**IN THE EASTERN CARIBBEAN SUPREME COURT**

**IN THE HIGH COURT OF JUSTICE**

**ON MONTSERRAT**

**CASE. MNIHCV2018/0015**

**BETWEEN**

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| **DENNISON DALEY** | **CLAIMANT** |
| **and** | |
| **DENZIL WEST, DIRECTOR OF DITES** | **1ST DEFENDANT** |
| **THE ATTORNEY-GENERAL OF MONTSERRAT** | **2ND DEFENDANT** |

**APPEARANCES**

Mr Tiyani Behanzin for the Claimant.

Ms Renée Morgan for the Defendants.

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**2018: NOVEMBER 22**

**2019: SEPTEMBER 16**

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**RULING**

**On whether in law the claimant as a public servant can raise constructive dismissal**

1 **Morley J**: I am asked to determine if the claimant Daley, who resigned as a public servant on Montserrat after he fell out with his supervisor the defendant West[1], can in law claim constructive dismissal.

[1] The parties will be so referred for ease of reading and no disrespect is intended by not writing out the legalese of whether claimant or defendant.

2 To get the case into the High Court, the claim has been mixed with allegations of constitutional breaches; otherwise Daley's grievances would be adjudicated internally within the public service by the Public Services Commission.

3 The discussion in this ruling is a 'preliminary issue' under **r26.1(2)(i) CPR 2000**[2], in advance of any trial on the facts.

4 Originally, complaint of constructive dismissal was filed as a fixed date claim form on 21.03.18. On 17.04.18, Counsel Morgan for the office of the Attorney General filed an application the claim be struck out for want of being actionable and for being bad in law, supported by submissions filed on 27.06.18 that a public servant cannot claim constructive dismissal. On 29.06.18, Counsel Behanzin filed an amended statement of claim, *interalia* now alleging under the **Constitution** racism, 'inhumane treatment' and 'forced labour' (meaning unpaid overtime). There was to be a trial on the facts and law on 06.12.18, but on 29.08.18 Counsel Morgan filed an application under **r26 CPR 2000** primarily to resolve whether constructive dismissal can arise for a public servant. By skype hearing on 24.09.18 I decided the preliminary point should be taken, which was argued on 22.11.18. My ruling should have been delivered on 04.03.19, but was delayed following late service in February 2019 by Counsel Behanzin of additional materials concerning **Hansard**. Thereafter, being peripatetic and mostly on Antigua, as the Judge my next sitting session on Montserrat has not been before this date, 16.09.19, at which point I am now delivering this ruling.

5 Daley was born on Montserrat on 24.03.84 and is now 35. He attended school on Dominica. Since 2002, on leaving school then aged 18, he has been employed by the Government of Montserrat (GOM), and in May 2005 was appointed as a public servant to the pensionable permanent establishment (PPE). His work history is helpfully set out in detail in the defence signed by West on 27.07.18. For the purposes of this ruling, it suffices to say he is a bright man, who began well, became a Systems Analyst with DITES[3] on 01.07.10, recruited by West, and from 28.06.13 developed a software company called Rovicka with Manish Valecha, much used by GOM; however, he sadly came into conflict with West from 2014, was reported on

[2] Civil Procedure Rules 2000.
[3] Department of Info, Tech, eGov Services.

24.04.14 for insubordination, acquitted on 27.01.16, and was then on 03.08.17 the subject of complaint by West for work absences. In light of evident breakdown in working relations Daley was offered a transfer as a Systems Analyst to Human Resources in September 2017; however, on 25.09.17, he resigned, and through this action claims his resignation was constructive dismissal to be adjudicated in the High Court.

6 In setting out the reason for taking the preliminary point, Counsel Morgan has listed the issues, for which I am grateful as the amended statement of claim from Counsel Behanzin is arguably written imprecisely and with perhaps too many words.

a. As to the law, there is: whether the **Montserrat Constitution Order 2010** cap 1.01 is supreme in relation to employment matters in the way claimed by Daley; whether in all the circumstances a claim for constructive dismissal pursuant to the **Labour Code** cap 15.03 which came into force on 27.12.12 is available to Daley as a public servant; and whether the principle of non-retrospectivity applies to Daley's terms of employment so that a possible right to claim constructive dismissal under **s12 Employment Act 1979,** in force from 01.04.80, might survive the implementation of the Labour Code.

b. As to the facts, there is: whether concerning the **Constitution** there has been a breach of **s4** for inhumane treatment, of **s5** for forced labour, of **s9** that Daley's private and family life have been violated, and of **s16** for racism; and whether in these various circumstances Daley can claim when he resigned to have been constructively dismissed, actionable under the Constitution.

