

**THE EASTERN CARIBBEAN SUPREME COURT**

**SAINT LUCIA**

**IN THE HIGH COURT OF JUSTICE**

(Civil)

**CLAIM NO.: SLUHCV2013/0372 BETWEEN:**

**LAMBERT NELSON**

Claimant

**and**

**CASTRIES CONSTITUENCY COUNCIL**

Defendant

**APPEARANCES:**

Mrs. Lydia Faisal for the Claimant

Mr. Peter Foster Q.C and Ms. Renee St Rose for the Defendant

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**2015:** May 28;

**2017:** July 20.

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## JUDGMENT

[1] **BELLE J:** On 30th October, 2015 having been granted leave to file a Claim for Judicial Review the Claimant Lambert Nelson filed his claim.

[2] The Claimant pleaded two grounds for the Claim. The grounds were that the Defendant's actions against the Claimant by refusing to honour the decision of its predecessor Council to bridge the Claimant's service as communicated by the Defendant's letter of 23rd October, 2012 to the Claimant was;

(a) In breach of his legitimate expectation

(b) Unfair arbitrary, perverse and in breach of natural justice.

### **Factual Background**

[3] In the affidavit filed on 30th October, 2013 in support of his claim the Claimant stated that;

i) He was contracted to serve as Town Clerk in 1999 for a period of two years. .

ii) Position of town clerk was made permanent.

iii) He held the office from June 2001 until his retirement from the defendant on October 23rd, 2012.

[4] In paragraph 7 the claimant states that he had worked in the public service from 1984, until 1999. He had held various pensionable positions with the Government of Saint Lucia including Assistant Secretary, Administrative Secretary, Economic Assistant and junior Clerk at various ministries.

[5] During his tenure as a public servant he never contributed to National Insurance Corporation. Mr. Nelson resigned from the Public Service in 2001 to take up the permanent position of Town Clerk with the Defendant.

[6] In Paragraph 15 of the Affidavit the Claimant states that he would not have resigned his position with the public service were it not for the assurance of the Mayor and Chairman of the Board Mr. Irving John and the fact that in the past the Defendant has bridged years of service for persons who had worked with the Public Service with years of service with the defendant.

[7] The Claimant applied for the bridging to take effect in 2010 for his 15 years in the public service employment to be bridged with the service for the defendant for 13 years, a total of 28

years total service. He also applied for early retirement. His request was approved at a meeting of 4th February, 2010, the request for early retirement was also accepted.

[8] The Defendant fully understood that the matter had to be confirmed by the relevant ministry which was the ministry of the Public Service.

[9] Mr. Nelson did not see any member of the Board sign or any committee sign the minutes of the council's meetings.

[10] Copies of the minutes of earlier meetings were presented to meetings of February 4th 2010, and March 23rd, 2010. The minutes were confirmed as far as the Claimant was concerned. Both parties' lawyers were present at the latter meeting.

[11] A number of witnesses gave affidavit evidence to the extent that they were aware of the promise to bridge the Claimant's pension and that the Council's minutes were never signed. These were Irving John a former Mayor and Chairman of the Council, and Council members Victor Augustin, Mc Arthur Dowell, Stephen Chicot and Bridget St. Croix.

[12] Mr. John also confirmed that Bridging of Mr. Nelson's pensions was discussed at the Council's meeting of February 4th, 2010. He also stated that matters such as this were never referred to the Cabinet of Ministers. He said that the agreement to bridge the pensions was confirmed by letter on 29th June, 2010. He insisted that the Council was not in the practice of signing the minutes.

[13] The Board at the time of his retirement had exhibited behaviour which tended to imply that it was in agreement with the pension being bridged. This behaviour included holding a surprise retirement party at council's premises on Thursday 4th April, 2012, with commendations being given.

[14] Mr. Nelson commenced retirement leave on 10th April, 2012.

[15] The new Board which was sworn in on 1st March, 2012 actually made an offer of pension and gratuity in terms of \$5,000.00 per month and a reduced gratuity of \$134,890.00.

[16] By letter of 2nd October, 2012 the Board reversed its earlier decision stating that the previous Board had no authority to bridge pension of the Council with that of the Public Service, and insisting that such a decision had to be one of the Cabinet of Ministers and applying the Pensions Act of 1967 and the collective agreement between the Civil Service Association and the Council.

[17] Finally the council argued that it was not in a financial position to make full payment of the proposed gratuity.

[18] A chain of letters was exhibited in support of the Claim for Judicial Review. The first of these was dated 29th June, 2010. It reads as follows:

Mr. Lambert Nelson, Town Clerk

Castries City Council CASTRIES

Dear Mr. Nelson,

#### Request for Early Retirement

I am pleased to inform you that the Council considered and approved your request for bridging of your service (1984-1999) in the Public Service with your period of employment as Town Clerk.

Council further approved your request for early retirement having attained the requisite period of Public Service.

In pursuance of the foregoing you should be proceeding on your pre retirement leave on or about July 1, 2011.

