

SAINT LUCIA

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SLUHCV2011/0025

BETWEEN:

DENYS BARROW

CLAIMANT

AND

THE ATTORNEY GENERAL OF ST. LUCIA

DEFENDANT

Appearances:

Mr. Peter I. Foster for the Claimant and the Claimant who presented his case in person.

Mr. Raulston Glasgow, Solicitor General, Mr. Sydney Bennett Q.C., Mr. Deale Lee and Ms. Jan Drysdale for the Defendant.

.....
2011: October 4th,

2012: December 12th .
.....

JUDGMENT

[1] **WILKINSON J.:** The Claimant filed his fixed date claim form on February 24th 2011, and therein he sought judicial review of the decision of the Government of Saint Lucia (the Government) not to pay him pension benefits and the following relief:

1. A declaration that the Claimant, as a retired Judge of the Eastern Caribbean Supreme Court (ECSC) is entitled to be paid a pension in accordance with the Eastern Caribbean Supreme Court (Rates of Pension)(Judges) Act¹ and/or the Pensions Act²;

¹ Act No. 12 of 1989.

² Chapter 15.26 of the Revised Laws of Saint Lucia.

2. In the alternative, a declaration that the Claimant is entitled to be paid gratuity in accordance with the Pensions Regulations;
3. An order for payment of the pension benefits aforesaid;
4. Such further and other relief as the Court may deem just;
5. Costs.

[2] The grounds upon which the Claimant sought relief were:

1. That the Government had paid and continues to pay pensions to other retired Judges of the ECSC who retired in circumstances similar in all material respects to the circumstances in which the Claimant retired. There was nothing that made his circumstances of retirement different from those other Judges who were being paid pension. He contends that to treat him differently is irrational, unreasonable and an abuse of power.
2. The Claimant had a legitimate expectation that the Government would pay a pension to a Judge of the Court who retired after attaining the age of 55 years and do so regardless of the number of years for which the judge had served.
3. Justice of Appeal Michael Gordon retired as a Judge of the ECSC in 2006, when both he and the Claimant were Justices of Appeal and the Government paid Justice Gordon a pension when he had served for less than three (3) years thereby confirming the expectation of the Claimant that the Government would apply the pension legislation in an equal and non-discriminatory manner to the Claimant.
4. It was contended that the decision of the Government not to pay or the failure of the Government to pay the Claimant a pension in accordance with the Eastern Caribbean Supreme Court (Rates of Pension) (Judges) Act (ECSC (Rates of Pension)(Judges)Act) and/or the Pensions Act is in breach of sections 97 and 98 of the Constitution and therefore unconstitutional.

Issues

1. Whether the Claimant is entitled to be paid a pension pursuant to either the Pensions Act or the ECSC (Rates of Pension) (Judges) Act or both.
2. Whether the Claimant if he fails to qualify for a pension has made out a case of legitimate expectation based on past recommendations of the Judicial and Legal Services Commission (JLSC) and payments made by the Government to retired judges pursuant to those recommendations.

The evidence

- [3] The Court has observed that all of the affidavits to some extent so far as content was concerned they failed to comply with CPR 2000 rule 30.3 (1) and the Evidence Act³ sections 44 to 67 because they contained hearsay, opinion and legal submissions. The Court has cautioned tirelessly against this practice.
- [4] The facts are largely uncontroverted as shown by the Parties' positions at trial. There was no cross-examination and the Court was informed that it could proceed on the affidavits as filed after hearing legal submissions.
- [5] The Claimant was appointed a Justice of Appeal of the ECSC on August 1st 2005, and pursuant to section 13 of the Supreme Court Act (formerly The West Indies Associated States Supreme Court Order 1967) it was directed that he was to be in service at Saint Lucia and he was thereby appointed to a pensionable office in that service. At December 31st 2008, he retired as a Justice of Appeal. On that date, he having been born at July 8th 1952, he was fifty six (56) years of age.
- [6] While the Claimant was in the service of the Government of Saint Lucia, he was aware that the Pensions Act was in effect and that section 6 of that Act identified circumstances ("pensionable circumstances") in which a pension might be paid. One of those "pensionable circumstances" was that of a public officer attaining the age of fifty five (55) years. He was also aware that there existed a view that "pensionable circumstances" included not only the requirement that the public officer must reach the minimum age of fifty five (55) years but must also have minimum public service of at least ten (10) years. He was of the opinion that this was a mistaken view.
- [7] The Claimant also held the view that if he was not entitled to a pension then at least he was entitled to a gratuity pursuant to regulation 5 of the Pension Regulations.

