

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA

CLAIM NO. ANUHCV 2012/0209

BETWEEN:

ANGELIQUE FORD

Claimant

AND

PERMANENT SECRETARY, MINISTRY OF NATIONAL SECURITY AND LABOUR

Defendant

Appearances:

Dr. David Dorsett for the Claimant
Mrs. Carla Harris Brooks for the Defendant

2012: September 20

RULING

- [1] **REMY J.:** The Claimant is an Immigration Officer. The Defendant is the Permanent Secretary in the Ministry of National Security and Labour.
- [2] By letter dated 28th September 2011, the Defendant advised the Claimant that she was "found to be in breach of the Antigua and Barbuda Criminal Act" and was suspended from her duties from 22nd September 2011 to 19th October 2011, "pending investigations into the matter." After completion of her suspension on 19th October 2011, she was not allowed to resume her duties.

[3] By application dated 22nd February 2012, the Claimant applied for leave to apply for judicial review with respect to the continued suspension. Leave was granted on 4th April 2012. The first hearing was adjourned to 29th May 2012.

[4] On 5th April 2012, the Claimant filed her fixed date claim form seeking among others, the following remedies:-

- i). An Order of certiorari quashing the decision of the Defendant to suspend the Claimant from her duties from 22nd September 2011;
- ii). A declaration that the decision of the Defendant to suspend the Claimant on account of a purported breach of the Antigua and Barbuda Criminal Act is illegal, irrational, and unfair, there being no such Act.
- iii). A declaration that the Defendant is entitled to her full salary from the date of her suspension on 22nd September 2011.
- iv). An order that the Defendant do pay all salary due to the Claimant following her suspension on 22nd September 2011.
- v). A declaration that the Claimant is entitled to resume her duties as Immigration Officer Grade V.
- vi). An order that the Defendant is restrained whether by himself, his servants, or agents, or howsoever otherwise from impeding, interfering, or otherwise hindering the Claimant from performing her duties as an Immigration Officer Grade V.

[5] The Claimant also sought damages, interest and costs.

[6] By letter dated 12th April 2012, the Defendant ordered the Claimant to report to duty on 16th April 2012. By a further letter dated the 12th April 2012, the Defendant requested that the Claimant provide a written report with respect to "an incident that occurred at the VC Bird International Airport." The Claimant provided the report by memo dated 13th April 2012. By letter dated 4th May 2012 the Defendant preferred two charges against the Claimant and advised of a hearing scheduled for May 14th 2012 with respect to the charges.

[7] On 11th May 2012 the Claimant filed a Without Notice Application seeking inter alia, an order that "proceedings brought by the Respondent (the Permanent Secretary) against the Applicant by letter dated 4th May 2012 be stayed until further order." On 11th May 2012, the Court heard the application and granted the said Order. The return date was set for 29th May 2012.

[8] In her Affidavit filed on 24th May 2012, Ms. Sharon Peters, Permanent Secretary within the Ministry of National Security and Labour (the Defendant) deposed inter alia that: -

- a) The Claimant is not a civil servant as defined in the Civil Service Act, Cap 87 but a non-established employee. "By instrument of appointment dated 16th December 2005, the Claimant was appointed by the Governor-General as an Immigration Officer effective 1st January 2005 on the advice of Cabinet.
- b) Since the Claimant is a non-established employee, the Civil Service Act, Cap 87 and its Regulations do not apply to her. Her contract with the Government is governed by the Antigua and Barbuda Labour Code.

[9] The Claimant filed an Affidavit in Reply on the 25th May 2012, in which she deposed as follows: -

1. "Whilst it is the case that by letter dated 17th May 2002 I was appointed by the Defendant's predecessor as an Input Clerk, the reality is that by an instrument given under the hand of the Governor-General on 16th December 2005, I was appointed to be an Immigration Officer with effect from 1st January 2005.
2. Whilst it may be the case that the Permanent Secretary may have the "power to appoint and discipline non-established employees" the current state of affairs is that the power that appointed me is the Governor-General. As of now I have a singular appointment, and appointment by the Governor-

General. Non-established employees are not persons appointed by the Governor-General."