Please therefore inform Council of your retirement options. Our continued co-operation would be appreciated.

Yours sincerely,

Irving John Chairman

Cc: PS Public Service

[19] On October 23, 2012 the Defendant City Council wrote to Me Nelson as follows:

Lambert Nelson Town Clerk

C/O Castries City Council Peynier Street

Castries

Dear Mr. Nelson,

Pursuant to your letter dated April 2, 2012 in which you requested early retirement with a reduced pension plus gratuity, please be advised that further to the expiration of your pre-retirement leave, the Board of Councillors has approved your early retirement effective October 25, 2012. You will therefore receive a reduced pension in favour of a full gratuity.

Please be further advised that the Board has no legal authority to bridge your tenure in the Public Service with your employment at the Castries City Council as that authority resides with the

Cabinet of Ministers. As such, the computation of your retirement benefits is on the basis of your continuous employment with the Council which commenced in July 2001.

Your retirement benefits are calculated by applying the provisions of the Collective Agreement between the Civil Service Association and the Castries City Council and the Pensions Act No. 9 of 1967. The computation of your entitlements is therefore as follows:

Terminal Annual Salary - \$122,627.28 Years of Service - 11 years 3 months Monthly Pension - \$2,155.56

Gratuity \$134,890.00

The Castries City Council is currently not in a financial position to make full payment of your gratuity at this time, therefore we ask that you liaise with the acting Town Clerk and the Accounts Department for arriving at an agreed schedule of payment. We seek your cooperation and patience in this matter.

The Board wishes to thank you for several years of services to the Council and extends its best regards to you in your future endeavours.

Sincerely Shirley Lewis

Mayor / Chairperson

Cc: Hon. Harold Dalson, Minister for Social Transformation and Local Government

James Perineau, Town Clerk (Ag.) Mavista Edward, Accountant (Ag.)

John Husband, Chairman, HR Committee Employee file

[20] Finally it is significant that on 4th April, 2013 the Council lawyers Edgar & Edgar wrote to Mr Lambert's lawyer Mrs Lydia Faisal as follows:

Mrs. Lydia Faisal

Legal Practitioner for Lambert Nelson Chambers

No 12-16 1st Floor Suite No. 4 Lamar Building

Bridge Street Castries

Dear Madam,

Re: Lambert Nelson

We continue to act on behalf of the Castries City Council.

Further to the meeting of all parties at our client's offices on 7th March, 2013 and our client's further instructions on the same, please be advised that our client acknowledges the Gratuity owed to your client in the sum of

\$134,890.00 for his years of service with our client.

That our client is not in a position to make a lump sum payment of the said sum at this time. Accordingly, our client is proposing the monthly sum of

\$5,000.00 commencing on 30th April, 2013 in defraying the said sum. Grateful for your continued assistance in resolving this matter.

Yours faithfully Edgar & Edgar

Per ..... EFFREM O.EDGAR

[21] One of the reasons why this chain of letters is remarkable is that in its Defence filed on 13th November, 2013 at paragraph 6 the Defendant said:

"The Defendant denies that the Claimant is entitled to a gratuity or pension in accordance with the Collective Agreement between the Defendant and Saint Lucia Civil Service Association for the period 1st April 2010 to 31st March 2013.

i) The Claimant was in the Defendant's employment as Town Clerk, appointed pursuant to section 13 of the Castries Corporation Act whose terms of employment was specifically regulated by the Act;

ii) The Claimant does not form part of the bargaining unit referred to in the Collective Agreement;

iii) The Claimant negotiated, agreed and executed the Collective Agreement on behalf of the Defendant and could not form part of the bargaining unit."

[22] This contradiction of what it had previously stated in correspondence even if through its counsel puts into question the ability of the Council to negotiate in good faith since it is not able to clearly and unequivocally state the basis upon which it calculated the pension which was due to the Claimant.

[23] Mr. Nelson says that the Cabinet of Ministers never made any decisions as regards the employment retirement or execution of any management functions of Defendant's council.

## **The Dispute**

[24] The Defendant argues that the Claimant only made his application to bridge the pension with the Council with that for his service in the Public Service if at all in 2010 and not in 2001 as he stated. The Defendant challenges the unsigned minutes produced which confirm the discussion and decision of the Council in 2010.

[25] The Defendant also argues that the Council has never bridged anyone's pension before and that such an act would amount to a special favour to the Claimant. According to the Defendant the Council has no authority to bridge the pension of the Council with that of his service to the Public Service of Saint Lucia.

[26] On the factual basis the Defendant argued that the evidence supported the view that the Council was never asked to bridge the Claimant's pension until 2010 because the minutes of the institution were not signed and it is on such minutes that the claimant relies to show that the matter of a bridged pension arose from this time of his initial employment with the Council after the secondment ended. However, I hold as a matter of fact that I am satisfied on a balance of probabilities that the Claimant did raise the issue of a bridged pension as early as 2001 and was given an assurance that Council would honour his wish.