³ Act 5 of 2002

- [8] At December 13th 2008, the Claimant made his first claim for pension in an email sent to the Honourable Chief Justice, Chairman of the JLSC. The Secretary of the JLSC responded that his claim was being considered.
- [9] At July 7th 2009, it became apparent to the Claimant that the JLSC had no legal responsibility to pay his pension and its delay in progressing or informing him of a decision on his claim made it prudent for him to make his claim for pension directly to the Government. By a letter of that date he wrote to the Accountant General making a formal claim for pension and setting out the basis of his claim.
- [10] He followed his letter to the Government with a further letter dated February 2nd 2010, to the Chairman of the JLSC and copied to the Government. In this letter he referred to a number of matters amongst which were an opinion that he had written about judges' pension, the fact that one (1) year had passed since his claim to the JLSC for pension was outstanding and he had yet to receive a position from the JLSC on his claim for pension, that he had been informed that the JLSC had sought two (2) legal opinions from leading counsel and one of which had said that he was not entitled to pension, that he disagreed with referral of the question of Judges' pensions to the Privy Council because he wished to be told the basis on which such referral was being made, that while not receiving his pension no one had told him why he was not being paid his pension, that he had been informed that the Attorney General intended to refer the question of Judges' pensions to the Court of Appeal for determination, that the approach to the Court of Appeal was contrary to modern civil practice which promoted negotiated settlement and that he was placing on record his desire to settle the issue of his claim. He invited the JLSC and the Government to engage in discussion with him about his claim.
- [11] There being no response to any of the Claimant's letters and email, on May 17th 2010, Counsel for the Claimant wrote to the Attorney-General. Counsel referred to the Claimant's request of December 13th 2008, his understanding of the various

pension Acts and asked the Attorney General to apply the law and provide the Claimant with his benefits due.

[12] On May 22nd 2010, the Solicitor General responded to the Claimant's Counsel's letter on behalf of the Attorney General. He indicated that it was not the intention of the Government to deny the Claimant his rights but the demand for benefits was premature as the question of a Judge's entitlement to pension benefits was awaiting consideration under the Attorney General's Reference⁴. It was the Government's view that the Attorney General's Reference was a prudent course to avoid an ad hoc approach to the question of Judges' pensions.

[13] As part of its decision making process on whether or not to pay the Claimant a pension, the Government filed the referred Attorney General's Reference before the Court of Appeal and the Court delivered its opinion on September 22nd 2010. Amongst other questions before that Court was the general question of entitlement to pension of a Judge who retired in the circumstances such as that of the Claimant.

[14] The Claimant believed the opinion to be seriously flawed by the Government's failure to put significant material before the Court of Appeal and an example of this failure was that the Government had not required a Judge in the past to serve any minimum number of years to qualify for a pension. It was his view that had such material been disclosed, he would have been able to show that many, if not most of the Judges who had been or were being paid pensions, had not served any minimum number of qualifying years.

[15] Post the opinion being delivered, the Claimant wrote to the Attorney-General on two (2) further occasions, November 27th 2010, and December 20th 2010. From his letter of November 27th2010, there is cited as follows:

⁴ SLUHCVAP2010/0009.

" ... In the submissions filed on behalf of the Attorney General the concession had been made that I was in any case entitled to a gratuity.

It is, of course, a matter for you and your Government to decide whether and to what extent to accept the opinion of the Court, since it is only an opinion and not a judgment. I need not rehearse here the reasons why you may find it awkward if not impossible to accept a conclusion as to qualifying service that is the very opposite of the practice that has been consistently observed in St. Lucia and other OECS States.

However, the Government decides to proceed, whether to pay me a pension or a gratuity, I must respectfully ask that you now make that decision. It has been more than two months since the Court gave its opinion. It is almost two years since I retired.

I would be grateful to be informed by 10th December 2010 of the Government's decision. I thank you in advance for your kind attention to this matter."

- [16] In the letter of December 20th 2010, the Claimant pointed out that he had requested a reply to his letter of November 27th 2010, by December 19th 2010, and noted with regret that he had not received any. He gave a further opportunity to negotiate a settlement and asked for a reply indicating the Government's willingness to meet for discussions by December 30th 2010. The Claimant received no response to this letter.
- [17] At January 31st 2011, the Claimant wrote a letter to the Chairman of the JLSC and therein he sought disclosure before this Court of documents about recommendations made for the payment of pensions to Judges who had not had ten (10) years actual service.
- [18] The Claimant said that he was aware that the Government had repeatedly paid pension to other Judges who had retired in circumstances similar in all respects to his. To his knowledge those Judges and their periods of service were Justice of Appeal Michael Gordon 2003 – 2006, Puisne Judge Velma Hylton 1992 – 1996, Chief Justice Sir Vincent Floissac 1991 – 1996, Puisne Judge Ephraim Georges 1991 - 1995, Chief Justice Sir Lascelles Robotham 1984 – 1991.

