EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANGUILLA

AXAHCVAP2013/0003

BETWEEN:

PATRICIA YVETTE HARDING

Appellant

and

THE ATTORNEY GENERAL OF ANGUILLA

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste — Justice of Appeal
The Hon. Mr. Mario Michel — Justice of Appeal
The Hon. Mr. Tyrone Chong, QC — Justice of Appeal [Ag.]

Appearances:

Mr. Horace Fraser for the Appellant
Mr. Ivor Greene with him Ms. Erica Edwards and
Ms. Mary Clare Haskins for the Respondent

2013: December 4;
2015: November 23.

Civil appeal - Contract law - Whether contract came to an end by effluxion of time - Whether registrar was unlawfully removed from office by the invocation of a contractual provision prior to contract's natural expiration – Constitutional law – Whether removal was contrary to the Constitution - Administrative law - Legitimate expectation – Whether there was a legitimate expectation to the renewal of a contract.

In 1999, the appellant was appointed to the office of Registrar of the High Court by the Governor of Anguilla after consultation with the Judicial Legal Services Commission ('the JLSC') pursuant to section 68 of the Anguilla Constitution Order 1982, as amended by the Anguilla Constitution (Amendment) Order 1990. The appellant was employed for seven (7) consecutive contractual periods.

In 2004, the Government of Anguilla created a policy which stated that all contract positions would be advertised prior to the end of any given contract. Included in the appellant's latter contracts was a clause which contained this term and a term that if the person engaged wishes to be considered for a further period of employment she shall submit an updated curriculum vitae which shall be forwarded to the Governor for

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consideration in consultation with the JLSC six months prior to the completion of the terms of engagement. The appellant's contract also included a notice clause that the Governor, after consultation with the JLSC may at any time determine the engagement of the person engaged by giving three months' notice in writing or on paying her three months' salary in lieu of notice ('clause 7(1)').

On 8th July 2011, the appellant wrote to the Permanent Secretary of Public Administration, indicating her desire to be considered for a further contract with the Government of Anguilla and submitted her updated curriculum vitae. In October 2011, the post of registrar was advertised in accordance with the policy. By letter dated 14th December 2011, the appellant was informed by the Deputy Director of Human Resource that her request for re-engagement with the Government of Anguilla did not receive favourable response. The letter also stated that out of her nineteen (19) unclaimed vacation she should make arrangement to take fourteen (14) days and would be compensated for the remaining five vacation days in addition to three months' salary in lieu of adequate notice. The appellant proceeded on eight days' vacation instead of fourteen and on her return on 21st December 2011 could not access her computer as her information technology was deactivated. The appellant's contract was due to end on 10th January 2012.

The appellant filed a claim seeking various reliefs against the Attorney General of Anguilla including: a declaration that as holder of the office of Registrar of the High Court, she had the right to the protection of the law; a declaration that she had been unlawfully and unjustifiably deprived of the protection and security of tenure guaranteed to her by the Constitution; a declaration that her removal from office as Registrar was deliberate and manifestly unlawful; and a declaration that the office of Registrar is not subject to the termination by effluxion of time.

The learned trial judge dismissed the appellant's case and found that the appellant's contract ended due to an effluxion of time. Further, the three months' salary paid to the appellant was adequate for the lack of notice. He found no evidence of any conspiracy to remove the appellant from office. The learned trial judge found that the letter sent to the appellant indicating that she should take her vacation days was merely to comply with a term of the contract that leave should be taken during the currency of the contract as opposed to a step to remove the appellant from office. He also found that the appellant had no legitimate expectation to a renewal of her contract. The appellant, dissatisfied with the decision of the learned trial judge, appealed alleging inter alia that her term of office did not come to an end by effluxion of time and that the she was removed from office unlawfully. She further alleged that the mechanism used to effect such removal was the leave and the notice clause.

Held: dismissing the appeal save for the appeal in respect to costs and making no order as to costs, that:

1. The expiry in the ordinary course of a fixed term cannot be described as a "removal". Rather a notice to determine the engagement prior to its natural expiry would constitute a removal. It is common ground that the appellant's contract was due to end by effluxion of time on 10th January 2012 and that the appellant was

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informed of the negation of her wish of re-engagement by letter dated 14th December 2011. Given the context of that letter and the background and prevailing circumstances of this case, it is clear that there was no intention to terminate the appellant's contract prior to its natural expiry. Reference to clause 7(1) was manifestly otiose and fundamentally out of sync with the realities of the situation. Further the letter of 14th December 2011 does not stand in a vacuum. The contract was going to end in about three weeks after the letter was sent and in keeping with the term that vacation should be taken during the currency of the contract; the appellant was informed as to how outstanding vacation should be dealt with.

Section 68 of the Anguilla Constitution Order 1982 considered; **Thomas v Attorney-General of Trinidad and Tobago** (1981) 32 WIR 375 applied; **Horace Fraser v Judicial Legal Services Commission et al** [2008] UKPC 25 distinguished; **Angela Inniss v The Attorney General of Saint Christopher and Nevis** [2008] UKPC 42 distinguished; **Duncan v The Attorney General of Grenada** GDAHCVAP1997/0013(delivered 8th 1997, unreported) distinguished.

2. In all legitimate expectation cases, whether substantive or procedural three practical questions arise: firstly, to what has the public authority, whether by practice or by promise, committed itself; secondly, whether the authority has acted or proposes to act unlawfully in relation to its commitment; and thirdly what should the court do. In the case at bar the appellant is contending for a legitimate expectation of a substantive right. A critical consideration in the concept of substantive legitimate expectation is whether the conditions under which a prior representation, promise or practice by a public decision-maker gives rise to an enforceable expectation of a substantive benefit. The source of the expectation may be either an express promise given on behalf of the public authority or an established practice which the claimant can reasonably expect to continue. Notably, the expectation of a continuation of a substantive right is not absolute. In this case, the source of the expectation was not from an express promise for no promise was given. There was no conduct or undertaking, held out to the appellant nor was there any representation made by the Governor to the appellant that her contract will be renewed. Notwithstanding that the appellant had seven (7) consecutive contracts, it has always been within the knowledge and contemplation of the appellant that her contract may not be renewed as the post will be advertised and there may be other applicants applying for the post. Thus, a legitimate expectation to a renewal of a contract cannot arise because her contracts were renewed previously.