[10] When the matter came up for hearing on the 29th May 2012 (the return date), Counsel for the Claimant had not served the Affidavit of 25th May 2012 on Counsel for the Defendant. The Court made an Order inter alia that:-

- a) The application filed on the 11th May 2012 was adjourned to 7th June 2012.
- b) Respondent to file Affidavit in Reply within 14 days.
- c) Counsel for Claimant granted leave to file Affidavit in Response within 7 days.
- d) Parties to file and serve Statement of Facts, Issue and Law within 21 days thereafter.
- e) The Matter (i.e. the hearing of the application for judicial review) was adjourned to 24th July, 2012 at 2 p.m.

[11] On the 7th June 2012, the hearing of the application filed on the 11th May 2012 came up for hearing before the Court and Counsel made oral submissions to the Court. Dr. Dorsett, Counsel for the Claimant submitted that the Defendant is not entitled to prefer any charges against the Claimant and to initiate disciplinary proceedings against her. Learned Counsel grounds his submission on the following:-

- a. The Applicant's first appointment was by letter or Instrument of May 17th 2002; the Applicant was at that time a non-established person. Subsequent to this appointment as a non-established person, the Applicant later received an Instrument of Appointment under the hand of the Governor-General. This Instrument was granted under Statutory power, specifically, Section 3 (2) of the Immigration and Passport Act. By virtue of this appointment, the appointment of 2002 "lapsed and it ceased and is no more". So, as of the present time, the only appointment and the Applicant's current appointment is that of the Governor-General, a Section 3(2) appointment.

- b. When one looks at the Immigration and Passport Act, one would see that only certain persons may be appointed to such an office, as that of Immigration Officer. An Immigration officer, as one reads Section 3(2) of the Immigration and Passport Act, is that of "a police officer not below the rank of a subordinate police officer."
- c. There is no issue with the Respondent stating that she has the power to appoint and discipline non-established officers. Further, non-established officers fall under the Antigua and Barbuda Labour Code (the Labour Code). However, the Applicant is not a non-established employee as of now. When one looks at the Labour Code and the sections that define the persons covered and more particularly those who are not covered, the Applicant does not fall under the jurisdiction of the Labour Code.

[12] Mrs. Carla Brookes-Harris, Learned Counsel for the Defendant, submitted that it was important to establish whether the Claimant was an established employee or a non-established employee. Learned Counsel developed her submissions as follows:-

- (i) The Claimant is a non-established employee and therefore the Civil Service Act, Cap. 87 of the Laws of Antigua and Barbuda and its regulations, do not apply to the Claimant. The Civil Service Act defines a civil servant. The Claimant is not an established employee; in the First Schedule to the Civil Service Act, the position of Immigration Officer is not mentioned in it at all. It is on this basis that the Respondent submits that the Claimant is not an established employee.
- (ii) As a non-established employee, the Antigua and Barbuda Labour Code governs the Claimant's contract of employment within the Government.
- (iii) Immigration Officers are no longer regarded as police officers and as such the ground on which the Claimant is stating that the Labour Code does not apply cannot stand. Since there's no doubt that the Claimant is a non-established

worker, the next issue to be addressed is whether the Permanent Secretary has the power to exercise disciplinary control over the Claimant.

- (iv) Learned Counsel for the Claimant has conceded that if an individual is a non-established employee, then the Permanent Secretary has such power to exercise disciplinary control over non-established employees.
- (v) By virtue of Section 80 of the Constitution, the Governor-General cannot act on her own to remove or suspend the Claimant.
- (vi) By virtue of Section 78 of the Constitution, the Permanent Secretary is the Head of the Ministry under the direction of the Minister. The Permanent Secretary is therefore responsible for managing the day to day affairs of the Ministry and this would include investigation of alleged misconduct by employees within the Ministry.
- (vii) Section 100 of the Constitution provides how and by whom an established employee is appointed. The Section provides that the Public Service Commission has the power to appoint persons to hold offices in the public service. The Claimant has failed to adduce any evidence that she was appointed by the Public Service Commission. It is clear from the documents exhibited to the Affidavit of Ms. Sharon Peters that the Public Service Commission had nothing to do with the appointment of the Claimant as an Immigration Officer.

