EASTERN CARIBBEAN SUPREME COURT

IN THE COURT OF APPEAL

SAINT VINCENT AND THE GRENADINES

SVGHCVAP2016/0007

BETWEEN:

[1] ELVIS DANIEL

[2] ADDISON THOMAS

[3] KENROY JOHNSON

[4] OSWALD ROBINSON

(In his Representative Capacity as President of the Saint Vincent and the Grenadines Union of Teachers)

Appellants

and

[1] PUBLIC SERVICE COMMISSION

[2] ATTORNEY GENERAL

Respondents

Before:

The Hon. Dame Janice M. Pereira, DBE	Chief Justice
The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal

Appearances:

Mr. Ruggles Ferguson with him, Ms. Shirlan Barnwell for the first, second and third Appellants

Mr. Richard Williams with him, Ms. Dannielle France for the Respondents

---

2018: July 18;

2019: January 29.

Civil appeal — Constitutional interpretation — Ultra vires — Whether article 16 of the collective agreement is ultra vires section 26(1)(d) of the Constitution of Saint Vincent and the Grenadines — Legitimate expectation — Whether article 16 gave rise to a legitimate expectation to the appellants— Bad faith — Whether the respondents acted in bad faith by neglecting or refusing to grant the appellants leave to contest the general election, and refusing to reinstate them — Whether the respondents' breached the appellants' constitutional right to protection of property

On 3rd November 2005, the Government of Saint Vincent and the Grenadines (the "Government") and the Saint Vincent and the Grenadines Union of Teachers (the "Union") entered into a collective agreement. Article 16 of the collective agreement provided for a no pay leave of absence of up to six months for certain Union members to contest elections. The first three appellants, Elvis Daniel, Addison Thomas and Kenroy Johnson (the "appellants"), were teachers in the public service of Saint Vincent and the Grenadines and were also Union members. They sought to engage article 16 by applying for leave to contest the general

election held in Saint Vincent and the Grenadines on 13th December 2010. The application was addressed to the Chief Personnel Officer of the Public Service Commission (the "CPO") who replied by letter, drawing the appellants' attention to section 26(1)(d) of the Saint Vincent and the Grenadines Constitution (the "Constitution"), which provides that no person shall be qualified to be elected as a representative if he holds or is acting in any public office. At the time of the application, the appellants were holding a public office.

Having failed to obtain election leave, the appellants resigned their posts as teachers and unsuccessfully contested the general elections. They wrote to the CPO seeking reinstatement to their posts. The CPO replied indicating that there was no vacancy to which the appellants could have been appointed. The appellants by fixed date claim sought various declarations, including a declaration that article 16 does not offend section 26(1)(d) of the Constitution. The appellants also sought an order for reinstatement and damages for loss suffered and for breach of their constitutional rights.

The learned judge struck out the claim. The judge found, inter alia, that the import of section 26 of the Constitution was to prohibit those who continue to be public officers from offering themselves as candidates for political office, while they remain public officers.

The appellants, being dissatisfied with the decision of the learned judge, appealed. The grounds of appeal raised the following issues for this Court's determination: (i) whether article 16 of the collective agreement is ultra vires section 26(1)(d) of the Constitution; (ii) whether article 16 gave rise to a legitimate expectation that the appellants would be granted leave to contest the general election and if unsuccessful, would be reinstated to their posts or to equivalent posts; (iii) whether the respondents acted in bad faith by refusing the appellants leave for the purpose of contesting the general election, and refusing to reinstate them to their original or equivalent posts after the election; and (iv) whether the respondents breached the appellants' constitutional right to protection of property.

Held: allowing the appeal; setting aside the judge's order dismissing the claim; remitting the matter to the High Court for an assessment of damages by a judge for breach of the appellants' property rights protected by section 6 of the Constitution; awarding costs on the appeal and the costs in the court below to the appellant, to be assessed by a judge if not agreed within 21 days, that:

1. Article 16 of the collective agreement does not and cannot qualify a public servant, in this case a teacher, to be elected as a representative, given the provisions of section 26(1)(d) of the Constitution. It only addresses leave to contest an election. Further, the provision of article 16 speaking to return to teaching posts or posts of equivalence in the public service without loss of benefits cannot be said to violate the Constitution. It therefore cannot be successfully argued that article 16 violates or seeks to amend section 26(1)(d) of the Constitution. To successfully challenge article 16, on the ground that it is violates section 26(1)(d) of the Constitution, it must be shown that there is something in its provisions that qualifies the appellants to be so elected. Article 16 is therefore not ultra vires section 26(1)(d) of the Constitution.

   Section 26(1)(d) of the Constitution of Saint Vincent and the Grenadines, Cap.2, Revised Laws of Saint Vincent and the Grenadines 1990 considered; Section 35(1)(d) of the Representation of the People Act, Cap.9, Revised Laws of Saint Vincent and the Grenadines 2009 considered; De Freitas v The Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing and Others [1999] 1 AC 69 considered.

2. The principle of legitimate expectation is based on the proposition that when a public body states that it will do something, a person who has reasonably relied on that statement should, in the absence of good reasons, be entitled to rely on the statement and enforce it through the courts. For a legitimate expectation to arise there has to be a clear, unambiguous and unqualified representation. By virtue of article 16, the Government committed itself to the grant of no pay leave for up to six months to the appellants to contest general elections; reinstatement to their posts or posts of equivalent status in the public service if unsuccessful; and no loss of benefits. The terms of article 16 are clear, unambiguous and devoid of relevant qualification, and certainly engendered a legitimate expectation on the part of the appellants.

