

IN THE SUPREME COURT OF GRENADA  
AND THE WEST INDIES ASSOCIATED STATES

IN THE HIGH COURT OF JUSTICE

CLAIM NO.: GDAHCV 2018/0354

BETWEEN:

PATRICIA BERNADETTE STRACHAN

Applicant

and

THE PUBLIC SERVICE COMMISSION  
THE ATTORNEY GENERAL

Respondent

Appearances:

Herricia Willis for the applicant

Olabisi Clouden for the respondents

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2018: November 22

2019: January 23

2019: February 15

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JUDGMENT

[1] GLASGOW, J: This is **an application filed by the applicant (“Mrs. Strachan”)** asking for the court’s permission to file judicial review proceedings seeking several declarations and orders. The application was filed on 5<sup>th</sup> September, 2018. On reviewing the matter, the court was minded to refuse leave. CPR 56.4(3)(c) instructs that where the court is minded to refuse the request for leave, the court must fix the application for hearing in open court. The application was served and the application was heard on 23<sup>rd</sup> January, 2019.

Mrs. Strachan’s **C**omplaint

[2] Mrs. Strachan is a public officer, who was appointed by the Public Service Commission (“PSC”) to the post of clinical instructor (acting) on 1<sup>st</sup> August, 2003. She was confirmed in that post on 19<sup>th</sup> February, 2007 which appointment was

stated to take effect from 1<sup>st</sup> August, 2003. At the time of her acting appointment, her functions as clinical instructor were performed at the Grenada School of Nursing (“GSN”) which was an entity attached to the Ministry of Health.

[3] On 18<sup>th</sup> January, 2006 a memorandum was sent by the Chief Nursing Officer to ‘*director and nurse tutors*’ of the GSN **informing them of the government’s decision** to transfer the GSN to the T.A Marryshow Community College (“TAMCC”). The memorandum reminded officers that their consent was required if they wished to **be assigned/released to the “statutory body.”** Mrs. Strachan received a letter dated 7<sup>th</sup> March, 2006 from the then Permanent Secretary of the Ministry of Health informing of the same matters stated in the 18<sup>th</sup> January, 2006 memorandum. The letter asked her to state in writing whether she wished to be assigned to TAMCC. A deadline of 17<sup>th</sup> March, 2006 was set for her to respond to the letter.

[4] **The court has not been provided with a copy of Mrs. Strachan’s response** to the 7<sup>th</sup> March, 2006 letter from the Permanent Secretary. However, the record discloses a letter **from the Chief Personnel Officer (“CPO”)** dated 15<sup>th</sup> September, 2006 addressed to Mrs. Strachan in which reference is made to a 20<sup>th</sup> March, 2006 letter penned by Mrs. Strachan. The 15<sup>th</sup> September, 2006 letter informs Mrs. Strachan that on 11<sup>th</sup> September, 2006, the PSC **“released” her to TAMCC** with effect from 28<sup>th</sup> August, **2006. The “release” was to** subsist for 5 years. Confirmation that she continued to hold the substantive post of clinical instructor within the Ministry of Health was received via the 19<sup>th</sup> February, 2007 letter which **indicated that her appointment to that post was no longer in an “acting” capacity.** She was thenceforth confirmed in the post of clinical instructor with effect from 1<sup>st</sup> August, 2003 at Grade [H] with emoluments totalling \$34,296.00 per annum. Instructively, besides setting out the grade of the post and the emoluments attaching thereto, the 19<sup>th</sup> February, 2007 letter advises Mrs. Strachan that her **appointment is subject to the “provisions of the PSC Regulations, the Civil Service Staff Orders, Finance and Audit Act and other Regulations in force from time to time.”** Mrs. Strachan was also advised that she *“will be liable to transfer to any*

*post of equivalent grade within Grenada including Carriacou*". Mrs. Strachan pursued a Bachelor of Science degree which she completed in August, 2007.