- [19] It was the Claimant's view that having regard to the Government's practice of paying pension in circumstances similar to his, the refusal to pay in his case was a breach of his legitimate expectation that he too would be paid a pension.
- [20] Evidence for the Defendant was received on affidavits deposed to by the Honorable Attorney General, Mr. Lorenzo R. Francis and the Secretary of the JLSC, Mrs. Kimberly Cenac-Phulgence.
- [21] The Honourable Attorney General's affidavit was in some respects novel as he said that because of his recent appointment at July 19th 2010, he was not able to speak to several aspects of the Claimant's claim. As the Court understands, the office of Attorney General is prescribed by section 72 of the Constitution and the office holder as the principal legal adviser to the Government is expected to be fully briefed and ready to speak on behalf of the Government regardless of the era and nature of the matter.
- [22] The Honorable Attorney General said that he having only been appointed to his post on July 19th 2010, aside from his knowledge that the Claimant was a former Justice of Appeal of the ECSC he could neither admit nor deny several of the matters set out in the Claimant's affidavits and so he wished to put the Claimant to proof of them.
- [23] He denied that the Claimant as a public officer was entitled to the relief sought as he did not retire in pensionable circumstances, those circumstances being service of ten (10) years and attainment of fifty five (55) years of age. He relied on the opinion in the Attorney General's Reference for his position. He was prepared to admit that the Claimant was entitled to a gratuity and discussions were ongoing with the Ministry of Justice and the Permanent Secretary in the Ministry of the Public Service with a view to securing payment of the gratuity at the earliest.
- [24] In relation to the hearing of the Attorney General's Reference, he denied that he had failed or refused to put significant materials before that Court. The materials

were never put before the Court because they were never in his possession or control and so he could not facilitate disclosure without a Court order. In relation to the present proceedings, he had requested the submission of all materials available from both the Cabinet Secretary and the Permanent Secretary in the Ministry of Public Service and it was only recently that he had received information regarding the pension status of Justice of Appeal Michael Gordon. The remaining requests were still pending up to date of his affidavit.

[25] In trying to ascertain information about retired judges the Attorney General found that the Government did not maintain personal files about Judges and the matters of their appointment, length of service and other details; such were in the possession of the JLSC. He provided a list of Judges who had retired within the previous ten (10) years and to whom on JLSC's instructions pensions were paid either to them or their wives (where the Judge was deceased). The Judges were Chief Justice Sir Lascelles Robotham, Chief Justice Sir Vincent Floissac, Justice of Appeal Albert Matthew, and Puisne Judge, Justice Suzie D,Auvergne. In regards to Justice of Appeal Michael Gordon, he was informed that he was in receipt of a pension and Puisne Judge, Justice Ephraim Georges was not assigned to Saint Lucia for payment of his pension.

[26] The Attorney General said that if Judges had in the past been paid pensions in the circumstances alleged by the Claimant then such would have been inconsistent with the statutory provisions governing payment of pensions and such could not give the Claimant a legitimate expectation that he too would be paid a pension.

[27] The Secretary of the JLSC said that pursuant to section 11 of the Supreme Court Order⁵ the JLSC was empowered with the concurrence of the Premiers and Prime Ministers of the various Member States who shared the ECSC to determine the terms and conditions of office for the Judges and this included pension rights. On appointment a Judge was assigned for pension purposes to a particular Member State and his or her eligibility to pension was determined pursuant to the Pensions

⁵ Cap. 2.01 of the Revised Laws of Saint Lucia.

Act and Regulations of that Member State⁶. The JLSC informed the Member States of impending retirement, age at retirement, length of service, and eligibility for pension. The Member States usually acted on this advice.

[28] There was passed in 1975, the Supreme Court (Salaries, Allowance and Conditions of Service of Judges) Order which provided for Judges to add to their actual years of service for the purpose of computing pension ten (10) years for the Chief Justice, seven (7) years for a Justice of Appeal, and five (5) years for a Puisne Judge. Further legislation passed was the ECSC (Rates of Pensions) (Judges) Act. The JLSC interpreted the ECSC (Rates of Pensions) (Judges) Act as providing an alternative method for the calculation of Judges' pensions. The JLSC interpreted this Act as stating that a Judge who retired in 'pensionable circumstances' received a pension at a rate of three-quarters ($\frac{3}{4}$) of his salary and pensionable emoluments; if he had given continuous judicial service for ten (10) years in the case of a person retiring as Chief Justice, twelve (12) years in the case of a person retiring as a Justice of Appeal, or fifteen (15) years in the case of a person retiring as a Puisne Judge he would then be entitled to a pension equal to his full salary and emoluments as at date of retirement.

[29] The JLSC she said always advised the Member States to pay pension to those who retired on attaining the retirement ages prescribed in the Supreme Court Order, sixty-two (62) years for a Puisne Judge and sixty-five (65) years for a Chief Justice and Justice of Appeal.

[30] On the departure of Justice of Appeal Dr. Nicholas Liverpool at the age of sixty one (61) years and after serving for three (3) years two (2) months, there arose the question of whether or not a Judge who had resigned from office without attaining the age of retirement (sixty five (65) years for Justice of Appeal) was entitled to a pension. A legal opinion was sought by the JLSC and the JLSC was advised that in order for Justice of Appeal Dr. Liverpool to qualify for a pension, it was necessary for him to have retired in 'pensionable circumstances' and they were

⁶ The Court was informed that all the Member States have a similar Act to that of Saint Lucia.

attainment of sixty five (65) years of age and service of ten (10) years. Based on that opinion, the JLSC did not recommend the payment of a pension to Justice of Appeal Dr. Liverpool.

