

SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

SLUHCV 2008/0790

BETWEEN:

IMRAN JEAN

Claimant

and

[1] THE ATTORNEY GENERAL
[2] THE PUBLIC SERVICE COMMISSION

Defendants

Appearances:

Mr. Tonjaka Hinkson for Claimant

Ms. Jan Drysdale, Crown Counsel IV for 1st Defendant

Mrs. Grace E. Ward-Glasgow, Crown Counsel for 2nd Defendant

2010: April 30;
August 12.

JUDGMENT

[1] GEORGES, J. [AG.]: This is a constitutional motion by the Claimant for redress under Section 16 of the St. Lucia Constitution Order 1978 (“the Constitution”) on the grounds that certain of his fundamental rights and freedoms guaranteed under Sections 1, 9 and 13 of the Constitution have been are being or are likely to be contravened.

[2] Let me say at the outset that section 1 of the Constitution does not confer rights on any body. It simply states in general what the rights and freedoms are which are described in detail in succeeding sections. This is confirmed by the Privy Council decision in Francis v Chief of Police [1973] 2 All ER 251 which held that the control of the use of loudspeakers at public meetings did not infringe the fundamental rights of the Appellant to freedom of expression and communication guaranteed

under section 19(1) of the Constitution. Lord Pearson's view of section 1 of the Constitution at page 256 of that judgment is particularly instructive on the point.

- [3] Among other things the Claimant seeks a declaration that requiring him to work his day of worship or his Sabbath under threat of dismissal is unconstitutional.
- [4] He also asks for a declaration that he be reinstated with the Saint Lucia Fire Service. He specifically claims breaches under Section 9 of the Constitution that is infringement of his freedom of conscience including freedom of conscience, freedom of thought and religion and under Section 13 of the Constitution for breach of his right to be protected from discrimination on the basis of his creed.
- [5] Briefly the circumstances which triggered this motion are that on 27th October 2005, the Claimant was appointed by the Public Service Commission ("the Commission") to the post of Fireman on probation for 12 months with the Ministry of Home Affairs and Internal Security.
- [6] Prior thereto he was interviewed and selected to undergo a course of training in order to be appointed to the post. The Claimant had earlier on 3rd September 2004, completed an application form and submitted certified copies of all requisite documentation and on 28th April 2005 he also submitted an Attestation Paper duly completed and signed by him.
- [7] The attestation paper consisted of 8 questions. Question 5 asked:
- "Do you clearly understand and accept that regardless of your day of worship you may be called upon at any time to perform duties related to the Fire Service? To which the Claimant answered "Yes". That to my mind is crucial and pivotal to this case.
- [8] In his evidence the Claimant testified that when he signed the Attestation Paper he had prayed about it and was comfortable with all the answers he had given. In particular regarding question 5 he acknowledged that his answer in the affirmative was unequivocal and unqualified. He also agreed that a large component of the

job of a fire officer was to help persons in emergencies and such emergencies were not limited to natural disasters and/or strikes.

[9] He further agreed/admitted that officers in the Operations Department worked on a rotational shift extending over a period of six days and that rotational system existed prior to his joining that department and that all fire officers were required to work at any time assigned. Finally the Claimant admitted that he knew and understood that if he disagreed with any decision that he had the option of appealing it but that he had not appealed the decision to dismiss him by the Public Service Commission. He could for example have appealed to the Public Service Appeals Board.

[10] Paragraph 2.2 of the Claimant's skeleton arguments states that the Government of St. Lucia through the Commission in its capacity to dismiss and appoint public servants like himself was liable for the actions of its agents and in particular Mr. Mark A. Louis, Permanent Secretary Acting with actual authority by virtue of powers delegated to him by the Commission – the necessary implication being that the First and Second Defendants were one body.

[11] That ofcourse is a fallacy since section 86 of the Constitution makes it clear that the Commission is a separate body the purpose being to appoint confirm (and subject to Section 96 of the Constitution) dismiss and or discipline members appointed to the public service.

[12] Indeed the first paragraph of the Claimant's terms and conditions of employment dated 11th November 2005, from the Acting Permanent Secretary of the Ministry of Labour Relations Public Service & Cooperatives (Mark A Louis) states that:

“The Public Service Commission has approved your APPOINTMENT to the post of FIREMAN Ministry of Home Affairs and Internal Security (St. Lucia Fire Service) with effect from 27th October 2005.”

The Claimant was therefore given employment with the Ministry – his appointment being specifically to the Saint Lucia Fire Service.