[13] By way of rebuttal, Dr. Dorsett re-iterated that the appointment of the Applicant is an appointment by the Governor-General pursuant to statute. It is the submission of Learned Counsel that in the absence of any Section within the Immigration and Passport Act dealing with how the Applicant may be "dis-appointed," then recourse must be had to Section 18 of the Interpretation Act. He contends that Section 18 does not vest directly or indirectly or by any circuitous route any power to the Permanent Secretary. There is no need to resort to other acts or other legislation. If the Immigration and Passport Act is silent, an act is on the books to fill in the gaps and that

Act is the Interpretation Act which is designed to interpret anything that may be missing from the Immigration and Passport Act as it relates to the appointment or dis-appointment of the Applicant.

THE LEGISLATIVE FRAMEWORK

- [14] Section 78(1) of the Antigua and Barbuda Constitution Order 1981 (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] The Civil Service Act, section 3 states:

“3. (1) The several public offices in the public service from time to time set out in the First Schedule are deemed to constitute the Civil Service of Antigua and Barbuda which is hereby established for the purposes of this Act.

(2) A public officer who holds a public office in the public service that by subsection (1) is deemed to be an office in the Civil Service shall be referred to as a Civil Servant.”

- [16] The Antigua and Barbuda Labour Code (The Code) Cap. 27 defines “non-established employee” as: -

“non-established employee” means a person who is employed by the Government whose wage or salary is paid from or out of funds other than personal emoluments included in the Official Estimates of Antigua and Barbuda;”

and defines “established employee” as:-

“established employee” means a Civil Servant or a person employed by the Government whose salary is paid from or out of personal emoluments included in the Official Estimates of Antigua and Barbuda.”

Section A 6(1) states:-

"A 6. (1) To the extent that provisions of this Code apply to employers, they shall apply to all employers of Antigua and Barbuda including the Government as the employer of its non-established employees; but they shall not bind the Government as the employer of its other employees."

Section A 6(2) states:-

"To the extent that provisions of this Code apply to employees, they shall apply to all employees of employers in Antigua and Barbuda including non-established employees of the Government; but they shall not apply to

a) established employees of the Government;"

[17] The Immigration and Passport (Amendment) Act, 1999 – No. 2 of 1999, amended section 3 of the Immigration and Passport Act Cap. 208 by repealing subsections (1) and (2) and substituting the following: -

"3 (1) Subject to the direction of the Minister, the Chief Immigration Officer shall administer and enforce this Act and shall control and supervise all persons employed to assist him in the administration and enforcement of this Act.

(2) There may be appointed a fit and proper person to be –

- a) a Chief Immigration Officer; and
- b) such other immigration officers as may be necessary to enforce the provisions of this act."
- c) any appointment under this section shall, if the appointment is to be an office in the Public Service, be made pursuant to the Constitution, but otherwise shall be made by the Governor-General."

ANALYSIS

A - Is the Claimant an established worker or a non-established worker?

[18] In paragraph 3 (3) of her Affidavit filed on the 25th May 2012, the Applicant deposed inter alia that:-

- i. "Having been appointed under section 3(2) of the Immigration and Passport Act as a matter of law I am to be regarded as a police officer not below the rank of a subordinate police officer,
- ii. The Labour Code does not extend to members of the Police Force or other persons under an appointment by the Governor-General."

[19] The Claimant has undoubtedly failed to take into account that Section 3(2) of the Immigration and Passport Act was repealed and amended by the Immigration and Passport (Amendment) Act, 1999 – No. 2 of 1999. Pursuant to that amendment, and as correctly submitted by Learned Counsel for the Defendant Mrs. Harris, Immigration Officers are no longer regarded as police officers. I therefore endorse the submission of Mrs. Harris that "as such, the ground on which the Claimant is stating that the Labour Code does not apply cannot stand."

[20] The Claimant also contends that whilst the Permanent Secretary may have "the power to appoint and discipline non-established employees", since she was appointed by the Governor-General she cannot be considered as a non-established employee.

