

IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
COMMONWEALTH OF DOMINICA

(CIVIL) -

DOMHCV2015/0163

BETWEEN:

BERNARD SANDERSON

Claimant

And

THE DOMINICA STATE COLLEGE
By its President

Defendant

Before: The Hon. Justice M E Birnie Stephenson

Appearances:

Dr Willaim Riviere for the Claimant
Mr Michael Bruney for the Defendant

2016: May 25th
(Written Closing Submissions
filed on the 16th June 2016
and 22nd August 2016)

JUDGMENT

[1] **STEPHENSON J.:** This is an application for Judicial Review brought by Mr Bernard Sanderson ("Sanderson"). Mr Sanderson is a lecturer employed by the Dominica State College, he seeks the following relief:

- a. An order of Certiorari, quashing the decision of the defendant that he has reached the mandatory age of retirement and that he should take the necessary steps to discuss with the college his tenure and continued employment with the institution;
- b. An order of prohibition, prohibiting the College from terminating his employment before he has reached the lawful mandatory retirement age;
- c. Costs;
- d. Further and/or other relief which the court may consider just.

[2] "Sanderson filed a fixed date claim form with an affidavit in support; he also relies on the contents of his witness statement. The College relied on the affidavit evidence of Mrs Sophia Albert Charles its Senior Academic Officer in defence of the claim.

[3] The undisputed facts are as follows that:

- i. Sanderson was employed by the College as a lecturer in Computer Science;
- ii. Sanderson was born on the 2nd November 1954 and that he turned 60 on the 2nd November 2014;
- iii. In September 2002, Sanderson was seconded to the College from the Clifton Dupigny Community College and employed there as a Lecturer in Computer Science;
- iv. In August 2004, Sanderson exercised his option to become a permanent employee of the College;
- v. From September 2002 Sanderson was employed as a member of the College's Academic Staff;
- vi. By letters of the 16th January 2015 and 19th May 2015, Sanderson received letters from the President of the College informing him that he had reached his mandatory age of retirement and that he was invited to discuss with the college his continued employment with the College¹;
- vii. By letter dated the 25th June 2015, Sanderson was informed by the College's Solicitor that he was given 10(ten) days to do as previously directed by the President of the College failing which College reserved its right to pursue appropriate legal action in the matter.²

¹ The Letters received by Sanderson from the President of the College were exhibited in the matter.

² The said letter was exhibited in the matter.

Claimant's Case

- [4] Learned Counsel on behalf of Sanderson submitted that the sole issue before the court is whether section 30 of the DSC Act prevails over section 27(3) of the said Act.
- [5] It is the claimant's contention that in the three letters written by the college to him on the 16th January, 19th May and 25th June 2015, it was clear that the college had taken the decision that he had reached the age of retirement and that his continued employment was at the pleasure of the College Board. Further that he had to apply to the Board for the continuation of his employment. That the correspondence also invited him to meet with the Office of the College President to further discuss his tenure and options for further employment and that he was required to vacate his employment at age 60 years.
- [6] Sanderson also made reference to the averments contained in the affidavit of reply filed on behalf of the college where it was averred that "*the claimant's office of employment at the Dominica State College is deemed to have been vacated on November 2, 2014, and shall remain vacant unless extended at the pleasure of the Board of the College*".
- [7] Sanderson's contention is that in arriving at its conclusion, the college was in breach of statute and it failed to discharge its statutory duty towards the claimant or that it acted in abuse of or in excess of its powers towards the claimant.
- [8] Learned Counsel Mr Riviere on behalf of Sanderson submitted that in the circumstances the inferences flowing from these facts is that the defendant took a decision which had the effect of adversely affecting his client's right to continued employment with the college.

The Defendant's case

- [6] The defendant's submission before the court is that the claimant's claim ought to be dismissed on the grounds that there is no basis for bringing the action and that the claimant's legal arguments have no merit.
- [7] Learned Counsel Mr Michael Bruney on behalf of the College's firstly submitted that Sanderson is seeking an order Certiorari quashing a decision by the College that he had reached the mandatory retirement age and that he should take the necessary steps with the college regarding his tenure and continued employment with the college. Mr Bruney submitted that nothing in the letter dated January 16th, 2015 sent to Sanderson suggested that he had reached the age of retirement of the academic or permanent staff of the college. Secondly that Sanderson is seeking an order of prohibition prohibiting the college from terminating his employment before he reached the mandatory retirement age.