- [5] Letter dated 28<sup>th</sup> September, 2009 from the principal of TAMCC informed Mrs. Strachan that she was appointed to the post of Assistant lecturer – School of Arts, Sciences and Professional Studies at the college. The post attracted a salary of \$52,766.69 per annum and allowances of approximately \$710.00 per month. Mrs. Strachan's release from the public service and continuation as assistant lecturer at TAMCC was extended by both the PSC and TAMCC on a number of occasions. See letters dated 1<sup>st</sup> February, 2012 from TAMCC to Mrs. Strachan; letter dated 19<sup>th</sup> July, 2012 from the CPO to Mrs Strachan. Letter dated 19<sup>th</sup> November, 2015 from the Permanent Secretary, Ministry of Health to the Public Workers Union is informative. In that letter the Permanent Secretary informs the union that Mrs. **Strachan's assignment to** TAMCC was extended from 28<sup>th</sup> August, 2014 to 31<sup>st</sup> December, 2016. The letter concludes thus – *"Please note that there will be no further extensions. On completion of the period of release, officers will be given the option to return to positions within the Ministry of Health and Social Security."* Mrs. Strachan was advised by way of letter dated 13<sup>th</sup> February, 2017 that her "release" to TAMCC was further extended from 1<sup>st</sup> January 2017 to 31<sup>st</sup> October, 2017.
- [6] On 15<sup>th</sup> May, 2017 TAMCC wrote to Mrs. Strachan informing her that TAMCC would be closing its Department of Nursing Education with effect from 31<sup>st</sup> July, 2017. TAMCC advised that the written notice was being given to allow employees **of the department**, *"the opportunity to discuss the implications with the relevant authorities."* TAMCC further indicated **that** *"any future engagement with the college will be separate and distinct from the current arrangements."* TAMCC and the PSC further extended **Mr. Strachan's** period of engagement until 31<sup>st</sup> August, 2017.
- [7] On 9<sup>th</sup> March, 2018 the PSC informed Mrs. Strachan that she was appointed to the post of Health Training Officer with effect from 1<sup>st</sup> August, 2017. The post is a grade [I] classification with emoluments totalling \$55,788.00 per annum. Again,

Mrs Strachan was advised that her appointment was subject to the various laws and regulations governing the public service and that she was liable to be transferred to any office of equivalent grade within the public service. The 9<sup>th</sup> March, 2018 letter cancelled and superseded a 28<sup>th</sup> November, 2017 along the same lines. I note that the Ministry of Health had previously written to Mrs. Strachan on 14<sup>th</sup> December, 2017 in response to a 9<sup>th</sup> November, 2017 letter in which she allegedly outlines a number of concerns about her return to the public service. I do not have sight of the 9<sup>th</sup> November, 2017 letter. But in its 14<sup>th</sup> November, 2017 response, the Ministry of Health advised that a date and time for a future meeting with Mrs Strachan will be set. There is no evidence that the meeting was held. For completeness, I note that TAMCC sent Mrs. Strachan on vacation leave on 1<sup>st</sup> August, 2017 until 31<sup>st</sup> August, 2017. She was sent on administrative leave by the PSC from 1<sup>st</sup> August, 2017 to 31<sup>st</sup> August, 2017.

### **Mrs. Strachan's Complaints**

[8] Mrs. Strachan complains that –

(1) She discovered that TAMCC's **decision to end the nursing programme** was further to a government policy decision to transfer the nursing programme to the Saint **George's University ("SGU")**. This *"important and far reaching decision was not discussed with the nursing educators or key stakeholders such as the Nurses and Midwives Council or the Grenada Nurses Association Inc."*<sup>1</sup> In fact she only learned of this policy in February **2017 when her "release" was extended to 31<sup>st</sup> October, 2017;**

(2) When the nursing programme was transferred to SGU, the Ministry promised to accommodate 5 posts in the budget to be laid before Parliament. However no job descriptions were received;

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<sup>1</sup> Paragraph 13 of Mrs. Strachan's affidavit filed on 5<sup>th</sup> September 2018 in support of her application.

- (3) She was presented with three job titles and asked to state her preference but she could make no informed decision as no other information was given to her besides the job descriptions;
- (4) At the time of the transfer of the nursing programme to TAMCC or by the time that it was transferred to SGU, it was clear that her substantive post of clinical instructor no longer existed but no adequate provision was made for return to the public service. In this regard she recites the two periods of leave stated above for which she never applied. She was told that the leave was given to facilitate the equipping of the offices to which she would be assigned on her return to the public service since *“there were insufficient desks and chairs to accommodate the nursing [tutors’] return to the public service.”*<sup>2</sup>
- (5) By December, 2017 she was supplied with no job description but was merely told that the new posts of Health Training officer and Health Training Coordinator would be considered as part of the budget being tabled before Parliament;
- (6) She was disappointed that she was stripped of her chosen career path of educating nursing students. Her new post involves educating categories of staff outside of her scope of practice. She was in effect demoted as her salary and benefits were reduced. She claims that her substantive post was abolished, she was made redundant through the government policy of transferring the nursing programme to SGU and she is therefore entitled to be retired in accordance with section 84(8) of the Constitution. Mrs. Strachan complains that her right to work has been violated.

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<sup>2</sup> Ibid at paragraph 18.

