THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE
FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT
(CIVIL)
A.D. 2017

CLAIM NO. SKBHCV2016/0344

BETWEEN:

DR LAWRENCE RAWLINGS

Applicant

and

THE ATTORNEY GENERAL OF ST. KITTS & NEVIS
THE MINISTRY OF HEALTH

Respondents

Appearances:-
Ms. Nadia Chiesa with her Ms. Stacey Ann Aberdeen for the Applicant
Mrs. Tashna Powell Williams for the Respondents

2017: March 20th

DECISION FOR APPLICATION FOR LEAVE FOR JUDICIAL REVIEW

[1] **WARD, J**.: The applicant Dr. Lawrence Rawlings, is a licensed medical practitioner and surgeon. Since 1981 he operated a private surgical practice in St. Kitts.

[2] He would from time to time be accorded use of the operating and hospital facilities at the Joseph N. France Hospital ("the hospital") in his capacity as a private practitioner.

[3] In March 2009, Dr. Lawrence contracted with the Government to provide full time surgical coverage as General Surgeon at the hospital for an initial period of 6 months, effective 11 March, 2009.

[4] At the expiration of this period, Dr. Rawlings did not seek to renew the contract. He communicated this position by an undated letter addressed to then Permanent Secretary for the second respondent, Mr. Elvis Newton.

[5] By letter dated 2 September, 2009, Dr. Cameron Wilkinson, Medical Chief of Staff, wrote to Dr. Rawlings advising him that on termination of his contract he would have to re-apply to the hospital if he wished to function there in another capacity. It is common ground that this was a reference to his continued use of the operating and hospital facilities in a private capacity. The Permanent Secretary subsequently endorsed this position by letter dated 22 September, 2009.

[6] Dr. Rawlings challenges this decision and seeks, inter alia:

(i) A declaration that the privileges granted to him to use the operating and hospital facilities at the hospital in his capacity as a private practitioner constitutes a legal and equitable right which could not be arbitrarily revoked;

(ii) A declaration that the said privileges were arbitrarily revoked without just cause and in breach of the duty of procedural fairness in circumstances in which there was evidence of malice leading to abuse of power;

(iii) Judicial review of the executive action taken by officials of the Ministry of Health in arbitrarily withdrawing the privileges granted to him to use the facilities at the hospital.

[7] The respondent contends that it is unaware that Dr. Rawlings enjoyed any privilege to use the hospital's facilities for his private practice other than when he was employed part time with the Government. Such privilege is automatically granted when a surgeon is in the Government's employ. In Dr. Rawlings' case, he provided part time services to the Government as a covering surgeon in 2001 and again from February 2007 to September, 2009. Accordingly, when he utilized the hospital facilities in a private capacity between 2001 and 2009 such access was incidental to his part time contractual arrangement with the Government as a covering surgeon and not as a private physician with a privilege.

[8] The respondent supports this assertion by exhibiting available hospital data from 1999 which it says shows that Dr. Rawlings used the surgical facilities only in the years that he was employed with the Government.

[9] The respondent further contends that what Dr. Rawlings claims as a privilege is merely permission to access the hospital facilities and staff which is granted at the discretion of the Permanent Secretary. It is neither automatic nor lifelong and no fee is charged for such access.

[10] Since 1999 the set procedure is that private physicians who wish to access the facilities are required to apply in writing. This is so even where they previously had access but had either moved away from the jurisdiction, ceased to avail themselves of the privilege for any extended period; once they returned to the Federation or once they left the Government service.

[11] This application process is necessary and expedient in order to avert logistical difficulties created by limited resources and essential personnel at the hospital.

[12] The respondents deny that Dr. Rawlings held any privilege as a private physician capable of revocation and, accordingly, the letters authored by the Medical Chief of Staff and the Permanent Secretary cannot and did not operate as a revocation of Dr. Rawlings' alleged privilege.