- [8] Learned Counsel Bruney submitted that Sanderson's action is premature in that no decision was made by the college which in any way jeopardized or threatened his employment. That Judicial Review could only be brought where a decision has been made which had resulted in the illegal termination of Sanderson's employment with the College, or if a decision had been taken by the College which would have adversely affected Sanderson's employment, or if there was an imminent and substantial threat of termination of his employment or unlawful termination with his tenure at the college.
- [9] Mr Bruney submitted that the jurisdiction of the court ought not to be invoked to determine hypothetical questions.
- [10] It was submitted on behalf of the college that Sanderson has failed to produce any credible evidence that there were moves afoot to terminate or adversely affect his employment.
- [11] Learned Counsel Mr Michael Bruney in his written submission submitted that there is nothing in the correspondence received by Sanderson that could be construed as a threat to terminate his employment but rather as an invitation to discuss his retirement process and his continued tenure. Further, that the letter received from the College's Solicitor did not, in fact, threaten legal action but was an invitation by the Solicitor for an indication from Sanderson his position as it relates to discussing options for continued employment and to inform Sanderson that the college reserved its right to pursue appropriate legal action if he failed to respond accordingly.
- [12] Counsel maintained that the correspondence from the College to Sanderson was at all material times an invitation to discuss his retirement process and continued tenure and employment with the college.
- [13] I would say at this point, that I do not necessarily agree with Counsel. Mr Bruney's submission that the letters received by Sanderson should not be construed as possible cessation of employment with the college as the letters I find clearly said to Sanderson that he had passed the age of retirement, thereafter making reference to the section of the act which states that "an officer ... shall vacate her office of employment with the college at the mandatory age of retirement ...". The letter further made reference to the section of the act which provided that the officer who has reached the mandatory age of retirement is eligible for continued employment at the pleasure of the Board of the college, after that person has reached the mandatory age of retirement in the public service"

- [14] It seems to me clearly that having informed Sanderson that the college considered that he had passed the civil service age of retirement, and that therefore he had to vacate his office of employment and that there was the possibility that he could continue his employment at the pleasure of the Board, that Sanderson was being informed that his employment had come to an end and was to be continued at the pleasure of the board.
- [15] So at first blush, I cannot agree with learned Counsel that the application by Sanderson was premature as the letters received by him presented him with what I consider was a decision that he had reached the age of retirement and that he was required to demit office having done so. That, however,, there was the option for him to continue in his employment at the pleasure of the Board. I see the letters as a clear invitation to Sanderson to meet to discuss his continued employment.
- [16] Learned Counsel Mr Bruney continued to submit that Sanderson's legal arguments had no merit on the ground that section 30 of the DSC Act is subject to section 27 and 28 of the said Act.
- [17] Learned Counsel submitted that by section 26(2) of the DSC Act, the College Board is empowered to employ a public officer for a maximum period of two years when such period could be renewed. By Section 26(4) a seconded officer has the option to become a permanent member of the College Staff. Based on the facts before the court the Claimant exercised that option.
- [18] Learned Counsel referred to Section 27 which makes provision for the public officers who were on secondment and who exercised their option to become permanent members. There, Mr Bruney submitted that the provisions of the Pensions Act continued to apply to Sanderson as he was a public officer who exercised his option to accept permanent employment. That he can continue his employment with the College for an indeterminate period subject to section 27(3) and that his employment would be continued at the pleasure of the Board and subject to terms and conditions of his continued employment to which section 30 would relate.
- [19] Learned Counsel Mr Bruney submitted that since Sanderson's permanent employment with the College commenced by virtue of the provisions of section 26(4) as "*a public officer on secondment to the College who exercised his option to accept permanent employment ...*" then he must be subject to section 27.
- [20] Mr Bruney submitted that Sanderson claims that his employment fell to be considered under section 30 of the DSC Act but he has failed to bring any evidence before the court to establish the terms of his contract or of his employment in support of that claim. Also, that Sanderson failed to produce any evidence or arguments before the court that the Pensions Act did not apply to him.