## The Response

[9] Interestingly it is the 2<sup>nd</sup> respondent which filed a response to the application on behalf of both respondents. There is no response from the PSC. I am surprised that the 2<sup>nd</sup> respondent has not taken the point that it is not the decision maker in this case and as such no claim ought to lie against it. Mrs. Strachan clearly avers that she brings this application against the Attorney General in his capacity as the person who is legally obliged to defend actions against the government. This is not in strict sense a claim about a decision made by the government. Rather, the PSC's **exercise of its** constitutional responsibilities and rights in respect of Mrs. Strachan, a public officer, is under challenge in this claim. It is the PSC which is clothed with the constitutional authority to employ, discipline and remove public officers.<sup>3</sup> The PSC is an entity which is autonomous of the government.<sup>4</sup> When the PSC makes a decision regarding one of the officers under its purview, it makes that decision independent of the government and must therefore answer for the exercise of its constitutional authority independently of the government. The government ought to file an answer for any decision that it has taken in this case and the PSC has to answer likewise for any decision it has taken. See the judgment of Roland Browne v AG,<sup>5</sup> where Wilkinson J refused to give permission to bring judicial review proceedings against the Attorney General where complaint **was made about the Public Service Commission's decisions regarding a public officer**. Section 86(1) of the Saint Lucia Constitution in respect of **that country's Public Service Commission's power to appoint, discipline and remove public officers** are in similar terms to the section 84(1) of the constitution. See also the case of Antonia Martial v the Public Service Commission,<sup>6</sup> where Shanks J was asked to deliberate on, inter alia, section 86(1) of the Saint Lucia Constitution. In that case, the Public Service Commission relied on and presented a written opinion received from the Attorney General as part of its answer to a claim for

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<sup>3</sup> Section 84 of the Constitution.

<sup>4</sup> Endell Thomas v AG (1981) 32 WIR 375.

<sup>5</sup> SLUHCV 2009/0730.

<sup>6</sup> SLUHCV 2005/0301.

judicial review. Although his Lordship ultimately found that an allegation of bias could not be made out in respect of the opinion received by the PSC in that case, he opined that –

*It seems to me unfortunate to say the least that the Commission, which, as I have said, is meant to be independent of the executive, is receiving something that looks like an internal memo from the Attorney General containing advice about a case pending before it. This may create precisely the impression that should not be created, namely that the Commission is in some way linked to and under the control of the government. I would suggest that in future the Commission only take advice (my emphasis) from their own legal counsel.*

[10] But we are here. The dates of appointment, the various correspondence and **“release” presented** by Mrs. Strachan in support of her application for permission are not disputed. However, the application for leave is opposed on the following grounds –

- (1) The last substantive post occupied by Mrs. Strachan before her move to TAMCC was that of clinical instructor at GSN. When the GSN programme was moved to TAMCC, the substantive post of clinical instructor was, in essence, abolished;
- (2) That where a post in the public service is abolished, the PSC is required by its regulation 46(6) to either recommend to the government that the officer is retired or transferred to a post no lower in status or emoluments than the last substantive post held by the officer;
- (3) Mrs. Strachan was not required to retire but was retained in the service as a civil servant. In the discharge of the plenitude of its powers, the

PSC may second a public officer to any office but must do so with the **officer's** imprimatur;

- (4) Section 26 of the T.A Marrayshow Community College Act, Cap. 315 (**"the Act"**) provides for the secondment of public officers. Section 27 of that Act reiterates that seconded officers retain their status as public servants during the period of their secondment;
- (5) Mrs. Strachan accepted the offer to teach in the nursing programme at TAMCC and was released on secondment to do so. She retained her post as a public officer during that period;
- (6) When TAMCC **discontinued the programme, Mrs. Strachan's** secondment thus ended and she had to return to the public service;
- (7) At that point the PSC was further confronted with the options of recommending her retirement or transferring her to an office of no less status or emolument;
- (8) The mere abolition of the office of clinical instructor was not sufficient to trigger section 84(8) of the Constitution which entitles the public officer to pension or other benefits if he or she is made to retire on the abolition of his or her office;
- (9) The regulation 46 process was not engaged in this case;
- (10) Mrs. Strachan held a post of clinical instructor prior to her secondment to which was attached a grade [H] salary of \$3,279.00 per month. On her return to the public service, she was appointed to the post of health training officer to which post is attached a grade [I] salary of \$4,649.00 per month; This post is not lower in emoluments or status as alleged in

**the evidence. Indeed the grade [I] post is higher than Mrs. Strachan's last held grade [H] post;**

(11) There is no justiciable constitutional cause or reasonable ground for redress in regards to the allegations of an infringement of a right to work. The Constitution does not set this out as a separate right to be enforced to which section 16 of the Constitution is applicable. Indeed there is no constitutional **right for one to work in one's expertise or chosen path of career.**

#### The Various Legal Arguments

[11] The following are the legal points raised by Mrs. Strachan –

- (1) **As at July 2017, the parties knew that Mrs. Strachan's substantive post** no longer existed. Her substantive post no longer existed due to the reorganisation of the Ministry of Health in 2006 or when the nursing programme was transferred to SGU in 2017. She was therefore made redundant and had to retire when she was stripped of her chosen career path without discussion;
- (2) In making Mrs. Strachan redundant, the respondents have failed to observe the Constitution, the staff orders and the PSC's **regulations** or have failed to observe basic rules of natural justice;
- (3) Mrs. Strachan was not released from her post on secondment as asserted by the Attorney General since, in her opinion, the GSN remained within the public service. Several reasons were presented for this specific assertion –