   Council of Civil Service Unions v Minister for the Civil Service [1985] 1 AC 374 applied; **R (Bhatt Murphy) v The Independent Assessor** 2008 EWCA Civ 755 applied**; R v Devon CC,Ex p Baker** [1995] 1 All.E.R. 73 applied; **Rainbow Insurance Company Limited v The Financial Services Commission and**

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others [2015] UKPC 15 applied; **Regina v North and East Devon Health Authority,Ex p Coughlan** [2001] QB 213 applied; **Regina (Bibi) v Newham London Borough Council** [2002] 1 WLR 237 applied; **Robert Perekebena Naidike et al v The Attorney General of Trinidad and Tobago** [2004] UKPC 49 applied.

JUDGMENT

[1] **BAPTISTE, JA**: In 1999 the appellant was appointed to the office of Registrar of the High Court by the Governor of Anguilla after consultation with the Judicial and Legal Services Commission ("JLSC"). The appointment was made pursuant to section 68 of the **Anguilla Constitution Order 1982 as amended by the Anguilla Constitution (Amendment) Order 1990** ("the Constitution") which states that "[p]ower to make appointments to the offices" which includes '…to any office in the public service of any registrar…' shall vest in the Governor, acting after consultation with the JLSC.

[2] The appointment of the appellant had been accompanied by the execution of a two year contract of engagement with the Government of Anguilla. Altogether, the appellant had been employed for seven (7) consecutive contractual periods; six (6) of those contractual periods were for two (2) years and the period 2005-2006 for one (1) year. In 2004, the Government of Anguilla created a policy ("Executive Policy") which stated that all contract positions would be advertised prior to the end of any given contract. Latter contracts for the appellant contained this term.

[3] The appellant's last contract of engagement was executed on 21st January 2010 and was scheduled to expire on 10th January 2012. Annexed to it was a schedule setting out the conditions to which the agreement was subject and which schedule was to be read and construed as part of the agreement. The issue of whether the appellant had been dismissed from her position as registrar or whether her contract came to an end due to effluxion of time was principally what generated a claim by the appellant in the High Court.

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Chain of events - Claim in lower court

[4] Clause 11 of the contract stated:

> "11. (1) Six months prior to the completion of the terms of engagement provided for in this Agreement the post held by the person engaged shall be advertised in accordance with the Policy decision of the Government dated 12 August 2004. Such advertisement shall not constitute a notice of termination of employment. If the person engaged wishes to be considered for a further period of employment she shall not be required to re-apply for the post but must submit an updated Curriculum Vitae.
>
> (2) The Curriculum Vitae of the person engaged together with the applications of any suitably qualified persons shall be forwarded to the Governor for consideration in consultation with the Judicial Service Commission. The person engaged shall be informed of the decision of the Governor, following such consultation, three months prior to the completion of the term of engagement provided for in the Agreement…"

[5] Pursuant to clause 11 of the contract, the appellant, on 8th July 2011, wrote to the Permanent Secretary of Public Administration indicating her desire to be considered for a further contract with the Government of Anguilla and on 11th July she submitted her curriculum vitae. The Permanent Secretary acknowledged receipt of the letter on that same day.

[6] In accordance with the Executive Policy, the post of Registrar was advertised in October 2011. In November 2011, the appellant was asked by the Deputy Governor General to attend an interview. She refused to attend. There was further correspondence between the appellant, the Deputy Governor and the Governor on the matter of her attendance at an interview however, the appellant maintained her refusal to be interviewed. On 14th December 2011, the Deputy Director of Human Resource wrote to the appellant indicating that her request for re-engagement with the Government of Anguilla as Registrar of the High Court did not receive favourable consideration. The letter also stated:

> "Our records show that you have nineteen (19) unclaimed vacation. Please make arrangement to take fourteen (14) days from Friday, 16 December 2011 to Tuesday 10 January 2012. Compensation will be made for the remaining five (5) days, in addition to three (3) months' salary in lieu of adequate notice pursuant to paragraph 7(1) of the terms and conditions of your employment agreement."

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[7] The appellant by fixed date claim form filed on 15th March 2012 sought various reliefs against the Attorney General of Anguilla including: a declaration that as holder of the office of Registrar of the High Court, she had the right to the protection of the law; a declaration that she had been unlawfully and unjustifiably deprived of the protection and security of tenure guaranteed to her by the Constitution; a declaration that her removal from office as Registrar was deliberate and manifestly unlawful; and a declaration that the office of Registrar is not subject to the termination by effluxion of time.

[8] The appellant deposed that she proceeded on eight (8) days' vacation from 18th December 2011 and that on 21st December 2011, when she returned to work she could not access her computer to remove personal information as her information technology access had been deactivated. The appellant claimed that the actions of the Executive were to effect her removal from office unlawfully and in derogation of her rights as the holder of the office of Registrar. The appellant asserted that in breach of clause 11 of the schedule of the contract she was given no time to re-organise her financial affairs and that she was 58 years of age and expected to retire from the office at age 65. The appellant submitted she was removed from office by the Executive without consultation with the JLSC; this removal was premised on no lawful reason that can lead to removal; she had a legitimate expectation to an automatic re-appointment and to a hearing, if her application for a renewal of her appointment was not going to be granted to her; and that the directive to her extending her vacation leave came from the Deputy Director of Human Resource, a functionary who has no such authority. The appellant also alleged that her removal was a conspiracy between the Deputy Governor and the Permanent Secretary of Public Administration.