3. Where the court finds a legitimate expectation of some benefit, it will not order the public authority to honour its promise, where to do so would be to assume the powers of the Executive. The issue engaged here is reinstatement to the public service, as contemplated by the second limb of article 16 of the collective agreement. It is a matter of judicial discretion whether a litigant who has been unlawfully dismissed or compelled to resign and has in fact ceased to perform any of the duties of his office, should be granted an order of reinstatement. The circumstances of the appellants' resignation from the teaching service in 2010, the length of time since their resignation, plus the court's lack of competence to determine the needs and requirements of the public service would make it inappropriate to permit the appellants to invoke the principle of legitimate expectation to compel their reinstatement to their original post or post of equivalence in the public service.
Rainbow Insurance Company Limited v The Financial Services Commission and Others [2015] UKPC 15 applied; R (Bibi) v Newland LBC [2002] 1 WLR 237 applied; Regina v Department of Education and Employment ex parte Begbie [2000] 1 WLR 1115 applied; The United Policy Holders Group et al v The Attorney General of Trinidad and Tobago [2016] UKPC 17 applied; Hong Kong v Ng Yuen Shin [1983] 2 AC 629 applied; CCSU v Minister for Civil Service [1985] 1 AC 374 applied; Chief Constable of North Wales Police v Evans [1982] 1 WLR 1155 applied; Jhagroo v The Teaching Service Commission [2002] UKPC 63 applied.

4. Bad faith must be clearly alleged and proved. Mere error or irrationality and poor decision making does not of itself demonstrate bad faith. Additionally, errors of fact or law and illogicality will not demonstrate bad faith in the absence of other circumstances which show capriciousness. In the circumstances, the material the appellants seek to rely on to ground their allegation of bad faith does not rise to the level or standard on which such an allegation can be founded.

   SBBS v Minister for Immigration & Multicultural & Indigenous Affairs [2002] FCAFC 361 applied.

5. The appellants' property rights violation argument concerns pension benefits. Pension benefits are amenable to protection as property rights under section 6 of the Constitution, unless the deprivation of benefits arises from a lack of qualification or entitlement to it. Once the appellants are entitled to pension benefits, in the absence of some lawful basis for its deprivation, in respect of which none has been advanced in this case, the appellants are entitled, not only to a declaration that their property right guaranteed by section 6 of the Constitution has been breached, but an assessment of damages for that breach, as a mere declaration would not be adequate given the nature of the breach.

Attorney General of Trinidad and Tobago v Ramanoop [2005] UKPC 15 applied; Alleyne v Attorney General of Trinidad and Tobago [2015] UKPC 3 applied.

JUDGMENT

[1] BAPTISTE JA: It is unremarkable for the citizen to invoke the Constitution as a means of redress in respect of action by the State where it is alleged that rights guaranteed thereunder are being contravened or are threatened with contravention. This case presents the rather remarkable scenario in which the State engages the Constitution to avoid the provisions of article 16 of a collective agreement it entered into with the St. Vincent and the Grenadines Union of Teachers (the "Union"), on the ground that that article is ultra vires the Constitution. How did we get here? We step back to 2005.

[2] On 3rd November 2005, the Government of Saint Vincent and the Grenadines (the "Government") and the Union entered into a collective agreement. Article 16 of the collective agreement provided for no pay leave of absence of up to six months for members of three years standing or more, to contest elections. At the hearing of the appeal, counsel informed the Court that article 16 was hailed by the Government as a progressive step for incentivising persons with ability and diversity to serve as elected representatives. The first three appellants, Elvis Daniel, Addison Thomas and Kenroy Johnson ("the appellants"), were teachers of 30 years standing in the public service of Saint Vincent and the Grenadines and were also long-standing members of the Union. They sought to avail themselves of the facility provided by article 16 of the collective agreement by applying for leave to contest the general election held in Saint Vincent and the Grenadines on 13th December 2010. The application was addressed to the Chief Personnel Officer of the Public Service Commission, Tyrone Burke, who replied by letter, drawing the appellants' attention to section 26(1)(d) of the Saint Vincent and the Grenadines Constitution[1] (the "Constitution"), and ended by saying "I await your response".

[3] Section 26(1)(d) of the Constitution essentially provides that no person shall be qualified to be elected as a representative if he holds or is acting in any public office. It also makes provision for

[1] Cap. 2, Revised Laws of Saint Vincent and the Grenadines 1990.

Parliament to prescribe exceptions and limitations to the prohibition. None were prescribed. There is no dispute that at the time of the application, the appellants were holding a public office.

[4] Nomination day was nigh – 26th November 2010. In light of the response from the Chief Personnel Officer, the appellants resigned their posts as teachers. In separate letters to the Chief Personnel Officer, they stated that their resignation was necessitated by their failure to obtain election leave pursuant to article 16 of the collective agreement. The appellants contested the general elections on the slate of the opposition New Democratic Party but were unsuccessful. They sought reinstatement to their posts by individual letters addressed to the Chief Personnel Officer. The letters stated:

> "I hereby submit a request for reinstatement to the post I held immediately prior to my resignation to facilitate my participation as a candidate in the recently held General Elections. My resignation was precipitated by my failure to obtain election leave, and in no way reflected anything negative toward my post then."

The Chief Personnel Officer replied by letter: ''Please note that there is no vacancy at this time to which you can be appointed".

[5] It is apparent that in seeking reinstatement, the appellants would have been guided by a provision in article 16 of the collective agreement which stated that in the event that the member is unsuccessful, that member shall return to his/her original post or one of equivalent status, all benefits intact.