[13] It is further said that there was no decision capable of being reviewed. The said letters merely notified Dr. Rawlings of the procedure to be followed if he wished to access the facility as a private physician after his contractual term ended. Dr. Rawlings made no application to access the hospital in a private capacity so there was no decision regarding the matter of access to the facilities.

ISSUES

[14] The issues that fall for resolution on this application for leave to apply for judicial review are:

(i) Whether the applicant has met the threshold for leave to apply for judicial review;

(ii) Whether there has been unreasonable delay in making the application.

Before proceeding to treat with these issues, however, it is important to set this application in context by briefly outlining its procedural history.

[15] On 10 June, 2010 Dr. Rawlings filed an application for leave to apply for judicial review. The matter was given a hearing date of 16 July, 2010. The respondents were served with the application for

leave and supporting documents on the afternoon of 15 July, 2010. However, they did not appear at the hearing of the application for leave nor did they oppose the application.

[16] The Court granted Dr. Rawlings leave to apply for judicial review and ordered him to file the fixed date claim form within 14 days of the order. This he did. He was then represented by different Counsel.

[17] There is no evidence that either the Order granting leave or the 2010 claim was served on the respondents although it was plainly filed. There was a period between 2013 and 2015 when the Court file could not be located.

[18] Dr. Rawlings changed Counsel in 2013 and again in 2016. During that time he made attempts to enquire into the status of his matter

[19] In October, 2016, the matter came on for status hearing.

[20] At the status hearing the issue of service of the 2010 claim arose. The Court granted an adjournment to allow both sides to make further enquiries into this issue.

[21] At the adjourned hearing on 11 October, 2016 the applicant withdrew the 2010 claim.

[22] On 9 December, 2016 the applicant filed this application for leave with supporting affidavit.

[23] It is perhaps convenient to state here that at the hearing of this application on 9 March, 2017, the applicant conceded that the Attorney General was not a proper party and also withdrew the allegations of malice against Dr. Wilkinson.

[24] While the respondent had taken the preliminary point that the Ministry of Health was not a proper party to the proceedings because it was not a legal personality, Counsel for the respondent did not oppose the application to amend the title of the proceedings by substituting the Permanent Secretary on behalf of the Ministry of Health.

Issue: Whether the applicant has met the threshold for leave.

[25] Undergirding the requirement for leave to apply for judicial review is the necessity to filter out unmeritorious claims. Part 56.2(1) **CPR 2000** requires an applicant for leave to establish that he has sufficient interest in the subject matter of the application. This he may do by demonstrating, *inter alia*, that he has been adversely affected by the decision which is the subject of the application. He must demonstrate that he has an arguable case that a ground of judicial review exists that merits thorough examination at a substantive hearing and that there are no debarring factors such as delay in bringing the application or availability of an alternative remedy.

[26] I bear in mind that as I consider this application I am not concerned with the merits of the decision in question nor am I required to perform an in depth analysis of the applicant's case. I am rather concerned with the legality, rather than the merits, of the decision; with the jurisdiction of the decision maker and with the fairness of the decision making process.

[27] In this case, the respondent does not challenge the assertion that the applicant has a sufficient interest in the subject matter of the application. The applicant in his affidavit in support avers that the impugned decision has led to the closure of his private surgical practice.

[28] The Court is satisfied that the applicant has crossed this *locus standi* hurdle since he is plainly affected by the decision in question.

[29] The Court next considers whether the applicant has an arguable case with a realistic prospect of success. In conducting this assessment I have in mind the relevant learning as enunciated in the case of **Sharma v Browne-Antoine**[1]:

> *"The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy…the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities."*

[30] Counsel for the applicant submits that Dr. Rawlings' case satisfies this requirement because he had a legitimate expectation that once granted his privileges to use the operating and hospital

[1] (2006) 69 WIR 379

facilities at the hospital they would not be revoked arbitrarily and without cause. Further, if they were to be revoked, he held a legitimate expectation that he would be told the grounds on which his privileges were being revoked and would be given the opportunity to respond to any allegations against him regarding the revocation of his privileges.