[9] Mr. Greene, counsel for the Attorney General, submitted that the appellant's contract did not provide for automatic renewal of appointment to the Office of Registrar and as such the appellant could not have had any legitimate expectation that her appointment to the post would have been automatically renewed. Mr.

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Greene further submitted that the appellant's contract ended due to effluxion of time and that there was no mechanism, whether be it the advertisement of the post or the letter to proceed on vacation, to effect a removal from office.

[10] The learned trial judge found that the letter sent to the appellant indicating that she should take her unclaimed vacation days was merely to comply with a term of the contract that leave should be taken during the currency of the contract as opposed to a step to remove the appellant from office. The learned trial judge did not agree with the appellant that she had a legitimate expectation to a renewal of her contract; in addition, he found that this was an application case and not a legitimate expectation case. He also found no evidence of any conspiracy to remove the appellant from office. The learned judge ultimately dismissed the appellant's case and found that the appellant's contract ended due to an effluxion of time and held that the three months' salary paid to the appellant was adequate for the lack of the required notice. He awarded prescribed costs against the appellant.

Appeal stage

[11] The appellant appealed the judgment of the trial judge, alleging that:

1. The learned trial judge erred in law in concluding that the appellant's term of office came to an end by effluxion of time.

2. The learned trial judge's finding that the appellant was not removed from office by his application of purely contractual considerations is contrary to law.

3. The learned trial judge misdirected himself on principles of legitimate expectation which renders his findings flawed.

4. The learned trial judge's failure to accept that the "new policy consideration" by the Executive was a ploy to control the holders of public

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office was wrong in law. The learned judge also failed to appreciate and consider the issue of bias raised against the interview panel.

5. The learned trial judge failed to give reasons on which he premised his award of prescribed costs against the appellant.

[12] Two principal issues arise in this appeal. They are: (1) whether the appellant was removed from office as Registrar of the High Court or whether her contract came to an end by effluxion of time; and (2) whether the appellant had a legitimate expectation that her contract would have been renewed.

Grounds 1 and 2

Submissions of Appellant

[13] Mr. Fraser submits, on behalf of the appellant, that the finding of the learned trial judge that the appellant's appointment which was premised on a fixed term contract for two years came to a natural end is deeply flawed. Mr. Fraser argues that the appellant was removed from office unlawfully and the mechanism used to effect such removal was the leave clause and the notice clause (the vacation and the three (3) months' salary in lieu of notice that was paid to the appellant). Mr. Fraser contends that the learned trial judge's decision clashes with the decisions of the Privy Council in **Horace Fraser v Judicial Legal Services Commission et al**[1] and **Angela Inniss v The Attorney General of Saint Christopher and Nevis**[2] and submits that the only distinguishing feature between the two cases and the case at bar is the length of the remaining term under the respective contracts of engagements, which is immaterial to the issue in the case.

[1] [2008] UKPC 25.
[2] [2008] UKPC 42.

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Submissions of Respondent

[14] Mr. Greene, on behalf of the Attorney General, agrees with the finding of the learned trial judge that the contract came to its end by effluxion of time. Mr. Greene denies that there was any intervention by the Executive or mechanism to bring the contract to an end before its date of completion. Counsel distinguishes the cases of **Horace Fraser** and **Angela Inniss** on the basis that in those two cases the contracts came to an unnatural end. Mr. Greene points out that in this case the contract ended due to effluxion of time.

Discussion

[15] I find it apposite to set out the provisions of section 68 of the Constitution:

> "68. (1) Power to make appointments to the offices to which this section applies and to **remove** and exercise disciplinary control over persons holding or acting in such offices shall vest in the Governor, **acting after consultation with the Judicial Service Commission**.
>
> (2) This section applies to the office of Magistrate, **to any office in the public service of any registrar**…" (My emphasis).

The words of that section are clear. The relevant question would then be, whether the appellant, as counsel complains, was removed from her post as registrar.

[16] The definition of "remove" was considered in **Thomas v Attorney-General of Trinidad and Tobago**[3] where the Board held that:

> "To 'remove' from office in the police force in the context of section 99 (1), [which section is analogous to section 68 of the Constitution in the case at bar]… embraces every means by which a police officer's contract of employment (not being a contract for a specific period), is terminated against his own free will, by whatever euphemism the termination may be described, as, for example, being required to accept early retirement."[4]

The Board in **Horace Fraser** adopted the words of Lord Diplock in **Thomas v Attorney General** and went on to say that this definition 'points to a broad interpretation of such provisions with which the Board fully concurs'.

[3] (1981) 32 WIR 375.
[4] At p. 126.

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[17] In **Horace Fraser**, pursuant to decisions by the JLSC, Mr. Fraser served under successive annual contracts as a magistrate in Saint Lucia. There was a contractual provision giving a right to determine the contract on three months' notice or payment of one month's salary. The Constitution of Saint Lucia gave the JLSC the power to exercise disciplinary control over persons holding the office of magistrate and the power to remove such persons from office. Fraser was dismissed from his office by a letter from the Permanent Secretary of the Ministry of the Public Service on the recommendation of the JLSC after allegations of improper conduct. The JLSC admitted that it did not comply with its code for disciplinary proceedings when, without any inquiry into the question whether Mr. Fraser had misconducted himself, it advised the Ministry that his contract should be terminated. The JLSC maintained that his employment as a magistrate could be terminated summarily by invoking a clause to that effect in his contract. The Board held that removal from office included bringing a magistrate's engagement to an end against his will prior to its natural expiry and that the magistrate had constitutional protection against removal from office which operated over and above the contractual provision.

[18] The Board held at paragraph 16:

> "**The expiry in the ordinary course of a fixed term cannot be described as a "removal"**. **But provisions whereby the Ministry engaging a member of the lower judiciary can bring a term of office to an end prior to its natural expiry fall into a different category**. If the Government, when engaging a member of the lower judiciary, could include and then operate such a provision independently of the Constitutional protection afforded by a provision such as s.91, [equivalent to section 68 of the Constitution of Anguilla] the judicial officer in question would have little security at all." (My emphasis).