[21] The Claimant seems to be contending that, since she was appointed by the Governor-General, she is ipso facto, an established employee. The Court does not find merit in this submission. In the view of the Court, Section 3(2) (c) of the Immigration and Passport Act above does not lend itself to that interpretation. The sub-section makes a distinction between persons appointed to an office in the Public Service, - i.e. – public officers, and persons who are not appointed to public office. It follows logically therefore, that persons whose appointments under Section 3(2) (c) are made by the Governor-General are not public officers, as they are not appointed to public office. The Claimant is not appointed to public office; she does not fall within the definition of a Civil Servant as provided by Section 3 (2) of the Civil Service Act. She therefore cannot bring herself within the definition of an "established employee" either under the Labour Code or the Civil Service Act.

[22] The Court finds further that the Claimant cannot invoke the aid of Section 100 of the Constitution to provide support for her contention that she is an established employee. While the Section does not make a distinction between an established and a non-established employee, it provides how and by whom an established employee is appointed. The Section provides that the Public Service Commission has the power to appoint persons to hold offices in the public service. I find merit in the submission of Learned Counsel for the Respondent that the Claimant has failed to adduce any evidence that she was appointed by the Public Service Commission. It is clear from the documents exhibited to the Affidavit of Ms. Sharon Peters that the Public Service Commission had nothing to do with the appointment of the Claimant as an Immigration Officer.

[23] By letter to the Claimant dated 8th December 2005, the Claimant was advised of her appointment as Immigration Officer – Grade V effective 1st January 2005. Part of the letter to the Claimant dated 8th December, 2005 and signed by the Permanent Secretary, Office of the Prime Minister, reads thus:-

“Dear Ms. Ford,

I refer to communication dated April 26, 2002 appointing you as Input Clerk, Immigration Department.

I wish to advise that approval has been granted for your appointment as Immigration Officer - Grade V effective 1st January, 2005.

Your monthly emoluments will be as follows:-

.....
.....
.....

Please be also advised that the terms and conditions of your employment remains.

Yours sincerely,

sgd.....
Permanent Secretary
Office of the Prime Minister”

[24] The Instrument of appointment by the Governor-General reads in part thus:-

“By virtue of the power and authority vested in me under
Section 3 (2) of the Immigration and
Passport Act Cap 208

and of all other powers and authorities me therefore enabling, I do hereby

appoint you MS.ANGELIQUE FORD to be Immigration
Officer with effect from the first day of January, 2005

Given under my hand at Antigua the 16th day of December, 2005

Sgd,
Governor-General”

[25] The Court notes that the exhibits attached to the Affidavit of the Respondent and filed on the 12th June 2012, namely Exhibits SP2 to SP4, all refer to Salary Vouchers and Monthly Listings for various persons, inclusive of the Claimant. All the exhibits refer to same voucher number with respect to the Claimant Angelique Forde. Next to the Claimant’s name and voucher number is the description “Salaries Non-Est Staff”. It would therefore appear that the Claimant has been receiving her salary on the basis that she is a non-established worker or employee. There is no evidence that the Claimant has opposed this characterization. In fact, as is evident from paragraph 2 of her Affidavit filed on 5th July 2012, the Claimant relies on the above exhibits to “confirm her allegation” that she “was denied a portion of the salary due to her” in the month of November 2011. The Court is of the view that the Claimant is therefore estopped from now denying that she is a non-established worker.

B - Is the Defendant entitled to institute disciplinary proceedings against the Claimant?

[26] Mrs. Harris contends that "since there's no doubt that the Claimant is a non-established worker, the next issue to be addressed is whether the Permanent Secretary has the power to exercise disciplinary control over the Claimant."

[27] As stated above, during his oral submissions before the Court, Dr. Dorsett stated that "there is no issue with the Respondent stating that she has the power to appoint and discipline non-established officers."

[28] At first blush it would appear that, based on the above findings that the Claimant is a non-established employee, that the task of the Court in determining the above issue would be a relatively straightforward one. Dr. Dorsett however, strenuously denies the authority of the Defendant to conduct disciplinary proceedings against the Claimant. The Court has to decide whether the Defendant has power to discipline the Claimant, notwithstanding the finding that the Claimant is a non-established employee.

