitution. In accordance with section 78(1) of the Constitution "where any Minister has been assigned responsibility for any department of government, he shall exercise direction and control over that department; and, subject to such direction and control, the department shall be under the supervision of a permanent secretary whose office shall be a public office." The Police Act in section 6

speaks to the composition of the Force, with the Minister to whom responsibility for the police is assigned given the power to determine the numbers in each rank and, by order from time to time establish other ranks. Additionally, the Commissioner is given command of and responsibility for the superintendence of the Force “subject to the provisions of this Act and the general directions of the Minister.”

[51] The Prime Minister, stated Mr. Simon QC, through the Acting Permanent Secretary has the legal authority to exercise executive direction and control over the Police Force in any and all matters of an administrative nature not specifically addressed by the Constitution and the Police Act. The grant or authorization of vacation leave is properly a function of the Permanent Secretary in the absence of any law or regulation to the contrary. He next argued the Gazetted Officers are governed for the purposes of leave by Part IX of the Civil Service Regulations by necessary intendment, regulation 82 places that authority squarely in the hands of the Chief Establishment Officer (“subject to any directions of the Minister”) and empowers the Chief Establishment Officer to delegate that authority to the Permanent Secretary or Head of Department, who in this case would be the Commissioner. He stated the various leave forms attest to that fact, including the delegation of that authority to the Commissioner in the case of constables, corporals and sergeants and the evidence of Ms. Lewis, given her years of service as Chief Establishment Officer, is quite supportive of that fact.

[52] Finally, Mr. Simon QC urged the Court to find that the Acting Permanent Secretary acted *intra vires*

**Natural Justice
Officers’ Submissions**

[53] Mr. Cumberbatch next stated that the Acting Permanent Secretary acted in breach of the rules of natural justice. The decision of the Acting Permanent Secretary, counsel opined, was disciplinary in nature. This, Counsel argued, is reinforced by the fact that the officers who were directed to go on their accumulated leave were not shown to have accumulated more vacation leave than other officers. The main basis of this argument was that there were other officers who had accumulated more vacation than those directed to proceed on

leave yet they were not directed to take portions of their leave. The rules of natural justice require that the officers be treated fairly and they were not. In support of his argument, Mr. Cumberbatch referred the Court to **Fairmount Investments Ltd v Secretary of State for the Environment [1976] 1 WLR 1255; R v Secretary of State for Home Department v Exp Doody, [1994] 1AC 531**

Respondents' Submissions

- [54] In response, Mr. Simon QC urged the Court to accept, that the fact that there were other offices that had also accumulated substantial vacation leave and had not been directed to proceed on leave was of no moment. The officers in these proceedings cannot be heard to complain that other officers should have been similarly requested to proceed on leave, this is a decision that falls within the power of the Acting Permanent Secretary to determine which officers, if any, should be required to proceed on portions of their leave. The Executive is clothed with the discretion to decide which officers should be required to proceed on portions of their accumulated leave.

Bad Faith/Abuse of Authority Officers' Submissions

- [55] Finally, Mr. Cumberbatch argued that in the events that occurred it is clear that the Acting Permanent Secretary abused her power/authority. The Acting Permanent Secretary's action indicates "arbitrary" direct political interference in the process with a reckless disregard for the principles of fairness, reasonableness or good faith. Counsel sought to rely on **Attorney General of Grenada v The Grenada Bar Association Civil Appeal No 8 of 1999** in support of this contention.
- [56] Mr. Cumberbatch submitted that the officers who were sent on leave were punished and that in so doing the Acting Permanent Secretary acted in an unfair manner and with bad faith. The Acting Permanent Secretary, he posited acted from political motives subject to direct and improper intervention.
- [57] Mr. Cumberbatch stated further, that all of the Respondents acted in bad faith which is indicative by the very act of sending the officers on "forced" vacation leave. He sought to

rely on speeches delivered by the Prime Minister as supportive of the argument that the Respondents acted in bad faith. In counsel's view the decisions to send the officers on leave had to do with their perceived political affiliations. In addition, he attributed the Acting Permanent Secretary's sending the officers on leave to various political matters which are attributed to the Prime Minister, the Deputy Prime Minister and the Attorney General.