[6] In light of the situation, the appellants filed a fixed date claim seeking declaratory and other relief, including relief under the Constitution. They sought declarations that:

(1) Article 16 of the collective agreement does not offend section 26(1)(d) of the Constitution but is rather a prudential interpretation of the fundamental democratic rights entrenched in the Constitution, allowing teachers to participate in the electoral process where their standing for elective office would not compromise the integrity of their office in the public service;

(2) The respondents acted in bad faith in refusing to grant the leave requested for the purpose of contesting the general elections thereby forcing them to resign their teaching positions in order to take advantage of the collective agreement;

(3) Participation in the election gave rise to a legitimate expectation that the respondents would in good faith, honour the terms of the collective agreement and restore them to their teaching posts or some other post of equivalent status in accordance with article 16; and

(4) The respondents continue to act in bad faith in refusing to honour the terms of the collective agreement and restore them to their teaching posts or posts of equivalent status within the public service, thereby violating the collective agreement and depriving them of their fundamental right to property guaranteed by section 6 of the Constitution.

The appellants also sought an order directing the respondents to restore them to their original teaching posts or to posts of equivalent status; damages for losses suffered as a consequence of the respondents' failure to honour the terms of the collective agreement and for breach of their constitutional rights.

[7] A High Court judge struck out the claim as being entirely hopeless. The judge held that the import of section 26 of the Constitution was to prohibit those who continue to be public officers from offering themselves as candidates for political office while they remain public officers. Article 16 of the collective agreement seems to permit these public officers to vie for office as parliamentary representatives while maintaining all their benefits should they fail to secure the contested position. The clear reading of section 26(1)(d) means that a person is simply not qualified to be a candidate while he continues to hold public office as a teacher. The laudable aims of the article cannot trump the clear constitutional provisions.

[8] With respect to legitimate expectation, the judge stated that the existing policy was expressly laid down in article 16 of the collective agreement, and there can be no answer to the respondents' argument that they wish to abolish it as having been made ultra vires and as such ab initio. The judge stated that a legitimate expectation must be legitimate. The qualifications for eligibility to seek election as a parliamentary representative are set out in the Constitution and can be changed by Parliament by following the procedure therein set out. It is not for the Government to do so by

means of a contract, however well-intentioned. The learned judge further stated that the hiring of public servants is not a matter for the Government but for the independent Public Service Commission.

[9] The learned judge addressed the issue raised by Mr. Ferguson, the appellants' counsel, as to whether the appellants were wrongly and unlawfully forced to resign from their posts, as no other option was available which would have allowed them to contest the 2010 elections. The learned judge opined that they could resign or remain as teachers. If they chose to remain as teachers, it cannot be gainsaid that they could not offer themselves as candidates. The learned judge also considered the issue of the entitlement of the first respondent to determine the qualifications of the candidates or prospective candidates at a general election. In that regard, the learned judge opined that the first respondent did not make any determination as to the eligibility of the appellants to stand as candidates. The Public Service Commission merely pointed to the applicable constitutional provisions and asked the appellants what was their position. It was the appellants who clearly felt that they would run afoul of section 26(1)(d) of the Constitution unless they resigned prior to nomination day.

[10] The appellants have registered their dissatisfaction with the judgment by filing several grounds of appeal against the order of the learned judge. The issues raised in the appeal are crystallised thus:

(i) Whether article 16 of the collective agreement is ultra vires section 26(1)(d) of the Constitution;

(ii) Whether article 16 gave rise to a legitimate expectation on the part of the appellants that they would be granted leave to contest the general election and if unsuccessful, would be reinstated to their original posts or to posts of equivalent status within the public service;

(iii) Whether the respondents acted in bad faith by neglecting or refusing to grant the appellants leave for the purpose of contesting the general election, and refusing to reinstate them to their original or equivalent posts after they lost at the polls;

(iv) Whether the letter from the Chief Personnel Officer amounted to a determination of the appellants' eligibility to stand as candidates for the general election; and

(v) Whether the appellants were deprived of their fundamental right not to be deprived of property as guaranteed by section 6 of the Constitution.

Ultra Vires

[11] With respect to the first issue, Mr. Ferguson contends in triplicity that: firstly, the learned judge erred in law in finding that article 16 of the collective agreement is ultra vires section 26(1)(d) of the Constitution. Secondly, further or alternatively the judge erred in not holding that article 16 does not offend section 26(1)(d) of the Constitution. Thirdly, the judge erred in holding that article 16 amounted to an attempt to amend the Constitution without complying with the requisite constitutional provisions.

[12] Mr. Ferguson advances an interpretative basis for his submission that article 16 does not amend or offend the Constitution. The proposition being that article 16 is a prudential interpretation of the fundamental democratic rights entrenched in the Constitution, allowing the participation of teachers in the electoral process where the standing for elective office would not compromise the integrity of the office in the public service. Mr. Ferguson regards the starting point to be the fundamental right to freedom of association entrenched in section 11(1) of the Constitution and notes that section 11(2) thereof allows Parliament to pass laws that "imposes restrictions upon public officers that are reasonably required for the proper performance of their functions". Mr. Ferguson draws upon the general proposition in De Freitas v The Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing and Others[2] that civil servants hold a unique status in a democratic society which does not necessarily justify a substantial invasion of their basic rights and freedoms.

[2] [1999] 1 AC 69.