[31] Adopting the position of the legal opinion thereafter, the JLSC over the years where Judges resigned before attaining the ages sixty two (62) years (Puisne Judge) and sixty five (65) years (Justice of Appeal), there was no recommendation for the payment of a pension. Pensions were not recommended nor paid to Justice of Appeal Dr. Nicholas Liverpool (three (3) years two (2) months service), Puisne Judge Ian Donaldson Mitchell (nine (9) years service), Acting Chief Justice Adrian Saunders (period of service not indicated), Puisne Judge Velma Hylton (three (3) years seven (7) months), Puisne Judge Sandra Mason Q.C. (three (3) years one (1) month service).

[32] Once again adopting the position of the legal opinion as then understood in relation to Judges who demitted office upon reaching the prescribed retirement ages of sixty two (62) years and sixty five (65) years, the JLSC recommended the payment of pensions and pensions were paid to Justice of Appeal Albert Matthew (fifteen (15) years 5 1/2 months service), Chief Justice Sir Lascelles Robotham (twelve (12) years 11/2 months service), Justice of Appeal Michael Gordon (three (3) years 5 months service), Puisne Judge Suzie D'Auvergne (fourteen (14) years 1 month service), Chief Justice Sir Vincent Flossaic (three (3) years seven (7) months service). Where the Judges had less years than ten (10) years actual service the JLSC applied section 12 of the Supreme Court (Salaries, Allowances and Conditions of Service of Judges) Order in that is it added ten (10) years for the Chief Justice and seven (7) years for the Justice of Appeal. The retired Puisne Judge during the period cited served in excess of ten (10) years.

[33] It was only after the opinion in the Attorney General's Reference she said that the JLSC came to understand that to be entitled to a pension under either of the Acts, a Judge had to have actual service of at least ten (10) years and attain the age of fifty five (55) years and further that it was immaterial whether the judge had

resigned from office rather than left office at the end of his or her statutory tenure. It was also then understood that the additional years granted by section 12 of the Supreme Court (Salaries, Allowances and Conditions of Service of Judges) Order could not be used for any other purpose under either the ECSC (Rates of Pension) (Judges) Act, or the Pensions Act than to in computing increase the amount of pension payable.

[34] The Court was referred to two (2) reports by the Claimant. Despite Counsel for the Defendant's urging otherwise, the Court cites them briefly as they appear to be the backdrop against which the ECSC (Rates of Pension) (Judges) Act came about. They show that the issue of payment and calculation of Judges' pensions is not a new one. The first report was that of Chief Justice Sir Lascelles Robothom dated May 10th 1985 and titled "Payment of Judges Pensions". It was stated to have been prepared for presentation to the Organisation of Eastern Caribbean States Seventh Meeting of the Authority. Therein, he stated that there was dissatisfaction amongst retired Judges whose pension payments were delayed and this was a cause of anxiety amongst sitting Judges, that there were variations in computation of pensions between the Member States so that pension payments differed and this too led to further anxiety. He recommended that there be a special act to address Judges' pensions and that it be patterned off the Jamaica Act. He highlighted certain matters he thought would benefit the Judges and closed his report with:

" Whatever form however the proposed draft takes, the pension rights given therein could not be made any less favourable than they are at present. Section 11(1)(b) of the Courts Order S.i. 223/1967 provides:

"The salary and allowances (other than allowances which are not taken into account in the computation of pension) of a Judge shall not be reduced and the terms and conditions of office applicable to a Judge upon his appointment shall not be made less favourable to him during the currency of that appointment."

All serving Judges now enjoy the benefit of having years added to their period of service for the purpose of computing pension. The Chief Justice gets 10 years, a Justice of Appeal 7 years, and a Puisne Judge 5 years...

These are the particular terms and conditions of Service which could not now be altered to the Judges' detriment ..." (My emphasis)

[35] Approximately three (3) years later another report was prepared by a Committee appointed to consider proposals for a new regime for payment of Judges' pension. The report is cited as Paper No. 13 AUT/88 'PAYMENT OF JUDGES PENSIONS'. The report stated that the Committee recommended that notwithstanding whatever existed in the existing Pensions Acts of the Member States the following:

" 9. The Committee accordingly recommends as follows:

Recommendations

Notwithstanding anything contained in the Pension's Act, the pension payable to a Judge upon his retirement shall be computed as follows:-

- (a) In the case of the Chief Justice, if he has had continuous service as a Judge for a period of not less than five years, at a rate equivalent to his full annual pensionable emoluments at the date of his retirement. Otherwise he shall receive Pension at the rate equivalent to $\frac{3}{4}$ of his full annual pensionable emoluments.
- (b) In the case of any other Judge, he shall receive pension at a rate equivalent to $\frac{2}{3}$ of his full pensionable emoluments at the date of his retirement in pensionable circumstances. Provided that if a Judge continues in service for a further period of not less than 5 years after becoming eligible for pension, he shall on retirement receive pension at the rate equivalent to his full pensionable emoluments. (My emphasis)
- (c) Provision shall be included in any new legislation to enable a Judge on retirement to receive in lieu of a full pension a Reduced Pension equivalent to $\frac{3}{4}$ of the full Pension plus a Gratuity of 15 times one quarter of the full pension."