[19] Further at paragraph 18 the Board continued:

> "…**the Board has expressed its view that a notice to determine the engagement prior to its natural expiry constitutes a removal**; and on that footing such a notice can once again only be justified in the event, determined by the Commission, that reasonable cause for such removal exists. The constitutional protection therefore operates over and above

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> any contractual provisions for termination against the officer's will of the engagement prior to its natural expiry date." (My emphasis)

At paragraph 19:

> "…Removal, whether outright or under a contractual provision, is, in the light of s.91, only permissible if made pursuant to a decision reached by the Commission at the time of removal. Such a decision can only validly be reached if the Commission at that time determines, in accordance with a proper procedure, that reasonable cause exists for the officer's removal."

The Board concluded that Mr. Fraser was unlawfully removed from office in breach of the constitutional protection afforded to him by section 91 of the Constitution of Saint Lucia.

[20] **Angela Inniss v The Attorney General of St. Christopher and Nevis** was another case in which the Privy Council examined the matter of removal from public office. The appellant, a former Registrar of the High Court, was employed under a two year contract with the Government of St. Kitts and Nevis. Clause 8(1) of the contract provided that the Government may at any time determine the engagement on giving three months' notice in writing or on paying one months' salary in lieu. Section 83(3) of the Constitution gave the power to exercise disciplinary control and to remove from office to the Governor General, acting in accordance with the recommendation of the JLSC. After about one year and a little less than nine months from its commencement and prior to the natural expiry of the appellant's contract, the Permanent Secretary of the Establishment Division, on behalf of the Government, wrote to the appellant purporting to terminate her contract. In the High Court, Moore J held that there was a breach of section 83(3) of the Constitution. The Court of Appeal held that there was no breach of the appellant's constitutional rights. Before the Board, the respondent conceded that it could not now support the decision of the Court of Appeal that there was no breach of the appellant's constitutional right; no doubt in view of the Board's holding in **Horace Fraser** that provisions in his contract fell within the constitutional protection.

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[21] Mr. Fraser contends that similar to **Angela Inniss** and **Horace Fraser**, the appellant's contract was terminated prior to its natural expiry and that this was done in contravention of section 68 of the Constitution. Mr. Fraser argues that the only difference between these two cases and the present case lies in the length of time remaining under the contract. To my mind, the critical question here is whether the appellant's fixed term contract came to an end through effluxion of time or whether she was removed from office by the Executive invoking a contractual provision in her contract, prior to its natural expiration, and contrary to the Constitution.

[22] It is common ground that the appellant's contract was due to end by effluxion of time on 10th January 2012. Having indicated her wish to be considered for further employment, the appellant submitted her curriculum vitae pursuant to clause 11 (1) of her contract. Having done that, the appellant pursuant to clause 11(2) had to be informed of the decision with respect to her wish for further employment, three months before the expiration of the term of engagement - that would be three months prior to 10th January 2012. That was not to be. The appellant was informed of the negation of her wish by letter dated 14th December 2011. That was about three weeks before the contract was due to end. Leaving aside for the moment the issue of legitimate expectation, simply informing the appellant that her request for re-employment was unsuccessful would suffice and the contract would have run its natural course to effluxion, with the matter of outstanding vacation leave being catered for. Matters however did not move in that seamless manner. In fact, things became a bit convoluted by the insertion in the December 14th letter of reference to clause 7(1) of the appellant's contract; the clause deals with termination of engagement. The effect of that insertion falls to be considered.

[23] Clause 7(1) states:

> "[t]he Governor, after consultation with the Judicial Service Commission may at any time determine the engagement of the person engaged by giving her three months' notice in writing or on paying her three months' salary in lieu of notice".

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[24] Mr. Fraser has made much about the reference to clause 7(1) in the letter of December 14th and it forms the substratum or at least part of the bedrock of his contention that the appellant was unlawfully removed from office by the invocation of a contractual provision and contrary to the constitutional protection ala **Horace Fraser** and **Angela Innis**. While the letter is undoubtedly important, its appeal, for the purpose for which Mr. Fraser wishes to employ it, is only attractive in its superficiality. The letter has to be put in its proper perspective and it is vital to have regard not just to its text but to its context as well, which includes the surrounding circumstances. The letter of 14th December does not stand in a vacuum. In that regard, it is important to note that the appellant's contract was due to expire on 10th January 2012. There cannot be any contention about that. Pursuant to the terms of the contract, the appellant indicated her interest to be re-engaged. That was done in a timeous manner. The request was denied. At the time of the notification of denial, the contract had a life of less than one month before expiration. I note here that the respondent did not comply with the 3 months' notice requirement of clause 11(2) of the contract. It is also interesting to note that the learned judge found that the three months' salary paid to the appellant was adequate for lack of required notice.

[25] The appellant had 19 days unclaimed vacation and was told to take 14 days from Friday, 16th December 2011 to Tuesday, 10th January 2012. This was no doubt in keeping with the requirement that leave should be taken during the currency of the contract, as the learned judge found, as opposed to a step to remove the appellant from office. January 10th is significant because it marked the end of the contract. At the end of the contract, the appellant would still have had 5 days' vacation outstanding. The letter stated that the appellant would be compensated for the five days. Given the context of the letter, it is manifest that there was no intention to terminate the appellant. The contract was coming to an end by effluxion of time; the appellant was informed as to how the outstanding vacation would be dealt with. Given that background and the prevailing circumstances, it was totally unnecessary to refer to clause 7(1). It is patently obvious that the reference to

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clause 7(1) of the contract was manifestly otiose and fundamentally out of sync with the realities of the situation. Clause 7(1) has no nexus or connection with the factual matrix. It just stands out by itself, quite incongruously. It has no relationship with anything which went on before. In the circumstances, it cannot be used to found or ground an argument that the appellant's contract was terminated prior to its natural end.

