

**EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE**

(CIVIL SUIT)

**BRITISH VIRGIN ISLANDS
BVIHCV 2010/305A**

JULIAN WILLOCK

Claimant

V

**THE ATTORNEY GENERAL
CHAIRMAN PUBLIC SERVICE COMMISSION
DIRECTOR OF HUMAN RESOURCES OF THE GOVERNMENT OF THE VIRGIN ISLANDS**
Respondents

Appearances:

Gerard Farara Q.C counsel for the Claimant

Baba Aziz, Attorney General and Karen Reid Senior Crown Counsel for the
Attorney General

Judgment:

(2011: January 31, February 3)

(Ruling on application for leave to apply for judicial review)

[1] **Joseph-Olivetti J:** -By this application, Mr. Julian Willock seeks leave to make a claim for judicial review pursuant to CPR 2000 Part 56.

[2] The law governing such applications is not in dispute. Essentially, an applicant must satisfy the court that he/she has a sufficient interest in the subject matter, that no alternative form

of redress exists, that there has been no undue delay in making the application and that there is an arguable case for review, that is, one in which he/she has a reasonable prospect of success. See CPR 56.2 and 56.3. **Panday v The Judicial and Legal Services Commission (Mauritius) [2008] UKPC 52.**

- [3] The main dispute for determination at this stage is whether or not Mr. Willock has such a case. The court is not therefore called upon to determine the substantive issues and will be careful not to make any findings whether of fact or law on any substantive issue that may be raised if leave is granted.
- [4] The short factual background for these purposes is as follows. Mr. Willock is the Permanent Secretary in the Ministry of Communications and Works. He was sent on compulsory leave following the publication of an article in the BVI Beacon which made certain allegations of misconduct against him.
- [5] In July 2010 Mr. Willock was informed by the Deputy Governor that investigations would be conducted into the allegations of misconduct contrary to General orders 3.27. In due course the Governor appointed an investigative Committee (“the Committee”) to investigate the allegations and by letter of 22 September 2010 the Acting Director of Human Services sent Mr. Willock the Terms of Reference of the Committee, its composition, Guidelines and an explanation of the investigation process.
- [6] The Terms of Reference included this first statement, “to investigate into allegations of misconduct and to determine whether there is a case to answer in respect of all or any of the allegations stated hereunder”. The letter, **inter alia** stated:-“the investigation is to be conducted in accordance with the enclosed Guidelines which were provided to the Investigating Committee and is provided for your information and reference.”
- [7] The Guidelines, *inter alia*, stated that a face to face interview with Mr. Willock was central to the process.

- [8] The members of the Committee comprised 3 persons only one of whom was a public officer. It appears that those persons were required to take an oath of secrecy upon assuming office.
- [9] Mr. Willock challenged the legality of the Committee by his solicitor's letter dated 23 September 2010, and in response the Attorney General by letter of 23 September relied on section 92(1) of the Virgin Islands Constitution Order 2007 and Rule 34(2) of the Public Service Commission Regulations. ("the Regulations") to justify the appointment of the Committee. In addition, the Attorney General also assured Mr. Willock that the process embarked upon embodied the principles of fairness and respect for the rules of natural justice.
- [9] By letter of 24 September 2010, the Chairman of the Committee required Mr. Willock to submit a written explanation concerning the allegations within 7 days. Mr. Willock duly complied. He received no other communication from the Committee, even after the slated period for reporting had been extended by the Governor at the request of the Committee. In short, the evidence before the court which was not disputed disclosed that at no time did the Committee require Mr. Willock to attend a face to face interview or appraise him of the evidence against him.
- [10] Subsequently, Mr. Willock was informed that the Committee had delivered its Report of 30 November 2010 to the Public Service Commission, "the PSC" and the Report was placed on the agenda for the PSC's meeting scheduled for 7 December 2010. He then launched these proceedings in which he seeks the following substantive declaratory other relief:-
- i. That the Governor and the Public Service Commission's appointment of the Investigation Committee was ultra vires the Constitution and the Public Service Commission Regulations and therefore null and void;
 - ii. That the report made and submitted by the Committee ought to be quashed;
 - iii. That there is procedural irregularity in that Regulation 47 of the Regulations has not been followed;
 - iv. That the Committee did not conduct the investigations in accordance with its own guidelines;
 - v. That the Committee conducted the investigation in a manner grossly unfair to him;

