

THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

SVGHCV2018/0086

IN THE MATTER OF AN APPLICATION FOR INTERIM INJUNCTION PURSUANT TO PART 17.1 (A) (B)
OF THE CIVIL PROCEDURE RULES 2000

AND

IN THE MATTER OF A MATTER FOR JUDICIAL REVIEW OF A DECISION BY THE PERMANENT
SECRETARY OF MINISTRY OF SECURITY TO TRANSFER JAMALI WHYTE FROM THE INLAND
REVENUE DEPARTMENT IN THE MINISTRY OF FINANCE TO THE MARITIME ADMINISTRATIVE
OFFICE IN THE MINISTRY OF SECURITY

BETWEEN:

THE PUBLIC SERVICE UNION

APPLICANT

and

PERMANENT SECRETARY OF MINISTRY OF NATIONAL SECURITY

FIRST RESPONDENT

THE CHIEF PERSONNEL OFFICER

SECOND RESPONDENT

PUBLIC SERVICE COMMISSION

THIRD RESPONDENT

Appearances:

Mr. Jomo Thomas with him Ms. Shirlan Barnwell for the applicant.

Ms. Karen Duncan with her Mr. Duane Daniel for the respondents.

2018: Jun. 27
Jul. 5

REASONS FOR DECISION

BACKGROUND

- [1] Henry, J.: Mr. Jamali Whyte is **employed as a junior clerk in the Inland Revenue Department ('IRD')** of the Government of Saint Vincent and the Grenadines. He works at that IRD on the island of Union Island, one of the sister islands within the State of Saint Vincent and the Grenadines. The business of the State is administered under a central government on mainland Saint Vincent. Mr. Whyte **is a member of the Public Service Union ('PSU')**, a trade union authorized to represent the interests of public officers, also referred to as public or civil servants. The public service in the State is operated in accordance with the applicable laws and a body of internal rules known as the Civil Service Orders for the Public Service of Saint Vincent and the Grenadines (1970) (**'CSO'**).
- [2] The CSO makes provision for the transfer and re-assignment of public officers within and across ministries throughout the State. Public servants may therefore be transferred from a post on one island to another post on the mainland or to another island. Mr. Jamali Whyte claimed that he was verbally notified by and then formally advised by letter dated 25th April 2018, from the Permanent Secretary in the Ministry of National Security, Mr. Godfred Pompey that he was to:
1. **proceed on 8 days' vacation leave; and**
 2. thereafter report for duty at the Maritime Department, Cruise Ship Terminal on mainland Saint Vincent with effect from 8th May 2018.
- [3] Mr. Whyte claimed that he had not applied for vacation leave or a transfer. He deposed¹ that he wrote² to the **Public Service Commission ('PSC')** indicating that he had not been given a reason for the decision to transfer him. The exhibited letter reflects that it was addressed to the CPO. Mr. Whyte indicated that the PSU wrote³ to the **Chief Personnel Officer ('CPO')** requesting a meeting to address the matter. Mr. Whyte deposed that PSU wrote⁴ **to the PSC's** Chairman regarding the decision. He claimed that neither he nor the PSU has received any response to the letters.

¹ By affidavit filed on 6th June 2018.

² By letter dated 26th April 2018.

³ By letter dated 30th April 2018.

⁴ By letter dated 14th May 2018.

- [4] Mr. Whyte complained that he does not know what considerations the P.S. applied to the decision to transfer or re-assign him. He opined that it seems arbitrary. He averred that he was not given a hearing and that he views the decision as a punishment for some wrong he has not committed. He explained that based on the expenses associated with travel between the two islands, such a move would negatively impact him financially.
- [5] On 6th June 2018, the PSU filed an application for leave to apply for judicial review of the decision by the P.S. to transfer or re-assign Mr. Whyte and an interim injunction restraining the P.S., the CPO and the PSC from transferring or re-assigning him from the Revenue Office Union Island to the Maritime Department Cruise Ship terminal Kingstown or to any location on mainland Saint Vincent until final determination or further order. It alleged that the P.S. acted unlawfully and that the decision was made without assigning reasons. It claimed that the P.S. failed to take into account relevant factors and that the decision was therefore unreasonable.
- [6] The P.S., CPO and PSC opposed the application for leave and for the interim injunction. They contended that Mr. Whyte did not follow the procedure prescribed in the CSO for writing to them. They submitted that this default translates to a failure by him to seek redress in the established manner. They contended further that the application for leave to apply for judicial review should be denied because Mr. Whyte has not availed himself of the available remedies. They submitted that the letter purporting to shift Mr. Whyte within the service, speaks to re-assignment and not transfer. They contended that for this reason the application for injunctive relief should be dismissed.
- [7] A hearing was conducted in open court on 27th June 2018 and leave was granted to the PSU to file an application for judicial review within 14 days. The P.S., CPO and PSC were also restrained from transferring or re-assigning Mr. Whyte to any public office on the mainland. I undertook to give written reasons for the decision. They are outlined below.