[26] The circumstances of this case are easily distinguishable from **Horace Fraser** and **Angela Innis**. In both of these cases, the contract was terminated prior to its natural expiry and there was a removal from office. The mechanism used to effect removal was the contractual clause. This contractual clause could not trump the constitutional provision. In the present case, the contract came to an end by effluxion of time. The appellant was not removed from office. As the Privy Council held in **Horace Fraser,** the expiry in the ordinary course of a fixed term contract cannot be described as a removal. Applying the meaning of "removal" as defined in **Thomas v The Attorney General**, and paying regard to the circumstances of the case it is clear that the appellant was not removed from office.

[27] Mr. Fraser pointed out that leave is at the discretion of the Governor and complained that the direction to take leave was unlawful as it was given by the wrong person. I note that this did not form part of the grounds of appeal. Mr. Fraser also referred to the case of **Duncan v The Attorney General of Grenada**.[5] Duncan was the Deputy Director of Planning and Development. He was directed by the Public Service Commission to proceed on 43 days vacation leave immediately even though he had not applied for leave. The leave was the total amount for which Duncan was eligible and was due to expire on 7th December 1995. The reason advanced for the directive to go on leave was to improve the operations of the Ministry of Finance. Duncan challenged the reason advanced; requested a withdrawal of the letter and to be retired under the Constitutional provisions. Duncan received no response. On 7th December he

[5] GDAHCVAP1997/0013(delivered 8th 1997, unreported).

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received another letter informing him that in the exigencies of the Service, the Public Service Commission has directed that he is to remain on leave with effect from 8th December 1995 until further notice. For some time the State continued to pay his salary. Duncan was never asked to resume his duties and had received no retiring benefits.

[28] Duncan contended that the effect of the action of the respondent was to retire him and to do so in circumstances where he was denied the constitutional protection of his right to receive retirement benefits, as if he had obtained the compulsory retirement age, as provided by section 84(8) of the Constitution. The learned trial judge did not agree. Duncan's contention found favour with the Court of Appeal. It granted a declaration that the Public Service Commission retired Duncan from the public service for the purpose of reorganising the Ministry of Finance with effect from 8th December 1995 and that he was entitled to pension and retiring benefits as if he had attained the compulsory retiring age on that date.

[29] It can be clearly seen that **Duncan** is easily distinguishable from the appellant's case. The factual matrix pertaining to the circumstances surrounding the direction to take leave is quite different. In the present appeal, the contract had less than a month before its expiry and the appellant was advised that it was not going to be renewed. The direction to take leave was bound with the requirement that leave should be taken during the currency of the contract. **Duncan** was effectively being removed from the public service. He was essentially placed on indefinite leave, even when he had no accrued leave. **Duncan** gives no assistance to the appellant.

[30] I do not agree with Mr. Fraser that the leave clause and the notice clause were used to effect the appellant's removal from office; or that being asked to take leave was a mechanism to determine her appointment. Inviting the appellant to make arrangements to take fourteen days' vacation instead of the requested eight days' vacation and compensating her for the remaining five days' was merely to comply

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with a term of her contract that leave should be taken during the currency of the contract as the learned trial judge found. Accordingly, the appellant fails on grounds 1 and 2 of the appeal.

[31] For completion I would just address one further matter. Mr. Greene contended that the reference in the letter of December 14th to clause 7(i) was an error and the reference ought to have been to clause 11(2). Does Mr. Greene's contention that the reference ought to have been to clause 11(2) stand scrutiny? Clause 11(2) simply provides for the appellant to be informed of the decision of the Governor, that decision being whether or not she would be considered for a further period of employment, and which decision would be made in consultation with the JLSC, three months prior to the completion of the term of engagement. On the clear terms of the clause, it is difficult to find in favour of the error contended for - that the reference in the letter ought to have been to clause 11(2). The reasons are that, clause 11(2) makes no reference to payment of compensation or for payment of salary in lieu of adequate notice. The only commonality between clause 7(1) and 11(2) lies in a reference to three months, but the three months refer to completely different situations. The three months under clause 7(2) refers to termination of engagement by giving three months' notice in writing or three months' salary in lieu of notice. However, as I indicated earlier, reference to clause 7(2) was otiose as no issue of termination arose.

[32] Under clause 11(2) the three months refer to a person being informed of the decision with respect to their request for further employment three months prior to the expiration of their engagement. What stands out is that the appellant did not receive adequate notice pursuant to clause 11(2) that her contract would not be renewed. Instead of three months' notice, she received about three weeks. leaving the learned judge to conclude that the three months' salary paid to the appellant was adequate for lack of required notice. Although clause 11(2) does not speak to compensation for short notice, the judge could not sensibly have found that there was no removal and the contact effluxed and at the same time

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conclude that the payment was in some way referable to termination under clause 7(2).

Ground 3 – Legitimate expectation

Submissions of appellant

[33] Mr. Fraser complains that clause 11(2) of the contract which required the appellant to submit an updated curriculum vitae was an imposition by the Crown of a purported term of contract. Having regard to that fact, it therefore had no contractual force because the Crown and the appellant were not ad idem. To my mind, this submission is unmeritorious. Clause 11(2) was a valid part of the terms of engagement and was not devoid of contractual force. Mr. Fraser also contends that if it can be argued otherwise, then the clause is an innominate term which cannot be used to deprive the appellant from the benefit of her legitimate expectation in a re-appointment to office which is protected by the Constitution. The appellant therefore could not at law contract out of the constitutional protection the holder of the office of registrar is given from interference by the Executive.

[34] Mr. Fraser posits that the appellant's case is a legitimate expectation case in the language of Megarry V-C in the case of **McInnes v Onslow-Fane and Another,**[6] Mr. Fraser contends that the legitimate expectation is founded on seven consecutive contracts, and good grounds must exist to defeat that expectation. Counsel argues that the appellant complied with clause 11(1) of the contract of engagement and was therefore expecting to hear from the Crown regarding her application for re-engagement within 3 months of her application. The failure of the Crown to indicate one way or the other regarding its position to the application was contrary to its own policy it had implemented. Three months prior to expiration no decision was made; thus fortifying her expectation. Since nothing adverse to the appellant's reappointment within the three (3) month period of her application was brought to her notice, her re-appointment ought to have been

[6] [1978] 1 WLR 1520.