Respondents' Submissions

- [58] Mr. Simon QC refuted the contentions that the officers who were directed to take portions of their accumulated leave were so directed because of their political affiliations to the party in opposition. He stated that there is no evidence that the allegations made by the officers who testified are true. There is no evidence that they have been prejudiced by any affiliations they may have. Mr. Simon QC stated that to repeat the allegations is sufficient for them to be rejected since there is no merit in any of the allegations. There is no evidence before the Court on which it could be properly concluded that the Acting Permanent Secretary acted in bad faith in directing the officers to proceed on leave, nor that any of the respondents for that matter were motivated by bad faith when the Acting Permanent Secretary directed the officers to proceed on leave.

Respondents' Further Submissions

- [59] Mr. Simon QC asked the Court to deny the officers' application and suggested that the main issue for determination by the Court is whether the officers have established that the decision of the Permanent Secretary to send them on vacation leave, is amenable to judicial review. The case of **Endell Thomas v Attorney General of Trinidad and Tobago (ibid)** is instructive as to what areas in the relationship between the Crown and Public Officers is contractual.
- [60] Finally, Mr. Simon QC posited that it is undisputed that vacation leave is a term of the officers' contract of employment. The issue of vacation leave arises out of and is an intrinsic part of their contracts of employment. It has been stated in decided cases that notwithstanding that the employer is a public body, employers contractual obligations are not enforceable by way of judicial review because they are undeniably private law matters

not having sufficient statutory underpinning: **R v. Lord Chancellor's Department ex parte Nangle** [1992] 1 ALL ER 897; **R v. East Berkshire Health Authority ex parte Walsh** [1985] Q.B. 152.

[61] Thus a claim to enforce a purely private law right, such as a contractual right even against a public body cannot be brought by way of a claim for judicial review. The crucial question is whether the issue/dispute has sufficient public law element. The issue at Bar is one of contractual rights, which arise out of the relationship of employer and employee and is part of the terms and conditions accepted by the claimants when they entered the service of the Crown as police officers. Employment by the Crown does not per se inject any element of public law; nor does the fact that the Claimants are police officers; nor does the fact that the terms of the contracts of employment came into existence against a statutory background and subordinate legislation.

[62] Queens Counsel Mr. Simon therefore submitted that there is no public law element or at best an insufficient public law element in the issue before the Court to justify a claim for judicial review.

[63] Mr. Simon QC finally submitted that the officers Claim should be dismissed with costs for several reasons including the following:

- (a) The claim for judicial review is ill founded as there has been no breach of any statutory duty owed to the officers by the Acting Permanent Secretary and/or the Police Service Commission;
- (b) The issue of the officers' leave entitlements is governed by private contract law on terms expressed by the Police Regulations in the case of Inspectors and the lower ranks and on terms and conditions adopted by implication from the Civil Service Regulations in the case of Gazetted Officers, and therefore not subject to judicial review;
- (c) The management and control of the Police Force vests in the Commissioner of Police acting under the direction and control of the Minister through the administrative supervision of the Permanent Secretary;

[64] Finally, Mr. Simon QC posited that the officers have suffered no loss of pay, loss of status, or loss of any other entitlements which would normally flow from disciplinary action.

Court's Analyses

[65] I have given careful consideration to the submissions made by all learned counsel and have also reviewed the evidence in its entirety and with respect I am not at all persuaded, as urged by Mr. Simon QC, that the matters in the case at Bar are matters exclusively of a contractual nature. To the contrary, I am satisfied that the matters complained of by the officers are matters of a hybrid nature since they touch and concern both the officers' legal rights to vacation leave and they question the appropriateness of the Acting Permanent Secretary's decision.

[66] Accordingly, and with respect, I do not accept the submissions advanced by Mr. Simon QC that this is not a matter that falls within the ambit of the public law. To the contrary the issues raised in the case at Bar fall within both the parameters of private law and public law. See: **R v Civil Service Appeal Board exp Bruce [1988] 3 ALL ER 686** in which May LJ stated that "there was a sufficient public law element behind the applicants' dismissal from appointment with the Inland Revenue and the hearing of this appeal by the Board to entitle him to apply for judicial review."

[67] I have no doubt that the Acting Permanent Secretary is a public functionary and public law consequences flowed from her decision which impact on the rights of the officers. See: **R v Panel on Take-overs and Mergers exparte Datafin Ltd (1987) QB 815** in which it was held that once the activities of a body were of a public law character the body was susceptible to judicial review. In my judgment, the decision of the Acting Permanent Secretary is susceptible to judicial review.