ISSUES

- [8] The issues are whether:
1. The Public Service Union should be granted leave to apply for judicial review of the decision to re-assign or transfer Mr. Jamali Whyte; and
-

2. The Court should grant an interim injunction to restrain the P.S., CPO or PSC from transferring or re-assigning Mr. Whyte to a public office on Saint Vincent island.

LAW AND ANALYSIS

Issue 1 – Should the Public Service Union be granted leave to apply for judicial review of the decision to re-assign or transfer Mr. Jamali Whyte?

[9] The Court may grant an applicant leave to apply for judicial review of administrative action if the applicant establishes a good arguable ground with a realistic prospect of success, and if there is no discretionary bar and no alternative recourse available to him. The Civil Procedure Rules 2000 ('CPR')⁵ and the celebrated case of *Satnarine Sharma v Browne-Antoine*⁶ rehearse those legal principles.

[10] The P.S., CPO and PSC do not dispute that a letter was given to Mr. Whyte as alleged. They admitted that they were served with the Notices of Application and supporting documents respectively on 7th and 8th **June 2018 and the PSU's written submissions on 11th June 2018**. They filed no skeleton arguments and list of authorities or written submissions.

[11] They contended that the letter from Mr. Pompey purports to re-assign Mr. Whyte and not to transfer him. They submitted that the expression re-**assignment' is more apt**. They argued that Mr. Whyte was being assigned within the same Ministry and therefore the move did not involve a transfer. In this regard, they pointed to the letter dated 25th April 2018.

[12] It states:

'25th April, 2018

Mr. Jamali Whyte

Junior Clerk

Union Island Revenue Office

Union Island

⁵ Rules 56.4 – 56.5 of the CPR.

⁶ [2006] UKPC 75.

Dear Mr. Whyte

Further to our conversation on Wednesday, 25th April 2018 requesting that you proceed on vacation leave with effect from 25th April 2018 for eight (8) days re: CSO 6.2(a) Leave

You are further directed to report for duty at the Maritime Department, Cruise Ship Terminal with effect from 8th May, 2018 on completion of your vacation leave. This re-assignment will continue until further notice.

Regards

Signed
Godfred T. Pompey (Mr.)
Permanent Secretary
Ministry of National Security, etc.

cc: Mrs. Sherma Selma Adams, District Officer, Union Island Revenue Office
Chief Personnel Officer
Director, Maritime Administration' (underlining added)

- [13] The P.S., CPO and PSC invited the Court to consider whether the application contained grounds relating to **a transfer. They contended that in its grounds the PSU referred to Mr. Whyte's 'transfer'**. They argued that everything turned on the language in the referenced letter. They reasoned that by **using the term 'transfer' the PSU has not met the requirements for leave to apply for judicial review.**
- [14] The PSU submitted that Orders 2.16 and 2.17 of the CSO provide respectively that officers are liable for transfer to any post of equivalent grade in the State; and may be transferred by the Permanent Secretary within a Ministry, between and Ministry and a Department in that Ministry if there is no change in emoluments. It submitted further that the CPO may effect transfers of officers between Departments of different Ministries after consultation with the relevant Permanent Secretary.
- [15] The PSU argued that pursuant to CSO 2.17(c), the April 25th decision to transfer or re-assign Mr. Whyte is a function of the CPO and not the P.S. It alleged that Mr. Whyte works in the Ministry of Finance and not in the Ministry of National Security of which Mr. Pompey is the P.S. The PSU did

not rebut the submissions that the **word 're-assign' and its cognate expressions are more apt than 'transfer' and related terms.**

[16] The PSU has invoked the provisions outlined in CSO 2.16 and 2.17. The CSO makes provision for transfer of officers within the public service. The relevant orders are 2.16 and 2.17. They use the terminology 'transfer'. **The Court's attention was not directed to any provisions which contemplate 'assignment' or 're-assignment' of public officers. It does not seem that P.S.'s use of the word 're-assignment' was based on the language in the CSO. The submissions by the P.S., CPO and PSC on this point are without merit.**