[36] The Court was given sight of the Hansard of Parliamentary Debates at Saint Vincent dated September 21st 1989, and Hansard of Parliamentary Debates at Saint Lucia dated December 12th 1989. The statements therein show introduction by the respective Prime Ministers and support of the respective Oppositions of the Bills that would later become the Eastern Caribbean Supreme Court (Rates of

Pension of Judges) Act at Saint Vincent and Eastern Caribbean Supreme Court (Rates of Pension) (Judges) Act at Saint Lucia. They add little to the discussion.

Law

- [37] The **Supreme Court Act**⁷ consolidates several laws made between 1967 and 2008, (formerly The West Indies Associated States Supreme Court Order 1967) it provides inter alia :

“8. TENURE OF OFFICE OF JUDGES

- (1) Subject to the following provision of this section, a judge of the Court of Appeal shall hold office until he or she attains the age of 65 years and a Puisne Judge shall hold office until he or she attains the age of 62 years...

13. PENSIONS OF JUDGES, CHIEF REGISTRAR AND OTHER OFFICERS.

- (1) For the purposes of any laws, regulations and other instruments relating to the grant of pensions, gratuities and other like benefits of judges, Chief Registrar and the holders of the other offices of the Supreme Court referred to in section 12(1) of this Order shall be in the service of such State as the Chief Justice may, in each case, from time to time direct; and any such direction given by the Chief Justice shall take effect as from such date as may be specified by the Chief Justice and shall have effect as an appointment to a pensionable office in that service ...

- [38] At December 1st 1967 the **Pensions Act**⁸ came into force. It provides inter alia:

“ AN ACT for the regulating of pensions, gratuities and other allowances to be granted in respect of offices held in the Civil Service in Saint Lucia.

2 INTERPRETATION

- (1) In this Act, unless the context otherwise requires, the following expressions have the meanings assigned to them, that is to say-

⁷ Cap.2.01. The Court has observed that on page 1 the statute is described as Supreme Court Act and on subsequent pages as the Supreme Court Order.

⁸ Cap. 15.26

“pensionable emoluments” – (a) in respect of public service under the Government of Saint Lucia include –

- (i) salary,
- (ii) personal allowance, and
- (iii) housing allowance, and
- (iv) inducement allowance,

but do not include duty allowance, entertainment allowance or any other emoluments whatever;...

“pensionable office” means –

- (a) In respect of public service under the Government of Saint Lucia, an office which, by virtue of provisions in force in an order made by the Governor General and published in the Gazette, is declared to be a pensionable office;...

5. PENSIONS NOT OF RIGHT

- (1) An officer shall not have an absolute right to compensation for past services or to pension, gratuity or other allowance; nor shall anything in this Act affect the right of the Crown to dismiss any officer at any time and without compensation...

6. CIRCUMSTANCES IN WHICH PENSION MAY BE GRANTED

- (1) Pension, gratuity or other allowance shall not be granted under this Act to any officer except on his or her retirement from the public service in one of the following cases –
 - (a) if he or she retires from public service under the Government of Saint Lucia –
 - (i) on or after he or she attains the age of 55 years, or in special cases...

9. MAXIMUM PENSION

- (1) Except in cases provided for by subsection (2), a pension granted to an officer under this Act shall not exceed 2/3 of his or her highest pensionable emoluments at any time while in the public service under the Government of Saint Lucia...

[39] Under the **Pensions Officers Order**⁹ section 2 at Schedule 1, List of Pensionable Posts there are listed the posts of Justice of Appeal and Puisne Judge.

[40] The **Pension Regulations** made pursuant to the **Pensions Act** provides inter alia:

“2. INTERPRETATION

In these Regulations, unless the context otherwise requires –

‘qualifying service’ means service which may be taken into account in determining whether an officer is eligible by length of service for pension, gratuity, or other allowance; (My emphasis)

“pensionable service” means service which may be taken into account in computing pension under these Regulations. (My emphasis)

PART 2

OFFICERS WITHOUT OTHER PUBLIC SERVICE

4. PENSION TO WHOM AND AT WHAT RATES TO BE GRANTED.

(1) Subject to the provisions of the Act and of these Regulations, every public officer holding a pensionable office under the Government of Saint Lucia who has been in public service under the Government of Saint Lucia for 10 years or more may be granted on his or her retirement a pension at the annual rate of one four-hundred eightieth of his or her pensionable emoluments in respect of each completed month of his or her pensionable service... (My emphasis)

5. GRATUITIES WHERE LENGTH OF SERVICE DOES NOT QUALIFY FOR PENSION.

Every officer, otherwise qualified for a pension who has not completed the minimum period of service qualifying for a pension, may be granted on retirement a gratuity not exceeding 5 times the annual amount of the pension which, if there had been no qualifying period, might have been granted to the officer under regulation 4(1). (My emphasis)

⁹ S.I. 62/1997

PART 4

GENERAL

14. GENERAL RULES AS TO QUALIFYING SERVICE AND PENSIONABLE SERVICE

- (1) Subject to the provisions of these Regulations, qualifying service shall be the inclusive period between the date on which an officer begins to draw salary in respect of public service and the date of his or her leaving the public service without deduction of any period during which he or she has been absent on leave. (My emphasis)
- (2) ...