[13] In keeping with the interpretative theme, Mr. Ferguson essentially complains that the learned judge used a restrictive textual analysis in interpreting section 26(1)(d) of the Constitution by simply looking at the words of the section and ascribing a narrow meaning to them. In the premises, Mr. Ferguson submits that the judge erred by interpreting section 26(1)(d) through statutory lenses. Mr. Ferguson prays in aid the authorities which advance the proposition that a Constitution is interpreted with less rigidity and greater generosity than Acts. Mr. Ferguson submits that although the judge applauds the rationale of article 16 as laudable, he arrived at the wrong conclusion by applying a narrow statutory interpretation approach and holding that it was ultra vires section 26(1)(d) of the Constitution.

[14] In further advancing his position that article 16 of the collective agreement does not amend the Constitution, Mr. Ferguson observes, quite correctly, that the thrust of section 26(1)(d) of the Constitution is to avoid public officers holding both elected office and public office at the same time. Mr. Ferguson argues that article 16 does not facilitate a position whereby a public officer holds elected office and a public office at the same time. In the premises, Mr. Ferguson contends that no real contradiction exists between article 16 and section 26(1)(d). In further developing that thesis, Mr. Ferguson posits that had the appellants been successful they would not have been able to return to the service. It would have been a switch over from public officer to elected member. Hence the reason why article 16 has a precondition for re-entry into the service.

[15] Mr. Ferguson submits that that the broad and generous interpretation of article 16 he contends for, and which is required, embraces and recognises the provisions of section 26 (1)(d) and facilitates a teacher, wishing to contest elections to do so. It assures leave of absence without pay to contest elections after three years in the teaching service. In the event of being unsuccessful, a return to their original post or one of equivalent status, all benefits intact. In the absence of article 16, the teacher would have to resign his position, thereby losing his benefits. There is no guarantee of re-employment. Therein, says Mr. Ferguson, lies the benefits of article 16.

[16] The reasons proferred by Mr. Williams, the respondents' counsel, for resiling from article 16 are that it is ultra vires section 26(1)(d) of the Constitution in that a public officer is not qualified to be elected or appointed as a representative. It is also ultra vires section 35(1) (d) of the

Representation of the People Act,[3] and rule 6 of the House of Assembly Election Rules of Saint Vincent and the Grenadines.[4] The rule provides that every candidate shall, at the time of his nomination, deliver or cause to be delivered to the returning officer, a statutory declaration of his qualifications made and subscribed by such candidate in form 3. Part 4 of the declaration in form 3 requires the candidate to confirm that he does not hold any public office or acts in any public office as is referred to in section 35(1)(d) of the Representation of the People Act, upon pain of fine or imprisonment, if the statement is false and which he knows to be false or does not believe to be true.

[17] In passing, it is interesting to note that the nomination ineligibility point was not lost on the appellants. This is reflected at paragraph 4 of their submissions which I quote it full:

> "Prior to nomination day, the Appellants were forced to resign their respective positions as teachers after the First Respondent neglected or refused to grant them leave, contrary to the terms of the collective agreement. Without resigning it would have been impossible for the Claimants to be nominated to contest General Elections. Nomination is a prerequisite for contesting General Elections."

[18] Mr. Williams reminds the Court of the triteness of the law that an agreement which contravenes the provisions of a statute and moreso the entrenched provisions of a Constitution is void and unenforceable and no rights can flow or accrue therefrom. Only Parliament can permit public officers to be eligible to contest elections. No other entity has the power or authority to make such an agreement as it would represent a usurpation of the power of Parliament. Mr. Williams submits therefore that article 16 is unenforceable.

[19] Having set out the parties' competing arguments, section 26(1)(d) of the Constitution falls for consideration. Materially, the section provides that no person shall be qualified to be elected or appointed as a representative or senator if he, subject to such exceptions and limitations as may be prescribed by Parliament, holds or is acting in any public office. Straight away, it is noted that section 26(1)(d) of the Constitution speaks to persons who are not qualified to be elected or to put it otherwise, it speaks to disqualification. It disqualifies a public officer from being elected or appointed as a representative or senator. Another point – a critical one, I may say, is that section

[3] Cap.9, Revised Laws of Saint Vincent and the Grenadines 2009.
[4] Cap.9, Revised Laws of Saint Vincent and the Grenadines 2009.

26(1)(d) provides for Parliament to prescribe exceptions and limitations to the disqualification imposed. Section 26(1)(d) of the Constitution is quite translucent. It simply means that the appellants would not be qualified to be elected to Parliament while being public officers, absent Parliamentary prescription of exceptions and limitations.

[20] Parliament has not prescribed any exception or limitation to the prohibition contained in section 26(1)(d). In no way can article 16 of the collective agreement be considered or regarded as such. So at the time the appellants sought leave, pursuant to article 16 of the collective agreement to contest the general election, as public officers, they were not qualified to be elected to Parliament. Of course, the appellants were never elected to Parliament. Further, their leave application was overtaken by subsequent events, notably their resignation from their teaching posts before nomination. In the circumstances, when the appellants contested the general election, they were no longer public officers and in that regard, no issue could arise as to their qualification to be elected.

[21] Be that as it may, the contention that article 16 of the collective agreement violates section 26(1)(d) of the Constitution, has to be predicated on the premise that it qualifies the appellants, in breach of section 26(1)(d) to be elected as representatives. This invites a close examination of article 16. Article 16 states:

> "A member of the Union of at least three years standing, shall on application, be granted leave - of - absence to contest National/General/Local Elections. The Leave of Absence shall be no pay leave for a period not exceeding six (6) months. In the event that the member is unsuccessful, that member shall return to his/her original post or one of equivalent status, all benefits intact. The resumption of duty must be at the beginning of a school term."