- (a) All correspondences received by Mrs. Strachan up until 2015 indicated that Mrs. Strachan was transferred/assigned to the Ministry of Education/TAMCC. The GSN was reflected in the **Government's** estimates of expenditure as a cost centre, thereby reflecting that the respondents were liable for funding the TAMCC's department of nursing;
- (b) TAMCC is a statutory body under the direction and control of a council established by the Ministry of Education. The council is the decision making body of TAMCC. The Minister of Education sits on the council, has powers of general direction to make policy and approves the remuneration for council members. TAMCC fell under the "*umbrella*" of the Ministry of Education. **Therefore Mrs. Strachan's employment fell under the** direction and control of the respondents;
- (c) The alleged secondment policy does not apply to Mrs. Strachan;
- (d) By failing to follow regulation 46(1) to (5) of the PSC Regulations 1969, the respondents prevented Mrs. Strachan from asserting her rights under section 84(8) of the Constitution. The respondents acted arbitrarily and therefore ultra vires;
- (e) The respondents contravened regulation 46 by transferring Mrs. Strachan to a post which they consider to be equivalent to or comparable to her previous post instead of permitting her to exercise her right to retire

under regulation 46(6) and section 84(8) of the Constitution;

(f) The respondents failed to consult with Mrs. Strachan before transferring her to a post of equivalent or comparable position; and

(g) The post to which she has been stationed is not equal in status or emoluments since for example she will not qualify for travelling allowance.

#### **Respondents' Legal Arguments**

[12] **The respondents' arguments as related by the 2<sup>nd</sup> respondent** is that Mrs. **Strachan's reliance on section 84(8) of the** Constitution is misconceived since the section is only applied where Regulation 46 of the **PSC's regulations is** engaged. Section 84(8) reads –

*(8) Every officer who is required to retire on abolition of his office or for the purpose of reorganization of his Ministry or Department shall be entitled to pension and retiring benefits as if he had attained the compulsory retiring age.*

[13] The respondents argue that the entitlements created by section 84(8) of the Constitution are only conferred on a public officer when they are “*required to retire*”. The respondents further submit that one must look to regulation 46 of the **PSC's regulations for the procedure to be applied by the PSC** in cases where a **public officer is faced with “the abolishment of his or her public office.”**

[14] The respondents explain that when a public office is abolished, 2 courses may be adopted in respect of a public officer who holds that public office –

(1) The Head of Department (“HOD”) or Permanent Secretary (“PS”) may recommend to the PSC that the public officer ought to be retired. The HOD or PS must provide reasons to the PSC for its consideration. The public officer is then asked to make representations to the PSC regarding the recommendation; or

(2) The public officer may be transferred to another public office no lower in status or emoluments.

[15] The respondents further submit that when Mrs. Strachan was seconded to TAMCC she retained her status as public officer. Upon her return to the public service, the PSC was obliged to consider one of the 2 options set out in regulation 46. **In Mrs. Strachan’s case, the PSC opted to transfer her to an equivalent post** instead of considering her retirement. The respondents conclude that the public officer is not automatically retired when the public office which they hold is abolished. The court is asked to consider the case of Grenada Technical and **Allied Workers’ Union** & the Public Workers Union v The Public Service Commission.<sup>7</sup>

[16] The respondents address separately the question of whether Mrs. Strachan has been transferred to a post not lower in status or emoluments. Quoting from Blenman JA in *Willan Thompson et al the Attorney General of Grenada*,<sup>8</sup> the **respondents contend that** “*the power and scope of the Public Service Commission has been settled. It is trite law that the power to appoint carries with it the power to remove and transfer.*”<sup>9</sup> Indeed, they continue, every instrument of appointment of

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<sup>7</sup> GDAHCVAP 11 of 2003.

<sup>8</sup> GDAHCVAP 2015/0010.

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a public officer includes a note stating that the appointed officer is liable to transfer to any office of equivalency within Grenada.

[17] The respondents further submit that unlike secondment, a transfer does not require the public officer's consent. In this regard, it is said that regulation 46 requires the PSC to transfer the public officer to another public office not lower in status or emoluments than the one which he or she holds or held. Equivalency, they explain, means equivalency of rank or grade. The case of Brian Francis v the Attorney General<sup>10</sup> is presented as support for this latter proposition. It is therefore the view of the respondents that the PSC has discharged its constitutional obligation to Mrs. Strachan. When she returned to the public service, she was transferred to a grade [I] post of Health Training Officer. They argue that it is immaterial that this post does not carry the prestige of teaching students enrolled in the nursing courses at the tertiary level. What is important is that the office is equal in status within the meaning of that term as elucidated by the courts in cases such as the Brian Francis decision from our Court of Appeal.

