IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

IN THE COLONY OF MONTSERRAT

(Civil)

CASE NO: MINIHCV 2015/0035

BETWEEN:

KEN WEAKLEY

Applicant

AND

THE COMPLAINTS COMMISSION
THE CHIEF MEDICAL OFFICER

Respondents

Appearances:

Mr. Jean Kelsick for the Applicant
Mrs. Sheree Jemmotte-Rodney for the Respondents

2016 April 04
2016 July12

Judgment

[1] **Redhead, J. (Ag):** The applicant, Ken Weakley applies to the Court for an order granting him leave to apply for judicial review of the Complaints Commission's decision dated 31st July 2015 in respect to a complaint made by the applicant on 3rd February 2015 with reference to the Chief Medical Officer's (CMO) treatment of the applicant between 27th December 2014 and 2nd January 2015. The said treatment being the subject/matter of the said complaint.

The grounds of the application are as follows:

[2] In breach of its duty the Complaint's Commission failed to give the said written

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

complaint of the Applicant of maladministration on the CMO part and fair hearing. I must confess that I have great difficulty in understanding this ground as articulated by Learned Counsel.

[3] In consideration of the said complaint, the Complaints Commission failed to treat the applicant fairly when he appeared before it.

[4] The Complaints Commission's written decision dated 31st July 2015 is unreasonable and/or irrational and/or unfair in that finding that the applicant was entitled to an apology, it failed to find that the 2nd respondent, the CMO was guilty of maladministration and to properly address and rule on the Applicant's several and specific complaints of misconduct and maladministration on the part of the 2nd respondent, The CMO.

[5] The 2nd Respondent's failure to honour the undertaking given by her to the applicant on or about the 31st day (Sic) of 2014 to contact Nigel Harris, the manager of Fly Montserrat and approve the Applicant's medevac from Antigua to Montserrat was in breach of the Applicant's legitimate expectation that she would do so. As a consequence of the 2nd Respondent's said failure the applicant incurred avoidable and unnecessary medical and accommodation expenses of $30,903.12.

[6] The 2nd Respondent's treatment of the applicant was unreasonable and/or irrational and/or unfair and/or inconsistent and tantamount to an abuse of power and in breach of the 2nd Respondent's statutory and public duties to him and resulted in the Applicant incurring distress and discomfort and unnecessary expense of $30,903.12.

[7] The said written complaint lodged by the Applicant with the 1st Respondent (The Complaints Commission) exhausted, unsuccessfully, the only alternative form of redress available to the applicant against the 2nd Respondent. While the 1st Respondent considered the complaint for the reason that was aforesaid, its treatment of the complaint, and the decision thereon was unreasonable and/ or irrational and/or unfair.

[8] The applicant is personally and directly affected by the first Respondent's said written decision and the 2nd Respondent's decision not to approve the medevac from Antigua.

[9] I shall refuse the application for judicial review filed by the applicant for the under mentioned reasons.

[10] The applicant on 27th December 2014 sustained a serious back injury and as a result he was taken to Glendon Hospital. The applicant was advised by Dr Gopal

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

that he may have sustained a spinal fracture and a CAT scan was necessary in order for a proper diagnosis to be made. It was recommended that he should travel to Antigua so that the CAT scan can be done.

[11] On 28th December Dr Gopal advised the Applicant that medevac to Antigua was his best option and that he, Dr Gopal, had contacted Belmont Clinic in Antigua in this regard.

[12] The applicant said that he began to make arrangements to be medevac to Antigua on the same day but because of financial reasons he was unable to conclude the arrangements for that day.

[13] Dr Tracey Huggins, (CMO) spoke to him at the hospital on 28th December 2014. According to the applicant he was treated with gross discourtesy, berating and shouting at him, saying that he the applicant was wasting her time because he had deferred the date of the medevac. He explained to the CMO why it was not possible for the 28th December 2014. The CMO then informed the applicant that he would have to organize the medevac and an ambulance himself.

[14] By the evening of 28th December 2014. The applicant said that he had arranged to be medevac to Antigua the following day.

[15] On 29th December 2014 the CMO again spoke to the applicant who again told her that he had made all the necessary arrangements to be medevac from Montserrat to Antigua, a booking with Belmont clinic and ambulance transportation from Glendon Hospital in Montserrat to the airport in Antigua to Belmont Clinic. The Chief Medical Officer according to the Applicant replied "that will not do I will organize this'' and stormed off.