[29] In the "Claimant's Statement of Facts, Issues and Law" filed on the 5th July 2012, Dr. Dorsett submits that "the Defendant is not entitled to prefer any charges against the Claimant and to initiate disciplinary proceedings against her." He contends that the Claimant's appointment is an appointment by the Governor-General under the Immigration and Passport Act, specifically under Section 3 (2) (c) of the said Act.

[30] Dr. Dorsett contends that the Claimant's appointment "is not an appointment 'exercisable upon the recommendation or subject to the approval, consent or concurrence' of another authority, to adopt the language of section 18(1) of the Interpretation Act." He contends that the Claimant's appointment is not in any way conditional on the Defendant's recommendation, approval, consent or concurrence. He adds that, by virtue of section 18(1) of the Interpretation Act, since it is the Governor-General who has appointed the Claimant, it is the Governor-General, and not the Defendant, in whom is vested the power to remove or suspend the Claimant from her office, and, among other things, to "withhold the Claimant's remuneration in whole or in part during any period of suspension from office, and to terminate the Claimant's remuneration on her removal

from office." Briefly stated, Dr. Dorsett submits that, since it is the Governor-General who has appointed the Claimant, it is the Governor-General who alone can dis-appoint the Claimant.

[31] Section 18 of the Interpretation Act reads thus:-

"18. (1) Subject to the Constitution, words in an enactment authorizing the appointment of a person to any office shall be deemed also to confer on the authority in whom the power of appointment is vested ----

- a) power, at the discretion of the authority, to remove or suspend him, and
- b) power, exercisable in the like manner and subject to the like consent and conditions, if any, applicable on his appointment –
 - i. to re-appoint or re-instate him,
 - ii. to appoint another person in his stead, or to act in his stead whether or not there is a substantive holder of the office, and to provide for the remuneration of the person so appointed, and
 - iii. to fix or vary his remuneration, to withhold his remuneration in whole or in part during any period of suspension from office, and to terminate his remuneration on his removal from office;

but where the power of appointment is only exercisable upon the recommendation or subject to the approval, consent or concurrence of some other person or authority the power of removal shall, unless the contrary intention is expressed in the enactment, be exercised only upon the recommendation, or subject to the approval, consent or concurrence of that other person or authority."

[32] Dr. Dorsett submits that section 18(1) of the Interpretation Act makes it clear that the decisions relating to the Claimant's continuation in office and her remuneration "are matters that are solely matters to be determined by the appointing authority, the Governor-General." He states that the Defendant in her letter of 4th May 2012 (Exhibit AF7, attached to the Claimant's Affidavit of 11th May 2012) advised that if the Claimant was found guilty of "any of the above Charges the penalty of punishment imposed on you may be either dismissal from the service, demotion in grade and title, or suspension without pay for a fixed period." Learned Counsel further submits that by that letter, the Defendant "is seeking to ascribe to herself and vest in herself powers that by virtue of section 18(1) of the Interpretation Act are vested solely in the Governor-General". He

states that the power to appoint or disappoint the Claimant is clearly that of the Governor-General and not that of the Defendant and that the Defendant "is acting ultra vires the Interpretation Act."

[33] It is the further submission of Dr. Dorsett that section 2 of the Immigration and Passport (Amendment) Act 1999 clearly states that "the Chief Immigration Officer shall administer and enforce this Act and shall control and supervise all persons employed to assist him in the administration and enforcement of this Act." He contends that the Defendant is not the Chief Immigration Officer and accordingly, the Defendant "cannot act as one who is empowered to control and supervise the Claimant, a person appointed to enforce the provisions of the Immigration and Passport Act." He adds that "the Defendant can only act in accordance with positive law."

[34] I find merit in the above submission of Dr. Dorsett. The Permanent Secretary (the Defendant) is not endowed with any power or authority under the Immigration and Passport (Amendment) Act to initiate disciplinary proceedings against the Claimant. The Permanent Secretary is not the Chief Immigration Officer. It is the Chief Immigration Officer who is vested with the responsibility of "administering and enforcing the Act" and controlling and supervising all persons employed to assist him in the administration and enforcement of the Act. The Claimant is one such person employed to assist him. The Chief Immigration Officer is "subject to the direction of the Minister". He is not subject to the direction of the Permanent Secretary. Consequently, any decision to control and supervise persons, including, arguably, the decision to initiate disciplinary proceedings, would be the domain of the Chief Immigration Officer, either of his own accord or acting under the direction of the Minister.