Materially, article 16 is threefold in its construct: (1) upon application, no pay leave of absence of up to six months to contest elections; (2) if unsuccessful, a return to the teaching post or a post of equivalence in the public service; and (3) no deprivation of benefits. It is not by happenstance that article 16 avoids addressing the issue of a successful election bid by a public officer. The reason is fairly obvious, as it could not, in face of the disqualification imposed by section 26(1)(d) of the Constitution, seek to address the issue of a teacher being successful at the polls.

[22] The limb of article 16 of the collective agreement providing for a leave of absence to contest general election seems to be the basal part of the discussion relating to constitutional legitimacy. That limb does not and cannot qualify a public servant to be elected as a representative, given the provisions of section 26(1)(d) of the Constitution. From its terms, article 16 does not deal with qualification to be elected as a representative. That matter is not within its purview. As it does not so deal, it cannot be successfully argued that it violates or seeks to amend section 26(1)(d) of the Constitution. Article 16 of the collective agreement, which provides for leave to members of the Union to contest a general election, does not immunise them from the disqualification provision of section 26(1)(d) of the Constitution.

[23] Section 36(1) of the Constitution vests the High Court with the jurisdiction to hear and determine any question whether any person was validly elected as a representative. If the election of a public officer is successfully challenged on the basis that he was not qualified to be elected to Parliament, in terms of section 26(1)(d) of the Constitution, the question of his reinstatement to the public service and the terms of that reinstatement are not matters covered by section 26(1)(d) of the Constitution. Accordingly, the limbs of article 16 of the collective agreement dealing with reinstatement and no loss of benefits do not violate section 26(1)(d) of the Constitution.

[24] In conclusion, to successfully challenge article 16 of the collective agreement on the ground that it is violates section 26(1)(d) of the Constitution, it has to be shown that there is something in its provisions that qualifies the appellants to be so elected. There is nothing in the provisions of article 16 qualifying the appellants to be elected to Parliament. Article 16 deals with leave to contest. A provision granting leave to teachers, upon application, to contest a general election, does not qualify them to be elected to Parliament. It was open to the Government to initiate the requisite steps for Parliament to prescribe exceptions and limitations to the disqualification imposed by section 26(1)(d) of the Constitution. The fact that this was not done does not transform a provision granting leave to contest a general election into one that violates the Constitution. Further, the provision of article 16 speaking to the return to teaching posts or posts of equivalence in the public service, without loss of benefits, cannot be said to violate the Constitution.

[25] I now address the question of the position of public officers in a democratic society. As recognised in De Freitas, as a general proposition, civil servants enjoy a special position in a democratic

society. As the servant or agent of the State, a civil servant or public officer enjoys special advantages and protections and correspondingly must submit to certain restrictions. The preservation of the characteristics of impartiality, neutrality and loyalty of civil servants or public officers has long been recognised in democratic societies as necessary in preserving public confidence in the conduct of public affairs. The Board recognised this as at least one justification for some restraint on the freedom of civil servants to participate in political matters and is properly to be regarded as an important element in the proper performance of their functions.

[26] The Board further recognised that the general proposition of the uniqueness of civil servants or public officers in a democratic society does not necessarily justify a substantial invasion of their basic rights and freedoms. The Board stated that the restrictions which may, consistently with the Constitution, be imposed upon the freedom of expression and assembly in the case of civil servants must be restrictions which are reasonably required for the proper performance of their functions and must be reasonably justifiable in a democratic society. The Board noted that it is a fundamental principle of a democratic society that citizens should be entitled to express their views about politicians, and while there may be legitimate restraints upon that freedom in the case of some civil servants, that restraint cannot be made absolute and universal.

[27] The learning contained in De Freitas is quite instructive and ought to carry great resonance in this period of Caribbean civilisation. The intendment of the forward thinking article 16 of the collective agreement is surely a step in the right direction. The learned judge saliently observed that the civil service position the appellants occupied require no sensitivity; the pool of persons qualified to run for office as parliamentary representatives is small; and is further diminished if persons willing to serve can only do so on pain of loss of all benefits to pensions and rights accrued over decades if their bid for political office fails. The learned judge concluded that it was open to the Government to utilise section 26(1)(d) of the Constitution to prescribe for teachers to be elected, but this could not be done by way of an article in a collective agreement.

[28] I noted Mr. Ferguson's arguments with respect to the issue of interpretation of a Constitution as opposed to an ordinary statute. In my judgment, the framers of section 26 (1)(d) of the Constitution were evidently alive to the infelicities - some of which were identified by the learned judge - which could be occasioned by a blanket disqualification of public officers from being elected to

Parliament. In that regard, the Constitution itself provides an ameliorative avenue to mitigate the infelicities which may be visited by such a blanket prohibition. In other words, while section 26(1)(d) disqualifies public officers from being elected to Parliament, that disqualification is not absolute. Section 26(1)(d) contains the very important qualification, "subject to such exceptions and limitation as may be prescribed by Parliament".

[29] The position is that Parliament has been endowed with the authority to prescribe exceptions and limitations to the disqualification to be elected to Parliament imposed by section 26(1)(d). In that context, the issue, contrary to what Mr. Ferguson contends, is not one of the interpretation. It boils down to the Government initiating the requisite action to enable Parliament to prescribe the necessary exceptions and limitations to achieve the beneficence gleaned from article 16 of the collective agreement. As the learned judge correctly pointed out, this cannot be done by a collective agreement. Article 16 in my view, provides a mutually agreed platform to inform such prescription. The critical point is that without Parliament prescribing exceptions and limitation to the disqualification of public officers, the disqualification to be elected, imposed by section 26(1)(d) of the Constitution, would operate as a bar. No interpretation of article 16 can change that position.