[18] The respondents also resist Mrs. Strachan's allegation that section 1(d) of the Constitution has been breached in that her right to work has been violated. In this regard it is the respondents' case in answer that section 1 of the Constitution is not separately enforceable since it is not one of the provisions set out in section 16 of the Constitution which is the enforcement provision related to the fundamental rights. They also allude to the allegation that natural justice rights were breached in Mrs. Strachan's case. It is argued in response that the PSC does not have the obligation to consult with Mrs. Strachan or her bargaining agents where it seeks to transfer her to a post of equivalent status or grade.

[19] The respondents conclude by asking the court not to grant permission for judicial review proceedings to be commenced. They submit that before allowing such proceedings to be issued, Mrs. Strachan is obliged to satisfy the court that there are arguable grounds with reasonable prospects of success and that there are no

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<sup>10</sup> GDAHCV2001/0521.

other discretionary bars against granting permission such as delay or the availability of remedies alternative to judicial review<sup>11</sup>. It is contended that Mrs Strachan, on her application, has not so satisfied the court.

### Analysis

[20] It is by now well accepted that before the court grants permission to an applicant to seek judicial review, it must be satisfied “*that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy*”<sup>12</sup>. I am of the view that the present application does not present arguable grounds for judicial review in many respects. The law is simply against the applicant.

[21] I start this part of the discussion by reciting the legal proposition accepted by both sides that on 1<sup>st</sup> August, 2003 Mrs. Strachan was appointed by the PSC to the post of clinical instructor pursuant to its constitutional mandate set out in section 84 (1) of the Constitution which reads –

*84.-(1) Subject to the provisions of section 91 of this Constitution, the power to appoint persons to hold or act in offices in the public service (including the power to confirm appointments), the power to exercise disciplinary control over persons holding or acting in such offices and the power to remove such persons from office and the power to grant leave shall vest in the Public Service Commission.*

[22] Implicit in **the PSC’s** powers of appointment etc. is the power to transfer the public officer in or out of the public service. As Blenman JA explained in Willan

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<sup>11</sup> R v IRC *ex parte* National Federation of Self Employed & Small Businesses Ltd [1982] AC 617; *Sharma v Brown – Antoine* [2007] 1WLR 780(PC).

<sup>12</sup> *Sharma v Brown- Antoine et al* [2007] 1WLR 780(PC).

Thompson et al v The Attorney General et al<sup>13</sup> in respect of the PSC's power to transfer public officers who serve as police officers –

*It is trite law that the power to appoint carries with it the power to remove and transfer. It is therefore axiomatic that the Public Service Commission, which has the power to appoint police officers, equally has the power to transfer those officers. I am fortified in the above view by regulation 2 of the Public Service Regulations, 1969 that provides for the transfer of public officers ... I have no doubt that the Public Service Commission has the power to transfer public officers within the public service.*

[23] In respect of transfers outside of the public service the Court of Appeal in the case of **Grenada Technical and Allied Workers' Union et al v Public Service Commission et al** <sup>14</sup> endorsed the trial judge's exposition of the law where he stated that -

*I do not accept that because that power is not expressed it means that the power does not exist. The power to transfer, for example, is not expressed but no one can doubt that the PSC has the power to transfer persons within the service from one office to another. Such a transfer can be either on appointment or on temporary assignment. That latter type of transfer is **in fact a secondment...Given that the PSC has the power to second within the service there is no reason why, subject to the proper safeguards, it should not be able to second outside the service. The difference with outside secondment is that it must be by agreement; it cannot be imposed upon the officer just as it cannot be imposed upon the receiving employer...***

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<sup>13</sup> GDAVCAP 2015/0010.

<sup>14</sup> GDAHCVAP 2003/0011.

[24] The PSC in its regulations made pursuant to section 83 of the Constitution makes specific reference to its power to transfer various categories of public officers. Regulation 29(1) reads –

*Public officers, other than particular officers shall, subject to the provisions of this Regulation, be transferred by the Commission by order in writing.*

Was Mrs. Strachan Transferred?

[25] **So what happened in Mrs. Strachan’s case? There is some debate as to whether** she was transferred out of the public service (seconded) or transferred to another government department. Without rehashing the arguments I have set out above, Mrs. Strahan says that she was transferred to TAMCC because, in essence, the GSN remained a part of the **government’s budgetary obligations. She explains that** TAMCC was listed as a cost centre in the **Government of Grenada’s** Estimates of Revenue and Expenditure. Additionally, she continues, TAMCC is managed by a council over which the Minister of Education has general directional control. **TAMCC is therefore under the** “*umbrella of the Ministry of Education so the Applicant’s employment was at the material time, under the direction and control of the Respondents*”.<sup>15</sup>