18. EMOLUMENTS TO BE TAKEN FOR COMPUTATION OF PENSIONS

- (1) For the purpose of computing the amount of the pension or gratuity of an officer who has had a period of no less than 3 years' pensionable service before his or her retirement –
 - (a) in the case of an officer who has held the same office for a period of 3 years immediately preceding the date of his or her retirement, the full annual pensionable emoluments enjoyed by him or her at that date in respect of that office shall be taken; ... (My emphasis)

[41] At January 1st 1974, the **Supreme Court (Salaries, Allowances and Conditions of Service of Judges) Order** commenced. This Order provided for amongst other matters that a judge was entitled to provision of a residence free of rent, travelling and duty allowances, board and lodging reimbursement if out of his resident State on duty, subsistence allowance when out of his resident State, entertainment allowance, that salary and allowances were to be free of income tax, leave and leave passages, and there was a provision pertaining to the computing of a Judge's pension. The section on pension provides:

"12. PENSIONS

In computing the pension of a judge who on retirement from the service holds one of the offices mentioned in Schedule 1 to this Order the

additions in the said Schedule mentioned shall be made to his or her period of service. (My emphasis)

However, no additions shall be made which together with the number of years of his or her actual pensionable service amounts to more than 400 months.

SCHEDULE 1

Chief Justice 10 years
Justice of appeal.....7 years
Puisne judge..... .5 years”

[42] At July 1st 1989, the Eastern Caribbean Supreme Court (Rates of Pension) (Judges) Act, 1989¹⁰ commenced. Its long title reads:

“An Act to provide for pensions for Judges of the Eastern Caribbean Supreme Court and for matters connected therewith or incidental thereto.

The Act provides inter alia:

“2. In this Act –

“Judge” means the Chief Justice, a Justice of Appeal or a Puisne Judge of the High Court as the case may be.

3. (1) The pension payable to a Judge upon his retirement in pensionable circumstances shall be computed as follows:

(a) In the case of the Chief Justice, if he has had continuous service as a Judge for a period of not less than ten years, at a rate equivalent to his full annual pensionable emoluments at the date of his retirement. In any other case, he shall receive a pension at a rate equivalent to three-fourths of his full annual pensionable emoluments.

(b) In the case of a Justice of Appeal, if he has had continuous service as a Judge for a period of not less than twelve years, at a rate equivalent to his full annual pensionable emoluments at the date of his retirement. In any other case, he shall receive a pension at a rate equivalent to three-fourths of his full annual pensionable emoluments.

¹⁰ No. 12 of 1989

(c) In the case of a Judge of the High Court, if he has had continuous service as a Judge for a period of not less than fifteen years, at a rate equivalent to his full annual pensionable emoluments at the date of his retirement. In any other case, he shall receive a pension at a rate equivalent to three-fourths of his full annual pensionable emoluments.

(2) Nothing contained in this Act shall operate to prevent a Judge from opting to have his pension computed under the provisions of the Pensions Act, 1967 in lieu of under the provisions of this Act.

4. ...

(3) A person who retires in circumstances other than under the provisions of this Act, shall be entitled to have his pension computed under the provisions of the Pensions Act, 1967." (My emphasis)

[43] Paragraphs in Halsbury's¹¹ on the interpretation of statutes which the Court found useful in looking at the Acts under consideration were:

1373. Nature of the legal meaning. The legal meaning of an enactment, that is the meaning that corresponds to the legislator's intention, is the meaning arrived at by applying to the enactment, taken with any other relevant and admissible material, the rules, principles, presumptions and canons which govern statutory interpretation. These may be referred to as the interpretative criteria, or guides to legislative intention.

1374. Doubt as to the legal meaning. If, on an informed interpretation, there is no real doubt that a particular meaning of an enactment is to be applied, that meaning is to be taken as its legal meaning. If there is a real doubt, it is to be resolved by applying the interpretative criteria...

1393. Statement of the function construction rule. Under the common law, an enactment must be construed so that significance is given to each component of the Act containing it according to its legislative function as such a component. This may be called the functional construction rule.

1394. Interpretative significance of framework. The framework of an Act consists of its structure and format together with any outside enactments incorporated in it. In construing any provision of the Act it is

¹¹ 4th edition, Volume 44(1)

necessary to bear its framework in mind since the Act is to be treated as a whole.