Legitimate Expectation

[30] The second issue to be addressed concerns the principle of legitimate expectation. Mr. Ferguson argues that the learned judge erred in law in holding that legitimate expectation could not arise despite the respondents' failure to honour the collective agreement. Further, the learned judge erred in failing to hold that that the appellants had a legitimate expectation pursuant to article 16 that they would be reinstated in their respective posts or posts of equivalent status after their unsuccessful election bid. Mr. Williams seeks to uphold the judge's decision, essentially positing that one cannot rely on a legitimate expectation which will conflict with a statutory duty. Mr. Williams relies on the proposition that no legitimate expectation can arise where the body lacks authority or power to make the representation. In any event, Mr. Williams argues that article 16 is ultra vires the Constitution so no legitimate expectation can arise.

[31] Insofar as is material, I will briefly summarise the law in relation to legitimate expectation. The doctrine of legitimate expectation was developed by the courts as part of administrative law to

protect persons from gross unfairness or abuse of power by a public authority. The constitutional principle of the rule of law underpins the protection of legitimate expectation as it prohibits the arbitrary use of power by public authorities: Rainbow Insurance Company Limited v The Financial Services Commission and Others.[5]

[32] Broadly, the principle of legitimate expectation is based on the proposition that when a public body states that it will do something, a person who has reasonably relied on that statement should, in the absence of good reasons, be entitled to rely on the statement and enforce it through the courts: per Lord Neuberger in The United Policyholders Group v The Attorney General Of Trinidad and Tobago.[6] To found a claim based on the principle, the statement in question must be "clear, unambiguous and devoid of relevant qualification".[7]

[33] The principle of legitimate expectation cannot be invoked if or to the extent that it would interfere with the public body's statutory duty. However much a person is entitled to say that a statement by a public body engendered a legitimate expectation on his part, circumstances may arise where it becomes inappropriate to permit that person to invoke the principle to force the public body to comply with the statement. If, taking into account the fact that the principle applies and all other relevant circumstances, a public body could, or a fortiori should, reasonably decide not to comply with the statement.[8]

[34] The court will enforce an expectation only if it is legitimate. Nobody can have a legitimate expectation that he will be entitled to an ultra vires relaxation of a statutory requirement.[9] For an expectation to be legitimate, the party seeking to invoke it must show, inter alia, that it lay within the powers of the authority both to make the representation and to fulfil it.[10] A legitimate expectation can only arise on the basis of a lawful practice or promise.[11] Under English domestic law, there can be no legitimate expectation that a public body will confer a substantive benefit when it has no power to do so.

---

[5] [2015] UKPC 15 at para.51.
[6] [2016] UKPC 17 at para.37.
[7] See: Bingham LJ in R v Inland Revenue Commissioners, Ex p MFK Underwriting Agents Ltd [1990] 1 WLR 1545 at p.1569.
[8] supra, n.6.
[9] supra, n.5 at para.52.
[10] See: Schiemann LJ in R (Bibi) v Newland LBC [2002] 1 WLR 237.
[11] See: Gibson LJ in Regina v Department of Education and Employment ex parte Begbie [2000] 1 WLR 1115.

[35] In Attorney General of Hong Kong v Ng Yuen Shiu,[12] Lord Fraser stated that the concept of legitimate expectation is capable of including expectations created by something that falls short of enforceable legal rights, provided they have some reasonable basis. Likewise in CCSU v Minister for Civil Service,[13] Lord Fraser said:

> "But even where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege, and, if so, the court will protect his expectation by judicial review as a matter of public law."

[36] By virtue of article 16 of the collective agreement, the Government committed itself to the grant of no pay leave for up to six months to the appellants to contest general elections; reinstatement to their posts or posts of equivalent status in the public service if unsuccessful; and no loss of benefits. It is trite law that for a legitimate expectation to arise there has to be a clear, unambiguous and unqualified representation. The terms of article 16 are clear, unambiguous and devoid of relevant qualification. I have no doubt that they engendered a legitimate expectation on the part of the appellants.

[37] When article 16 was agreed upon, the Government must have been aware of the provisions of section 26(1)(d) of the Constitution. A provision it now seeks to invoke to thwart the legitimate expectation engendered by article 16 of the agreement. While invoking section 26(1)(d) of the Constitution to disavow article 16, the Government appears to pay no regard to the fact that the said section speaks to Parliament prescribing "such exceptions and limitations". The argument that article 16 violates section 26(1)(d) of the Constitution does not square off with the fact that the said section contains the mechanism to obviate the disqualification bar.

[38] The Court heard Mr. Williams' ultra vires argument. The ultra vires doctrine provides that a public authority which derives its powers from statute cannot validly act outside those powers. It must be recognised that the issue here is not about a statutory body or authority acting outside the parameters of a statute or being asked to relax a statutory provision or assuming upon itself powers it does not possess and thus acting unlawfully. This is the central government entering into a collective agreement with the Union containing the impugned article 16. Undoubtedly, the

[12] [1983] 2 AC 629 at p.636.
[13] [1985] 1 AC 374 at p.401.

fullness of the purpose sought to be achieved by article 16 could only achieve efficacy by parliamentary prescription of exceptions and limitations to the qualification bar on public officers imposed by section 26(1)(d).

