THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO ANUHCV 2013/0375

BETWEEN:

PHILBERT RAYNES

First Claimant

DIANELLE OTTO

Second Claimant

And

PERMANENT SECRETARY,

First Defendant

MINISTRY OF NATIONAL SECURITY AND LABOUR

Second Defendant

CLAIM NO ANUHCV 2013/0522
BETWEEN:

LESLIE DUNNAH

Claimant

AND

PERMANENT SECRETARY,

First Defendant

MINISTRY OF NATIONAL SECURITY AND LABOUR

Second Defendant

Appearances:

Dr. David Dorsett of Watt, Dorsett and Associates for the Claimants in both claims
Mrs. Carla Brooks Harris and Rose Ann Kim of the Attorney General's Chambers for the defendants in both claims

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2016: March 3

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JUDGMENT

[1] **HENRY, J.**: The claimants are Immigration Officers appointed by the Governor-General under section 2 of the Immigration and Passport (Amendment Act) 1999. By letter dated 13th March 2012, the first defendant purported to revoke the appointment of Philbert Rayes; by letter of 19th April 2012 the appointment of Dianelle Otto and by letter dated 18th June 2012, the appointment of Leslie Dunnah. All three have filed applications for judicial review with respect to the purported revocation of their appointments.

[2] The claimants Philbert Rayes and Dianelle Otto seek the following remedies:

(a) An order of certiorari quashing the decision of the defendant to terminate the services of the claimants;
(b) A declaration that the claimants have held the office of Immigration Officer grade V at all material times and are entitled to all the emoluments, rights, allowances, and pre-eminences appertaining to the said position, including the payment of their salaries and allowances from 16th March 2012 in respect of Raynes and 15th April 2012 in respect of Otto;
(c) An order that the defendant do pay all salaries and allowances due to the claimants in accordance with the declaration above;
(d) A declaration that the claimants are entitled to resume their duties as Immigration Officers grade V;
(e) An order that the defendant is restrained whether by herself, her servants, or agents, or howsoever otherwise from impeding, interfering, or otherwise hindering the claimants from performing their duties as an Immigration Officers grade V;
(f) Damages;
(g) Interest pursuant to section 27 of the Eastern Caribbean Supreme court Act:
(h) Costs.

[3] The claimant Leslie Dunnah seeks the following remedies:

(1) An order of certiorari quashing the decision of the Respondent to terminate the services of the applicant as an Immigration Officer V by letter dated 18th June 2012.
(2) A declaration that the Applicant has held the office of immigration officer V at all material times and are entitled to all of the emoluments, rights allowances and pre-eminences appertaining to the said position, including the payment of their salaries and allowances from 18th June 2012.
(3) An order that the Respondent do pay all salaries and allowances due to the Applicants in accordance with the declaration above
(4) A declaration that the Applicant is entitled to resume his duties as Immigration Officer Grade V.

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(5) An order that the Respondent is restrained whether by herself, her servants, or agents, or howsoever otherwise from impending, interfering, or otherwise hindering the Applicant from performing his duty as an Immigration Officers Grade V.
(6) Damages.
(7) Interest pursuant to section 27 of the Eastern Caribbean Supreme Court Act;
(8) Costs pursuant to CPR 2000r. 56.13(5).
(9) Interest pursuant to section 7 of the Judgments Act.
(10) Any other relief that the court deems fit pursuant to section 20 of the eastern Caribbean Supreme Court Act.

[4] The claimants state that the decision to revoke their appointments as immigration officers contravenes section 18 (1) of the Interpretation Act in that the defendants are not lawfully authorised to revoke the said appointments. Further, that the claimants having never been lawfully removed from office and have, as a matter of law, at all material times held the position and been empowered to exercise the functions of the office and are entitled to all of the rights associated thereto.

[5] In her affidavit in response, Sharon Peters, the Permanent Secretary in the Ministry of Security and Labour states that the claimant Leslie Dunnah was terminated for just cause on 20th June 2012. She admits that Dunnah was appointed by an instrument signed by the Governor-General. By letter dated 5th April 2012, Dunnah was suspended pending the outcome of an investigation by the department into a complaint of fraud involving Dunnah. By letter dated 13th April 2012, Dunnah admitted that he did unlawfully solicit and take monies from a Jamaican national so that the latter could obtain an extension of time in his passport. Dunnah was notified of the date of the hearing and was asked to respond to the allegation of fraud. The hearing took place on 18th June 2013. At the hearing, Dunnah admitted to the allegations made against him. At the conclusion of the hearing, the Panel found Dunnah guilty of the allegations made against him and recommended that his employment be terminated.

