

EASTERN CARIBBEAN SUPREME COURT

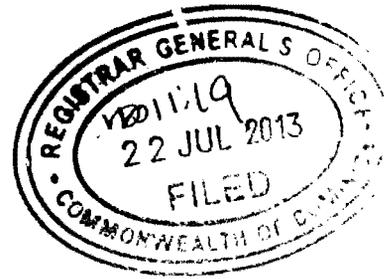
IN THE HIGH COURT OF JUSTICE

(CIVIL)

COMMONWEALTH OF DOMINICA

DOMHCV2012/0218

BETWEEN:



ASHLEY MASSICOTTE

Applicant

and

DOMINICA STATE COLLEGE

Defendant

Before: The Hon. Justice Brian Cottle

Appearances:

Mrs. Gina Dyer-Munro for the Applicant

Mr. Michael Bruney for Respondent

JUDGMENT

[2013: February 08th 25th]

[July 22nd]

[1] **Cottle J:** The applicant filed a fixed date claim form (further amended) in which he sought the following relief:-

1. *A declaration that the action of the Respondent, wherein the Applicant was transferred from his substantive position as Associate Registrar to the position of Lecturer without being given a hearing is illegal, void and ultra vires.*

2. *An order prohibiting the Respondent, from continuing to pay the applicant a salary of Associate Registrar, even though the Applicant was transferred to a Faculty of Arts and Sciences and qualifies in that faculty for a salary of a senior lecturer and therefore a salary which is in excess of what the Applicant is currently being paid and the continuation of such is illegal, void and ultra vires.*
3. *A declaration that the action of the Respondent wherein the applicant was transferred from his substantive position to Lecturer was tantamount to disciplining the Applicant without following the procedures for discipline as set out in the Dominica State College Act.*
4. *An order of Certiorari squashing (sic) the decision of the Respondent/Defendant to transfer the Applicant to the Faculty of Arts and Sciences.*
5. *Damages*
6. *Costs*
7. *Such further order, writs or directions as may be necessary or appropriate to give effect to the relief claimed by the Applicant*

[2] The claim form indicates that the applicant is also seeking "leave to apply for judicial review". It is the accepted position at law that no claim for judicial review can be sought unless the claimant has first applied for and been granted leave to bring his claim. The claim form having been filed without leave is a nullity and must be struck out. This was the position adopted by the Court of Appeal in General Aviation Services Ltd et al v Director General of the Eastern Caribbean Civil Aviation Authority HCVAP 2012/006 from St. Lucia. Applying, as this court must, that judgment, the claim form is struck out.

[3] The claimant also filed, on 27th September 2012, a further amended notice of application for leave to apply for judicial review I will deal with this application as if the offending claim form had never been filed. The applicant complains of a decision by the respondent to transfer him from his substantive position as Assistant Registrar at the State College, to the position of lecturer at the same institution, without affording him a hearing.

[4] In his affidavit in support the applicant states that he views his transfer as a disciplinary measure. Further, the transfer was said to be pending a review. Counsel for the applicant submits that the decision to transfer the applicant is reviewable for illegality. As I understand the submission, the respondent is governed by the Dominica State College Act No. 4 of 2002, which establishes the respondent. The legislation at Sections 31 and 32 sets out the procedure for disciplinary action against staff members. No provision is made for transfer. As a consequence, the decision to transfer the applicant is illegal, as it is ultra vires.

[5] Counsel also submits that the letter of the transfer of the claimant was motivated by "less than honourable" motives. In the view of the claimant, his transfer is a demotion and he has, in effect, been disciplined without having been afforded a hearing.

- [6] Counsel for the claimant cites the case of Marie Dyer v Eluid Williams claim 4 of 1991 from the Commonwealth of Dominica. There, Adams J. found that the attempt to transfer the claimant to a different position where the claimant's substantive position was higher than the position to which she was being transferred amounted to a demotion in an attempt to impose some form of punishment on the claimant. That claimant was able to demonstrate that the two offices involved were separate and distinct, attracted different salaries and were not of the same class, grade or division.
- [7] In the present case the claimant has not demonstrated that the post of Lecturer in the Faculty of Arts and Sciences is in any way inferior to the claimant's substantive position of Associate Registrar. He has not indicated that his emoluments are in any way diminished. The claimant bases his allegation of having been demoted from Assistant or Associate Registrar, to Lecturer, on his statement that as lecturer he is part of the general staff of the respondent while the Associate Registrar is part of the administrative staff.
- [8] On the face of the letter transferring the claimant, his salary and benefits remain unchanged. The letter also mentions that an email account of the respondent, for which the claimant had been responsible, had all the emails deleted. The defendant indicated that the occurrence would be reviewed. The letter does not blame the claimant for the deletions. It clearly gives a reason for the transfer.
- [9] In considering whether to grant leave this court must consider, among other things, whether the applicant has established a prima facie case. CPR 2000 part 56.3 (4) requires the applicant to verify his application by evidence on affidavit which must include a short statement of all the facts relied on. My examination of the affidavit by the applicant does not reveal any complaint other than a transfer from the position of Assistant Registrar to the post of Lecturer at the respondent college. In the view of the applicant this is a demotion. No facts are recited to explain why the transfer is to be viewed as a demotion. In his affidavit he says that he receives the same salary as he did in his substantive post as Assistant Registrar. He has not shown how the transfer reduces either his responsibilities or emoluments. I can discern no prejudice that he has suffered.
- [10] This is a sharp contrast to the position of the applicant in the Marie Dyer case. There the court found that the very letter of transfer was castigating the applicant and seeking to punish her by the way of transfer. I find that the present applicant has shown no grounds which merit the grant of leave. I therefore decline to grant leave to apply for judicial review.



Brian Cottle

High Court Judge