[27] The Defendant relied on the Pensions Act to conclude that there were alternative provisions made for situations such as Mr. Nelson's other than bridging. I am of the view that these alternatives do not deem the bridging to be unlawful if done the correct way.

[28] The Defendant also argued that since the bridging was unlawful the Claimant could not derive a legitimate expectation from the promise made if it was made. I have questioned the assumption that bridging is inherently unlawful and therefore I cannot accept the Defendant's argument on this issue.

### **The Law Judicial Review**

[29] It is common ground that Judicial Review is concerned, not with the decision, but with the decision making process. Unless that restriction on the power of the court is observed, the court would be under the guise of preventing the abuse of power, be itself guilty of usurping power. See **Lord Brightman's dictum in Chief Constable of the North Wales Police v Evans**<sup>1</sup>.

[30] Counsel for the Defendant submitted and it was not refuted that in **Council of Civil Service Unions v Minister for the Public Service 2** at pg. 1196 A-F Lord Diplock explained that there are three grounds by which an administrative action is subject to judicial review. The first ground is illegality, that is, the decision maker must understand correctly the law that regulates his decision-making power and must give effect to it.

[31] The second ground is irrationality, which was a concept developed in the Court of Appeal decision **Associated Provincial Picture Houses Ltd v Wednesbury**

<sup>1</sup> [1982] All ER 141 at 154

<sup>2</sup> [1984] 3 WLR 1174

**Corporation 3** . In coming to a decision of irrationality the court is entitled to investigate whether the local authority took into account relevant matters or came to a conclusion so unreasonable that no reasonable authority could ever make it.

[32] The third is procedural impropriety which will depend on the subject matter of the case but involves observing rules of natural justice which include a right to notice and opportunity to be heard.

### **Legitimate Expectation**

[33] The concept of legitimate expectation is a natural development of the concept of natural justice and the public law duty to act fairly in making administrative decisions. Sometimes the expectation may be substantive or because of the substantive benefit at stake may be procedural as Sedley J stated in the case **R v Ministry of Agriculture, Fisheries and Food exp Hamble (Offshore) Fisheries Ltd.** 4 ;

"What then is the legal alchemy which gives an expectation sufficient legitimacy to secure enforcement in public law? In what circumstances does fairness demand that, at the point where a public body is considering making a change of policy which it is, in other respects, entitled to make, an exception should be made to give recognition to an expectation which has been raised. The answer, it is explained, is that a balance has to be struck. Legitimacy is not an absolute. It is a function of expectations induced by government and of policy considerations which militate against their fulfilment."

[34] Like any other administrative law principle, legitimate expectation arises from a public law relationship. In this case the first challenge therefore is to establish what appears at first instance to be a private employment decision to refuse to pay the promised bridged pension to be a public law decision which can be reviewed by the court. However, the Defendant has not argued that the matter is not a public law matter.

3 [ 1948] 1 KB 233

4 [1995] 2 All ER 714

[35] In examining the background to the law it is important to note that the Castries City Council is a creature of statute. The Council's business is governed by the Castries Corporation Act and the Constituency Council Act. In the case of the latter statute it states its purpose as follows:

"The purpose of this Act is-

(a) to improve the delivery of social services to constituencies; and

(b) to assist in the management of resources to be used for the development of constituencies, through the establishment of Constituency Councils.



[36] The **Castries Corporation Act** 1967 is described in its short summary as "An Act to constitute Castries a Municipal City, to incorporate the inhabitants thereof and to provide for the good government of the City and for other purposes incidental thereto.

[37] Section 99 of the **Castries Corporation Act** states:

"(1)It shall be the general duty of the Council to provide for the collection and expenditure for the benefit of the city of all monies authorised by law to be raised for such purpose: to provide for the good government and improvement of the City; and to enforce the provision of this or any other enactment relating thereto, and also of all regulations and bye laws made under this or an such enactment.

(2) Without prejudice to the generality of the preceding subsection, the Council may also provide for -

a) the grant of scholarships to pupils from Primary Schools in the City for education at Government or Assisted Secondary Schools in the Island; and

b) poor relief in the City, by assistance for charitable organisations for that purpose, or otherwise."

[38] Under the caption **Financial Matters the Act** states at Section 101:

"The corporation shall, on or before the sixteenth day of November in each year, prepare and submit to the Minister a true estimate of the income receivable and the expenditure to be incurred during the financial year commencing on the first day of January next following , and the Minister of Finance may approve or amend the same; and no further sums shall be expended in any year thereafter than as provided in such estimates , unless the same shall have been included in a supplemental estimate of expenditure to be from time to time submitted to the Minister who may approve or amend the same;

Provided that the Corporation may at any time during the year authorise a saving under any head or sub-head of recurrent expenditure in such estimates to be applied to meet an excess under another head or sub-head of recurrent expenditure."

