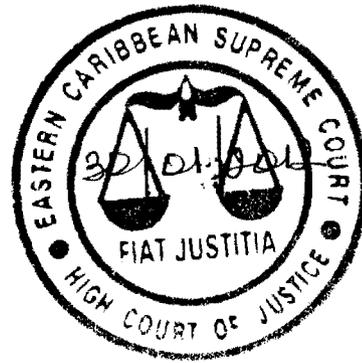


THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
SAINT VINCENT AND THE GRENADINES
HIGH COURT CIVIL CLAIM NO. 399 OF 2010



IN THE MATTER OF THE APPLICATION OF THE POLICY RELATING TO THE TRANSFER OF PERSONS EMPLOYED BY THE CIVIL SERVICE RULES

AND

IN THE MATTER OF AN APPLICATION BY OTTO SAM FOR LEAVE TO APPLY FOR JUDICIAL REVIEW OF THE DECISION OF THE CHIEF PERSONNEL OFFICER TO TRANSFER HIM TO A POST THAT AMOUNTS TO A DEMOTION, WHERE HE HAS NO OFFICE, COMPUTER TOOLS TO PERFORM DUTIES AS WELL AS BEING SEPARATED FROM THE REST OF THE STAFF SO AS "NOT TO CREATE ANY PROBLEMS."

BETWEEN:

OTTO SAM

Applicant

AND

TYRONE BURKE, THE CHIEF PERSONNEL OFFICER

First Respondent

THE DIRECTOR, NATIONAL EMERGENCY MANAGEMENT ORGANIZATION

Second Respondent

THE ATTORNEY-GENERAL OF SAINT VINCENT AND THE GRENADINES

Third Respondent

Appearances: Mr. J. Thomas for the Applicant
Mr. G. Bollers for the Respondents

2011: July 6
2012: January 30

JUDGMENT

[1] **THOM, J:** The Applicant, Mr. Sam, is a Public Officer. He is a trained teacher. On December 29, 2005 he was appointed to the post of Head Teacher of the Lowmans

Windward Anglican School. In August 2009, he was transferred to the South Rivers Methodist School.

- [2] On the 17th day of August 2010, the Chief Personnel Officer wrote to Mr. Sam informing him that he was assigned to the National Emergency Management Office (NEMO) with effect from August 23, 2010.
- [3] Mr. Sam deposed in his affidavit in support of his application that he reported for duty to the Director (Ag.) of NEMO on the 23rd day of August 2010. On August 23, 2010, he received a memorandum from the Director (Ag.) outlining his responsibilities at NEMO.
- [4] On September 22, 2010 he wrote to the Director (Ag.), informing her that he was not assigned any work to do. On November 4, 2010, four days after hurricane Tomas struck Saint Vincent and the Grenadines, he was sent on 90 days vacation leave even though he had made no application for vacation leave.
- [5] Mr. Sam sought leave to seek judicial review of the decision contained in the letter of August 17, 2010 on the grounds that the decision is illegal, irrational, and was actuated by spite, malice, bias and improper motive, and was discriminatory.
- [6] The Respondents opposed the application for grant of leave on the ground that Mr. Sam was not transferred to NEMO as he alleges but rather he was assigned to NEMO to perform a specific task being to prepare a National Disaster Education Policy Plan. Further, Mr. Sam has no reasonable prospect of success at trial.

SUBMISSIONS

- [7] Learned Counsel Mr. Thomas submitted that the letter of August 17, 2010 amounted to a transfer of Mr. Sam from the Ministry of Education to NEMO. Mr. Sam does not challenge the authority of Chief Personnel Officer to transfer him, but he contends that the decision to transfer him was illegal; it was contrary to his letter of appointment. It amounted to a

demotion. Also, the transfer was actuated by spite, malice and bias, it amounted to a punishment for statements made by him against the manner and circumstances under which the Honourable Prime Minister visited the South Rivers Methodist School while he was the Headmaster. Further, the decision was unreasonable and irrational in that a highly skilled, trained educator was removed from the classroom and sent to NEMO, he was given no duties to perform and then compulsorily sent on 90 days vacation leave.