Mr Bruney submitted that Sanderson failed to adduce any evidence before the court of the date of commencement of his employment in the public service or whether or not he was appointed to a pensionable office or a non-pensionable office.

[21] Learned Counsel submitted that the clear and unambiguous words of the DSC Act show that Sanderson fits into the class of persons captured by section 27 of the Act being a public officer on secondment who exercised his option to accept permanent employment and therefore he must vacate his office under section 27(3) and is eligible for continued employment under section 28.

[22] The College, therefore, prayed that Sanderson's application be rejected and that for the Court to declare that in the circumstances of the case, the claimant's employment with them is deemed vacated on the 2nd November 2014 and shall remain vacant unless his employment is extended at the pleasure of the College's Board.

[23] Leave was granted to Sanderson to file Judicial Review and trial directions were subsequently given. At the hearing of the matter, the parties agreed that there was no dispute on the facts of the case and an order was made for written closing submissions on the law and thereafter the court reserved its judgment.

Court's Considerations

[24] The lawfulness of a decision or action made by a public body, inferior court or tribunal is subject to review by the Judge of the High Court by way of Judicial Review. Judicial Review is a challenge to the way in which a decision is made rather than the rights and wrongs of the conclusion reached. The court will not in Judicial Review matters substitute what it thinks is the correct decision.

[25] Judicial Review is said to be the mechanism by which individuals are protected from official or regulatory action that is unreasonable or unfair, arbitrary or abusive, unjustified or disproportionate. It ensures that the officials and bureaucrats who exercise public power are subject to the law, rather than being a law unto themselves.

[26] A quashing order is the order that quashes a decision that has been challenged and a prohibition order is an order preventing an inferior court or public body from acting outside of its jurisdiction in

the future. A quashing order addresses decisions that have already been made and a probation order addresses future decisions that may be made.³

[27]The issue to be resolved in the case at bar is whether or not Sanderson, upon arriving at his 60th birthday, fell to be considered as achieving the mandatory age of retirement as a public officer or whether he is to be considered a permanent member of staff of the College where he would achieve the mandatory age of retirement at 65.

[28]To resolve this issue it is necessary to examine sections 26 and 27 of the DSC Act. Sections 26 and 27 of the Dominica State College Act⁴ ("the Act") provides that:

26. *(1) Where secondment of a public officer to the College is approved by the Public Service Commission, subject to such conditions as it may impose, the officer so seconded to the College shall be employed in accordance with the provisions of this Act, but the service of the seconded officer during the period of secondment shall, in relation to pension, gratuity or other benefits and rights as a public officer, be treated as continued service in the Public Service.*

(2) For the avoidance of doubt, it is hereby declared that an officer seconded from the Public Service to the College shall continue to be a public officer until such time when he resigns, retires, or otherwise leaves the Public Service, but the officer shall, during his period of secondment to the College, comply with the provisions of this Act and Rules made under this Act.

(3) The Board may employ a public officer on secondment to the College as a member of staff for a maximum period of two years, except in exceptional circumstances, when the secondment may be extended or renewed.

(4) A public officer who is seconded to the College shall exercise an option at least three months prior to the completion of the period of his secondment of either becoming a member of the permanent staff of the College or returning to his substantive position in the Public Service or such other equivalent and suitable position to which he may be appointed in the Public Service.

(5) A public officer who exercises his option under subsection (4)

(a) to become a member of the permanent staff of the College, shall do so in writing addressed to the Chairman of the Board and copied to the Permanent Secretary of the Ministry;

(b) to return to the Public Service, shall do so in writing to the Permanent Secretary of the Ministry and copied to the Chairman of the Board.

³ Judicial Review a practical guide Hugh Southey & Adrien Fulford at paragraphs 7.2.1 and 7.2.3

⁴ Act No. 2 of 2002 of the Laws of Dominica

(6) Where the officer under subsection (5) exercises his option to return to his substantive position and such position no longer exists, the Establishment, Personnel and Training Department shall consult with the officer in order to treat with the officer or his representative with a view to agreeing to a suitable alternative position to which the officer may be appointed by the Public Service Commission or subject to the power of removal by the Commission, to make provision for compensation.

(7) A public officer on secondment to the College shall be so employed by the College that his remuneration and conditions of service are not less favourable than those that are attached to such appointment in the Public Service.