1397. Interpretative significance of operative components of an Act. The significance of the operative components of an Act in its interpretation lies in the fact that they are the portions of the Act in which the legislative message principally resides. (My emphasis)

1414. The informed interpretation rule. The informed interpretation rule is a rule under common law that the court must infer that the legislator, when settling the wording of an enactment, intended it to be given a fully informed, rather than a purely literal, interpretation. Accordingly, the court does not decide whether or not there is any real doubt as to the legal meaning of the enactment, and if so in what way to resolve it, until it has first discerned and considered, in the light of the facts to which the enactment is being applied, the context of that enactment, including all such matters as may illumine the text and make clear the meaning intended by the legislator in the factual situation of the instant case...

Additionally, the informed interpretation rule requires that, when constructing an enactment as it is applied to the facts of the instant case, attention should be paid to any relevant aspects of (1) the state of the law before the Act contacting the enactment was passed; (2) the history of the enacting of that Act; and (3) the events which occurred in relation to the Act subsequent to its passing. These may be described collectively as the legislative history of the enactment, and individually as the pre-enacting, enacting and post-enacting history. (My emphasis)

- [44] On the issue of whether the Claimant was entitled to hold a legitimate expectation, the Court has found useful the illustration of a legitimate expectation in **Behluli v. Secretary of State for the Home Department**¹² where Beldam LJ said:

“Although legitimate expectation may in the past have been categorized as a catchphrase not to be elevated into a principle, or as an easy cover for a general complaint about unfairness, it has nevertheless achieved an important place in developing the law of administrative fairness. It is an expectation which, although not amounting to an enforceable legal right, is founded on a reasonable assumption which is capable of being protected in public law. It enables a citizen to challenge a decision which deprives him of an expectation founded on a reasonable basis that his claim would be dealt with in a particular way.”

¹² [1998] Imm. AR 405,407

[45] To hold a legitimate expectation is one thing but it can be forsaken in a number of ways and one of them is that a Court cannot require a public authority to act contrary to a statute. In Regina v. Secretary of State for Education and Employment Ex parte Begbie¹³ Peter Gibson LJ said:

“Where the court is satisfied that a mistake was made by the minister or other person making the statement, the court should be slow to fix the public authority permanently with the consequences of that mistake.”

Findings and analysis

[46] The Court was not given sight of, at least for perusal, the Claimant's letter terminating his service at December 31st 2008. The Court observes that the Claimant's position is that he retired at December 31st 2008, and the issue of whether or not he was retired was not disputed by the Defendant. Indeed by the Defendant's statement that preparations were being made to pay a gratuity, it appears that both parties are agreed that the Claimant is retired. The Court therefore proceeds on the ground that the Claimant is retired and the only question is whether he was due to be paid a pension or gratuity.

[47] The facts are not in dispute and so it is unnecessary to make a finding on them or repeat them here.

[48] The Defendant has also made an admission that the Claimant is entitled to be paid gratuity pursuant to regulation 5 of the Pensions Regulation where no pension is payable and this being correct in law if payment is being made under the Pension Act and Pension Regulations there is no need for the Court to discuss or make any further finding about a gratuity payment. The Court observes that up to the date of trial there was no evidence that the gratuity had either been calculated or offered to the Claimant.

[49] This case has to be decided solely on interpretation of the pertinent Acts.

¹³ [2000] 1 W.L.R 1115.

- [50] The first Act for consideration is the Supreme Court Act. At section 8 the tenure of a Judge is set out, the maximum age for service of a Puisne Judge is fixed at sixty two (62) years, and a Justice of Appeal is sixty five (65) years. For the purposes of computing a Judge's pension this Act is not all encompassing and so resort must be had to the pension law where a Judge is assigned on appointment for the purposes of his pension.
- [51] On reading the Pensions Act and the Pensions Regulations it is clear that the Act is all encompassing and there is no need to look outside the Act to ascertain any component for the calculation of a pension. Referring to section 5 of the Act, the payment of pension is not as of right and so the Act does two (2) things, it firstly sets up perimeters as to who qualifies, and secondly it sets up the manner of computation.
- [52] The Parties appear to be in agreement that the Claimant is retired and so pursuant to section 6(1)(a) has crossed what would be the first threshold towards qualifying by having attained fifty five (55) years and thus is entitled to some benefit at the end of his tenure. The debate is whether the Claimant is entitled to a pension or the lesser, the payment of gratuity. This is determined by looking at the factors to be taken into consideration for computation and calculation of the actual sum payable as pension.
- [53] The method of computation and calculation is found in the Pension Regulations. There are set out two (2) components to the determination. The first is that qualifying service must be achieved, and according to the interpretation of qualifying service it is referable to the length of service. At regulation 4 there is set out the entry threshold minimum ten (10) years of public service to achieve payment of a pension and the rate of calculation to achieve the dollar value payable as pension.
- [54] As the Court understands Counsel for both sides up to this point there is agreement.