[39] Given that position, it lay exclusively within the purview, province and power of the Government to initiate the necessary steps to enable Parliament to prescribe the exceptions and limitations to the bar imposed. Neither the appellants nor their union could take such steps. There is no evidence on the record that such steps were even attempted. Alas! Instead of doing what was required and provided for by the Constitution, the Government invoked part of the same section of the Constitution to disappoint the expectation of the appellants. The Government acted with conspicuous and manifest unfairness towards the appellants.

[40] It was unfair for the Government to resile from giving effect to the legitimate expectation contained in article 16 by not seeking the necessary Parliamentary prescription in terms of the exceptions and limitations to the bar imposed. The appellants addressed that issue in terms of bad faith but it is most apt to discuss it here. In their affidavit evidence, the appellants deposed that the respondents acted in bad faith by not putting in place the regulation to deal with the Collective Agreement. In my judgment, the appellants were clearing complaining of Government's failure to seek parliamentary prescription in terms of exceptions and limitations as provided for by section 26(1)(d) of the Constitution, thus trumping their legitimate expectation. There was no overriding public interest justifying Government's position.

[41] In legitimate expectation cases, the issues of fairness and good administration are engaged. It is therefore instructive to engage the applicable law. There is no doubt that a public authority can change policy. In R (Bhatt Murphy (a firm) and others) v The Independent Assessor,[14] Laws J broadly summarised the place of legitimate expectation in public law. He stated that the power of public authorities to change policy is constrained by the legal duty to act fairly. A change of policy which would otherwise be legally unexceptionable may be held unfair by reason of prior action or inaction by the authority.

[14] [2008] EWCA Civ 755 at para.50.

[42] It has been recognised that the principle of good administration prima facie requires adherence by public authorities to their promise. Whether it does so require must be determined in the light of all the circumstances. It has also been said that there is value in holding Governments to promises they have made thus upholding responsible public administration and allowing people to plan their lives sensibly. In Francis Paponette and Others v The Attorney General of Trinidad and Tobago,[15] Lord Dyson observed at paragraph 42, that the breach of a representation or promise on which an applicant has relied is a serious matter. Fairness as well as the principle of good administration demands that it needs to be justified. Often, it is only the authority that knows why it has gone back on its promise. At the very least, the authority will be better placed than the applicant to give reasons for its change of position. If it wishes to justify its act by reference to some overriding public interest, it must provide the material on which it relies.

[43] At paragraph 46, Lord Dyson stated that where an authority was considering whether to act inconsistently with a representation or promise it has made and which has given rise to a legitimate expectation, good administration as well as elementary fairness demand that it takes into account the fact that the proposed act will amount to a breach of the promise. The promise and the fact that the proposed act will amount to a breach of it are relevant factors which must be taken into account.

[44] A clear and unambiguous representation was made to the appellants. Article 16 induced a legitimate expectation of a substantial benefit. It was reasonable for the appellants to rely on it. They sought to rely on it to their detriment. It was unfair for the Government to resile from giving effect to the representation, thus frustrating the expectation. Fairness and good administration required that it be justified. This has not been demonstrated.

[45] Even where the court finds a legitimate expectation of some benefit, it will not order the public authority to honour its promise, where to do so would be to assume the powers of the Executive. The issue engaged here is reinstatement to the public service, as contemplated by the second limb of article 16. It is a matter of judicial discretion whether a litigant who has been unlawfully dismissed or compelled to resign, and has in fact ceased to perform any of the duties of his office,

[15] [2010] UKPC 32.

should be granted an order of reinstatement.[16] The circumstances of the appellants' resignation from the teaching service in 2010, the length of time which has expired since their resignation, plus the court's lack of competence to determine the needs and requirements of the public service would make it inappropriate to permit the appellants to invoke the principle of legitimate expectation to compel their reinstatement to the original post or post of equivalence in the public service.

Bad Faith

[46] I now deal with the issue of bad faith. The appellants contend that the learned judge erred in law in not holding that the respondents acted in bad faith in refusing to grant them leave to contesting the general elections and refusing to reinstate them to their original post or a post of equivalence in the public service. For their part, the respondents deny bad faith. The appellants contend in their skeleton submissions that: (i) a court is entitled to draw inferences from established facts; and (ii) bad faith should not be inferred from the facts if those facts are equally consistent with mere negligence. Further, the actions of the first respondent constituted a deliberate effort to prevent the three appellants, who all belonged to the opposition party, from being nominated and from contesting the general election.

[47] The law on bad faith can be briefly stated. An allegation of bad faith is a serious matter and is not to be lightly made. Bad faith must be clearly alleged and proved. Mere error or irrationality does not of itself demonstrate bad faith. Bad faith is not to be found simply because of poor decision making. Errors of fact or law and illogicality will not demonstrate bad faith in the absence of other circumstances which show capriciousness: SBBS v Minister for Immigration & Multicultural & Indigenous Affairs.[17]

[48] In their joint affidavit in support of the fixed date claim, the appellants seek to provide an evidential basis for the allegation of bad faith. They deposed that the respondents acted in bad faith by not putting in place the regulation to deal with the collective bargaining agreement. The appellants stated their belief that the respondents in good faith would honour the collective agreement and

[16] See: Chief Constable of the North Wales Police v Evans [1982] 1 WLR 1155; Jhagroo v The Teaching Service Commission [2002] UKPC 63 at para.41.
[17] [2002] FCAFC 361.

restore them to their original posts or to ones of equivalent status. The appellants also stated that the respondents' position is wilful and vindictive.