[39] Section 102 is more specific, stating:

"The funds or monies belonging or payable to and collected by the Corporation under and by virtue of this Act shall be applicable towards paymentof-

a) the expenses incidental to the office of the Mayor, the salaries and other remuneration of the Town Clerk and other officers of the Corporation;

b) the expenses of elections;

c) the fees payable to the Revising Barrister;

d) superannuation allowances and gratuities payable under this Act, or any other Act authorising the payment of same;"

[40] It can be stated without fear of contradiction that the **Castries Corporation Act** makes the council sound like a department of government with some exceptions. The evidence is that its Mayor is appointed by the Minister. It appears to be that what tends to make the decision challenged a public law matter rather than a private law matter has to do with how the decision was made by the council which is operating like an arm of the state. In other words it is not just a matter of breach of contract but a matter of reversal of a policy decision which was promised in relation to the Claimant.

[41] It is also important to note that the Council functions as a de-facto local government which has far reaching impact on the lives of those who reside, work, go to school, church or engage in recreational activities in the City of Castries. The responsibilities overlap with that of the national government in the sense that food, shelter, education, commerce, roads and works all appear to come under the global responsibility of the Council. This responsibility in turn falls upon the full time employees of the Council headed by the Town Clerk. It therefore would be wrong to diminish or down play the importance of the position of the Council's Town Clerk.

These conclusions influence the view that the Council's decisions were a matter of public law.

[42] In **Commonwealth Caribbean Public Law 5**, Professor Albert Fiadjoe refers to the case **Roman v Water and Sewerage Authority**<sup>6</sup>, H. Ct. Trinidad and Tobago in which the dismissed executive director of a public authority argued that 'once a public authority represents [that] it will act in a certain way [that] person is entitled to rely on that representation, and that if it is not observed the person affected has a right in public law to judicial review. In summarising the review of the case Professor Fiadjoe opined that the matter boiled down to an issue of whether the applicant's employment had an element of public law which entitled him to bring proceedings for judicial review or whether he ought to seek his redress by private law. In dismissing the argument of counsel for the applicant, Ramlogan J held that the public law element relied upon was a purported representation that the provisions of the Statutory Authorities Service Commission Regulations- though abolished would apply, so that the applicant's case should have been heard by a disciplinary body before the termination of his services. He held further that 'the doctrine of legitimate expectation can only arise if there is a public element' and not the other way round. Accordingly, the dismissal of the applicant was concerned with an employer and its employee. The respondents, in terminating the applicant's services, were not performing a public function even if it were decided that the Statutory Regulations which were abolished in 1980 applied by agreement.

[43] Professor Fiadjoe submitted that it would have been a far simpler ground on which to dismiss the case would have been the fact that the purported promise to apply the abolished Statutory Authorities Service Commission Regulations could not have been *intra vires*. He concluded that a promise or undertaking which is beyond the powers of the authority cannot found a claim in legitimate expectation. In this case

the Defendant made a similar argument in relation to The Constituencies Corporation Act.

[44] Another case which addresses the impact of a promise made by a person in authority is **Chief Immigration Officer of the British Virgin Islands v Burnett 7**. In that case the Deputy Governor of the British Virgin Islands (BVI) made a written promise to the Claimant Mr. Burnett that his spouse would be permitted to enter the BVI with him on arrival by his private yacht. On arrival Burnett was told that he would only be allowed to visit a doctor pick up supplies and then leave since the Minister for Immigration and Cabinet had agreed that Burnett should not be allowed to enter the country because he was an undesirable person pursuant to Section 23 (1)(n) of the Immigration Act. However, the learned trial judge held that the Chief Immigration Officer fettered her discretion in following the Minister's directive without question. Georges J also held that Mr. Burnett could not have a legitimate expectation of being able to enter the BVI since he enjoyed no such right under the law. He therefore quashed the Chief Immigration Officer's decision on the basis that the Chief Immigration Officer had improperly exercised her discretion.

[45] The Court of Appeal upheld the learned judge's order but held that the Claimant did have a legitimate expectation because of the way in which the decision to prevent Mr. Burnett from entering the BVI had been taken. In the view of CJ Sir Vincent Floissac and Satrohan Singh JA, Mr. Burnett should have been given a hearing before the decision was taken to prevent him from entering the country since the decision affected him adversely.

[46] It is of some importance that in reviewing the law C J Floissac made the following comment;

"Having regard to the grounds on which the respondent impugns the refusal of permission for him to enter and remain in the Territory, it is not necessary for the purposes of this appeal to adjudicate on any of these submissions. The grounds do not relate to the existence of the executive powers but to

7 (1995) 50 WIR 153

the manner of their exercise. The grounds involve principles of natural justice and other principles which transcend the question of executive power and nationality."

[47] It should be noted that Mr. Burnett had filed a notice of motion for an order of certiorari quashing the Chief Immigration Officer's decision refusing to grant permission to the respondent, Burnett, to enter and remain in the Territory of the Virgin Islands.