7 For these many injuries, Daley seeks (as Counsel Behanzin vaguely articulates it) 'exemplary damages' to be paid personally by West, plus damages for his 'reputation', and for 'victimization', 'constitutional breaches', 'inhumane treatment', infringement of 'fundamental rights', along with 'loss of income', and 'overtime since 2014'.

8 It is common ground as a Systems Analyst Daley was a public servant in the PPE. By **s4(2) Labour Code**, constructive dismissal (which is captured by **s65 in Part 5)** is specifically excluded as available to the public service, because s4(2) reports that only **parts 8,9, 10 and**

**12** of the Code shall apply to it, (therefore unavoidably meaning part 5 and s65 do not apply to the public service).

9 Insofar as Counsel Behanzin wished to show via **Hansard** the **Labour Code** was intended to apply to public servants, and so in February 2019 filed 74 pages of debate from 2012 in the Monserrat parliament, (whether admissible, persuasive, or helpful, or not), it should be noted the Minister for Communication and Works introducing the Labour Code specifically said part 5 (and therefore constructive dismissal) would not apply to public servants, noting he says at page 5 of the Hansard record offered by Counsel Behanzin:

> *We are just dealing with the minimum and some areas that only apply to the civil servants since they have a law that governs them that would take care of a lot of the same things that are inside this Bill so that – the application that Part 8, 9, 10 and 12 applies to the public service. Those are the parts that apply so that every part does not apply to the public service. I just want to mention that.*

10 Insofar as Counsel Behanzin wishes to argue the **Labour Code** introduced in 2012 (after Daley had commenced in the PPE in 2005) should not retrospectively deny him an action for constructive dismissal under **s12 Employment Act 1979**, there never was such action available to him, as the 1979 Act in **s2** (the definitions section) says specifically the word 'employee' as covered by the Act does not apply to 'permanent and pensionable civil servants'.

11 As actionablity did not arise under **s12 Employment Act 1979**, it follows retrospectivity does not arise.

12 The only available argument to Counsel Behanzin is that the **Labour Code** is in conflict with the **Constitution**, and should be struck down insofar as it denies constructive dismissal to public servants.

13 In an effort to draw the **Labour Code** into conflict with the **Constitution**, when he amended the statement of claim he complained of constitutional breaches of **ss4, 5, 9 and 16,** respectively alleging inhumane treatment, forced labour, attack on his private life, and racism. However, these allegations are controversial, they are not agreed, there is substantial dispute

on the facts, about which in theory there would have to be a trial, requiring the filing of witness statements, the calling of evidence, cross-examination, submissions, and factual adjudication.

14 In this context, the first point to consider is the principle in **Jaroo v AG Trinidad & Tobago 2002** UKPC5 where at para 36 the Privy Council opined:

> [Allegation of constitutional breach]*…is appropriate for use in cases where the facts are not in dispute and questions of law only are in issue. It is wholly unsuitable in cases which depend for their decision on the resolution of disputes of facts. Disputes of this kind must be resolved using the procedures which are available in the ordinary courts under the common law.*

15 This principle is in keeping with the dictum of Lord Diplock in **Harrikisson v AG Trinidad & Tobago 1977**, appeal 40 of 1977, who said the value of a constitutional safeguard would be *'diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action'*.

16 The short point is that actions in the High Court for breach of constitutional rights ought to be the last resort, only after the facts have settled and all other remedies are exhausted or denied. This court will in future be inclined quickly to strike down premature and inappropriate claims, with costs.

17 So, concerning this action where the facts are vigorously disputed, at first blush the claim by Counsel Behanzin for constitutional breach is *ipso facto* objectionable.

18 It is helpful next to consider why the PPE might not be able to claim constructive dismissal.

a. Historically in the UK, Crown public servants, (being the equivalent of those persons in the PPE), were understood to have status as officer-holders rather than under contract. Therefore it was understood in the UK that Crown servants were generally dismissible at pleasure[4].

[4] See paragraph 38.2, Tolley's Employment Handbook.

b. Though the situation has become complicated over time, with much case-law, nevertheless a public servant differs from a private employee, in that each of the former contributes to the efficient functioning of the state, with an obligation to serve the public. As such, private interests can be expected to be secondary to the public interest. In this context, it is not uncommon for public servants to be moved from one office to another as public needs arise, by order if appropriate. Understandably, this can cause upset, and indeed the *Harrikissoon* case *supra* is about a teacher complaining of being moved schools. Movement between offices is a common reason for claims of constructive dismissal in private employment, and if available to public servants would likely open a floodgate of complaint, which could undermine the work of ministries. In this context, denying constructive dismissal to public servants is not out of reason.

c. Moreover, it must be remembered that complaint can be raised to the Public Service Commission, specifically designed to handle civil service grievances, as set out in **Part VII of the Constitution**, **ss82-106,** (showing even the Constitution envisaged a separate treatment of public servants).