[16] The applicant was flown to Antigua where a CAT scan was performed. He was admitted to Mount St John's Hospital Dr Gaekward the resident orthopedic Surgeon advised him that his condition was stable but that he must adhere to strict bed rest for a period of six weeks and that he could not fly unless he was medevac. Dr Gaekwad confirmed that he could be discharged from the hospital and arrange for medevac the following day.

[17] On 29th December 2014 the applicant telephoned the CMO in Montserrat who told the applicant that she had been advised of the Applicants condition and his prognosis. He told the CMO that he wished to return to Montserrat by medevac the following day. The CMO told him that she would have to consider if he would be allowed to return to Montserrat. The applicant should telephone her in 48 hours, so that she could communicate her decision to him as she first needed to speak to the Fire and Ambulance Services, Glendon Hospital and the Government.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

[18] The applicant said that the CMO never explained to him that there were alternatives for the approval of his medevac back to Montserrat. She also told him that he needed 24 hours around the clock care; from two nurses and that he would be better off staying in a private clinic in Antigua for 6 weeks.

[19] The applicant said that the CMO had led him to believe that he could not be medevac to Montserrat without her approval. He had no option but to remain in Antigua.

[20] The Applicant said that he telephoned the CMO who told him that she would immediately contact Nigel Harris of Fly Montserrat, and approve the medevac for the next day. The Applicant said that in reliance on the CMO's undertaking, he started making the necessary arrangements.

[21] The applicant said that about half hour after speaking to the CMO, Michelle Graham's mother (the applicant's girlfriend's mother) telephoned Michelle saying that "we" (he and Michelle) should contact the Chief Medical Officer immediately. The applicant said that he was able to hear the conversation as the telephone was on speaker phone. The CMO spoke of a special air bed/gurney for medevac re-operation purposes. The CMO screamed at Michelle accusing her and the Applicant of being liars and playing games all along.

[22] According to the applicant, the CMO said that the applicant better pray that he did not need any future help from Glendon Hospital. He however made the necessary arrangements to be medevac the following day. The medevac had to be cancelled because in breach of the CMO'S undertaking she failed to and/or refused to approve the medevac with Fly Montserrat.

[23] The applicant then contacted Dr Ingrid Buffonge who told him that the CMO did not have the sole authority. Dr Ingrid Buffonge put the applicant in touch with Dr Joseph John who requested an MRI Scan on the applicant. The Scan confirming that the applicant's condition was stable and that the applicant could travel. The verification took two days and as a result, according to the applicant, that resulted in him in incurring additional and unnecessary accommodation and medical expenses of US$11,445.60 equivalent to EC$30,903.12 due to having to stay in Antigua longer than was necessary, consulting with Dr John and undergoing additional medical test.

[24] On 3rd February 2015 the Applicant submitted a formal complaint to the Complaints Commission concerning the CMO's conduct.

[25] On 30th September 2015 the chairperson of the Complaints Commission wrote to Mr. Kelsick, lawyer for the Applicant.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

Paragraph 2 of his letter states as follows:

> "In short, while the commission found that your client's complaint revealed a course of conduct on the part of a public officer which amounted to maladministration within the meaning of the Act, that course of conduct was found to be peripheral to your Client's return to Montserrat which was itself conditional on a decision for the government of Montserrat given that your client's wish to return to Montserrat coincided with the height of the holiday and festive season December 29 to January 1 2015. The commission could find no basis to recommend that your client should be compensated for having to remain in Antigua for the period of two days it took to procure that decision.''

[26] Learned Counsel, Mrs. Jemmotte-Rodney on behalf of the respondents referred to order 56/(3) (a) and (b)[1] and argued that the Rule is mandatory and that failure to state the relief is fatal to the application. Mrs. Jemmotte-Rodney submitted that the court does not look favourably on failure to comply with the mandatory requirements of the rules[2]. As a result of this submission Mr. Kelsick applied for amendments to his application.

[27] The amendments applied for by the learned counsel, Mr. Kelsick, are as follows:

(a) Declaration that the first respondent's written decision dated 31st July 2015 is unreasonable and/or irrational and/or unfair by failing to find that the 2nd Respondent was guilty of maladministration and to properly address and rule on the applicant's several and specific complaints on behalf of the 2nd Respondent.

(b) Further a declaration that the 1st Respondent's failure to recommend the applicant be reimbursed his expenses of $30,903.12 incurred by him as a result of the 2nd Respondent's maladministration is unreasonable and/or unfair.

(c) An order that the 1st Respondent recommend to the Government of Montserrat that the Applicant be reimbursed his said expenses of $30,903.12.