[31] It was further submitted that the revocation of Dr. Rawlings' privileges was arbitrary and without cause because his contract with the Government did not expressly or impliedly revoke, suspend, alter or in any way interfere with his rights as a private practitioner or his privileges at the hospital in his capacity as a private practitioner held since 1981.

[32] Secondly, he had received specific verbal assurance that he could continue in private practice and that his privileges would not be revoked without notice or cause. Based on his experience and practice when he previously provided surgical coverage at the hospital between 1981 and 2009 he had never before been told that he needed to apply in writing if he wished to retain access to the facilities in a private capacity.

[33] In response, counsel for the respondent submitted that the application for leave must be judged on the quality of the evidence presented by the applicant. Given the serious nature of the allegation that the respondent arbitrarily revoked Dr. Rawlings' privilege to use the hospital facilities without due process, resulting in the death of his medical practice, the applicant must establish that his case is likely to succeed at trial if leave is granted and not merely that it is potentially arguable.

[34] Counsel submitted that no legitimate expectation arises in the circumstances of this case and that the facts relied on in Dr. Rawlings' affidavit are vague and imprecise. In particular, he has failed to adduce evidence that his use of the facilities, at least from 1999, was a consequence of a privilege he held as a private physician as opposed to a government employee; or that someone authorized by the respondent gave his express or implicit assurance that when the applicant's tenure with the government ended he would have automatic access to the hospital's facilities without more.

[35] By contrast, it is said, the affidavits filed on behalf of the respondent outline a clearly settled procedure by which private practitioners access the hospital's facilities.

[36] In any event, submitted counsel for the respondent, there was no decision made that was capable of review. The letters from Dr. Wilkinson and the Permanent Secretary merely served to ask Dr. Rawlings to write in accordance with the established practice and procedure if he wished to

continue to access the hospital's facilities in a private capacity. They did not constitute a decision and could not and did not revoke a privilege which he did not have. Thus no legitimate expectation can be said to arise.

Legitimate Expectation

[37] I adopt the definition of legitimate expectation as articulated by Lord Fraser in **Council of Civil Service Unions and others v Minister for the Civil Service.**[2]

> *"Legitimate or reasonable expectation may arise from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue."*

[38] I am satisfied on the evidence before me that there is an arguable case that the applicant had a legitimate expectation that he would continue to have access to the hospital's facilities in a private capacity.

[39] Dr. Rawlings' evidence is that since 1981 he was granted the privilege of accessing the hospital's facilities in a private capacity by the then Permanent Secretary and Chief Medical Officer.

[40] While the respondent adduced evidence of the practice and procedure said to be in force since at least 1999, no evidence has been produced to show that, upon previous expiration of his employment with the government, even up to 2001, Dr. Rawlings had ever been notified by letter or otherwise that he would need to re-apply in writing if he desired to access the facilities in a private capacity.

[41] Further, the contract of employment for the period March to September, 2009 makes no reference to access to the hospital's facilities in a private capacity as an incident of his employment with the government. This would suggest that that privilege developed as a matter of practice as Dr. Rawlings avers in his affidavit.

[42] Indeed, it is clear from the evidence adduced on both sides that access to the hospital's facilities is not restricted to physicians in the employ of the government. What is in dispute is the process by which such access is granted.

[43] Contrary to the urgings of counsel for the respondent who invited the Court to view the letters from Dr. Wilkinson and the Permanent Secretary as a mere reminder of the procedure to be engaged for

[2] [1984] 3 All E R 935 at 944.

access as a private practitioner, I hold that on a proper construction they effectively and constructively denied the applicant continued access to the facilities unless he followed a procedure which, hitherto, on the evidence, he had never been required to follow.