19 So, it follows at second blush, again, the claim raised by Counsel Behanzin appears objectionable as there are intelligent reasons constructive dismissal as a policy is denied.

20 I turn now to the final argument available to Counsel Behanzin, namely whether the **Labour Code** is in conflict with the **Constitution** and should be struck down**,** noting the Code came into force on 27.12.12 and therefore after the Constitution came into force on 27.09.11. It is a curious feature **s117 Constitution** only refers to striking down pre-dating 'existing laws' where not in conformity.

21 In any event, if it is assumed post-dating laws can be struck down, about which I make no adjudication, it is difficult to see why it should happen to the **Labour Code**.

a. Concerning discrimination, to show the Labour Code discriminates against Daley, Counsel Behanzin must show public servants to be a protected class under **s16(3) Constitution**, being embraced conceptually as akin to *'sex, sexual orientation, race, colour, language, religion, political or other opinion, national or social origin, association with a national*

*minority, property, birth or other status'.* But under the *ejusdem generis* principle in determining what may fall under 'other status' according to Bennion[5] it is presumed that: '*… wide words associated in text with more limited words are taken to be restricted by implication to matters of the same limited character',* implying it is too great a stretch to fit public servants into a class akin for example to sex or religion.

b. Moreover, even if a protected class, it cannot be shown the class of public servants is treated less favourably than of private employees, which is a necessary feature of discrimination for it to be actionable, per **AG St. Christopher and Nevis et al v Kaleel Jones 2004***,* SKBHCVAP2004/001, where the Court of Appeal found that 'different treatment' was in itself not enough to found a constitutional claim, saying:

> '*Different treatment is only discriminatory, in the sense prohibited by the Constitution, if it results in less favourable treatment to a person compared to the treatment afforded to other persons…Subjecting a person to disabilities or denying him privileges or advantages accorded to other persons is what constitutes discriminatory treatment. A person so subjected or denied is obviously treated not merely differently, but also less favourably, than a person who is not so subjected or denied. It is different treatment which produces such a result that is proscribed…*'

c. Yet public servants in the PPE have some advantages over private employees. Arguably they are treated better, not worse. Considering **reg 31 Public Service Regulations,** unlike the private sector employee, they have security of tenure in that:
    i. They cannot be terminated with notice or with pay in lieu of notice as obtains under **s63 Labour Code**.
    ii. They cannot be terminated for medical reasons as under **s60 Labour Code** but must be retired under **reg 31(a)(iv),** and paid accordingly.
    iii. As above, the private sector employee may be dismissed against their will and without any fault on their part by being terminated with notice or payment in lieu of notice; by contrast, termination in the PPE is founded in a voluntary act by a public

[5] Bennion, Francis. *Bennion on Statutory Interpretation,* Fifth Edition, LexisNexis 2008, at page 1231.

officer, for example by absenteeism, committing a criminal offence, or misconduct worthy of dismissal.

iv. Public servants have a separate grievance procedure through the Public Service Commission, as distinct from private employees going through the Labour Commissioner.

v. Further, public servants have the right to claim for judicial review if statutory procedure and rules of natural justice are not followed in any aspect of their employment which has a public law element, (promotion, transfer, termination included).

22 As to racism, inhumane treatment and forced labour, and any other points of fact, these are grievances more properly raised with the Public Service Commission, which is equipped to deal with such, and if the Commission acts out of all reason, its decision might then be subject to judicial review.

23 Overall, the claim launched by Counsel Behanzin is misconceived. As a factual dispute, it was not appropriate to raise constitutional argument; in any event, the Public Service Commission was the correct grievance procedure, not constitutional motion to the High Court; constructive dismissal is not available to public servants for good reason; and in this case, there is no basis for arguing the **Labour Code** should be struck down as unconstitutional, as public servants are not a protected class, and even if they are they are not being treated less favourably than others.

24 In all the circumstances, under **r26.1(2)(i) CPR 2000,** as a preliminary issue I rule that in law there is no action available to Daley to claim constructive dismissal, and so dismiss the claim; moreover, under **r26.3(1)(b) and (1)(c) CPR 2000** I strike out the claim as currently not disclosing in law any reasonable ground for bringing it as it is framed, and as a misconceived constitutional claim being an abuse of the process of the court.

25 As the preliminary issue has been an important point of law, I make no order as to costs.

**The Hon. Mr. Justice Iain Morley QC**

**High Court Judge**

**16 September 2019**