- [13] In his evidence the Claimant contended that the First Defendant had given him an assurance that the rules regarding working his day of worship would not apply in relation to him. This was vehemently denied. Indeed the evidence shows and the Court accepts that whilst undergoing training the Claimant attended and participated in training exercises on his day of worship without hint of protest or objection from him.
- [14] The Claimant further alleged that the First Defendant acknowledged in its defence that his right to freedom of religion had been infringed but considered that accommodating him would mean that other firemen would be put at a disadvantage. This was rejected by the First Defendant in its submissions as was the allegation that the First Defendant had changed his terms of employment. In the light of the First Defendant's submissions and the evidence as a whole I frankly find this to be incredible. So too is the Claimant's allegation that the First Defendant imposed a shift rotation which required the Claimant to work every Saturday. Beyond any doubt the evidence shows and the Court accepts that the rotation system as a general rule necessitated the Claimant as well as other firemen to work every other Saturday.
- [15] The Claimant's further submission that the Attestation Paper was of no effect and ought therefore to be disregarded borders with respect on the absurd as it strikes in my view at the very heart of the Claimant's engagement.
- [16] As a result of those disputed facts the Claimant claims entitlement to certain relief in particular a declaration that he reinstated with the Saint Lucia Fire Service.
- [17] Learned Counsel for the First Defendant submitted in response that the Claimant was in the first place precluded from utilizing the constitutional court in the manner contemplated to permit him to be reinstated to his former post. There is no constitutional right to work. The action contemplated by him is furthermore a civil law action for wrongful dismissal and before the Court can exercise its jurisdiction it must first be satisfied that the action before it is not an abuse of process of the Court.

[18] Indeed the proviso to Section 16(2) of the Constitution specifically provides that:

“... the High Court may decline to exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law.”

And this is exemplified in the Privy Council decision of *Harrikisoon v The Attorney General* (P.C) [1980] A.C 265 which held that:

“it is an abuse of the process of the court to make such an application as a means of avoiding the necessity of applying for the appropriate judicial remedy for an unlawful administrative action which involved no contravention of a human right or fundamentals freedom.”

[19] As I see it following upon a disciplinary hearing held on Monday, 26th June 2006, into allegations of misconduct made against him the Claimant was dismissed for reason that on several specified occasions he had absented himself from duty without the permission of the Permanent Secretary or Head of Department which has been proven. He was therefore found to be guilty of conduct inconsistent with the fulfillment of the conditions of his employment.

[20] It was pointed out that he was under a legal obligation to act faithfully in the execution of his duties to the established rules and principles of the St. Lucia Fire Service and to comply with the conditions agreed to in the Saint Lucia Fire Service Attestation Paper signed by him on 28th April 2005. His failure to report for duty on a multiplicity of occasions without permission and due cause were held to be tantamount to a serious and fundamental breach of his contract of employment in light of which and in accordance with the “Delegation of Powers” dated 3rd December 2003, he was dismissed from the Saint Lucia Fire Service with effect from 15th July 2006.

[21] His dismissal letter came from Mark Louis, Permanent Secretary, Ministry of Labour Relations Public Service & Cooperatives and was copied to the Secretary of the Commission (the 2nd Defendant) and the Permanent Secretary Ministry of Home Affairs and Internal Security and The Chief Fire Officer.

[22] At that point in time the Claimant had several options open to him. In particular he could have appealed to the Public Service Board of Appeal within 21 days and/or applied for judicial review against the Second Defendant and in fact applied for judicial review but not against the Second Defendant the decision maker but against Mark Louis a member of the board. When the matter was struck out for using the wrong party the Claimant never filed judicial review against any body or person. So this motion against the 2nd Defendant is of no avail. And it is abundantly plain that the Claimant although having several remedies available to him his failure to utilize the appropriate ones does not clothe him with the right to bring a constitutional motion seeking reinstatement to his former position.

[23] As stated in Claim AXAHCV 2005/0031 Richardson v The Attorney General of Anguilla:

“any attempt to use the procedures under section 16(1) as a general substitution for normal procedures which were available constitutes an abuse of process.”

[24] And I fully agree with Learned Crown Counsel Jan Drysdale that the decision of the Claimant not to pursue the remedies available to him should disentitle him from seeking redress from the Constitutional Court and further that the Claimant's dismissal and subsequent attempt to be reinstated is not a breach of any fundamental right which the court has jurisdiction to entertain but is an administrative matter for which adequate remedies are available. For these reasons the Court declines to exercise its jurisdiction concerning the Claimant's dismissal and any resultant effects.