[48] Sir Vincent relied on the decision in **Council of Civil Service Unions v Minister for the Civil Service 8** at page 954, where Lord Roskill said inter alia referring to the phrase "reasonable expectation,"

[49] The principle may now be said to be firmly entrenched in this branch of law. As the cases show, the principle is closely connected with a 'right to be heard.' Such an expectation may take many forms. One may be an expectation of prior consultation. Another may be an expectation of

being allowed time to make representations, especially where the aggrieved party is seeking to persuade an authority to depart from lawfully established policy adopted in connection with the exercise of a particular power because of some suggested exceptional reasons justifying a departure.

[50] CJ Floissac added:

"In *Leech v Parkhurst Prison Deputy Governor* [1988] 11 All ER 485 at page

496. Lord Bridge of Harwich encapsulated the principle in one sentence which reads;

The principle is now as well established as any principle can be in the developing field of public law that where any person or body exercises a power conferred by statute which affects the rights or legitimate expectations of citizens and is of a kind which the law requires to be exercised in accordance with the rules of natural justice, the court has jurisdiction to review the exercise of that power."

8 (1984) All ER 95

[51] It is also apposite to refer to the factual matrix which the Court of Appeal applied to the law in question. The learned Chief Justice said;

"The Territory (including the Island of Tortola) is a British Dependent Territory. The respondent is an Englishman and a British subject. His children of his former marriage live in Tortola. The High Court of the Territory has given him judicial access to those children. By letter dated 10th November 1993, the Deputy Governor of the Territory officially assured the respondent that the "position" of the Minister of Immigration was that the respondent's wife "should be allowed to enter the Territory" when accompanying the respondent in his visits. The implication of that "position" was that the respondent himself would be allowed to enter the Territory.

In those circumstances, the respondent legitimately expected the privilege or courtesy of permission to enter and remain in the Territory. In those circumstances, the respondent also legitimately expected that certain rules of natural justice and fairness would be observed in relation to him before any decision or action by way of refusal of such a permission was made or taken. The rule invoked in this case is the *audi alteram partem* rule of natural justice and fairness."

[52] In the case at Bar the employer made a promise which it could make as long as it was prepared to have the budgetary implications approved by the Minister of Finance. Indeed the Defendant took the latter point raised by Professor Fiadjoe in relation to the **Roman v Water and Sewerage** decision that the law would not permit the Council to make the promise in the first place. But the immigration law of the BVI which permitted the immigration officer to exclude anyone from the BVI was not held to be sufficient reason to exclude Mr. Burnett from claiming legitimate expectation to a hearing before the decision was made. Judicial Review was not about the substance of the decision but about the process of making it. That means that the mere fact that another person in authority such as a Chief immigration officer or a minister has the power to render the promise effective or ineffective does not deprive the beneficiary of the

promise of the right to claim that they had a legitimate expectation that the promise would be kept or at least they would be given a hearing if the Council changed its mind.

[53] Legitimate expectation arises where an individual depends on a promise or expectation to his or her detriment. To apply it to this case the question to be determined is whether the Claimant relied on the decision of the Council of February 4th, 2010 and ratified by the Council on 23rd March, 2010. Then we have the evidence that Council reneged on its promise to bridge the pension from the Public Service to the Council's pension and refused to even agree to pay the initially promised gratuity claiming that the Claimant was not entitled to the benefit of the collective agreement with the Public Service Association.

[54] Indeed the Claimant alleges that the decision not to bridge the pensions and to refuse to pay the gratuity was tainted with political motivation. The behaviour of the Council could suggest that something of this nature was going on behind the scenes. The offer to pay and then the sudden reversal, which actually happened twice, once before trial and again in relation to another offer made which was reversed certainly give rise to a possibility of external manipulation of the Council. It is also of some interest that the Defendant sought to raise the fact the Claimant had been at some point dismissed from his position and then later reinstated and compensated.

[55] It has already been mentioned that a number of witnesses gave affidavit evidence to the extent that they were aware of the promise to bridge the Claimant's pension and that the Council's minutes were never signed.

[56] This evidence would serve to support the legitimate expectation of the Claimant since he would know of the decisions of council and the people involved and was not told at the time of the meeting and notification of any impediment to the decision being fulfilled.

[57] However, the Defendant argued that any decision to bridge the Claimant's years of employment within the Public Service of Saint Lucia and that of the service with Defendant must comply with the **Castries Corporation Act 9**.

9 No. 22 of 1967.

[58] Subsection (iii) of Section 102 of the **Castries Corporation Act** covers the payment of superannuation allowances and gratuities... provided for in the Act or any other Act authorising the payment of same. This was already quoted above.

[59] The Defendant alleged that any other use of the Defendant's funds and monies must be approved by the Minister of Finance. If this is the case the question is what would prevent it from happening? Indeed how would the minister go about approving the said expenditure?

[60] The Defendant continued and referred to subsection (v) of section 102 of the Act which states:

"income and expenditure of the Defendant is approved by the Minister of Finance after submission of estimates - further finances of the Defendant are to be approved audited and Gazetted for information of the minister of Finance and the public.