- [8] Mr. Bollers in response submitted that Mr. Sam was not transferred to any post at NEMO but was assigned to NEMO to perform a specific task. Learned Counsel referred the Court to Civil Service Orders Section 3.1 (1) and submitted that pursuant to the Section, a public officer may be assigned from one Ministry or Department to another. Mr. Sam was assigned from the Ministry of Education to NEMO which is a Department of the Ministry of National Security. Mr. Sam was transferred to facilitate a request made by the Permanent Secretary in the Ministry of National Security that someone be temporarily assigned to NEMO to assist with the preparation of a national disaster preparedness education policy. The decision to assign Mr. Sam was not irrational or unreasonable or made with any improper motive. The letter of appointment of Mr. Sam remains in effect. Mr. Sam's salary is still being paid by the Ministry of Education. Mr. Bollers referred the Court to its decision in the case of **Annella James v The Chief Personnel Officer et al** HCCIV. No. 105 of 2009.

FINDINGS

- [9] The grounds upon which judicial review may be sought were set out by Lord Diplock in **Council of Civil Service Union v Minister for the Civil Service** to include:
- (a) illegality;
 - (b) irrationality;
 - (c) procedural impropriety.

Lord Diplock explained the terms in the following manner:

“By ‘illegality’ as a ground for judicial review, I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not par excellence is a justifiable question to

be decided in the event of dispute by those persons, the judges, by whom the judicial power of the State is exercisable.

By 'irrationality' I mean what by now can be succinctly referred to as Wednesbury unreasonableness (see **Associated Provincial Picture House Ltd v Wednesbury Corp.** (1947) 2 AER p. 680). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well-equipped to answer, or else there would be something badly wrong with our judicial system.

I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act within procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice."

[10] It is settled law that the test to be applied by the Court on an application for leave to seek judicial review is the test as stated by the Privy Council **in Satnarine Sharma v Browne Antoine** P.C. No. 75 of 2006. The Court stated the test in the following terms:

"The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy; **R v Legal Aid Board, Exp. Hughes** (1992) 5 Admin. LR 623, 628; **Fordham Judicial Review Handbook** 4th Edition p. 426 - But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application. As the English Court of Appeal recently said with reference to the criminal standard of proof in **R (N) v Mental Health Review Tribunal** (Northern Region) [2005] EWCA Civ. 1605, 468 paragraph 62 in a passage applicable mutatis mutandis to arguability:

"...the more serious the allegations or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability) but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities."

It is not enough that a case is potentially arguable. An applicant cannot plead potential arguability to justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory process of the court may strengthen: **Matalulu v Director of Public Prosecutions** [2003] 4 LRC 712, 733."

[11] The Civil Service Orders governs the conditions of service of Public Officers. Provision is made in the Civil Service Order for Public Officers to be transferred or seconded. These provisions are Sections 2.17 and 2.19. They read as follows:

"2.17 (1) Subject to the provisions of paragraph (2) of this Order a transfer not involving a change in emoluments of an Officer, or the nomenclature of his post may, where the transfer –

- (a) is within a Ministry or between a Ministry and any Department of the Ministry, be made by the Permanent Secretary;
- (b) is within a Department, be made by the Head of that Department or the Permanent Secretary of the Ministry responsible for that Department;
- (c) is between Ministries or between Departments of different Ministries be made by the Chief Personnel Officer after consultation with the Permanent Secretaries concerned.

Provided that all transfers ordered under (a) and (b) above shall be reported forthwith to the Chief Personnel Officer.

(2) Where an Officer is or is to be, transferred under any of the foregoing provisions of this Order, a Permanent Secretary, or Head of Department, or the Officer concerned (through the Permanent Secretary or Head of Department) may lodge a written objection with the Chief Personnel Officer; and if the objection is lodged by an officer it shall be transmitted to the Service Commission.

2.19 Where an officer is required temporarily for duty in another post than in an acting capacity with the intention of reverting to his substantive post at a later date he will be seconded for temporary duty. All secondments must be authorized by the appropriate Service Commission."

[12] The letter of August 17, 2010 which is the subject of Mr. Sam's complaint reads as follows:

"Mr. Otto Sam
(u.f.s. PS/Education)

Dear Sir,

Please be informed that approval has been given for your assignment to the National Emergency Management Office, Ministry of National Security, Air and Sea Port Development, with effect from August 23, 2010 and until further notice.

You are therefore requested to report to the Director, National Emergency Management Office, Ministry of National Security, Air and Sea Port Development, on August 23, 2010 for instructions relative to the said assignment.