[44] Accordingly, I am satisfied that Dr. Rawlings has established an arguable case with a realistic prospect of success that he held a legitimate expectation based on long practice that his privilege to access the hospital's facilities in a private capacity would continue and would not be arbitrarily revoked.

[45] Having satisfied myself that the applicant has met the threshold requirement for leave to apply for judicial review, I must next determine whether the grant of leave is subject to a discretionary bar such as delay.

Delay

[46] **Part 56.5** of **CPR 2000** provides that the judge may refuse leave to apply for judicial review in any case in which he considers that there has been unreasonable delay before making the application. In so doing, the judge is enjoined to consider whether the granting of leave or relief would be likely to be detrimental to good administration or cause substantial hardship to or substantially prejudice the rights of any person.

[47] In seeking to determine whether the grant of leave would be detrimental to good administration the Court must recognize that there is an interest in good administration independently of hardship, or prejudice to the rights of third parties and that the loss suffered by the applicant by reason of the decision which has been impugned is a matter which can be taken into account by the Court when determining whether to exercise its discretion.

> *"…The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision."*

See dicta of Lord Diplock in ***O'Reilly v Mackman***[3] and referred to by Lord Bridge in ***R v Dairy Produce Tribunal for England and Wales Ex p. Caswell***[4]***.***

[3] [1983] 2 A.C. 237 at pp. 280-281
[4] [1990] 2 A.C. 738 at p. 749

Discussion

[48] This application for leave to apply for judicial review comes more than 7 years after such leave was first granted in 2010. I have previously rehearsed the procedural history associated with this application and the reasons that impel this current application.

[49] At the hearing of the application, counsel for the applicant candidly admitted that in essence the application is brought this late in the day because it was belatedly discovered that previous counsel for the applicant had failed to serve the original order granting leave or the fixed date claim form on the respondent. This is therefore an attempt to have a second bite of the cherry.

[50] Counsel submitted that the applicant acted with reasonable promptitude in bringing the application given that it was only in October 2016 that it was discovered that there had been no service of the 2010 claim and this was through no fault of the applicant.

[51] Counsel for the respondent submitted that to grant leave after such an inordinate delay is detrimental and prejudicial to good administration and prejudicial to the respondent's case since a central figure, the erstwhile Permanent Secretary, is now deceased.

[52] It is well settled that Courts have traditionally eschewed delay in bringing applications for judicial review. As Sharma, J.A. stated in ***Jones and others v Solomon***[5]*:*

> *It is well established (and all the authorities speak with one voice) that, where an application for judicial review is sought, it is fundamental and critical to this sort of relief that it should be granted promptly and that the power to grant leave is discretionary and not as of right."*

It is also well settled that the lack of diligence on the part of counsel does not furnish a good reason for delay in compliance with any rule or order of the Court: ***Gary Smith v Edward Henry***[6]

[53] In this case, the only reason proffered for the delay in bringing this application is the lack of diligence by the applicant's previous counsel. While the fact that the Court file was missing was faintly raised as being a relevant factor, counsel for the applicant properly conceded that the Court was not responsible for ensuring that the 2010 claim was served.

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[5] High Court Civil Suit No. 320 of 2011

[6] Claim No. SKBHCV 2008/0254

[54] In my view, as regrettable it is that the applicant's previous counsel may have failed him, that explanation does not possess the requisite persuasive force to move the Court to exercise its discretion to grant leave to apply for judicial review notwithstanding this inordinate delay.

[55] On the contrary, I am convinced that to condone this as a reason for delay would be detrimental to good administration and would fly in the face of the overriding objective of disposing of matters justly and efficiently.

[56] In the circumstances I am driven to the conclusion that the application for leave must be refused.

[57] IT IS ORDERED:

1) That the application for leave to seek judicial review is hereby refused.
2) There shall be no order as to costs.

Trevor M. Ward, QC
Resident Judge