[6] In regard to the claimant Dianelle Otto, Ms Peters deposes that she was advised of the suspension from duty pending an investigation on several reports from the Immigration Supervisor of the V.C. Bird International Airport for alleged misconduct and unacceptable behaviour. A disciplinary hearing was scheduled. At the hearing, Ms Otto did not deny using indecent language and verbally abusing her Supervisor. The witnesses concurred in their evidence that Ms Otto had cursed loudly which caused a crowd to gather and that her tirade lasted for over twenty minutes. Further, that during the tirade she had threatened to shoot her supervisor. At the conclusion of the hearing, the panel found Ms Otto guilty of misconduct and unacceptable behaviour and recommended her termination.

[7] In regard to the claimant Philbert Raynes, Ms Peters states that there were several reports of misconduct against Philbert Raynes including disrespectful behaviour and breaches of the

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Immigration Department's procedures. He was suspended from duty pending an investigation. At the disciplinary hearing, Mr. Raynes did not deny his lack of self control and disruptive crude behaviour at the annual meeting of the immigration Department. At the conclusion of the hearing, the panel found him guilty of the allegations made against him and recommended his termination.

[8] Ms Peters affirms that in all three cases the Minister of National Security was advised of the outcome. The terminations of all three claimants were done under the direction of the Minister. She therefore asserts that the claimants were lawfully removed in light of their unlawful behaviour.

[9] The underlying facts are not contested. However, Counsel for the claimants asserts that under section 18 (1) of the Interpretation Act, only those who appoint can dis-appoint. The claimants were all appointed by the Governor-General and only he can terminate them legally. Therefore the purported terminations were wholly illegal and the court ought to grant the requested remedies.

[10] Counsel for the defendant submits that the revocations were not unlawful. She relies on section 78(1) and section 80 of the Constitution. Her position is that the defendants do not dispute that the claimants were appointed by the Governor General pursuant to section 3 (2) of the Immigration and Passport (Amendment) Act 1999 No 2 of 1999. But submits that since the claimants have not challenged or opposed the defendant's evidence that she was acting under the direction of the Minister, therefore the decision in regard to the termination of the claimants' employment comports with section 78 (1) of the Constitution.

[11] Furthermore, the defendants contend that section 18 (1) of the Interpretation Act must be read in conjunction with section 80 of the Constitution. The effect of both sections is that the Governor General acting under the advice of the Cabinet or a Minister is the authority vested with the power to appoint and dismiss Immigration Officers. It therefore means that the Governor General does not have the sole discretion in discharging these functions.

[12] Section 18(1) of the Interpretation Act provides

> "18. (1) Subject to the Constitution, words in an enactment authorising the appointment of a person to any office shall be deemed also to confer on the authority in whom the power of appointment is vested- (a) power, at the discretion of the authority, to remove or suspend him,
>
> (b)....
>
> (c)....
>
> but where the power of appointment is only exercisable upon the recommendation or approval, consent or concurrence of some other person or authority the power of removal shall, unless the contrary intention is expressed in the enactment, be exercised only upon the recommendation, or subject to the approval, consent or concurrence of that other person or authority."

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[13] Section 78 (1) and 80 (1) & (2) of the Constitution provide:

> **78**.-(1) Where any Minister has been assigned responsibility for any department of government, he shall exercise direction and control over that department; and, subject to such direction and control, the department shall be under the supervision of a Permanent Secretary whose office shall be a public office.
>
> **80**.- (1) In the exercise of his functions the Governor-General shall act in accordance with the advice of the Cabinet or a Minister acting under the general authority of the Cabinet, except in cases where other provision is made by this Constitution or any other law, and, without prejudice to the generality of this exception, in case where by this Constitution or any other law he is required to act-
>
> (a) in his discretion;
>
> (b) after consultation with any person or authority other than Cabinet; or
>
> (c) in accordance with the advice of the Prime Minister or any person or authority other than the Cabinet.
>
> (2) Nothing in subsection (1) of this section shall apply to the functions conferred upon the Governor-General by the following provisions of this Constitution, that is to say, sections 63(6), 67(6), 73(1), 87(8) and 99(5) (which require the Governor-General to remove the holders of certain offices from office in certain circumstances).