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automatic. The letter of December 14th defeated her expectation. Mr. Fraser also argues that the appellant was denied her expectation by the inclusion into the contract of a provision for an interview for re-employment.

Submissions of respondent

[35] Mr Greene agrees with the learned trial judge that this case was an application case and not a legitimate expectation case. The appellant was employed on a contract and had to comply with the application process that was deemed necessary in applying for each individual contract. Importantly, counsel submits that the failure to follow the three month notice period would not give rise to a legitimate expectation of a new contract given the appellant's knowledge that; (1) there was another applicant for the post; (2) the interview process was deemed essential by the Governor for a selection to be made between the applicants; and (3) the fact that the appellant was requested to attend an interview to assist in the selection process. Further, there was no representation given to the appellant or by anyone in authority that would amount to a promise that the appellant would be awarded a new contract. Counsel refers the Court to the case of **Council of Civil Service Unions v Minister for the Civil Service**.[7]

[36] Mr. Greene opines that the fact that nothing adverse to the appellant's reappointment within the three month period of her application was brought to her notice is relevant only as data to be used in evaluating the appellant as a candidate for any subsequent contract. I agree. Mr. Greene also contends that the protection given to the appellant is set out in section 68 of the Constitution. An interview would not contravene the protection given by section 68 of the Constitution. I also agree. Mr. Greene also points out that the new policy was established in 2004 and since then the Government has granted contracts containing clause 11. The appellant signed a contract in 2005 which contained that clause and signed two other contracts of a two year period. Mr. Greene submits quite correctly that clause 11 removes any scope for any legitimate

[7] [1985] 1 AC 374.

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expectation that the contract would be renewed as a matter of course or automatically. The appellant would have known this because she signed three contracts containing that clause.

Discussion

[37] I now consider the law with respect to legitimate expectation. Legitimate expectation is now a well-known public law headline which encompasses two kinds: procedural legitimate expectation and substantive legitimate expectation. As explained by Laws LJ in **R (Bhatt Murphy) v The Independent Assessor**,[8] legitimate expectation of either kind may arise in circumstances where a public decision-maker changes, or proposes to change, an existing policy or practice. The doctrine will apply in circumstances where the change or proposed change of policy or practice is held to be unfair or an abuse of power. Unfairness and abuse of power march together and it is notorious that what is fair or unfair depends on the circumstances of the case. Laws LJ explained that a paradigm case of procedural legitimate expectation arises where a public authority has provided an unequivocal assurance, whether by means of an expressed promise or an established practice that it will give notice or embark upon a consultation before it changes an existing substantive policy. In the paradigm case, the court will not allow the decision-maker to effect the proposed change without notice or consultation, unless the want of notice or consultation is justified by the force of an overriding legal duty owed by the decision-maker, or other countervailing public interest such as the imperative of national security.

[38] Laws LJ explained at paragraph 32 that substantive legitimate expectation arises where the court allows a claim to enforce the continued enjoyment of the content - the substance - of an existing practice or policy, in the face of the decision-maker's ambition to change or abolish it. Thus it is to be distinguished from a merely

[8] 2008 EWCA Civ 755, at paras. 28-30.

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procedural right. Laws LJ.said that it is expressed by Simon Browne LJ in **R v Devon CC**,**Ex p Baker**[9], as category 1:

> "1. Sometimes the phrase [legitimate expectation] is used to denote a substantive right: an entitlement that the claimant asserts cannot be denied him ... [V]arious authorities show that the claimant's right will only be found established when there is a clear and unambiguous representation upon which it was reasonable for him to rely. Then the administrator or other public body will be held bound in fairness by the representation made unless only its promise or undertaking as to how its power would be exercised is inconsistent with the statutory duties imposed upon it. The doctrine employed in this sense is akin to an estoppel."

And it formed category (c) in the judgment of the court delivered by Lord Woolf in **Regina v North and East Devon Health Authority**,**Ex p Coughlan**:[10]

> "(c) Where the court considers that a lawful promise or practice has induced a legitimate expectation of a *benefit which is substantive*, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy."

[39] At paragraph 33, Laws LJ referred to the reference in **Ex p Baker** to 'a clear and unambiguous representation' and in **Ex p Coughlan** to 'a lawful promise or practice' and noted that these citations did not explain the content of the putative representation, promise or practice. He however observed that they went to the enjoyment of the substance of the policy in question. His Lordship said:

> "Presumably there will either be an authoritative representation of what the relevant policy is and will continue to be, or else simply the fact of a policy being settled and established in practice. A promise or practice: but not the kind of promise or practice found in the paradigm case of procedural legitimate expectation. In the procedural case we find a promise or practice of *notice* or *consultation* in the event of a contemplated change. In the substantive case we have a promise or practice of present and future *substantive policy*. This difference is at the

[9] [1995] 1 All.E.R. 73 at p. 88.
[10] [2001] QB 213 at para 57.

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core of the distinction between procedural and substantive legitimate expectation."[11]

[40] At paragraph 35 Laws LJ said:

> "The doctrine of substantive legitimate expectation plainly cannot apply to every case where a public authority operates a policy over an appreciable period. That would expand the doctrine far beyond its proper limits. The establishment of any policy, new or substitute, by a public body is in principle subject to Wednesbury review. But a claim that a substitute policy has been established in breach of a substantive legitimate expectation engages a much more rigorous standard. It will be adjudged, as I have foreshadowed, by the court's own view of what fairness requires. This is a principal outcome of this court's decision in Ex p Coughlan (see in particular paragraphs 74, 78, 81 and 82). It demonstrates the importance of finding the reach of substantive legitimate expectation."