[17] They contended that contrary to the CSO 2.17 (2), Mr. Whyte and the PSU wrote directly to the CPO and **the PSC's Chairman**, instead of through the P.S. or Head of Department ('HoD'). That order provides:

'(2) Where an officer is, or is to be, transferred under any of the forgoing provisions of this order, a Permanent Secretary, or Head of Department, or the officer concerned (through the Permanent Secretary or Head of Department) may lodge a written objection with the Chief Personnel Officer; and if the objection is lodged by an officer it shall be transmitted to the Service commissions.' (bold added)

[18] The P.S., CPO and PSC argued that CSO 2.17 (2) is mandatory. They reasoned that even though Mr. Whyte and the PSU issued letters to the CPO and Chairman of the PSC they were not properly issued and therefore the objections were not validly made, because they did not transmit them through the P.S. or the HoD. They contended that the letters therefore do not constitute complaints or objections within the meaning of CSO 2.17 (2).

[19] They submitted that the letters would therefore not trigger a response from the addressees. The P.S., CPO and PSC contended that in such circumstances, the PSU and Mr. Whyte have not pursued the alternative remedy to file a written objection with the CPO pursuant to CSO 2.17 (2). The PSU countered that the P.S., CPO and PSC had notice of the objections.

[20] It should be noted that the CSO does not have the character of law. It therefore does not trump established legal norms and principles. In carrying out its mandate to interpret contractual and legal

provisions, the Court will endeavour to give effect to the agreement between contracting parties provided that doing so does not dilute entrenched rights. In this regard, the Court must assess whether strict compliance is stipulated and if so whether substantial compliance would suffice.⁷

[21] CSO 2.17 (2) creates the avenue whereby an officer may object to being transferred. The provision **uses the word 'may' to convey that it is an election he or she can make. It states expressly that the objection be directed through the CPO or HoD. Section 3 (6) of the Interpretation and General Provisions Act⁸ provides that in every written law, the word 'may' is to be read as permissive and empowering.**

[22] Although the CSO is not a body of law, I see no reason not to apply that interpretation to Order 2.17 (2). I therefore find that it is arguable that the requirement to route mail through the P.S. or HoD is merely directory and not mandatory. In the premises, the CPO and Chairman of the PSC would have been properly served with the objection letters transmitted to them by Mr. Whyte and the PSU. Their respective decisions to ignore them or fail to respond in a timely manner have removed from Mr. Whyte the alternative remedy provided in Order 2.17 (2). Their submissions to the contrary are baseless.

[23] The PSU submitted that **the P.S.'s decision to require Mr. Whyte to proceed on leave was made without lawful authority.** This was one of the grounds on which it filed the application. It pointed out that CSO 6.7 provides that the CPO may require an officer to proceed on compulsory leave. It states:

'An officer or employee may be required by the Chief Personnel Officer to take leave which is due to him and an officer or employee may be required in the public interest to remain on leave after the expiry of leave granted to him.'

[24] The P.S., CPO and PSC made no submissions on this issue. I am of the considered opinion that this point affords the PSU a good arguable ground with a realistic prospect of success. It contended further that P.S. Pompey acted unlawfully when he failed to provide a reason or just

⁷ R v Immigration Appeal Tribunal ex parte Jeyeanthan; Ravichandran v Secretary of State for the Home Department, [1999] 3 All ER 231.

⁸ Cap. 14 of the Revised Laws of Saint Vincent and the Grenadines, 2009.

cause for transferring or re-assigning Mr. Whyte. The P.S., CPO and PSC made no counter-submissions. In view of the factual matrix supplied by Mr. Whyte, the PSU has demonstrated that this argument advances a triable ground with a realistic prospect of success.

[25] The PSU submitted and raised as a further ground that P.S. Pompey acted unlawfully when he decided to transfer Mr. Whyte from his post of Junior Clerk at the IRD to no named post at the Maritime Administrative Office. It submitted that doing so for an indeterminate period without reason defies logic and is void of reasonableness. It also alleged and submitted that the CPO and PSC acted unlawfully, unjustly and unfairly by denying Mr. Whyte a right to be heard in accordance with CSO 2.17 (2).