[25] The Claimant Imran Jean was crossexamined at some length and as stated earlier in the judgment a number of his assertions were challenged and vehemently denied. Leslie Fontenelle the Chief Fire Officer testified on behalf of the Fire Department whilst Paul Edgar and Anthony Louis gave evidence on affidavit for both Defendants. Mr. Fontenelle impressed as a credible witness whilst Mr. Jean tended to prevaricate. I have earlier in the judgment made specific reference and findings on some of those issues.

[26] Turning to Section 9 of the Constitution which is similar to Article 9 of the European Convention it is plain that Section 9(1) confers two separate and distinct rights on an individual namely:

- (1) the right to hold a belief, and
- (2) the right to propagate or manifest that belief.

Reference was made by learned Crown Counsel for the First Defendant to the dicta of Lord Nicholls of Birkenhead in *R v Secretary of State for Education and others ex parte Williamson and others* [2005] UKHL 15 in which he declared:

“article 9 of the European Convention on Human Rights safeguards the freedom of religion. The freedom is not confined to freedom to hold a religious belief. It includes the right to express and practice one’s beliefs.”

[27] The Claimant it was submitted had not demonstrated that the First Defendant attempted to force him to hold a particular belief or change his belief and accordingly cannot establish that there has been any breach of this section on that basis.

[28] In relation to the second rubric that is the right to manifest one’s religious belief it was submitted that the Claimant by signing the Attestation Paper consented to an abridgement of his right to manifest his religion in the manner complained of. I fully agree with both submissions. And it must be recognized that this right is not absolute but qualified and section 9 itself provides that a person may consent to his rights being abridged. In any event the Claimant is not entitled by virtue of his possession of a particular belief to exercise it as he deems appropriate.

[29] In *KALAC v TURKEY* [1997] 27E HRR 552 p 559 the Court agreed that the right to manifest one’s religious beliefs are qualified and further ruled that a person’s acceptance of employment with certain organizations is de facto consent to an abridgment or limitation of his rights. At paragraph 28 it is specifically stated that:

“In choosing to pursue a military career Mr. Kalac was accepting of his own accord a system of military discipline that by its very nature implied the possibility of placing on certain rights and freedoms of members of the armed forces limitations incapable of being imposed on civilians.”

That ratio is reflected in a number of later decisions culminating in R (on the application of Begum) v Governors of Denbigh High School [2006] UK HL 15 in which Lord Hoffman stated at paragraph 50:

“Article 9 does not require that one should be allowed to manifest one’s religion at any time and place of one’s choosing. Common civility also has a place in religious life.”

[30] Finally the case of Konttinen v Finland 3rd December 1996 is a case of a similar factual matrix to the case at bar in that it reiterated the following points:

- (1) the right to manifest one’s religion is limited
- (2) that acceptance of rules is a limitation of that right and
- (3) that absence from work although motivated by a religious belief does not amount to a breach of article 9.

More particularly it was stated:

“That a civil servant of the State ...had a duty to accept certain obligations toward his employer, including the obligation to observe the rules governing working hours.”

Further

“The State Railways was entitled to rely on its employment contract which the applicant had signed without reservations in 1986. Having joined the Seventh-day Adventist Church in 1991, he was free to relinquish his work if he considered that his professional duties were not reconcilable with his religious convictions.

In these particular circumstances the Commission finds that the applicant was not dismissed because of his religious convictions but for having refused to respect his working hours. This refusal, even if motivated by his religious convictions cannot as such be considered protected by Article 9. Nor has the Applicant shown that he was pressured to change his religious views or prevented from manifesting his religion or belief.

The Commission would add that, having found his working hours to conflict with his religious convictions, the applicant was free to relinquish his post. The Commission regards this as the ultimate guarantee of his right to freedom of religion.”

- [31] It is of paramount importance that all these cases were approved by the House of Lords case of Begum (cited supra) which post-dated the Court of Appeal case of Copesey v WWB Devon Clays Ltd [2005] EW Civ 932 which is relied on by the Claimant and on the basis of which it was submitted that where an employer seeks to change the working hours or terms of employment of an employee in such a way as to infringe on the employee's constitutional rights although such an infringement can exist the solution is to find reasonable accommodation with the employee. It was further submitted that the Defendants in that case sought to change or impose working hours which the Claimant thought would not be imposed so as to prevent him from practising his sincere adherence to his religious beliefs.
- [32] With the greatest respect the factual matrix of that case and the case at bar differ altogether for by signing the Attestation Paper the Claimant consented to an abridgment of his right to manifest his religion in the manner complained of. As pointed out earlier that right is not absolute but qualified and indeed Section 9 of the Constitution provides that a person may consent to his rights being abridged. Begum therefore remains the authority for determining whether the right to manifest one's religious beliefs has been infringed.
- [33] The Claimant although sincere in his belief has failed to realize that not all rights and freedoms are absolute and in a pluralistic society accommodation must be made for society to function effectively. So that whilst no person can demand that any person hold a particular belief section 9 will in fact protect his or her right to hold no religious belief it does not vest a person with the right to manifest those beliefs in any manner and at any time contemplated. That right is subject to limitation and because the right to manifest a belief is limited it is established that voluntary acceptance of rules even where that acceptance occurred before a party held a particular belief effectively limits that right and the nature of an organization may de facto limit that right as well.