[61] In arguing that the pension cannot be bridged unless it is first approved by the Minister of Finance, the Cabinet or the Governor General of Saint Lucia the Defendant's counsel stated that the Council did not make the offer of bridging the pension and paying the required gratuity. This is of course untrue since the court has seen and quoted the letter in which both the bridged pension and gratuity were offered.

[62] Both sides cited legal authority on the issue of legitimate expectation as referred to above. But it is necessary to examine a more recent case on the issue of legitimate expectation.

[63] In the Privy Council Decision in **The United Policy Holders Group and Others v The Attorney General of Trinidad and Tobago**<sup>10</sup>, Lord Neuberger held as follows:

"In summary, the trend of modern authority, judicial and academic, favours a narrow interpretation of the Coughlan principle, which can be simply stated. Where a promise or representation, which is "clear, unambiguous

<sup>10</sup> Privy Council Appeal No 0017 of 2015.

and devoid of relevant qualification", has been given to an identifiable defined person or group by a public authority for its own purposes, either in return for action by the person or group, or on the basis of which the person or group has acted to its detriment, the court will require it to be honoured, unless the authority is able to show good reasons, judged by the court to be proportionate, to resile from it. In judging proportionality the court will take into account any conflict with wider policy issues, particularly those of a "macro-economic"

or "macro-political" kind. By that test, for the reasons given by Lord Neuberger, the present appeal must fail."

### **The Pension's Act**

[64] The Defendant's grounds for opposing the Claimant's claim were:

- 1) Any decision previously taken by the Defendant Council to bridge the Claimant's years of service of the Government of Saint Lucia with the service with the Defendant was unlawful, ultra vires and in excess or an abuse of the powers of the Defendant conferred by the Castries Corporation Act No.22 of 1967.
- 2) The Claimant could not have a legitimate expectation that his years of service in the public service of Saint Lucia could be bridged with the years of service with the Defendant.
- 3) Public policy consideration requires the Defendant to act in accordance with its lawful powers under the Act.
- 4) The Claimant is not entitled to the gratuity or pension claimed.

[65] Counsel submitted that the Pensions Act Cap 15 :26 applied to Mr. Nelson during his time as a public officer. He referred to the relevant sections of the Act to confirm the qualification for

pension or gratuity under that legislation. I do not find it necessary to repeat those sections here. What is more on point in this case are some of the other sections referred to in pursuit of the argument that an abridgement of the two pensions would not be possible. In pursuit of this argument counsel to his credit cited regulation 19 of the Pension Regulations made pursuant to the Pensions Act. This regulation reads as follows:

"Only service in a pensionable office, (not being service in respect of which the officer is entitled to a gratuity in lieu of pension or to benefit under any other scheme of superannuation) shall be taken into account as pensionable service.

However-

(a) Where an officer has been transferred from a pensionable office in which he or she had been confirmed to an office which is not pensionable and subsequently retires either from a pensionable office or an office which is not pensionable his or her service in the office which is not pensionable may, with the approval of the Governor General be taken into account as though it were service in the pensionable office which he or she held immediately prior to such transfer and at the pensionable emoluments which were payable to him or her at the date of transfer;"

[66] It is important to note that there was no dispute that Mr. Nelson had been seconded to the position of Town Clerk from 1999 to 2001. The court takes judicial notice of the fact that this could not have occurred without the support or approval of the government of the day. The parties also agree that at the time of his resignation from the public service Mr. Nelson had served for more than 15 years. It is important to note that it is at the time of this transition that the Claimant first raised the matter of bridging his service. These were the policy and political implications of his request for a bridging of his pension at the time.

[67] Counsel further argued that the Council did take the Claimant's position into consideration when it granted him his early retirement. He confirmed that the Council provided the Claimant with a computation of his benefits pursuant to the Collective Agreement between the Civil Service Association and the Castries City Council and Pensions Act. Of course the council eventually reversed this position as well arguing that the Town Clerk was not entitled to be covered by the Collective Agreement.

[68] Counsel argued that the principle of estoppel did not apply. However, it is well accepted that legitimate expectation in public law is analogous to the private law principle of estoppel.

[69] Citing the case of **R v North and East Devon Health Authority, ex parte Coughlan** 11 counsel for the Defendant council argued that policy of the council could be modified or abandoned and thought that this provided the avenue for the Council to resile from its previous position and in particular since the Defendant

11 [2000] 3 All ER 850

could only be granted a bridged pension by the Governor general or The Minister of Finance.