[26] **The respondents’** response avoids answering **Mrs. Strachan’s** charge. The response indicates that Mrs. Strachan was seconded to TAMCC which is a statutory body. I do not fault the respondents for this approach. The legislation creating the statutory body, TAMCC could not be clearer. Section 3(2) of the Act **states that** “*The College shall be a body corporate to which section 49 of the Interpretation and General Provisions Act, Chapter 153, shall apply.*” (Bold emphasis added.) Mrs. Strachan is correct that TAMCC is managed by a Council which takes general policy directions from the Minister of Education (sec section 16 of the Act). However there is no basis on which to assert that this changes the

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<sup>15</sup> Paragraph 25 of Mrs. Strachan’s submissions on 13<sup>th</sup> December 2018.

nature of TAMCC **from a statutory corporate entity into an entity which “falls under the umbrella of the Ministry of Education”**.<sup>16</sup> Equally there is no merit in the statement that since funding was allocated in the national budget for the GSN that it is somehow to be deemed as part of the Ministry of Education. When GSN was moved to TAMCC, it was subsumed as part of that statutory corporate entity. The various letters and memoranda to Mrs. Strachan indicate the same.

[27] Accordingly, when Mrs. Strachan was asked to move to the GSN programme at TAMCC this action amounted to her being transferred out of the public service or more properly put, she was being seconded to TAMCC. This is entirely why she was asked to give her consent to the move to TAMCC.

**Mrs. Strachan's** Status as a Public Officer upon her secondment to TAMCC

[28] **What was Mrs. Strahan's status as a public officer on being seconded to TAMCC?**

The Act explains the position. Sections 26 and 27 instruct –

*26. The Public Service Commission may, subject to such condition as it may impose, approve the secondment to the College of an officer in the public service; but an officer so seconded shall, in relation to pension, gratuity or other benefits and in relation to other rights as a public officer, be treated as continued service in the public service.*

*27. For the avoidance of doubt it is hereby declared that an officer seconded to the College shall continue to be a public officer until such time when he or she resigns, retires or otherwise leaves the public service.*

[29] **The various letters and memoranda to Mrs. Strachan informing her of her “release” to TAMCC are also carefully worded to advise her that she retained her post of**

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<sup>16</sup> Ibid

clinical instructor in the public service, that is to say, she retained her position as a public officer while she was seconded to TAMCC.

Was the Office of Clinical Instructor Abolished?

[30] Much of the debate centres on whether the post of clinical instructor was abolished at the time that Mrs. Strachan was seconded to TAMCC or at the time that the nursing programme was terminated at TAMCC and continued at SGU. There is no evidence available at this juncture to indicate the abolition of the post of clinical instructor in the Ministry of Health during either period in question. In fact, as I have just stated the various letters and memoranda to Mrs. Strachan informing her **of her “release” to TAMCC** indicate that she retained the substantive post of clinical instructor. But even if it is the case that the post of clinical instructor was abolished as is asserted by Mrs. Strachan, her complaint that she was in effect entitled to be retired due to the abolition of her office is not borne out when one examines the constitutional and other obligations of the PSC in this regard.

[31] **Regulation 46(1) of the PSC’s regulations offers some insight into what may transpire where an office is abolished as claimed by Mrs. Strachan. It reads –**

*Where an office, being one of a number of like offices, has been abolished but one or more than one such office remains, the Permanent Secretary or Head of Department shall, subject to subrogation (4) of this Regulation, make a report thereon to the Chief Personnel Officer for consideration by the Commission, and shall recommend with his or her reasons there for, which officer shall be retired or removed from the public service in consequence of such abolition.*

[32] The regulation outlines that the PS or HOD is mandated to inform the CPO of the abolition of the office. The PS or HOD must also inform the CPO which public officers will be removed from office or will be retired as a consequence of the abolition. The PS or HOD must give reasons for the removal or retirement of the

public officer. It would therefore seem axiomatic that where a public office is being abolished, there is no automatic retirement or removal of the office holders. I would surmise that a removal or retirement would be governed by the exigencies of the department in question. What the regulation contemplates is that the government must engage the PSC. The PSC is mandated by the Constitution to decide what actions are to be taken in respect of the public officer where it is informed that -

(1) a public office is being abolished; and

(2) due to that abolition a public officer is to be removed from the public service or is to be retired.

[33] **This regulation recognises and preserves the PSC's** constitutional power under section 84(1) to appoint, remove and discipline public officers. Were the position otherwise, the government could simply remove a public officer by abolishing his office.

[34] Where the PS or HOD informs the PSC that an officer is to be retired due to the abolition of his or office, the officer is to be given a copy of the recommendation sent to the PSC. The officer is then allowed to make representations within 7 days of receipt of the recommendation. (See regulation 46(3)).

[35] Where the officer responds, the PS or HOD must then forward the response to the PSC along with the **PS' or HOD's views**. (See regulation 46(5)).