[14] Even if the conjoint effect of the two sections is as Counsel contends, and even if the court accepts the evidence that the Permanent Secretary was acting under the direction of the Minister, there is no evidence before the court that the terminations were done by the Governor General acting upon the advice of the Minister. On the record there is no evidence of the Governor General's involvement in the terminations. That being the case, the conclusion is that the terminations were done contrary to law.

[15] Counsel for the defendants nevertheless contends that the court ought to refuse the relief sought. She asserts that judicial review is a discretionary remedy and therefore the court has a discretion as to whether to grant the relief sought. Counsel cites the case of **Roland Browne v The Attorney General and the Public Service Commission**[1] There the court applied the principle stated in **R v Diary Produce Quota Tribunal for England and Wales Ex P. Caswell** [1990] 2 AC 738 that there is no unqualified right to any of the remedies claimed. In exercising its discretion, the court can take into account other factors including that there was unreasonable delay before making application, whether the claimant acted promptly or whether it would be detrimental to good administration or cause substantial hardship to the rights of any person or substantially prejudice the rights of any person. Counsel also cited the case of **Murray v Police Service Commission**[2]. There the court did not grant the requested Certiorari even though the applicant had a strong case

[1] HCVAP 2010/023

[2] Suite No. 5534 of 1996 High Court of Trinidad & Tobago

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on the merits. In that case the court was persuaded by the fact that an appointment had already been made to the post and even if the court were able to reconsider its appointment before the applicant's date of retirement, it was hardly likely that the applicant would be appointed. The court concluded that an order for certiorari or a declaration would serve no useful purpose. Counsel submits that likewise the decision or action in this case would remain unchanged had the public body acted lawfully.

[16] Counsel for the claimants submit that judicial review is a constitutional guarantee; that it is the rule of law in action and a fundamental and inalienable constitutional protector. Further, that the Rule of Law outweighs inconvenience or chaos. He cites the case of **R (FZ) v Croydon London Borough Council**[3]. He also refers the court to the case of **Bradbury v Enfield London Borough**[4] where it states that even if chaos should result still the law must be obeyed. He is adamant that the court has a duty to say when the law has been violated and to afford the applicants the appropriate relief. Finally, he refers to **McLaughlin v Government of Cayman Island**[5] for the proposition that if a person has not been properly removed from office in fact or law, the attempt is void and the dismissal without legal effect.

[17] Counsel for the claimants particularly relies on Lord Neuberger's recent statements in **R (Rotherham Metropolitan Borough Council) v Secretary of State for Business, Innovation and Skills**[6] where he stated that the courts have no more constitutionally important duty than to hold the executive to account by ensuring that it makes decisions and takes actions in accordance with the law.

[18] The court notes that, Lord Neuberger also stated:

> "However, whether in the context of a domestic judicial review, the Human Rights Act 1998 or EU law, the duty has to be exercised bearing in mind that the executive is the primary decision-maker, and that it normally has the information, the contextual appreciation, the expertise and the experience which the court lacks."

[19] Lord Neuberger concludes the section on "The proper approach for the court to adopt" with these words:

> "The line between judicial over-activism and judicial timidity is sometimes a little hard to tread with confidence, but it is worth remembering that, while judicial bravery and independence are essential, the rule of law is not served by judges failing to accord appropriate respect to the primary policy-making and decision-making powers of the executive."

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[3] (2011) PTSR 748
[4] (1967) 1 WLR 3011
[5] (2007) 1 WLR 2839
[6] [2015] UKSC 6

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[20] Part 56.5 of the Civil Procedure Rules (CPR) provide that a judge may refuse leave or to grant relief in any case in which the judge considers that there has been unreasonable delay before making the application. Further, where considering whether to refuse leave or to grant relief because of delay the judge must consider whether the granting of leave or relief would be likely to (i) be detrimental to good administration; or (ii) cause substantial hardship to or substantially prejudice the rights of any person.

[21] As noted by Edwards J in **Roland Browne**, the judge may revisit the issue of unreasonable delay where the claim has merit in determining whether to grant the relief sought. Even if the court accepts that the defendant has acted unlawfully, there is no unqualified right to any of the remedies claimed. Justice of Appeal Edwards sums it up by stating, that despite the success of the judicial review claim, the relief may be refused where the judge applies CPR 56.5 and makes a positive finding under that rule.