- [34] Further an employee has certain obligations that is owed to his or her employer in particular the rules which govern work. So that refusal to work albeit motivated by one's religious convictions cannot be considered as protected by Article 9 for that article does not guarantee the right to be exempted from rules which apply generally and neutrally.
- [35] So the evidence reveals and it is widely recognized that the Fire Service is well within the law of setting a rotational schedule to govern the hours of work of its officers. And the fact that such hours may entail an officer having to work on a day which is inconvenient to him or on his day of worship for that matter is not a breach of his section 9 rights to manifest his religious belief.
- [36] The Claimant has also alleged that his rights pursuant to section 13 of the Constitution had been infringed in relation to him. This relates to discrimination on the grounds of race creed etc. Learned Counsel has placed heavy reliance on the Charter of Rights and various Canadian cases in interpreting and extending the provisions of the Constitution to forge a breach of section 9. This is flawed as learned Crown Counsel pointed out in her closing submissions not only because the Constitution was crafted in accordance with the European Convention but also because the Charter of Rights came into being in 1982 three years after the Constitution was in force. It therefore cannot be presumed that the Charter affected in any shape or form the provisions of the Constitution. It is no doubt for that reason that Counsel for the First Defendant has placed reliance on cases emerging from the European Court which has extensively interpreted cases dealing with in particular section 9 rights viz the right of freedom of religion and the freedom to manifest that religion.
- [37] In order to determine whether a party has been discriminated against regard must ofcourse be given to the definition of that expression. Section 13(3) states that:
- “In this section, the expression “discriminatory” means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by sex, race, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are

not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.”

[38] In *Defreitas v Permanent Secretary of Agriculture* (1998) 3 WLR 375 the Court held that:

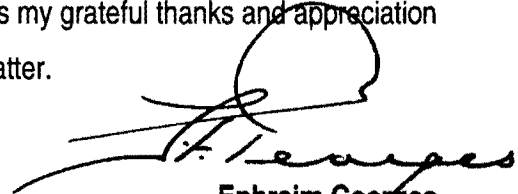
“While it may be justifiable on occasion to imply words into a statute where there has been an ambiguity or an omission and the implied words are necessary to remedy such a defect, in the present case subsection 10(2)(a) is perfectly clear and entirely free from any ambiguity or omission.”

[39] It is accordingly clear from the foregoing that in order for a policy rule or treatment to be deemed discriminatory it must be applied selectively. As expounded by Massiah JA in *Nieslon v Barker* (1982) 32 WIR 254 at page 280:

“The word “discriminatory” in article 149 (of the Guyana Constitution which is akin to section 9 of the Saint Lucia Constitution) does not bear the wide meaning assigned to it in a dictionary. It has a precise and limited connotation. Although it contains the elemental constituent of favouritism or differentiation in treatment its application is confined only to favouritism or differentiation based on “race place of origin political opinions colour or creed.” No other kind of favouritism or differentiation is “discriminatory” within the narrow constitutional definition of that word in article 149(2). It is to be profoundly in error to think that there has been a contravention of a person’s fundamental rights under section 149 where the alleged discrimination is based on some ground other than those referred to above no matter how reprehensible such grounds may appear to be. Such a situation clearly does not come within the purview of the constitutional guarantee although there may well be other means for its investigation and for securing redress.”

[40] As learned Crown Counsel rightly pointed out in her closing submissions at paragraph 6.7 the Claimant by his own admission stated that the policy regarding rotation/shift work was applied to all officers thereby defeating the suggestion that there was some unfairness in treatment. Moreover the Claimant has not provided any evidentiary basis to substantiate the allegation of discrimination. Mere allegation of a breach is insufficient to found a cause of action. I fully agree that the Claimant has consequently failed to demonstrate that there has in fact been a breach of section 13 of the Constitution and his claim is accordingly dismissed.

[41] In the result the constitutional motion against both Defendants dated and filed 6th August 2008, is consequently struck out with costs to the First Defendant in the sum of \$1000.00. In parting I wish to express my grateful thanks and appreciation to both Counsel for their assistance in this matter.



Ephraim Georges
High Court Judge [Ag.]