[70] Counsel argued that the promise made by the Council would be inconsistent with the statutory duties imposed upon it. However counsel also argued that if the court decides that the Council's decision to promise the bridged pension was lawful the court should consider whether to frustrate the Claimant's expectation is so unfair that it amounts to an abuse of power. Counsel submits that the court should consider the following factors:

i) The council has not been unfair in that it agreed to the early retirement of the Claimant and to pay the Defendant a Pension for the years of employment with the Council.

ii) The Claimant is entitled to receive 10% of his pension for his years of service to the Government of Saint Lucia.

iii) The benefit conferred on the Claimant to pay him for years of service not within the employment of the Council was arbitrary and unreasonable and has not been applied to other employees in the service of the Defendant;

iv) It is an extreme financial burden for the Council to undertake pension payments for years of service not provided to the Council;

v) The decision of the Defendant was not unfair to the Claimant as he still receives a pension for his years of service.

vi) The decision of the Defendant was made under review of applicable law.

[71] Counsel for the Defendant also relied on the decision in **Roberts v Hopwood**<sup>12</sup> in making the point that a legitimate expectation could not be founded on an unlawful act. However, I think that that decision can be distinguished on its very peculiar facts which justified the decision of the court. H.W.R Wade in the treatise **Administrative Law**<sup>13</sup>, summarized the impact of the decision in the following terms which also provides a synopsis of the facts of the case.

"The leading case in this group is *Roberts v Hopwood*. A minimum weekly wage of £4 for men and women equally was established in 1920 by the Poplar Borough Council, representing themselves as 'model socialist employers'. This in itself was very substantially above the previous rates, and soon became relatively higher still due to a sharp fall in the cost of living

<sup>12</sup> [1925] AC 578

<sup>13</sup> Oxford University Press, Sixth edition 1988

and in wages. But the council insisted on continuing the £4 rate maintaining that this was within their power to pay their servants 'such salaries and wages as (they) may think fit'. In due course the district auditor disallowed the wage payments, in so far as they exceeded current market rates, as being 'contrary to law', and surcharged the councillors personally. A long struggle over the surcharges began, in the course of which the auditor's ruling was unanimously upheld by the House of Lords, and an order of the Minister of Health, purporting to free the councillors from liability, was held invalid by the High Court. Ultimately, when the surcharges had accumulated far beyond the councillors' personal means, they were remitted by Act of Parliament.



The basis of the decision of the House of Lords, as already noted, was that the wages paid were excessive and unreasonable in such a degree that they were beyond the council's powers. The council's philanthropic purposes were not in law relevant considerations: their duty was not to give their ratepayers' money away in what were in substance gifts, but to take due account of the relevant factor of current market rates. They had misled themselves by eccentric principles of socialistic philanthropy."

### **Conclusions of fact and law**

[72] I am satisfied based on the circumstances of this case that a promise was made even though the manner in which it was recorded did not secure the historical record in the way that it should. Secondly, there is no doubt that the Council having presumably looked at the facts and law agreed to pay the pension in a manner consistent with what was agreed. The same Council a matter of months later reversed its earlier position without giving the Claimant so much as a fair hearing at that time. In my view this was a breach of natural justice and not just a breach of a contractual agreement which would not have been enforceable in Saint Lucia because it was not made in writing with the written agreement of both sides.

[73] The Defendant argues that the Claimant could not claim a legitimate expectation because the agreement to pay the abridged pension would have to be agreed to by the Minister of Finance. The Council also argues that the statutory framework of the Pension's Act of Saint Lucia militates against any abridgement of the pension of the Claimant since the Pensions Act only applies to Public Servants, but makes provision for a public servant to also receive an NIS pension under certain circumstances.

[74] This point was raised by the Council after the decision was made. Mr. Nelson had no opportunity to point out to the Council that in fact the Minister could be asked to approve a supplemental budget at any time pursuant to section 101 of the **Castries Corporation Act** and this budget could include the abridged pension.

[75] In my view, the legislation cannot be construed to prohibit the preparation of a budget or supplemental budget including the Claimant's proposed bridged pension. Consequently, while the promise made could not be enforced as a payment due, pursuant to the promise the failure to give Mr Nelson a hearing deprived Mr. Nelson and the Council of the opportunity to even propose to the Minister via a supplemental budget that the pension be paid.

[76] I therefore conclude that the Claimant had a legitimate expectation that the Council would at least give him an opportunity to appear before them and propose a way to settle the budgetary concerns before a Decision was made that it could not be done.

[77] While it is true that the Council may have gone about its business in an unorthodox and less than professional manner I do not think that the legality of its decisions can now be questioned on that basis alone. The councillors did not lack capacity in any way and there is no evidence that when certain relevant decisions were made the members of Council or Finance Committee were not present. While the court is not compelled to receive the minutes of the meetings of the Council submitted by the Claimant in evidence since they are not signed, the court has no reason

to believe that the evidence of the Claimant and his witnesses is not true. Indeed the Council appears to have conducted its business in this way without any minister or corporate partner questioning the legality of its decisions. We have no evidence that any such question was raised while the relevant council conducted its business without signed minutes.

[78] The legislation as it stands would have provided guidelines to the Constituency Council of the day. It certainly should not be construed as a constraining legislation. According to the former Chairman of Council Mr. Ervin John the intervention of the minister was not something that was known in the daily conduct of the Corporation's business. And so it should be. The Minister would be concerned that the Corporation follows broad policy. But operational decisions could be made by the Board and ratified by Minister in accordance with the legislation.