[36] **On receipt of the officer's comments and/or the PS or HOD's views, the PSC** can either transfer the officer to another post not lower in emoluments or status or the PSC may accept that the officer is to be retired or removed from the public service.

[37] Section 84(8) of the Constitution is only triggered in the instance where after deliberating on the recommendation and any responses thereto, the PSC finds that the officer is to be retired or is to be removed from the public service. The section is clear. It reads –

*84 (8) Every officer who is required to retire on abolition of his office or for the purpose of reorganization of his Ministry or Department shall be entitled to pension and retiring benefits as if he had attained the compulsory retiring age.*

[38] Where the PSC decides that an officer ought to be retired or removed from the public service as a consequence of the abolition of his or her office, Section 84(8) preserves his or her right to be paid pension and retirement benefits as if he or she reached the compulsory retirement age.

Cases where there is no indication that a public officer is to be removed from the public service or is to be retired

[39] What then happens in the cases where an office is being abolished, the PS or HOD informs the CPO of the same but there is no indication that any of the office holders ought to be retired or removed from the public service? In my view, the PSC retains its power to transfer those officers to any post not lower in status or emoluments.<sup>17</sup> (See regulation 29.) Indeed one may extrapolate that this was what transpired in this case. If Mrs. Strachan is correct that her office was abolished, at the time it was so abolished, there is no evidence that there was a recommendation for her retirement or removal from office. On the contrary, what is disclosed is a recommendation for her transfer to another office albeit an office which was outside of the public service. In view of the fact that she was being transferred to an office outside of the public service her consent was required<sup>18</sup>

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<sup>17</sup> See *Brian Francis v AG*

<sup>18</sup> See *Grenada Technical Ann Allied Workers' Union et al v AG et al*

and indeed she gave her consent to be transferred outside of the public service or more properly put, to be seconded.

- [40] Mrs. Strachan says that she was not transferred out of the public service (seconded). Rather it is her case that she was merely transferred to TAMCC which is another department within the Ministry of Education. I find that her case is made even less compelling if she is correct that she was not in fact seconded but was in fact **transferred to TAMCC which in “under the umbrella of the Ministry of Education”**. If she is correct **that TAMCC was in fact another department “under the umbrella of the Ministry of Education”**, then the PSC could have sent her to TAMCC and retained her there without her consent so long the office to which she was being was an office that was not lower in status or emoluments.

What happened when Mrs. Strachan returned to the public service?

- [41] Mrs. Strachan further complains that when she returned to the public service, she was not sent back to the office of clinical instructor since that office had been abolished. She further complains that this action was without her input. Natural justice required that she was given a hearing before this was done. It is further argued that the post to which she was transferred was lower in status and emoluments. Neither position is sustainable at trial. As I have stated above, Mrs. Strachan remained a public officer while she was seconded to TAMCC. Her tenure as a public officer remained subject to the powers and control of the PSC. It is an uncontroverted fact that Mrs. Strachan was reminded at every turn of her engagement with the PSC, TAMCC and the government that her tenure was subject to the powers and control of the PSC. I have explained that included in those powers of the PSC is the power to transfer every public officer including Mrs. Strachan to an office not lower in status or emoluments. Regulation 29(1) says that a transfer of public officers of the category within which Mrs. Strachan falls, shall be by order in writing. When Mrs. Strachan was asked to return to the public service, she was obliged to do so. There was no obligation on the PSC to give her

a hearing before it exercised that power. We have already seen that the PSC is only obliged to hear the officer before a transfer is ordered where the transfer is to an office outside of the service.<sup>19</sup> So the PSC was well within its power to transfer Mrs. Strachan to another office when she returned to the public service. The PSC was only obliged to ensure that the office to which Mrs. Strachan was transferred was one that was not lower in status or emoluments.

[42] Mrs. Strachan says that the office to which she was transferred was indeed lower in status since she was no longer teaching medical students. Teaching medical students was her life passion. I do not agree that the post is less in status or emoluments. I would borrow from the elucidation of Barrow J in the *Brian Francis v AG*<sup>20</sup> decision where he stated –

*I do not accept that the difference in duties and responsibilities of the new post, which I accept were narrower and less professionally challenging and satisfying (at least to the claimant) than those of the old post, necessarily made it a post lacking in equivalence, as the claimant pitched it, or, to use the language of regulation 46 of the Public Service Commission Regulations 1969, lower in status, than the old post. The meaning that I ascribe to status, as used in the regulation, is not prestige but rank or grade. Were it otherwise it would mean that any transfer at any, and especially at a senior, level would be in almost every case a promotion or a demotion, or a change in status, according to whether it is a more or less prestigious ministry or department to which a public officer is transferred.*

[43] In terms of emoluments, Mrs. Strachan is now employed at a higher grade with a greater salary. Her contention that the emoluments are less because she does not get travelling does not aid her cause. I find that travelling allowance is not a right

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<sup>19</sup> See *Grenada Technical Ann Allied Workers' Union et al v AG et al*.