At paragraph 36, Laws LJ opined that the concept of substantive legitimate expectation poses a question: what are the conditions under which a prior representation, promise or practice by a public decision-maker will give rise to an enforceable expectation of a substantive benefit?

[41] At paragraph 50 Laws LJ gave a very broad summary of the place of legitimate expectation in public law. His Lordship expressed the position as follows:

> "The power of public authorities to change policy is constrained by the legal duty to be fair (and other constraints which the law imposes). A change of policy which would otherwise be legally unexceptionable may be held unfair by reason of prior action, or inaction, by the authority. If it has distinctly promised to consult those affected or potentially affected, then ordinarily it must consult (the paradigm case of procedural expectation). If it has distinctly promised to preserve existing policy for a specific person or group who would be substantially affected by the change, then ordinarily it must keep its promise (substantive expectation). If, without any promise, it has established a policy distinctly and substantially affecting a specific person or group who in the circumstances was in reason entitled to rely on its continuance and did so, then ordinarily it must consult before effecting any change (the secondary case of procedural expectation). To do otherwise, in any of these instances, would be to act so unfairly as to perpetrate an abuse of power".

[11] [2008] EWCA Civ 755 at para..33.

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[42] In **Rainbow Insurance Company Limited v The Financial Services Commission and others**,[12] Lord Hodge said at paragraph 51:

> "The courts have developed the principle of legitimate expectation as part of administrative law to protect persons from gross unfairness or abuse of power by a public authority. The constitutional principle of the rule of law underpins the protection of legitimate expectations as it prohibits the arbitrary use of power by public authorities. Such expectations can arise where a decision-maker has led someone to believe that he will be consulted or be given a hearing before a decision is taken which affects him to his disadvantage (a 'procedural legitimate expectation') or that he will retain a benefit or advantage (a 'substantive right legitimate expectation'). The source of the expectation may be either an express promise given on behalf of the public authority or an established practice which the claimant can reasonably expect to continue: *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374,401, [1984] 3 All ER 935, [1985] IRLR 28 per Lord Fraser. The expectation of a continuance of a substantive right is not absolute, even in the strongest cases such as *Ex p Coughlan* (above), because a sufficient public interest can still override a legitimate expectation to which a representation had given rise. … It is enough to observe that there are cases in which fairness requires that a change in policy cannot be made abruptly because it would defeat the legitimate expectations of an individual or group. In such cases, as Sedley LJ stated in *Niazi* at para 70, it is not the alteration of the policy but the way in which it is done which is capable of frustrating a legitimate substantive right expectation."

[43] In **Regina (Bibi) v Newham London Borough Council**,[13] Schiemann LJ said:

> "In all legitimate expectation cases, whether substantive or procedural, three practical questions arise. The first question is to what has the public authority, whether by practice or by promise, committed itself; the second is whether the authority has acted or proposes to act unlawfully in relation to its commitment; the third is what the court should do."

Schiemann LJ went on to say that the answer to the first is a question of analysing the evidence – it poses no jurisprudential problems. Then, '[s]ometimes … the answer to this first question is dispositive of the case'.

[44] In **Robert Perekebena Naidike et al v The Attorney General of Trinidad and Tobago**,[14] a case referred to by Mr. Fraser, the Judicial Committee held that the

[12] [2015] UKPC 15.
[13] [2002] 1 WLR 237.

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claimant who had been granted work permits for a number of years previously had a legitimate expectation that the Minister would not refuse to renew his work permit save for good reason and after giving him a proper opportunity to address any concerns the Minister might have. The Board held that while he had no substantive right to be granted a work permit the claimant had a right to have his application fairly decided. Having concluded that the claimant had been given no opportunity to address the refusal, they held that the decision to refuse him the work permit was unlawful. Lord Diplock's speech at page 408 in **Council of Civil Service Unions v Minister for the Civil Service** was also referred to:

> "some benefit or advantage which … [the applicant] had in the past been permitted by the decision-maker to enjoy and which he can **legitimately expect to be permitted to continue** to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment." (My emphasis).

[45] It appears to me that the appellant in the present appeal is contending for a substantive right legitimate expectation. I note that even in such a case, the expectation of a continuation of a substantive right is not absolute. The source of the expectation was not from an express promise for no promise was given. It is based on the seven contracts given to the appellant. The appellant was given seven (7) consecutive contracts as a registrar. In 2004, after the new Executive Policy, the appellant signed all following contracts with a term that the post of registrar will be advertised. In addition, six months prior to the completion of a contract, the appellant had to submit an updated curriculum vitae if she wished to be further engaged. Included in the contract was a clause which indicated to the appellant that her curriculum vitae together with the applications of any suitably qualified persons shall be forwarded to the Governor for consideration in consultation with the JLSC. The uncontroverted evidence at the lower court was that the appellant's updated curriculum vitae in addition with the application form from the other applicant was sent to the JLSC. The question remains, what was the conduct or undertaking, be it written or otherwise, held out to the appellant so

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[14] [2004] UKPC 49.

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that she had a legitimate expectation to the renewal of the contract? The answer, to my mind, is none.

[46] There were no promises nor was there any commitment or undertaking made to the appellant. There was no representation made by the Governor to the appellant that her contract will be renewed. Notwithstanding that the appellant had seven (7) consecutive contracts with the Government of Anguilla, it has always been within the knowledge and contemplation of the appellant that her contract may not be renewed as the post will be advertised and there may be other applicants applying for the post. The appellant was under a two year contract; there was no legitimate expectation to a renewal of her contract. A legitimate expectation that her request for a new contract would succeed did not arise.