Yours faithfully,
Tyrone Burke (Mr.)
Chief Personnel Officer

c.c. PS/Education
PS/National Security, Air and Sea Port Development
Chief Education Officer
Director, National Emergency Management Office.”

[13] Mr. Bollers contends that the letter of August 17, 2010 does not constitute a transfer within the meaning of Section 2.17. Mr. Sam is not transferred to any post at NEMO, but rather it is an assignment of duty within the meaning of Section 3.1 (1). Section 3.1(1) reads as follows:

“3.1 (1) An officer shall discharge the duties of the office to which he is appointed and any other related duties that the Permanent Secretary or Head of Department may, at any time, call upon him to discharge.”

[14] Mr. Bollers relied on the ruling of this court in the **Annella James** case.

[15] The present case is distinguishable from the **Annella James** case. In the **Annella James** case, Ms. James a Crown Counsel, was assigned duties by the Attorney-General to give legal advice to the Ministry of Housing for a period of six months. The Attorney-General's Chambers to which Ms. James was appointed is responsible for providing legal advice to all Ministries within the Public Service of Saint Vincent and the Grenadines.

[16] In the **Annella James** case I stated at paragraphs 33 and 34:

“33. Learned Counsel for Ms. James submitted that the letter of March 4, 2009 does not amount to an assignment of duties but rather removal from the Ministry to which she was appointed.

34. I respectfully disagree with the submission of Learned Counsel the last sentence of the letter cannot be read in isolation. The letter when read as a whole seeks to assign Ms. James to perform legal duties which were to be discharged at a particular location being the Ministry of Housing.

These duties were to be completed within a specified time. Ms. James was not to become an employee within the Ministry of Housing. The Attorney-General's Chambers is the department which provides legal advice to the entire Civil Service. To perform this function it may become necessary from time to time for legal officers to leave their physical office at the Attorney-General's Chambers and go to other offices within the Civil Service to perform their legal duties. This is particularly so when legal officers are required to advise on legislative reform. It makes for good administrative efficiency for the officer to go to the particular Department/Ministry where there can be face to face interaction, rather than have all the documents transported to the Attorney-General's Chambers..."

- [17] In the present case there is no evidence that the duties outlined in the Memorandum from the Director are duties of the Office of Head Teacher or duties related to the office of Head Teacher.
- [18] Assuming that Mr. Bollers is correct that Mr. Sam was not transferred but only assigned to perform duty at NEMO in accordance with Section 3.1 (1), then the provisions of Section 3.1(1) must be satisfied.
- [19] The effect of Section 3.1(1) is that a Permanent Secretary or Head of Department may assign to an officer in addition to the duties of his office any other duties related to his office. To fall within this section the duties Mr. Sam is required to perform at NEMO must either be the duties of his office of Head Teacher or duties related to his office of Head Teacher. Secondly, the duties must be assigned by the Permanent Secretary or the Head of Department. It is not disputed that Mr. Sam holds the office of Head Teacher. At the time of the letter of August 17, 2010 Mr. Sam had been appointed to the office of Head Teacher for almost five (5) years.
- [20] The letter of August 17, 2010 does not state what is the duty or duties which Mr. Sam was assigned to perform at NEMO. The Chief Personnel Officer in his affidavit deposed at paragraph 8 that the letter of August 17, 2010 was written at the instance of the Permanent Secretary of the Ministry of Education as a result of a request from Permanent Secretary of the Ministry of National Security for someone to be assigned to assist with the preparation

of a national disaster preparedness education policy. No affidavit was filed by the Permanent Secretary of the Ministry of Education. It is not disputed that the Director (Ag.) of NEMO wrote to Mr. Sam on August 26, 2010, three (3) days after he had reported to NEMO outlining his responsibilities. The memorandum reads as follows:

"FROM: Director (Ag.), NEMO DATE: 26th August 2010
TO; Mr. Otto Sam
SUBJECT: PROGRAMMES AND RESPONSIBILITIES AT NEMO

The National Emergency Management Organization (NEMO) extends a warm welcome to you as a member of staff effective 23rd August 2010. During our discussions (Forbes/Sam) on Monday 23rd August 2010 at approximately 7:50 a.m., I indicated there are three (3) programme areas that you will be assigned which are:

- To Review the National Educational Policy and Disaster Risk Management Plan (a copy of which I gave to you on Monday 23rd August 2010).
- To develop a School Programme where NEMO visit schools and present disaster risk reduction information.
- To maintain a list of Shelter Managers for all Emergency Shelters in St. Vincent and the Grenadines.