27. *(1) Where a public officer on secondment to the College exercises his option to accept permanent employment with the College, the officer shall cease to be a public officer on the date of such acceptance, but the provisions of the Pensions Act shall continue to apply to him in relation to his service with the College as if he had continued to be a public officer in respect of his pension and gratuity payments.*

(2) An officer to whom the Pension Act applies under subsection (1) may, subject to subsection (3), hold office for an indeterminate period.

(3) An officer to whom this section applies shall vacate his office of employment with the College at the mandatory age of retirement from the Public Service and is eligible for gratuity and pension payments at that age.

[29] The wording of the DSC Act are plain and lends itself to a simple literal interpretation. I am guided by the words of Lord Scarman in the case of **Stock –v- Frank JOhnes (Tipton) Ltd [1978] 1 WLR 231 (HL)** as quoted by Perreira CJ in the case of **The Attorney General of St Lucia s Reference case** ⁵

“If the words of Parliament are plain, there is no room for the ‘anomalies test’ unless the consequences are so absurd that. Without going outside the statute, one can see that Parliament must have made a drafting mistake...”

[30] Based on the facts adduced in this case, Sanderson was a public officer who was seconded to the college and who subsequently exercised his option to accept permanent employment with the college. It is clear that prior to accepting permanent employment at the college when he was seconded to the college, the terms of his employment was governed by section 26(2) of the DSC Act, that is, during the period of his secondment he continued to be a public officer until such time as he resigned, retired or otherwise leave the public service.

⁵ SLUHAP2012/0018 at paragraph 7

[31] The evidence which is before the court is that Sanderson exercised his option to be permanently employed by the college. Therefore section 27(1) and (3) of the DSC Act then became relevant to Sanderson. It states

27. (1) Where a public officer on secondment to the College exercises his option to accept permanent employment with the College, the officer shall cease to be a public officer on the date of such acceptance, but the provisions of the Pensions Act shall continue to apply to him in relation to his service with the College as if he had continued to be a public officer in respect of his pension and gratuity payments.

...

(3) An officer to whom this section applies shall vacate his office of employment with the College at the mandatory age of retirement from the Public Service and is eligible for gratuity and pension payments at that age.

[32] It is the defendant's case that Sanderson has no basis for bringing the claim and I agree with them.

[33] It seems clear applying the fact of this case which is undisputed that Sanderson was initially seconded to the college and he subsequently exercised his option to become permanent staff and in those circumstances section 27(3) of the act speaks to his status as it regards his retirement and pension.

[34] I am of the considered view that Sanderson is not at any time **captured** by Section 30 of the College in the way he considers himself to be. Even though he is on the permanent staff of the College, he remained at all material times subject to the provisions of section 27(3); and in the circumstances of the case, it is quite correct for the college to maintain that his retirement age is that of the public service, that is at the age of 60 years.

[35] It is noted also that the first letter to Sanderson informed him in no uncertain terms that it was considered by the writer that he had reached the age of retirement. It is clear that Sanderson disagreed with this in his assertion that he had not reached the age of retirement. I do respectfully believe that this is a mistaken belief on his part.

[36] I am of the view that the crux of the dispute before the court is whether or not the college was correct in considering that Sanderson had reached the age of retirement thereby putting into action the protocol, so to speak, of discussions to continue his job. It is my view that if the college was

correct in its view that Sanderson had reached the age of retirement, then their actions would have been correct in the circumstances.

[37] I would, therefore, decline to quash the decision of the President to invite Sanderson to discuss his retirement and to continued tenure at the College, and it follows that I decline to grant the order of prohibition sought.

[38] The interim injunction granted in this matter on the 13th July 2015 is hereby discharge.

[39] I take this opportunity to encourage the parties here to enter into discussions regarding the continued tenure of Mr Sanderson. I would also like to thank Counsel for their kind assistance rendered to this court through their written submissions and I would like to apologize profusely to Counsel and the parties for the delay in delivering the judgment herein, however, the submissions were filed in this matter and the file mistakenly filed away, it was only after numerous enquiries made by me that the file with the submissions were eventually presented to me and every attempt was made to attend to the judgment.

[40] There shall be no order as to costs.

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M E Birnie Stephenson
High Court Judge