[68] It is well settled that judicial review is the procedure by which the Court exercises supervisory jurisdiction over tribunals and public bodies. It is also the means by which the Court controls the exercise of governmental powers. The Court in the exercise of this jurisdiction is not concerned with the merits of the decision of the body or tribunal but

seeks to ensure that the body or tribunal has acted properly or within the ambit of its power in arriving at its decision - in a word the Court is concerned with the legality of the decision made.

[69] Applicants for judicial review can properly challenge decisions of public bodies on three well recognized grounds (though they are not exhaustive) namely: illegality, irrationality and procedural impropriety. See **Lord Diplock 1196 in Council of Civil Service Unions v Minister of Civil Service [1984] 3 W.L.R 1174.**

[70] Judicial Review has also been approached from the following three bases namely:

- (1) Abuse of jurisdiction
- (2) Abuse of discretion
- (3) Violation of the Rules of natural justice

[71] **Grahame Aldous and John Adler in their Treatise – Applications for Judicial Review Law and Practice of the Crown Office Second edition** State at page 163 that *"the purpose of judicial review is not to provide an appeal procedure against decisions of public bodies on their merit but to control the jurisdiction of public bodies by ensuring that they comply with their duties or by keeping them within the limits of their powers."*

[72] Judicial review proceedings is discretionary and it is for the officers to persuade the Court on the basis of the evidence that the case for its consideration is one that is fit for the exercise of its discretion in favour of the officers. The remedies that are available in judicial review proceedings are also discretionary. Even though the Court has the power to enjoin or compel bodies to do their duties properly, once the Court comes to the conclusion that a body has the power to do a particular act the Court cannot require that body to exercise its power in any particular way it can only require that the discretion lying behind the decision to exercise a power be lawfully used. See: **R v Hall University Visitor; exp Page [1991] 4 ALL ER 747 at 751 per Lord Donaldson MR.**

[73] Over the years, Parliament has conferred upon various government departments, administrative bodies and tribunals – powers which must be exercised without the "four

corners” of the legislation. While most of the rules applied by administrators will be statutory the Court has also under common law developed rules which will apply to decision makers over and above statutory rules.

Ultra Vires

[74] I propose to deal with the specific submissions made by learned counsel. In the case at Bar, Mr. Cumberbatch insisted that the Commissioner is the only authority that is vested with the power to approve the officer’s vacation leave of the constables and corporals and relied on the evidence of the officers together with previous application forms which indicate that the custom was for the application forms to be signed by the Commissioner. While counsel has urged the Court to accept that the established procedure was for the leave to be approved by the Commissioner and this was the lawful procedure, he has not provided the Court with any legal basis for these assertions. One would have expected that, at least counsel would have referred the Court to some legal basis in support of the contentions that the Commissioner is sole authority to approve or grant leave of constables and corporals. The failure of the officers to provide the Court with any legal basis in support of their contention that the Commissioner is the only authorized person to approve or grant leave to corporals and constables, is in my respectful view fatal to their claim. Further, I have been provided with no legal basis by the officers for their contention that in relation to the senior officers’ leave, the Commissioner must first signify his/her approval. This in my respectful opinion is also fatal to the senior officers’ claim and the cases relied on by Mr. Cumberbatch cannot assist him.

[75] As stated earlier, Mr. Cumberbatch maintained that the procedure that the Acting Permanent Secretary utilized in sending of them on 90 (ninety) days of their accumulate leave was bad.

[76] It is well settled that procedural Impropriety has two aspects. Firstly, the disregard of statutory procedural requirements and secondly, violation of general principles of fair procedure implied at common law. The applicant who seeks to rely on this basis of ultra vires in order to challenge a decision of a body or tribunal must establish the violation of

express procedural requirement. Indeed, it is an essential aspect of ultra vires that the applicant is able to point to express procedural requirements that have not been complied with. The officers in the case at Bar have failed to so do (by way of emphasis) this in my respectful view, is again fatal to their claim.