I also informed you that there will be Shelter Management Training on 7th – 8th September 2010, which you will attend as the initial training in becoming a Certified Instructor with NEMO.

Please be reminded that an office was assigned to you on 23rd August 2010. It was shown to you on the tour of NEMO's building, and to date remains unoccupied.

Please don't hesitate to discuss with me any concerns you may have on the above mentioned duties.

Michelle Forbes (Miss)
Director (Ag.)"

[21] There is no evidence on the affidavits of the Respondents showing what are the duties of a Head Teacher and how the duties listed in the memorandum of the Director (Ag.) are duties related to the Office of Head Teacher, for example, whether maintaining a list of Shelter Managers for all Emergency Shelters in St. Vincent and the Grenadines is a duty or related to the duty of the Office of Head Teacher.

[22] Further under Section 3.1, it is for the Permanent Secretary of the Ministry or Head of Department in the Ministry to assign duties to the public officer. In this case duties assigned to Mr. Sam pursuant to Section 3.1(1) had to be assigned by the Permanent Secretary in the Ministry of Education or the Head of Department in the Ministry of Education. The letter of August 17, 2010 does not state any specific duties that Mr. Sam was assigned to do at NEMO. The letter states that he was required to report to the Director of NEMO for instruction relative to his assignment. The affidavit of Mr. Sam shows that the Director (Ag.) of NEMO Ms. Forbes outlined his duties at NEMO to him by memorandum dated August 26, 2010. The affidavit evidence of the Respondents does not show that the Permanent Secretary/Education or the Head of Department in the Ministry of Education assigned any duties to Mr. Sam to be performed at NEMO. Indeed, Ms. Forbes in her affidavit deposed at paragraph 22 as follows:

“With respect to paragraph 18 of the Applicant’s Affidavit, I admit that I called the Applicant into a meeting with Ms. Peters and at that meeting Ms. Peters gave an outline of a school safety course and that the Applicant was informed that he would be assisting her with school presentations. **The Applicant was assigned to NEMO to assist with such tasks as I may assign to him.** (Emphasis mine).”

[23] For the reasons stated above, I find that the submission of Mr. Bollers has no merit.

[24] Notwithstanding the above, the onus is on Mr. Sam to show that there is an arguable ground for judicial review having a realistic prospect of success.

[25] Mr. Sam based his challenge of the letter of August 17 on the ground illegality in that the letter was in violation of his appointment. It amounted to a demotion in that he was not placed in an equivalent grade or given similar work to do. The decision was irrational, it was activated by spite, malice and improper motive and was discriminatory.

ILLEGALITY

[26] Mr. Sam’s letter of appointment as Head Teacher states that his appointment was subject to the Civil Service Orders, that he could be transferred to a post of equivalent grade. It is not disputed by the Respondents that the level of Officers at NEMO are Director – Grade

11, Deputy Director – Grade 10, Training Officer – Grade 8. The letter of August 17, does not state that Mr. Sam is transferred to any office at NEMO, nor is he assigned to perform the duties of any office at NEMO, but simply that he was assigned to NEMO and he would receive instructions in relation to the said assignment from the Director of NEMO.

[27] As stated earlier, the Civil Service Orders make provision for transfer of Public Officers. Such transfers must be to an office of equivalent grade or higher. The Civil Service Orders also make provision for secondment of public officers to perform the duties of an office in another ministry or department temporarily. Here too the office must be to an equivalent grade or higher.

[28] I was not referred to any provision of the Civil Service Orders or any Regulations of the Public Service which authorizes a Permanent Secretary or the Chief Personnel Officer to assign or transfer a Public Officer to another Department or Ministry where the Public Officer will hold no office or will not perform the duties of any office in the Ministry or Department.

[29] In view of the above, I find that Mr. Sam has shown that he has an arguable ground with a realistic prospect of success; that the letter of August 17, 2010 was contrary to the terms and conditions of his appointment as a public officer.

IRRATIONALITY

[30] Mr. Thomas contends that the decision is unreasonable in that a highly trained educator was removed from the classroom and sent to NEMO.