[26] It is trite law that one of the pillars of natural justice is that a person is entitled to and must be given an opportunity to be heard before a decision is taken against him. As appears from the CSO, one possible interpretation of the applicable provisions is that an officer who is liable to transfer, must be assigned to a post within his Ministry or Department. By highlighting the foregoing issues, the PSU is seeking to ventilate matters of contention which present a good arguable case with a realistic chance of success.

[27] The PSU claimed and argued that P.S. Pompey failed to take account of relevant considerations in arriving at his decision to transfer Mr. Whyte. It submitted that Mr. Pompey did not have regard to **Mr. Whyte's familial ties in Union Island or the consequential increase in living expenses that such a move would portend.**

[28] There is no contrary assertion by Mr. Pompey, the CPO or the PSC. They made no submissions on that point. In the circumstances, I am satisfied that these submissions and the underlying factual matrix demonstrate that the PSU has advanced compelling legal arguments which could realistically be resolved in its favour at trial.

Discretionary Bar and Alternative Remedy

[29] The CSO provides an alternative course through which Mr. Whyte and the PSU could have pursued redress by making objections to the CPO or the PSC. They did so without success. In the circumstances, although an alternative remedy is theoretically available, the CPO and PSC by their

actions have deprived Mr. Whyte and the PSU of recourse along that path. I find therefore that there is no attainable redress in those circumstances. There is no discretionary bar such as delay or otherwise.

[30] For the reasons articulated, I find that the PSU has established on a balance of probabilities that it has a good arguable case against the P.S., CPO and the PSC with a realistic chance of success on each score. It is therefore appropriate and just to grant leave to apply for judicial review of the impugned decision, **including the P.S.'s direction that Mr. Whyte proceed on 8 days' leave.**

Issue 2 - Should the Court grant the Public Service Union an interim injunction to restrain the Permanent Secretary in the Ministry of National Security, the CPO or the PSC from transferring or re-assigning Mr. Whyte to a public office on Saint Vincent Island?

[31] The Court is empowered by the Civil Procedure Rules 2000 ('CPR')⁹ to grant interim injunctions. When considering such applications, the Court applies the discretionary principles enunciated by in *American Cyanamid Co. v Ethicon Ltd.*¹⁰ Accordingly, it must consider whether there is a serious issue to be tried and will refuse the injunction if there is none. If the Court is satisfied that there is a triable issue, it must ask itself if damages would be an adequate remedy. The Court must determine whether the respective parties are able to satisfy such an order.

[32] In doubtful cases, the Court assesses the parties' respective needs and determines where the balance of convenience lies. In its evaluation, the Court is also required to give effect to the overriding objective of the CPR.

Serious Issue to be tried

[33] The P.S., CPO and PSC have conceded that there is a serious issue to be tried. The PSU has raised a number of legal concerns including whether the P.S., CPO and PSC afforded Mr. Whyte an opportunity to be heard and took account of relevant considerations in arriving at the impugned decision. Those questions go to foundational administrative legal principles. Having regard to the

⁹ CPR 17.1 (1) (b).

¹⁰ [1975] A.C. 396.

allegations made by Mr. Whyte, I agree that there are serious triable issues as between the respective opposing parties.

Adequacy of damages

[34] Mr. Whyte deposed that a transfer to the mainland post would cause serious disruption to his family life. He indicated that it would mean being away from his partner and son for extended periods because there is no daily ferry service between Union Island and the mainland. He stated that the cost of daily air travel (of \$270.00 return) to and from work would be prohibitive and not sustainable on his monthly salary of \$1896.00. He indicated that he expends a total of \$1889.00 in household, medical, tax and miscellaneous expenses. He deposed that relocation would be so disruptive that no amount of money would remedy its effects on his family life.

[35] Learned counsel Mr. Duane Daniel indicated that CSO 5.29 (e) provides for the payment of a monthly hard area allowance to officers stationed in areas designated as such. The allocation amounts to between \$150.00 and \$200.00 and was last revised on November 30th 2005. Learned counsel Mr. Duane Daniel was unable to say if Mr. Whyte would qualify for such allowance on being transferred or re-assigned to the mainland. He made no submissions on the issue of adequacy of damages.

[36] He acknowledged that Mr. Whyte would not be entitled to an increase in emoluments by virtue of such transfer or re-assignment. The P.S., CPO and PSC did not dispute the figures presented by Mr. Whyte as to his current salary and expenditure. It appears to me that whereas Mr. Whyte might find himself in a financially embarrassing position if he is transferred or re-assigned as contemplated, the P.S., CPO and PSC are unlikely to apprehend such financial prejudice if the interim injunction is granted. They have not provided any testimony to contradict Mr. Whyte or to support an assertion that they would be so prejudiced.