[22] The Privy Council has affirmed the legal position of cases such as **Chief Constable of the Northern Wales Police v Evans**[7] and **Jhagroo v Teaching Service Commission**[8]. The Board agreed that even where a dismissal is invalid the court does not necessarily hold that the officer has remained in office. The Board pointed out that since public law remedies are, for the most part discretionary, it necessarily follows that a claimant may be disabled from obtaining the full relief he seeks whether on grounds of lack of standing, delay or his own conduct, or grounds pertaining to the facts of the particular case.

[23] The Board, recognised that there are appropriate cases where the court can decline to grant the discretionary relief normally available by way of judicial review based on the factors enumerated and as set out in Rule 56.5

Delay

[24] It has been held that there is no rule in our CPR which is comparable to the English Order 53, Rule 4 which stipulates that an application for leave for judicial review shall in any event be made within three months from when the grounds for the application first arose[9]. However, there is a requirement for reasonable promptness and to act with undue delay in all the circumstances of each particular case.

[25] In the instant case, Mr. Raynes was terminated on 13th March 2012 and Ms Otto on the 19th April 2012. In January 2013 letters were exchanged between the Industrial Relations Officer and the Chief Immigration Officer. However, no court action was taken on their behalf until June 2013. Leslie Dunnah was terminated on 18th June 2012, his claim was filed in August 2013.

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[7] [1982] 1 WLR 1155
[8] 61 WIR 510
[9] Roland Browne, Supra

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[26] In each case, leave to file a claim was not sought until over a year after the termination. In each case the claimant took no action in the first six months after termination and even after letters were exchanged, their application for leave to file a claim for judicial review was filed several months later. The court is of the view that the promptness required by the CPR has not been met. However, this is not the end of the inquiry, the court must consider whether the granting of the relief sought would be likely to cause substantial hardship to or substantially prejudice the rights of, any person or would be detrimental to good administration.

[27] Counsel for the defendant submits that to grant the orders would be detrimental to good administration and would cause substantial prejudice to the rights of others. She states that due to the inordinate delay the immigration department would have engaged the services of new employees to replace the claimants. The new employees would have accrued rights. Further there is a need for certainty and finality. She asks that the integrity of the department be also considered.

[28] The claimants point out that if the court is to exercise its discretion in favour of a party, there must be some material upon which it can exercise its discretion. The court's discretion cannot be exercised in an evidential vacuum. Counsel submits that the defendants have not presented material in the form of affidavit or other evidence, demonstrating that the granting of the remedies claimed would be detrimental to good administration or would cause substantial hardship to or substantial prejudice to the rights of any person.

[29] Good public administration is concerned with substance rather than form. It is concerned with the speed of decisions and requires decisiveness and finality[10]. In **O'Reilly v Mackman**[11], Lord Diplock pointed out that:

> "In asking the question whether the grant of such relief would be detrimental to good administration, the court is at that stage looking at the interest in good administration independently . . . In the present context, the interest lies essentially in a regular flow of consistent decisions, made and published with reasonable dispatch; in citizens knowing where they stand, and how they can order their affairs in the light of the relevant decision. Matters of particular importance, apart from the length of time itself, will be the extent of the effect of the relevant decision, and the impact which would be felt if it were to be re-opened."

[30] In **R v Elmbridge Borough Council, ex parte Health Care Corporation Ltd**[12] there was no evidence before the court in the case of actual detriment to good administration other than the facts of the case. However, the court noted that it was entitled to take a broad view of the matter. In the

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[10] Regina v Monopolies and Mergers Commission, Ex parte Argyll Group PLC [1986] 1 WLR763 at 774

[11]

[12] [1991] 3 PLR 63

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instant matter sufficient facts are before the court. The court is entitled to take a broad view of the employment context and to accept the defendant's submission.

[31] In regard to Leslie Dunnah, it is unlikely that any other action than termination would have been taken, given the nature of the findings. A similar conclusion can be reached in regard to the other two claimants. It is unlikely that having received the findings and the recommendation of the Minister, that a different result would have been reached by the Governor General.

[32] Furthermore, it is appropriate to consider the impact on the Immigration Department were the court to grant the requested relief. In each case the claimant has been found to have committed serious wrong doings – two involving gross insubordination towards superiors produced no result and one involving fraud. To return each to the department would no doubt have a negative impact on the department.

[33] The court is of the view that there has been an unreasonable delay before making the applications and there is sufficient evidence before the court to conclude that to grant the relief sought by the claimants would be detrimental to good public administration.

[34] Accordingly, the relief sought is refused. No order for costs.

CLARE HENRY
High Court Judge

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