[79] Other relevant legal precepts when examined do not lead me to the conclusion that there was anything improper about the decision to bridge Mr. Nelson's pension from the public service with that of the City Council.

[80] It has been conceded in this case by the Defendant that the Claimant was seconded to be the Town Clerk and did not simply resign to become the Town Clerk. Based on his evidence it is after having served with as Town Clerk for about two years that he decided to resign from the public service to take up the duty of Town Clerk. This is consistent with his evidence that he requested and was told that he would be given a bridged government pension as if he continued to work for the Government of Saint Lucia. This course of action it must be remembered was instigated by the secondment in the first place. Secondment tends to imply that there was a need for his services in an institution recognized as auxiliary to the government but not a public service job in a formal sense. In this regard government must bear some responsibility for his decisions after secondment and it touches and concerns the issue of proportionality in the circumstances since these facts are peculiar to him and do not open any floodgate of similar future decisions.

[81] Even though it is argued that this would be a special gift to the Claimant this special position of the Claimant worked in his favour since his position would not be a great burden on the Government of Saint Lucia and would be a one-off payment for the Council in terms of the size of the gratuity to be paid. The Council's plea that it could not afford to pay the gratuity appears somewhat strange since any person of Mr. Nelson's professional stature and years of service could claim this kind of gratuity and pension which is in line with a public servant's gratuity and pension for an employee at a level similar to that of Town Clerk. Is the council denying itself the skill and experience of someone of the calibre of Mr Nelson and using that as a way to avoid payment of a gratuity and would such a decision be lawful?

[82] The Defendant seems to be arguing largely on the basis that there was only one way to achieve the bridging of the service of the Claimant in the public service with his service in the Defendant Council. That is not the case and the promise does not attempt to go into the issue of how the bridging would be done. It is this area of decision making which seems to consume the thinking of the Defendant rather than the full history of the Claimant's secondment and the responsibility both on the part of the government of the day and the Council of the day to fulfil the promise. The decision to renege from this promise totally ignores the fact that both the

government and the council would have played a role in placing Mr Nelson with the Council and encouraging him to act to his detriment and in these circumstances bordered on the analogous promissory estoppel and breach of contract.

[83] Based on these undisputed facts and the further fact that the new Council and Mayor were appointed by a government whose position in relation to the request of bridging was at first unknown but apparently was presumed by the Council to be adverse to the interest of the Claimant, even though there is no evidence of any finding of any relevant Ministry or minister, in my view, required that Mr. Nelson be given a hearing before a decision was made to the effect that the Board had no authority to approve the bridging of the Claimant's pension. Indeed in real terms this promise could mean no more than accepting the responsibility to make the necessary proposal to the Ministries of the Public Service and Finance if necessary to have his position advanced. The Council resiled not only from a promise to bridge the Claimant's pension but also resiled from the duty to ensure that he was treated fairly and in so doing the action of the Council was unlawful in that fairness would have required a discussion with and not simply a determination that they had no authority to bridge the pension without more. The Council should have pointed out that they could do no more than to advance his case for a bridged pension with the Government of Saint Lucia and permit the Government to make an executive decision on the matter. In acting as it did it fettered its own discretion in the way it went about making the decision and it is highly likely that this fettering of discretion was driven by political and economic considerations rather than consideration of fairness to Mr. Nelson.

[84] Indeed the mechanics of the decision to grant a bridged pension was not a matter for the court's consideration since it would be presumed that the Council was aware of those mechanics. Furthermore, there was no economic or accounting opinion offered to establish what effect the decision to bridge the pensions would have on the Council's financial position as was the case in **Roberts v Hopwood**.

[85] I now note that if I am found to be incorrect on the issue of legitimate expectation and the legal right of the Council to resile from its decision to pay a bridged pension to the Claimant I do continue to hold that it remains open to a future or existing Council to procure a bridged pension for Mr. Nelson by any statutory and proper means available to it and therefore to reverse the decision of a past Council.

[86] My decision in favour of legitimate expectation was partly based on my determination that the resiling Council's position was based on doubt that any promise was made to Mr. Nelson and that the submission that the financial ramifications of that promise were relevant and made more poignant the fact that the Council could not lawfully bridge Mr. Nelson's pension. However, the Council gave no thought to the process involved in giving Mr Nelson the benefit of the doubt and treating him fairly. Consequently, the Council erred and its decision to resile from the previous decision was unlawful.

[87] The Defendant Council's decision to resile from its earlier decision to bridge the pension of the Claimant for services rendered with the Defendant with the service to the Public Service of Saint Lucia should be quashed and the matter should be remitted to the Council for reconsideration in the correct manner.

[88] An order of certiorari is therefore granted in the said terms.

[89] In the circumstances, there would be no order as to costs.

**JUSTICE FRANCIS H.V. BELLE**

**HIGH COURT JUDGE**