[35] Learned Counsel for the Defendant, Mrs. Harris has submitted that by virtue of Section 78 of the Constitution, the Permanent Secretary is the Head of the Ministry under the direction of the Minister. She contends that "the Permanent Secretary is therefore responsible for managing the day to day affairs of the Ministry and this would include

investigation of alleged misconduct by employees within the Ministry.” With the greatest of respect, I disagree with Counsel’s submission.

[36] Section 78(1) of the Antigua and Barbuda Constitution Order 1981 (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.”

[37] It is the Minister who is the head of the department of Government; in the instant case, the Ministry of National Security and Labour; not the Permanent Secretary “under the direction of the Minister,” as Mrs. Harris contends. It is the Minister who is responsible for the department and exercises direction and control over it. The role of the Permanent Secretary is not one of control, but is a supervisory one. Further, the Permanent Secretary’s supervisory role is circumscribed by the direction of the Minister. It is my view, therefore, that Section 78(1) of the Constitution does not authorize the Permanent Secretary to initiate disciplinary proceedings against the Claimant.

[38] The Court notes further that the Labour Code which makes the distinction between an “established employee” and a “non-established employee”, does not contain any provision authorizing the Permanent Secretary to exercise disciplinary control over non-established workers.

[39] The letter addressed to the Claimant dated 4th May 2012 was to “notify” the Claimant that 2 charges “are preferred “against her. The first “Statement of Offence” states that the Claimant “...an Immigration Officer did misconduct herself...” Particulars of the “misconduct” are spelt out. The second Statement of Offence states that the Claimant, “...an Immigration Officer” did “misconduct herself by failing to perform and or discharge her duties as an Immigration Officer.” The letter, which was signed by the Permanent Secretary (the Defendant) ends by advising the Claimant as follows:-

".....You are further advised that if you are found guilty of any of the above Charges the penalty of punishment imposed on you may be either dismissal from the service, demotion in grade and title, or suspension without pay for a fixed period."

[40] In the above letter, the Permanent Secretary, does not state that she is acting under the direction or authorization of the Minister; she does not state that she is acting under the supervision of the Chief Immigration Officer. There is no indication that these persons are even aware of her action, let alone whether they have given their stamp of approval. The Defendant has merely copied the said letter to the Minister and the Chief Immigration Officer (as well as to Mrs. Harris and Dr. Dorsett).

[41] Based on the above, I am of the view that the Defendant is not vested with the power or authority to prefer charges against the Claimant, or to exercise disciplinary control over her. She does not have the authority to conduct or direct disciplinary hearings against the Claimant with respect to the alleged "misconduct" referred to in her letter dated 4th May 2012. The Immigration and Passport Act gives her no such authority. Section 78(1) of the Constitution gives her no such authority; neither does the Civil Service Act nor the Labour Code. Whether or not the lacuna in the legislation is filled by Section 18(1) of the Interpretation Act – as submitted by Dr. Dorsett - is not an issue for determination by the Court.

[42] I endorse the submission of Learned Counsel for the Claimant that the Claimant is entitled to a stay of proceedings initiated by the Defendant against the Claimant by letter dated 4th May 2012 and an appropriate declaration.

[43] This brings me to the remaining issue, namely setting a date for the hearing of the application for Judicial Review. As stated above, the Order of the Court made on the 29th day of May 2012 was, inter alia, that the hearing of the Judicial Review was adjourned to the 24th July 2012. On that date, due to unavoidable circumstances, the said hearing did not take place. The Court now orders that the said hearing shall take place on the 25th day September 2012 at 2 p.m.

ORDER

My Order is as follows:-

- 1) The Court declares that the Defendant is not authorized to initiate disciplinary proceedings against the Claimant.
- 2) The proceedings initiated by the Defendant against the Claimant by letter dated 4th May 2012 are hereby stayed.
- 3) The hearing of the application for Judicial Review is set for the 25th day of September, 2012 at 2 p.m.


JENNIFER REMY
Resident High Court Judge
Antigua and Barbuda