<sup>20</sup> GDAHCV 2001/0521.

or entitlement but a standard sum given to officers who are required to travel as a form of reimbursement for travel expenses incurred in the execution of the tasks to which they have been assigned. There is no evidence that such a state of affairs **exists in Mrs. Strachan's** circumstances. Accordingly, I find that there is no basis for the complaint that Mrs. Strachan was transferred to an office lower in status and/or emoluments.

### **Mrs. Strachan's complaint about the breach of her right to work**

[44] Finally it is said that Mrs. Strachan right to work as granted under section 1 of the Constitution has been breached. This argument is equally unmeritorious and unsustainable. Section 1 of the Constitution reads –

*1. Whereas every person in Grenada is entitled to the fundamental rights and freedoms, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely*

*a. life, liberty, security of the person and the protection of the law;*  
*b. freedom of conscience, of expression and of assembly and association;*  
*c. protection for the privacy of his home and other property and from deprivation of property without compensation ; and*  
*d. the right to work, the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in these provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the rights and freedoms of others or the public interest. (emphasis added)*

[45] Baptiste JA in *Kent Andrews et al v AG*<sup>21</sup> explains a similar provision in the Constitution of St. Vincent and the Grenadines –

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<sup>21</sup> SVGHCVAP 2019/0019.

*The question is whether the general statement of fundamental rights and freedoms in section 1 is separately enforceable. The Constitution itself provides the answer.*

*It is evident from a reading of the Constitution that section 1 is not separately enforceable. It is not included in the enforcement provision. Section 16(1) of the Constitution gives a right to apply for redress to any person alleging a contravention of sections 2 to 15 (inclusive). Significantly, it omitted or did not mention section 1. On a clear interpretation of the Constitution, it is seen that the rights and freedoms enforceable under section 16 are those set out in sections 2 to 15 (inclusive). Section 1 does not confer any free standing rights. That was the position held by the Privy Council in *Blomquist v The Attorney General of the Commonwealth of Dominica and Campbell Rodrigues and Ors. v Attorney General of Jamaica* .*

[46] Section 16 of the Constitution reads –

*16.-(1) If any person alleges that any of the provisions of sections 2 to 15 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.*

[47] As explained by Baptiste JA in *Kent Andrews*, section 1 of the Constitution falls under the Part1 of the Constitution which enacts the fundamental rights and freedoms. Section 16(1) provides the mechanism for the vindication of those rights. Section 1 is not one of the provisions mentioned in section 16(1). **Baptiste JA recited the Privy Council's elucidation of similar provisions in the Jamaica**

Constitution in the case of *Campbell Rodrigues v The Attorney General*.<sup>22</sup> In that case, the Privy Council considered section 13 of the Jamaica Constitution which is in similar terms to section 1 of the Constitution. Section 25 (1) of the Jamaica Constitution provides recourse for the enforcement of sections 14 to 24 without reference to section 13. Their Lordships opined that –

*section 13 does not confer any freestanding rights and that on the clear interpretation of the provisions of Chapter 111 the rights and freedoms enforceable under section 25 are to be those set out in sections 14 to 24 (inclusive).*

- [48] **Mrs. Strachan's reasoning in respect of section 1 of the** Constitution must likewise be rejected. Section 1 is not mentioned as one of the enforceable provisions under that Part of the Constitution and as such cannot be relied on by Mrs. Strachan to ground her claim for relief.

#### Conclusion

- [49] The result of the foregoing is that Mrs. Strachan has failed to show that her proposed claim for judicial review has arguable grounds with realistic prospects of success. As I have stated above, the allegations in this case touch and concern **the exercise of the PSC's** constitutional powers in respect of a public officer. The decision to transfer Mrs. Strachan to TAMCC was made by the PSC and it was so communicated to her. Equally the decision to appoint her to the office of Health Training Officer was made by the PSC and it was so communicated to her. There is no allegation that the 2<sup>nd</sup> respondent usurped or arrogated to itself any of those powers in respect of any of the dealings with Mrs. Strachan. Accordingly, there appears to be no case for the 2<sup>nd</sup> respondent to answer on a judicial review

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<sup>22</sup> [2007] UKPC 65.

application. The application is dismissed against the 2<sup>nd</sup> respondent for those reasons.

[50] In respect of the 1<sup>st</sup> respondent, the PSC, I have set out above in this judgment the various reasons why I have concluded that Mrs. Strachan has no arguable case against that respondent.

[51] I have therefore concluded that permission for the claim for judicial review to be issued must be refused and it is so refused. I do not find that Mrs. Strachan acted unreasonably in bringing this application and as such there will be no order as to costs (see CPR 56.13 (6)) I thank counsel for their assistance.

Raulston L.A. Glasgow  
High Court Judge

By the Court

Registrar