(d) A declaration that the 2nd Respondent's failure to honour the undertaking given by her to the applicant on 31st December 2014 to contact Nigel Harris , the manager of Fly Montserrat and approve the Applicant's medevac from Antigua to Montserrat was in breach of the Applicant's legitimate expectation that she would do so.

(e) A declaration that the 2nd Respondent's treatment of the Applicant was unreasonable and/or irrational and/or inconsistent, arbitrary and tantamount to an abuse of power and in breach of the 2nd Respondent's statutory and public duty to him and resulted in the Applicant

---

[1] Civil Procedure Rules 2000

[2] See Homer Richardson v Attorney General of Anguilla

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

incurring distress and discomfort and unnecessary expense of $30,903.12.

(f) Order that the 2nd Respondent repay to the Applicant the sum of $30,903.12.

(g) The application to amend was granted.

[28] From the above I entertain no doubt that the application for judicial review is motivated and fuelled by the fact that the 1st Respondent failed to award the Applicant his expense of $30,903.12 which he incurred while he was in Antigua.

[29] I am confirmed in that view, as during the course of Mr. Kelsick's presentation I suggested to him that if his client was reimbursed his expenses we would not be here. He candidly responded in the affirmative.

[29] In the letter to Mr. Kelsick (referred to above) The Complaints Commission did say that "his client's complaint revealed a course of conduct on the part of a public officer, the CMO, which amounted to maladministration.''

[30] It is therefore, in my considered opinion, that for Learned Counsel to assert that there was a failure on the part of the complaints commission to find that the 2nd Respondent was guilty of maladministration is misguided.
Section 20(2) of the Complaints Commission Act states:
"Where the Commission is of the opinion that any person has sustained an injustice as a result of a breach or infringement of a human right or of maladministration, it shall include in its report such recommendations as it thinks fit and a request that the relevant department of government or public authority notify it, within a specific time, of the steps if any that it proposes to take to give effect to its recommendations.''

[31] Mr. Kelsick argued strenuously that the provision ''it shall include in its report such recommendations" in the section must include recommendation for compensation. I do not agree.

[32] I understand Mr. Kelsick's argument that a failure by the 1st Respondent to recommend such compensation or reimburse his client for expenses is unreasonable, irrational or unfair. Even if I am wrong in that subsection (2) does encompass a recommendation for compensation, the very subsection gives the Complaints Commission a discretion, "as it thinks fit."

[33] It is quite clear in the letter to Mr. Kelsick that the Complaints Commission considered the question of compensation to the applicant but decided against it.

[34] In addition, in an affidavit sworn to by Judith Baker secretary to the Complaints Commission, she swore that on 8th of May 2015 in the letter to the Applicant, she

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

indicated that following preliminary consideration of the matter, the 1st Respondent agreed to investigate the matter, By paragraphs 9,10 and 11 Ms Baker deposed as follows:-

(9) "In the said letter, the 1st Respondent informed the claimant that it was established for the purpose of investigating Complaints of maladministration within the public service and for making appropriate recommendations to the Governor with a view to improving the governance and administration of the public service. The applicant was notified that the 1st Respondent is not authorized to award compensation to any person.

(10) The Applicant was also informed in the said 8th May 2015 letter that the 1st Respondent's decision to investigate the Applicant's matter is premised on the understanding that no such remedy is available since it views the complaint as one intended to identify acts of maladministration within the public service through appropriate recommendations made by the 1st Respondent. The applicant was asked to confirm whether he still wanted to pursue his complaint before the Commission. By email response on 8th May.

(11) The applicant responded in the affirmative and informed the Secretariat how to locate him on Skype…"

[35] From the above, I am of the considered opinion that it is disingenuous for the applicant to come to Court for judicial review seeking a declaration that the 1st Respondent's failure to recommend that the Applicant be reimbursed his expenses of $30,903.12 incurred by him as a result of the 2nd Respondents maladministration is unreasonable and/or irrational and/or unfair.

[36] Judicial review as Mrs. Sheree Jemmotte-Rodney rightly argued in my view is not an appeal from a decision, but a review of the matter in which the decision was made. Learned Counsel contended that the Court is not entitled to an application for judicial review to consider whether the decision itself was fair and reasonable. I do not agree with this argument.