[77] The fact that a particular procedure was adopted for several years, without more, does not necessarily mean that it was lawful. By way of emphasis, the onus is on the officers to establish that the Commissioner is the sole person who is lawfully authorized to grant leave. To put another way, in public law matters where the Court is asked to impugn decisions of functionaries, the burden is on the claimants to establish in whom the authority lies. It is worth repeating that in the case at Bar, the Court would have expected the officers to advert its attention to the legal basis for their contention that the Commissioner is solely authorized to approve vacation leave of constables and corporals. The officers have clearly failed to discharge the burden of proof that is placed on them.

[78] Accordingly, I am far from satisfied that the Commissioner is the sole person who is lawfully authorized to approve vacation leave. I find the arguments advanced by Mr. Simon QC more attractive and agree that in the absence of any specific legislation that addresses the question of who is the authorized functionary to grant leave, the matter falls to be determined by the Executive. It appears that the Executive has authorized the Permanent Secretary to administer the leave based on the arguments advanced by Mr. Simon QC. In any event the presumption of regularity applies to the Acting Permanent Secretary's decision and this presumption has not been rebutted by the officers.

Bad Faith/Abused of Authority

[79] When reviewing a decision of a public body the Court will not admit evidence which is relevant to whether the decision is a reasonable one but will permit evidence which is relevant to whether the decision is one which the body had power to make or whether it was made in circumstances in which a reasonable body could have made it.

[80] As stated earlier, there is a presumption of regularity in relation to the acts and conduct of officials. Consequently, the burden of proof is upon the aggrieved party to establish malafides. There must be evidence of clear and intentional discrimination where the officers allege bad faith.

[81] Having reviewed the evidence led on behalf of the officers and read the submissions advanced on their behalf, I am far from satisfied as urged by Mr. Cumberbatch that the respondents held improper motives or acted in bad faith when the Acting Permanent Secretary directed the officers on leave. The allegations of bias and political motivation are not made out. I therefore accept Mr. Simon's submissions on this aspect of the matter.

[82] Further, I state that in the case at Bar, with respect, that since I am of the firm opinion that the presumption of regularity applied, the necessity for proof of malafides rested on unsatisfactory foundations which I could not accept as correct.

Natural Justice

[83] I am far from satisfied that the Acting Permanent Secretary's decision in sending the officers on 90 (ninety) days accumulated leave amounted to disciplinary action being taken against them. I am fortified in my view based on my review of the totality of the evidence and having particularly paid regard to the fact that the officers suffered no loss of any of their entitlements as a consequence of them having been directed to take 90 (ninety) days from their accumulated leave. Surely, it must be in the power of those who have responsibility for the proper functioning of the Police Force to determine whether officers who have accumulated annual leave should be requested to take a portion of their leave. In the circumstances of this matter there was no requirement to provide the officers with a hearing before requesting them to take a portion of their accumulated leave. The principles of natural justice have no application to the matter.

[84] Also, I do not accept the argument advanced by Mr. Cumberbatch that the officers could only be made to proceed on a portion of their annual leave if they had applied for same. Good administration of the Police Force must enable a review to be done by the

authorized functionary at appropriate stages, in order for the determination to be made as to which officers in the opinion of the appropriate authority, should be required to take a portion of their accumulated leave. To underscore my considered opinion, I do not accept that officers ought to have been given a hearing before they could be directed to take a portion of their accumulated (vacation leave). These are all matters of policy which in my view fall exclusively within the domain of the Executive. The Courts have always been most reluctant to review policies of the State officials unless it can be proved that they have acted improperly. On the evidence presented by the officers, I am not at all persuaded that the Acting Permanent Secretary acted improperly.

[85] **Hillarie Barnett in his Treatise Constitutional and Administrative Law Fifth edition page 714-715 states that:**

“Matters of public policy are for determination by the executive, and not the judiciary, and any purported attempt to control the decision will be regarded as a violation of the separation of powers and an intrusion into the proper decision making sphere of the executive. For example, in **Nottinghamshire County Council v Secretary of State for the Environment (1986)**, it was held that the court should not intervene to quash guidance drafted by the Secretary of State, on the authority of parliament, setting limits to public expenditure by local authorities. Lord Scarman ruled that:

“Unless and until a statute provides otherwise, or it is established that the Secretary of State has abused his power, these are matters of political judgment for him and for the House of Commons. They are not for the judges or your Lordships’ House in its judicial capacity.”