[47] The distinguishing feature between this case and **Robert Perekebena Naidike et al v The Attorney General of Trinidad and Tobago** is that the Board in **Naidike** held that the claimant had a right to have his application fairly decided and not a right to a work permit even though he had been granted previous work permits. The appellant in this case was always aware, due to the contract, that there may be another individual vying for the position of registrar; it was a contested position. It must be noted that the evidence was that the appellant's curriculum vitae was considered along with the other applicant's application for the position. A legitimate expectation to a renewal of a contract cannot arise simply because her contracts were renewed previously. Careful consideration must be given to Lord Diplock's words in **Council of Civil Service Unions v Minister for the Civil Service** when he said, 'some benefit or advantage which … [the applicant] had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue'. There was no benefit or advantage which the appellant could have legitimately expected to receive. It is incongruous to my mind that the appellant could have asserted that she had a legitimate expectation to a renewal of the contract; such an expectation is contradicted by the words of the contract. In my judgment, the appellant has not

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laid a proper basis for establishing a legitimate expectation. This ground of appeal accordingly fails.

Ground 4 – New policy consideration and bias

Submissions of appellant

[48] Mr. Fraser submits that once an applicant for a post in the public service has been appointed to office, the Executive has no total control over that office on matters of re-appointment; everything therein must be in consultation with the JLSC. Mr. Fraser further submits that at law the imposition of an interview on the appellant who was the incumbent in the office of Registrar of the High Court is contrary to the concept of separation of powers and unlawful interference with the appellant's legitimate expectation. Counsel posits that the Governor had no legitimate reason for not recommending the appellant for re-appointment to office and that his failure to do so was actuated by the "new policy" directives which included the appellant's failure to attend an interview. By taking the said irrelevance into consideration the Governor had fettered his discretion in relation to his duty in accordance with section 68 of the Constitution.

Submissions of respondent

[49] Mr. Greene submits in response that while the appellant was the incumbent at the time when the interview process was undertaken, the interview was in relation not to the contractual term the appellant was at the time serving but in relation to a new contract term for which there was no existing contractual relations. Counsel contends that there was no interference with the protection of the post of registrar under section 68 of the Constitution.

Analysis

[50] This ground deals in part with a change of policy by the requirement of an interview. In that context it is pertinent to refer to the statement of Laws LJ in **Bhatt Murphy** at paragraph 50:

> "The power of public authorities to change policy is constrained by the legal duty to be fair (and other constraints which the law imposes). A

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> change of policy which would otherwise be legally unexceptionable may be held unfair by reason of prior action, or inaction, by the authority. If it has distinctly promised to consult those affected or potentially affected, then ordinarily it must consult (the paradigm case of procedural expectation). If it has distinctly promised to preserve existing policy for a specific person or group who would be substantially affected by the change, then ordinarily it must keep its promise (substantive expectation). If, without any promise, it has established a policy distinctly and substantially affecting a specific person or group who in the circumstances was in reason entitled to rely on its continuance and did so, then ordinarily it must consult before effecting any change (the secondary case of procedural expectation). To do otherwise, in any of these instances, would be to act so unfairly as to perpetrate an abuse of power."

Sedley LJ said at paragraph 68:

> "A duty to consult before modifying policy may arise from an explicit promise to do so. It may also arise from practice which generates a similarly legitimate expectation that, other things being equal, there will continue to be no change without prior consultation. But there is no equivalent expectation that policy itself, and with it any substantive benefits it confers, will not change. It follows that the most that the beneficiary of a current policy can legitimately expect in substantive terms is, first, that the policy will be fairly applied or disapplied in his particular case, and secondly that if the policy is altered to his disadvantage, the alteration must not be effected in a way which unfairly frustrates any reliance he has legitimately placed on it"

[51] As already stated, the appellant had no legitimate expectation to a renewal of her contract. The provision for an interview is a rational and reasonable process to assist with the selection process. The appellant chose not to attend the interview. A recommendation was made by the Governor for the other applicant to fill the post to which the JLSC approved. That was simply the case. There is no evidence that the Governor took into account irrelevant considerations in coming to his decision. I agree with Mr. Greene that there was no interference with the protection afforded to the registrar by section 68 of the Constitution. I find no basis in the submission that the requirement of an interview contravenes the separation of power doctrine. I do not see the requirement of an interview as being in any way objectionable or having the consequences contended for by Mr. Fraser. Undoubtedly, certain advantages can be derived from an interview. The provision

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for an interview does not affect or interfere with or cannot be regarded as reserving the power to make appointments to the executive and not to the Commission. Further, there is no basis for saying that the Governor had fettered his discretion in relation to his role under section 68 of the Constitution. The Governor's role is to make the appointment to the position of registrar, after consultation with the JLSC.

[52] With respect to the issue of bias, Mr. Fraser's criticism that the learned trial judge failed to appreciate and consider the issue of bias raised against the interview panel is unfounded. At paragraph 71 of his judgment the learned trial judge indicated that he could not find evidence to support the allegation of a conspiracy. The appellant only made a bald statement of conspiracy between the Deputy Governor and the Permanent Secretary of Public Administration. There was no scintilla of evidence in relation to any bias or conspiracy. Accordingly, this ground of appeal fails.

Ground 5 – Costs award

[53] The learned trial judge awarded prescribed costs to the respondent. Counsel for the appellant contends that the policy of the court is not to award costs against a party who has lost a genuine constitutional claim before the court. Counsel complains that the learned trial judge failed to give reasons as to why a costs order was applicable. Mr. Greene, concedes this ground of appeal.

Conclusion

[54] For the reasons indicated, the appellant was not removed from office as Registrar of the High Court and the learned judge was correct to hold that her fixed term contract came to an end by effluxion of time. The appellant's case for a legitimate expectation cannot be sustained as she could not have had any legitimate expectation that her contract would have been renewed. The other grounds of appeal also fall away, save the appeal against costs. I would order that the appeal

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is dismissed save for the ground of appeal in respect of costs. I would make no order as to costs both here and in the court below.

Davidson Kelvin Baptiste
Justice of Appeal

I concur.

Mario Michel
Justice of Appeal

I concur.

Tyrone Chong, QC
Justice of Appeal [Ag.]

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