- vi. That the Committee improperly exceeded its remit by making positive findings, conclusions and recommendations;
- vii. That he was not afforded the opportunity of responding to new allegations either in writing or through the process of interviewing by the investigation Committee;
- viii. That there was bias against him in that the investigation was one sided.

[11] Hariprashad Charles J on 15 December 2010 granted him an interim injunction staying all proceedings of the “the PSC” in connection with this matter until further order.

[12] **Submissions**

[13] In a nutshell the thrust of Mr. Farara’s argument is that the appointment of the Committee is **ultra vires** the powers of the Governor and that of the PSC conferred on them by the Constitution and the Regulations. Counsel submitted that the power to discipline public officers is granted to the Governor by section 92 (1) of the Constitution. However, the Governor is required to act on the advice of the PSC. Section 91 of the Constitution establishes the PSC whose functions including matters of discipline of public officers are regulated by the Regulations. Nowhere in these Regulations is there any power given to the PSC to establish or appoint an investigating committee in circumstances where dismissal may be warranted. He contended that in this case the allegations were so serious that if well founded dismissal could very well result and therefore the PSC had to apply Regulation 47 which was not done.

[15] Therefore, says Mr. Farara, the PSC has embarked on a course by which it has not followed the procedure as laid down in the Regulations. The Governor does not have any autonomous authority to direct a course other than that set out in the Regulations and accordingly the appointment of the Committee was ultra vires and void.

[16] Mr. Farara also submitted that in any event the powers and functions accorded to the Committee under its Terms of Reference and the Guidelines exceed any power or authority that could lawfully be given to such an investigating committee.

- [17] And, further that, even if the PSC had the power to conduct a preliminary investigation it is patent from the Terms of Reference and the Guidelines given to the Committee that the PSC delegated that function and authority to the Committee and, most importantly, gave to the Committee powers and functions with regard to not only the collection but the assessment of evidence, which are all functions and powers reserved to the PSC or a Tribunal established under Regulation 47. The Investigating Committee is not a sub-committee of the PSC and therefore the PSC could not lawfully delegate those discretionary powers to the Committee. See **Vine v National Dock Labour Board [1957] AC. 488.**
- [18] Learned Counsel also argued that the Committee was given Guidelines for the conduct of the investigation. This was shared with Mr. Willock who had a legitimate expectation that the Guidelines would be observed by the Committee. This included in particular, affording him a fair opportunity of being heard including, most importantly, a face to face interview as well as the opportunity to deal with the allegations and evidence being lead against him. The Committee clearly acted in breach of its own guidelines and to the eventual prejudice of Mr. Willock. Counsel relied on inter ali **Attorney General of Hong Kong v Ng Yuen Shiu [1983] 2 A.C. 629.**
- [19] Mr. Aziz, the learned Attorney General, submitted in gist that the Committee was properly appointed to deal with a situation which was not expressly provided for as the Regulations did not expressly provide for a preliminary inquiry but that nonetheless the Governor had power to appoint an investigative Committee. He relied on section 92 of the Constitution, Rules 34(2) and 35 of the Regulations and section 19 of the Interpretation Act (Cap 136).
- [20] Mr. Aziz submitted in reliance on Rule 35 that there is a clear distinction between a preliminary investigation and a formal investigation. The purpose of a formal investigation is to determine or establish whether the person being investigated has committed a disciplinary offence. But that the essence of a preliminary investigation is that of a “the filter mechanism, not uncommonly found in disciplinary code to obviate the need for the

committee to spend time giving extended consideration to unfounded complaints. See **Grant v The Teacher's Appeal Tribunal and Anr (Jamaica) 2006** UKPC 59, para. 28.