[31] It is not disputed that Mr. Sam is a trained educator with over 30 years experience in the field of education. It is also not disputed that he has no training in disaster preparedness. The duties assigned to Mr. Sam at NEMO are the three matters referred to in Ms. Forbes' memorandum dated August 26, 2010. When the office which Mr. Sam holds, being the office of Head Teacher, and his experience of 30 years as an educator are taken into

account, and the duties which Mr. Sam are required to perform at NEMO which includes review of a Disaster Risk Management Plan, and to maintain a list of Shelter Managers for all Emergency Shelters in Saint Vincent and the Grenadines, I am of the view that Mr. Sam has an arguable ground with a realistic prospect of success in the terms of Lord Diplock's explanation of irrationality, that the decision was so outrageous in its defiance of logic that no sensible person who had applied his mind to the question to be decided could have arrived at it.

- [32] Mr. Thomas also contends that the decision was actuated by spite, malice and improper motive. The decision of which Mr. Sam complains is the decision contained in the letter of August 17, 2010. All of the acts referred to by Mr. Sam in his affidavit such as the quality of work assigned to him, the adequacy of the physical office he was required to occupy, the lack of working tools such as a computer all related to the actions of Ms. Forbes who Mr. Sam does not allege made the decision or was one of the persons who made the decision in the letter of August 17, 2010. There is no evidence in Mr. Sam's affidavit of spite or malice of either the Permanent Secretary in the Ministry of Education or the Chief Personnel Officer. I therefore find that Mr. Sam has not shown that he has an arguable case on this ground with a realistic prospect of success.

SECTION 16 OF THE CONSTITUTION

- [33] In paragraphs 20 and 22 of Mr. Sam's affidavit he states as follows:
- “22. I am advised by Counsel and verily believe the same to be true that the treatment meted out to me is discriminatory and wrong in violation of my fundamental and constitutionally protected rights.
24. I am advised by counsel and verily believe the same to be true that there is a legal basis to challenge the validity of the purported assignment by the First-named Respondent. I am advised by Counsel and verily believe the same to be true that this matter raises constitutional issues in relation to the First Respondent's purported assignment of me ...”

- [34] In his submissions Mr. Thomas after referring to Sections 16 and 13 (2) and (3) stated:

"The pattern of treatment meted out to the Applicant since his August 17, 2010 transfer, the menial or lack of assignment or task, the placing of him apart from the general staff (in a storage room), the refusal to provide him, a senior civil servant who formerly worked as a head teacher with basic tools such as a computer and the unrequested 90 (sic) forced leave is prima facie proof of discrimination. The bad acts on the part of the First and Second Respondents could not be more particularized."

[35] Section 16 of the Constitution makes provision for a person to seek redress for violation of the fundamental human rights which are enshrined in Section 2 – 15 of the Constitution. Section 13 (2) and (3) to which Mr. Thomas referred reads as follows:

"13 (2) Subject to the provisions of subsections (6), (7) and (8) of this section, no persons shall be treated in a discriminatory manner by any persons acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

(3) In this section, the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by sex, race, place of origin, political opinions, colour or creed 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."

[36] The allegation of discrimination made by Mr. Thomas in his submission does not amount to discrimination within the meaning of Section 13(3). I find there is no merit in this submission.

DELAY AND ALTERNATIVE REMEDY

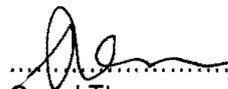
[37] The letter complained of is dated August 17, 2010. It was delivered to Mr. Sam on the same day. The application for leave to seek judicial review was filed on the 28th day of October, 2010. In view of these circumstances I find that there was no delay in the making of the application. Also there was no submission that there is an alternative remedy available to Mr. Sam. Having reviewed the pleadings I find that there is no alternative remedy available to Mr. Sam.

CONCLUSION

[38] In conclusion, the Applicant is granted leave to seek judicial review of the decision contained in the letter of August 17, 2010 on the grounds of illegality and irrationality.

[39] It is ordered:

- (1) That the Applicant is granted leave to seek judicial review of the decision contained in the letter of August 17, 2010 on the grounds of illegality and irrationality.
- (2) The Applicant must file and serve a claim for judicial review within fourteen (14) days hereof.
- (3) The First hearing shall take place on the 29th day of February 2012.
- (4) The First Respondent shall pay the Applicant costs in the sum of \$1,500.00


.....
Gerfel Thom
HIGH COURT JUDGE