[37] The PSU submitted that a statement from the case of Regina v Ministry of Agriculture, Fisheries and Food and another ex parte Monsanto Plc is relevant. It quoted the following passage as being dispositive of an issue:

'... in our judgment, although American Cyanamid principles are to be applied in the present case, this must be in the context of the public law questions to which judicial review

proceedings give rise. Such proceedings are, generally speaking, intended to provide swift **relief against abuse of executive power.**¹¹

[38] I remain mindful that the Court is not required to make findings on “**conflicts of evidence**” or “**difficult questions of law**”¹² at this stage. I note however, that being financially embarrassed may create **grounds on which a public servant can be disciplined. Mr. Whyte’s and the PSU’s assertions that damages would not be adequate are not without merit.** I am satisfied that based on the available evidentiary material before the Court, that damages do not appear to be an adequate remedy for Mr. Whyte or the PSU, but would be for the P.S. CPO and PSC. I turn next to look at the balance of convenience.

Balance of convenience

[39] If the **PSU’s application for an** interim injunction is dismissed, Mr. Whyte would be required to report to the mainland for duty at the Maritime Administrative Office in the Ministry of Security, Kingstown, with effect from June 28th 2018. He would either have to find rented accommodation, seek paid or unpaid room and board with someone on the mainland or travel to Saint Vincent from Union Island each day. He would leave his partner and son to carry on their lives without his daily involvement. Such move would undoubtedly have cost implications for him and his family.

[40] If the interim injunction is granted, Mr. Whyte would continue his life on Union Island and the Government would of necessity need to fill the unspecified post at the Maritime Administrative Office in the Ministry of Security, Kingstown with another officer or leave it vacant until the substantive application is determined. It is not clear if the post is vacant or whether it was anticipated that the present serving officer would be re-assigned elsewhere before Mr. Whyte assumed duties.

[41] The State is generally perceived to possess considerably more resources than the average citizen and therefore better able to absorb financial, personnel and other exogenous and endogenous shocks. This case is no exception. It appears that the balance of convenience swings in Mr.

¹¹ [1999] O.B. 1161.

¹² Ibid. at pg. 407 per Lord Diplock.

Whyte's and the PSU's favour; and that the status quo should remain the same, pending further order.

Undertaking in damages

[42] The PSU did not provide an undertaking in damages as stipulated by CPR17.4 (2). This is not fatal to its case, because an undertaking may be provided subsequently. In rare cases, the Court may direct that such an undertaking is unnecessary. This is not such a case. I am satisfied that the PSU has the means to supply such an undertaking.

[43] The PSU has established that there is a serious issue to be tried between the parties; that damages would be inadequate; and that the balance of convenience favours Mr. Whyte and the PSU. It is therefore just and reasonable to grant the interim injunction. The PSU will be required to file an undertaking in damages.

Miscellaneous

[44] The PSU filed supplementary submissions at 8.50 a.m. on the hearing date. The P.S., CPO and PSC indicated that they had not received them sufficiently in advance to permit them to prepare a response. I had not seen them at that time. They are therefore disregarded for the purposes of this decision. For the sake of completeness, I set out below the orders which were made on June 27th 2018.

ORDER

[45] It was ordered:

1. The PSU's **application** for an interim injunction to restrain the respondents from transferring or re-assigning Mr. Jamali Whyte from the Revenue Office in Union Island is granted until further order.
2. The PSU shall file on or before 29th June 2018 by 11.00 a.m., an undertaking in damages.
3. Return date is 5th July 2018.
4. The PSU is granted leave to **apply for judicial review of the first respondent's decision to transfer or re-assign Jamali Whyte from his post as junior clerk of the Inland Revenue**

Department in Union Island to the Maritime Administrative Office in the Ministry of Security, Kingstown.

5. **The applicant must file its application for judicial review within 14 days of today's date (i.e. on or before 12th July 2018), on the grounds outlined in the application for leave.**
6. The first hearing is scheduled for 30th July 2018.
7. Costs to be costs in the cause.
8. The Registrar is to issue notice of hearing at least 7 days in advance with proof of service.
9. The applicant has carriage of this order.

[46] I thank learned counsel for the submissions.

Esco L. Henry
HIGH COURT JUDGE

By the Court

Registrar