[21] In the instant case, Mr. Aziz argued that the Committee was merely charged with gathering evidence and statements from persons including a written explanation from Mr. Willock in response to the allegations and that their proceedings and report are determinative of nothing. They are merely collecting information to be placed before the PSC whose power it is to determine whether there is sufficient information upon which it can make a decision whether charges can be laid and, if so, whether they will be laid under regulation 45 (if they do not warrant dismissal) or under regulation 47 (if dismissal is contemplated). He urged that there is no prejudice to Mr. Willock, as it may well be that the PSC forms the opinion, after consideration of the report, that no further action need be taken.

[22] Further, it is only if the PSC is of the opinion that a charge or charges will be laid against Mr. Willock that the procedure under regulation 45 or 47 will be set in motion and an actual hearing take place before the PSC or a Tribunal appointed by the PSC under rule 47. It will only be at that stage that Mr. Willock will be entitled to the evidence against him and he will have ample opportunity to retain counsel, to be made privy to the evidence against him and to prepare his defence. In short that he was not prejudiced by the Committee's breach of its own Guidelines.

Court's Consideration

[23] The Court is not required to embark upon an in-depth study of the case in order to determine whether there is an arguable case. It is satisfied if upon "a quick perusal of the papers' there is evidence that there is an arguable case, that is, that there is a case fit for further investigation at a full "with notice" hearing of a substantive claim for judicial review. See **Panday v Judicial and Legal Services Commission [2008] UKPC 52**

[24] I have had regard to all pertinent legislation cited. I note that Section 92 (1) of the Constitution provides that the Governor acting on the advice of the PSC shall have the power to make appointments to public offices and to remove and exercise disciplinary control over public officers. The Governor may also act in his own discretion, otherwise than advised by the

PSC, if he is of the view that such advice would prejudice Her Majesty's Service. The rider clearly does not apply

[25] I remark that Rule 33 of the Regulations obligates the PSC to deal with disciplinary proceedings against officers in light of reports from Permanent Secretaries, Heads of Departments or otherwise in the manner set out in Part VI of the Regulations.

[26] I also note **the Appointment to Public Office (Devolution of Human Resources Functions) Regulations 2008**, cited by Mr. Aziz. By this Instrument the Governor delegated some of his powers under section 92 (1) of the Constitution, (including administration of disciplinary proceedings for minor offences) to certain Authorized Offices among them Permanent Secretaries. Mr. Aziz argued that this Instrument did not apply to Mr. Willock but that the Guidelines applicable were borrowed from that Instrument as it provided for the establishment of investigative committees and therefore strict adherence to the Guidelines by the Committee was not mandated. This is questionable in the light of the representation made in writing to Mr. Willock.

[27] I observed that Rule 34(1) provides that any misconduct by an officer shall be dealt with under Part VI of the Regulations as soon as possible after the time of its occurrence. And Rule 34(2) states any case not covered by the Regulations shall be reported to the Chief Establishment Officer and the Commission may issue instructions as to how the case is to be dealt with and the case shall be dealt with accordingly.

[28] Clearly, Rule 34 (2) envisages that there may be circumstances giving rise to disciplinary proceedings which do not fall within the specific provisions of the Regulations and the central issue here is whether this is such a case and if so what provisions should obtain. Mr. Farara has made out a strong case that Rule 47 applies.

[29] Also, I remark the provisions of Rules 35, 40 and 47 of the Regulations.

[30] **Conclusion**

[31] In my judgment, having considered briefly the arguments and the numerous authorities relied on, Mr. Willock has more than satisfied the threshold burden and is entitled to the relief sought as he has presented a good arguable case with a reasonable likelihood of

success questioning the validity of the appointment of the Committee and its proceedings. I will therefore grant him leave as prayed for and also continue the interim injunction until the determination of the judicial review proceedings. Costs will follow the substantive action.

[32] I will hear counsel on the necessary directions to be given. I thank counsel for their invaluable assistance.

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Rita Joseph-Olivetti
Resident Judge
Territory of the Virgin Islands