[86] In **Hammersmith and Fulham London Borough Council v Department of the Environment (1991)**, concerning the lawfulness of ‘charge capping’ local authorities (penalizing local authorities for exceeding their budgets), the House of Lords ruled:

“That the decision was not open to challenge on the grounds of irrationality ‘short of the extremes of bad faith, improper motive or manifest absurdity’. Lord Bridge went on to rule that such decisions, relating to national economic policy, ‘are matters depending essentially on political judgment’ and that, in the absence of any evidence of bad faith or abuse of power, the courts would be ‘exceeding their proper function if they presumed to condemn the policy as unreasonable.”

[87] In *R v Parliamentary Commissioner for Administrative ex parte Dyer (1994)*, Simon Brown LJ held:

“That matters of national policy were not open to challenge before the courts other than on the basis of bad faith, improper motive or manifest absurdity. Matters of national economic policy were for political – not judicial – judgment.”

Court’s General Observation

[88] In my respectful opinion, the failure by the officers to establish that the Commissioner is the sole lawful authority to grant leave to constables and corporals and in relation to the senior officers that the Commissioner must signify his/her approval puts an end to their claim. In addition, they have failed to prove any of the grounds on which they relied in seeking to impugn the Acting Permanent Secretary’s decision.

[89] However, due to the interest that the matter has generated, I propose to address some of the other matters raised in the case at Bar. Firstly, I have no doubt that the Executive has the power to set national objectives for the Force. The Executive also has an interest in promoting the efficiency of the Police Force.

[90] In some jurisdictions, it is usual for Parliament to specifically confer wide regulatory powers on a specific public functionary, such as the Permanent Secretary, in relation to the terms and conditions of police officers; in Antigua and Barbuda this does not appear to have been the case. In the absence of any legislative framework (including subsidiary legislation) which specifically addresses the issue of who has the power to grant leave as stated above, I accept Mr. Simon’s submissions that these matters would have to be regulated by the Executive. Usually, the permanent secretary of the ministry responsible for the police force is the authorized person to grant leave (this authority could be delegated by the Permanent Secretary).

[91] Even though as indicated earlier, Mr. Simon QC has referred the Court to the absence of specific legislative provisions that address the issue of who is authorized to grant leave and has posited that the Permanent Secretary is the proper person who is authorized to grant vacation leave, I must state that the further arguments he advanced in relation to the

statutory bases (by implication) do give me cause for pause especially when the Court was urged to accept that in relation to the leave of Gazetted Officers, Part 1X of the Civil Service Regulations by necessary intendment places that authority squarely in the hands of the Chief Establishment Officer. Perhaps the time has come for there to be specific and clear legislative framework to govern the entire Police Force. Alternatively, it may be useful for the Executive to formulate clear and comprehensive guidelines, which should be published, in relation to the accumulation of leave for all levels of officers and state who is authorized to grant leave to the various ranks of officers. This may obviate the need for much litigation since the bases and procedures would be well known to all persons. This in no way negates the fact that in the case at Bar, I am sure that the all questions of the officers' leave not dealt with by Parliament fall within the province of the Executive.

Conclusion

- [92] While I am satisfied that the decision of the Acting Permanent Secretary is susceptible to Judicial Review, the officers have failed to meet the threshold required to establish any of the grounds on which they rely in asking the Court to exercise its discretion in their favour and to impugn the Acting Permanent Secretary's decision. Accordingly, they have failed to establish their claim.
- [93] Further, in my respectful view, in the absence of any legislation that addresses in whom the authority to direct officers to take portions of their accumulated leave inhere, I am satisfied that this is a matter which falls within the province of the Executive. The Government of Antigua and Barbuda is clothed with the jurisdiction to determine who should exercise that power. As a public officer, the presumption of regularity applies to the Acting Permanent Secretary's decision and has not been rebutted by the officers.
- [94] For the sake of completeness, I state that no evidence was adduced to show that the Chairman of the Police Service Commission was involved in the decision; therefore, he should not have been joined as a respondent.
- [95] In view of the above circumstances and for the above reasons, I dismiss the officers' claim.

[96] In the exercise of my discretion and in accordance with Part 56(4) of CPR 2000, I make no order as to costs. I am not of the view that the officers in bringing these proceedings either acted unreasonably or abused the Court's process.

Louise Esther Blenman
Resident High Court Judge