- [55] This brings the Court to consideration of the ECSC (Rates of Pension) (Judges) Act. A perusal of this Act finds that it simply does what its name suggests and that it provides a rate for computation of a Judge's pension and does this by setting up the quantities to be applied for quantification to arrive at the pension amount payable. The quantities being pensionable circumstances plus in the case of a Justice of Appeal twelve (12) years continuous service plus full annual pensionable emoluments. That the Act is not all encompassing is seen by the fact that there are two (2) key phrases used which are not defined and they are "pensionable circumstances" and "pensionable emoluments". That definition is necessary is seen for example in the Pensions Act where "pensionable emoluments" is defined as including salary, personal allowance, house allowance, and inducement allowance. The Court also observes that the Act does not provide an age by which a Judge whether Puisne Judge or Court of Appeal Judge should retire.
- [56] The Act clearly begs to be associated with another Act or Acts for completeness. It is the Court's view that for completeness the Act must be read together with the Pensions Act for interpretation of such phrases as "pensionable emoluments" and "pensionable circumstances". The Act has been interpreted as providing no more than an opportunity for Judges to earn an increased pension payment on retirement – see **Suit No. 166/1998 Monica Joseph v. The Attorney General**. The Court agrees with this interpretation and the mathematical demonstration therein to support that position.
- [57] That Parliament clearly recognized the limitation of the Act is seen by the fact that there is provision at section 6(3) that where a Judge retires in circumstances which do not qualify him for a pension pursuant to the Act, he is entitled to have his pension computed pursuant to the Pensions Act.
- [58] That the ECSC (Rates of Pension) (Judges) Act only seeks to increase the rate of pension is not surprising when the Court recalls Chief Justice Lascelles Robotham

statements and his caution that any adjustment to pension in a new Act could not be less favourable than the provisions in section 11 of the Supreme Court Order.

[59] Once again, here too, on the Court's interpretation of the ECSC (Rates of Pension) (Judges) Act the Court does not believe that there is dispute between the Parties.

[60] This brings the Court to the Supreme Court (Salaries, Allowances and Conditions of Service of Judges) Order. The only section relevant for discussion is section 12. In regards to the section the Court observes that though connected with the pension of Judges it too like the ECSC Act (Rates of Pension) (Judges) Act is not at all encompassing on the issue and thus it needs to be associated with some other Act or Acts for it be of viable. Herein lies the dispute between the Parties, how are the years set out to be applied, qualifier or computation? The language of the section is that 'In computing' the pension the various years are to be applied.

[61] To reflect on the earlier Acts discussed, the Court observes that there were marked differences where the Acts spoke to qualifying and computing. In regards to the Pensions Regulations there is definition of "qualifying service" which speaks of service to be taken into account and it is measureable by length and whereas the definition of "pensionable service" cited above speaks of "computing", the Pensions Act section 18(1) speaks of "computing", the ECSC (Rates of Pension) (Judges) Act section 3(1) speaks of "computed".

[62] With such clear distinctions being made in the other related Acts to qualification and computation the Court finds that it must find that the phrase "In computing" must be interpreted not as adding to service to qualify for a pension but rather as part of the quantities used to find the sum payable as pension. This being the case, the Claimant having not given ten (10) years service, the Court finds in respect of the first issue that he is not entitled to a pension pursuant to any of the Acts.

[63] This brings the Court to consideration of the Claimant's legitimate expectation. There is no doubt that payments had been made in the past not in line with the Court's interpretation of the Acts. However, the Court on examination of the evidence of the Claimant and the Secretary of the JLSC finds that while one factor might have been common with the facts surrounding the Claimant's retirement, namely the short period of service, there was one factor that was certainly dissimilar and that was that the JLSC only recommended payment on the achievement of sixty two (62) years for a Puisne Judge and 65 for a Justice of Appeal. No payments had been recommended to a Judge retiring at the age of fifty five (55) years or fifty six (56) years as was the case of the Claimant. Admittedly the Claimant could hold the position that he was retiring pursuant to the age fixed by the Pensions Act and not the Supreme Court Act. The factors not being on all fours with each other, the Court finds that there could be no legitimate expectation.

[64] In the event that the Court is wrong on the question of legitimate expectation, the Court believes that in light of its interpretation of the legislation and **Regina v. Secretary of State for Education and Employment Ex p Begbie**¹⁴ that it could not make an order for payment of pension as to do so would see the Court ordering an unlawful act.

[65] The Court having found that there is no pension payable, but that a gratuity is payable and this has been admitted by the Defendant (see paragraph 23 above) will order that the gratuity be paid within fourteen (14) days it being outstanding in excess of 21/2 years before the matter came to trial.

[66] Finally, the Court sincerely apologizes to the Parties and Counsel for the delay in delivering this decision. The delay was brought about as a result of the Court

¹⁴ Ibid.

experiencing some unforeseen personal circumstances earlier this year which took longer to recover from than expected.

[67] The Court thanks the Claimant and Counsel for their assistance and patience.

Court's order:

1. The Defendant is to calculate and pay the Claimant's gratuity within 14 days of today.


Rosalyn E. Wilkinson
High Court Judge