[49] In my judgment, the appellants have not established bad faith. Having regard to the law on bad faith, the material the appellants seek to rely on to ground bad faith does not rise to the level or standard on which such an allegation can be founded. The allegation of bad faith fails due to the absence of a proper evidential basis to sustain it. Apparent inaction in obtaining parliamentary prescription pursuant to section 26(1)(d) is not, without more indicative of bad faith. The appellants belief that the respondents would honour the collective agreement, does not, by itself translate its lack of honour into evidence of bad faith. The appellants' conclusionary statement of wilfulness and vindictiveness is devoid of an evidential or factual underpinning

Response of Chief Personnel Officer

[50] It is convenient to address the issues raised pertaining to the resignation of the appellants and whether a determination was made with respect to their eligibility to be candidates for the general election. In their skeleton arguments, the appellants state that prior to nomination day they were forced to resign their positions as teachers after the first respondent neglected or refused to grant them leave, contrary to the terms of the collective agreement. The parties dispute whether the letter from the Chief Personnel Officer, consequent upon the appellants' application for leave to contest the general election, constituted a denial of the application for leave.

[51] I have no difficulty in concluding that the response from the Chief Personnel Officer to the appellants' request for leave constituted an implied rejection of their leave application. A factual inference can be drawn that by directing the appellants to section 26(1)(d) of the Constitution, the Chief Personnel Officer was in effect saying to them that as public officers they were debarred from contesting the general election. Further, the Government was resiling from the terms of article 16 of the collective agreement on the ground that it violated the Constitution. In fact, the respondents advanced that position at this appeal. The respondents' evidence that they did not refuse leave is unconvincing and unacceptable.

Breach of Constitutional Right to Protection of Property

[52] The appellants seek relief under the constitution alleging breach of their property rights. In their written submissions in support of the appeal, the appellants state that the failure to restore them to the original post or a post of equivalent status has caused them to lose all their benefits, including pension, accumulated after long and outstanding years of service in the teaching profession.

[53] In their skeleton arguments, the respondents agree that if the appellants' appeal is successful, they may be entitled to damages. They however contend that such a determination can only be made after a hearing on the facts with cross-examination to determine: (i) whether or not the respondents would be responsible for the appellants' resignation; (ii) whether the resignation was reasonable; (iii) and whether, having heard the facts, an award of vindicatory damages is payable.

[54] The issue to be determined is whether the appellants' right to the protection of their property as guaranteed by section 6 of the Constitution has been violated and if so, what is the appropriate redress. There is no dispute that the appellants resigned their posts as teachers to contest the general elections, lost at the poll, and unsuccessfully applied to be reinstated either to their original post or to a post of equivalence in the public service. By their resignation, the appellants brought their tenure of office to an end.

[55] To my mind, the critical issue arising in respect of the appellants' property rights violation argument concerns pension benefits. Pension benefits would be amenable to protection as property rights under section 6 of the Constitution unless the deprivation of benefits arises from a lack of qualification or entitlement to it. The issue of the loss of pension benefits was in fact foreshadowed by the learned judge in paragraph 15 of his judgment, when he stated that the small pool of persons qualified to run for office as parliamentary representatives is diminished further if persons who are willing to serve can only do so on pain of loss of all benefits accrued over decades if their bid for political office fails.

[56] The judge then asked the question whether the loser ought to be doubly penalised for his lack of success by depriving him of his expected pension rights. The learned judge answered affirmatively, although he felt constrained to do so. The constraint is understandable, given the

learned judge's finding that article 16 of the collective agreement violated section 26(1)(d) of the Constitution. Having held au contraire, I do not share the constraints of the learned judge.

[57] It appears to me that the learned judge made a determination that having resigned, contested and lost, the appellants also lost their pension benefits. In my view, once the appellants are entitled to pension benefits, in the absence of some lawful basis for its deprivation, in respect of which none has been advanced in this case, the appellants are entitled, not only to a declaration that their property right guaranteed by section 6 of the Constitution has been breached, but an assessment of damages for that breach, as a mere declaration would not be adequate given the nature of the breach.

[58] In that regard, I am guided by the Board in Attorney General of Trinidad and Tobago v Ramanoop[18] and in Alleyne v Attorney General of Trinidad and Tobago.[19] In Alleyne, the Board referred to the leading authority of Ramanoop, and summarised the courts' jurisdiction thus:

> "… the object of the jurisdiction is to uphold and give effect to the right which has been contravened. Sometimes, a court may judge a declaration to be sufficient for this purpose … But often the court will find that more than words are required to redress what has happened. There are no standard rules, but the fact that the injured party has suffered damage will often militate in favour of a monetary award. In assessing compensation in such a case, the common law measure of damages would be a useful guide, but no more than a guide … Other relevant factors would include the seriousness of the breach."

[59] On the state of the evidence, this Court is not equipped to make the assessment required. Apart from evidence of length of service of the appellants - 32, 30 and 39 years respectively - there is an evidential lacuna. I would therefore remit the matter to the High Court for assessment of damages. The judge would give such directions with respect to evidence and disclosure as required to facilitate the process. It would really involve a computative exercise reflecting expected pension benefits up to the date of the appellants' resignation.

[60] For the reasons given, I would allow the appeal and set aside the judge's order dismissing the claim. I would remit the matter to the High Court for an assessment of damages by a judge for breach of the appellants' property rights protected by section 6 of the Constitution.

---

[18] [2005] UKPC 15 at paras.18-19.
[19] [2015] UKPC 3 at para.39.

I would order that the Attorney General pay the appellants' costs of the appeal and in the court below, to be assessed by a judge if not agreed within 21 days.

I concur.
Janice M. Pereira, DBE
Chief Justice

I concur.
Gertel Thom
Justice of Appeal

By the Court

Chief Registrar