At page 143 of **Chief Constable of Northern Wales v Evans**[3] Lord Hailsham of St Maryleborne opined:

"it is important to remember in every case that the purpose of the remedies is to ensure that the individual is given fair treatment by the authority to which he had been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question. The function of the Court is to see that lawful authority is not abused by unfair

[3] 1982 3 ALL ER 143

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

treatment and not to attempt by itself, the task entrusted to that authority by the law.''

[37] As a matter of fact Mrs. Jemmotte-Rodney in her written submissions argued that the purpose of judicial review is to ensure that an individual is given fair treatment by the public authority, whether judicial or quasi judicial or administrative. In my view if that is not done or neglected, the end result, i.e the decision would be unfair.

[38] Mrs. Jemmotte-Rodney in her written submissions argued that it cannot be overstated that judicial review is not an appeal on the merits from a decision. The Court exercises a supervisory jurisdiction only. Even if the Court is not in agreement with the decision maker, the Court does not and cannot substitute its own Judgement, neither the Court cannot suggest the nature of the remedy to be given by the decision maker.

[39] Learned Counsel, Mrs. Jemmotte-Rodney, submitted that the Court should and would only give a mandatory order where it is able to conclude that only one result was legally available to the body in question.[4]

[40] In the case at bar, in my judgment, even if the first respondent had the legal authority to order compensation to the applicant, that was not the only remedy which was legally available to the first Respondent.

[41] Mr. Kelsick contended that the 1st Respondent's failure to recommend that the Applicant be reimbursed his expenses of $30,903.12 as a result of the 2nd Respondent's maladministration is unreasonable and/or irrational and/or unfair.

[42] Learned Counsel for the Applicant went further to seek an order that the 1st Respondent recommend to the Government of Montserrat that the Applicant be reimbursed his said expenses of $30,903.12.

[43] Mrs. Jemmotte-Rodney submitted that this relief is in-appropriate, as in effect, it is seeking to have the Court mandate to the 1st Respondent what decision it should make. A recommendation for the reimbursement of the Applicant's full expenses is not the only decision which was legally open to the 1st Respondent and for the Court to so order would have the effect of usurping the role of the decision maker.

[44] In Shah Bennet v London Borough Council Lord Scarman opined:

"an order of certiorari to quash the refusal of a mandatory award and or an order [5] of mandamus to require the authority to reconsider the application

[4] See paragraph 15.5 Judicial Review Handbook 6th Edition by Michael Fordhem P 156

[5] (1966) 8 Admin L.R 281

6 1983 1 A 11 ER 226 at 240

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

for an award my Lord, I think is the appropriate relief, for it avoids any semblance of the Courts assuming the function assigned by Parliament to the local education authorities, namely the power to decide whether to make or to refuse an award Counsel for the students did suggest that a declaratory relief was appropriate declarations are appropriate to or declare an entitlement or a right or a duty. But this is exactly what the Courts cannot, and must not do, in these cases. It is not for the courts to say either that the students are entitled to an award or that the authorities are under a duty to make an award."

[45] Learned Counsel for the Respondents referred to S.34 (2) of the Act which mandates:

> "No Civil or Criminal proceedings shall be brought against the Commission or Commissioner, or any person appointed under section 27 in respect of any such act as is referred to in subsection (1) without the leave of the High Court, and the High Court shall not give leave under this section unless it is satisfied that there is substantive ground for the contention that the person to be proceeded against has acted in bad faith."

[46] Mr. Kelsick Learned Counsel for the Applicant argued that "Civil proceedings in the section do not encompass judicial review.''

[47] In support of his argument he referred to S.13 (3) of the Act which provides:

> "The Commission shall not investigate any matter in respect of which the complainant has or had (1) a remedy by way of proceedings in Court other than by way of judicial review.''

[48] This subsection is completely distinct and separate from section 34(2) and has no relevance to the section.

[49] In my considered opinion S.13(2) mandates what the commission must not investigate i.e any matter in respect of which the complainant has or had a remedy by way of proceedings in a Court, whereas the words in section 34(2):

> (1) "Without the leave of the High Court and the High Court shall not give leave under the section unless it is satisfied that there is substantial ground for the contention that the person to be proceeded against has acted in bad faith."

[48] The above in my opinion restricts the Court's power to act freely under the Complaints Commission Act in case of Judicial Review.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

[49] However I would not classify it as an ouster of the Courts jurisdiction, I would rather regard the subsection referred to above as a condition precedent to an action for judicial review under the subsection referred to above.

[50] In light of all of the above, in my judgment, the applicant does not have an arguable case. The application for judicial review is hereby dismissed.

[51] No order as to costs.

…………………………….
Albert Redhead
High Court Judge

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm