

SAINT LUCIA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

Claim No: SLUHCV 2010/0931

BETWEEN

SONIA M. JOHNNY

Applicant

AND

[1] THE CABINET
[2] THE PERMANENT SECRETARY
[3] THE ATTORNEY GENERAL

Respondents

APPEARANCES:

Ms. Cynthia Hinkson-Ouhla for the Applicant
Mr. Raulston Glasgow with Ms. Jan Drysdale and Ms. Cagina Foster for the Respondents.

2011: January 13th,
September 26th.

RULING

[1] **WILKINSON, J:** At 20th October 2010, the Applicant filed an application for an order that leave be granted to apply for judicial review of the Respondents' decision refusing the Applicant's request for payment in lieu of vacation leave to which she says she was entitled under the terms of her employment contract. This application was subsequently amended and an amended application filed 7th December 2010. Therein the following relief was sought:

- (i) A declaration that the Applicant is entitled to payment in lieu of leave.
- (ii) An order for payment of all leave ordered plus interest.
- (iii) Certiorari quashing the Respondents' decision refusing the Applicant's request for payment in lieu of leave.
- (iv) Mandamus compelling the First Respondent to order payment to the

Applicant.

- (v) An order compelling the Respondents to produce the Cabinet memo and supporting documents submitted by the Second Defendant for the consideration of the Applicant's application.
- (vi) The documents considered and the material facts relied on by Cabinet in arriving at its decision.
- (vii) Interest pursuant to article 1009AA of the Civil Code.
- (viii) Costs.
- (ix) Any other order the Court deems fit.

The grounds of the application were:

- (i) The Applicant was appointed to the position of Saint Lucia's Ambassador to the Organization of American States in 1997 and held that position by a series of contracts from 1997 to 2007.
- (ii) During her tenure in office due to the exigencies of employment commitments the Applicant was only able to take short spells of vacation leave and accumulated seven and a half (7 1/2) months vacation leave which had been rolled over from contract to contract.
- (iii) By letter dated 9th January 2007, the Applicant applied to the Permanent Secretary for permission to take three and a half months (3 1/2) months vacation leave and receive payment in lieu for the remaining four (4) months.
- (iv) On 1st March 2007, the Applicant resigned from the service of the Government of Saint Lucia.
- (v) Despite many attempts to obtain a response from the First Defendant to her letter of 1st March 2007, the First Defendant failed to or refused to respond.
- (vi) On or about 19th July 2010, the Applicant received a letter from the Ministry of Foreign Affairs, International Trade and Investment informing her that her application for payment in lieu of accumulated leave was not approved by Cabinet.

The Evidence

- [2] The Applicant filed two (2) affidavits, the first on 20th October 2010, when she filed the original application and the second titled "amended affidavit" filed on 7th December 2010, when she filed the amended application. The Respondents also filed two (2) affidavits, the first on 26th November 2010, and the second on 17th December 2010.

- [3] The contents of the Applicant's affidavits were not denied by the Respondents.
- [4] The Applicant was hired and appointed by the Government of Saint Lucia on 17th November 1997, under a three (3) years contract as Ambassador for Saint Lucia to the United States of America and to the Organization of American States. The contract was subsequently renewed on apparently three (3) further occasions. The 1997 contract provided:

"Leave of (Absence) 8. The person engaged, shall be entitled to 33 working days per annum. Leave due during the tour of service shall normally be taken on completion on (of) the tour of service." (My emphasis)

The Applicant's contract executed at 17th November 2000, for 3 years changed the clause providing for vacation leave and it provided:

"Leave of Absence 8. The person engaged, shall be entitled to THIRTY-THREE working days per annum. Leave entitlement must be taken during the tour of service."(My emphasis)

The Applicant's contract on renewed at 17th November 2003, for 2 years provided:

"Leave of Absence 8. The person engaged, shall be entitled to THIRTY-THREE working days per annum. Leave entitlement must be taken during the tour of service. (My emphasis)

The three (3) contracts mentioned above provided the following identical term:

"1. The person engaged undertakes that he will, while in Saint Lucia (hereinafter called "the State") diligently and faithfully perform the duties of AMBASSADOR FOR ST. LUCIA TO THE UNITED STATES OF AMERICA AND THE OAS for the term of his engagement, and will act in all respects according to instructions and directions given to him by the Government through the PERMANENT SECRETARY, MINISTRY OF FOREIGN AFFAIRS AND INTERNATIONAL TRADE or other duly authorized officers."

- [5] The Court was not given sight of the renewal contract for the period 2005 to 2007, and is not prepared to guess at the provision for vacation leave.
- [6] The Applicant said that in relation to vacation leave she was also entitled according to the Foreign Service Orders to "home leave" every two (2) years and

this meant airline tickets for the person holding her post and their family to return home for at least three (3) weeks of vacation. She did not have the opportunity to use this entitlement.

- [7] Under the contracts, the Applicant held the posts continuously for nine (9) years, three and a half months (31/2) months. She resigned at 1st March 2007.
- [8] According to her contracts, the appointment as Ambassador fell under the jurisdiction of the Ministry of External Affairs, Trade and Investment (hereinafter 'the Ministry'). The Applicant said that as Ambassador "in order to perform my duties effectively I was required to serve my country on a twenty four (24) hours basis". During the course of her employment she says that due to the exigencies of the positions she was only able to take very short breaks and so her vacation leave accumulated and was rolled over from contract to contract.
- [9] The matters which engaged her time were (i) the "Banana Wars" between 1998 to 2000 - during this time because Saint Lucia was Chair of CARICOM she was made to assume Chair of the Cuacus of the Caribbean Diplomatic Corps and during this period she was under intense pressure from Caricom and so was required to relentlessly pursue and spend an enormous amount of time lobbying on Capital Hill; (ii) between 1998 to 2005, she held the post of chair of the Leo Rowe Student Fund; (iii) between 2002 and 2004, she on the instructions of the Prime Minister accompanied the Minister of Foreign Affairs on several fact finding missions to Haiti;(iv) between 2000 and 2001, she acted as the Caribbean's representative in the negotiations of the Democratic Charter; (v) in 2004, she was the Caribbean's representative in the negotiations of the Social Charter; (vi) in 2006, she was appointed chairperson of the Permanent Council; (vii) at August 2005, she acted as liaison between Saint Lucian students studying at Mexico and the Mexican government; (viii) at Summer 2004 to that year's end she acted as liaison for the Caribbean Labour Board for Saint Lucian students from the Sir Arthur Lewis Community College Hospitality division who were to participate in a practical training program at The Breakers Resort, Florida. The Government she

asserted at all times knew of her activities and in some instances asked her to undertake the activity, or stated that she being chosen by her peers was a boost to Saint Lucia.

[10] Her duties were overlapping and as a consequence she says she was not able to take leave. Further, the Government never asked her to proceed on vacation leave nor appointed anyone to act as Ambassador, the usual practice while she proceeded on leave. It was an implied term of the contracts that she would be paid for accumulated leave.

[11] At 9th January 2010, prior to terminating her contract she wrote to Mr. Cosmos Richardson requesting permission to take her outstanding leave. He never responded. Indeed she heard nothing from anyone until the letter of 30th June 2010, and this letter she received on the 19th July 2010. The letter stated:

“Dear Ms. Johnny,

RE: REQUEST FOR PAYMENT IN LIEU OF LEAVE

The Ministry of External Affairs, International Trade and Investment wishes to inform you that your request for payment in lieu of accumulated leave was not approved.

Yours sincerely,

(signed)
PERMANENT SECRETARY”

[12] During her tenure in the Banana War Years in consultation with the Permanent Secretary it was agreed between them that political events do not wait for anyone and that like other Ambassadors, and bearing in mind the importance of bananas to Saint Lucia, she should seize the moment, continue to work on Capital Hill and forget about her leave.

[13] There was provided to the Court copies of 2 pages of a leave register but it bore no identification marks as to whose leave was recorded therein and it also was not

certified so as to attest to its authenticity of an a particular record. The Court will therefore have no regard to this particular document.

The Applicant's submissions

- [14] The Applicant had earned her vacation leave in accordance with her contracts. The accumulation of leave was sanctioned by the Ministry of Foreign Affairs, International Trade and Investment in that the Permanent Secretary of the Ministry rolled over the Applicant's leave from one contract to the next with the approval of the Minister of Foreign Affairs, International Trade and Investment.
- [15] The Applicant was not able to take all of her vacation leave because of a number of extenuating circumstances which were recognized as such by the Ministry of Foreign Affairs, International Trade and Investment.
- [16] At no time did the Second Defendant under whose instructions and directions the Applicant acted request her to proceed on leave or inform her it would be forfeited. The Applicant admitted that forfeiture of leave was permissible.
- [17] The Applicant asserted that it was not an insurmountable position in law that judicial review was not available where an alternative remedy was available. For this proposition she cited **R v. Chief Constable of Merseyside Police ex p. Calveley**¹. Further the test at this juncture was whether the Applicant had made out an arguable case on the grounds of illegality, irrationality, unreasonableness and in particular a legitimate expectation. The presence of alternative remedies she said did not without more disallow an application for judicial review and for this proposition she relied on **R. v. Crown Prosecution Service ex p. Hogg**².
- [18] Cabinet she submitted was a proper party to the suit as it was a Constitutional body performing public functions and its duties were derived from statute. In respect of its functions and duties, the main function of Cabinet was to determine

¹ [1986] QB 424

² [1994] 6 Admin. L R 778.

policy. The Applicant's position was that the decision on rotation of the Applicant's leave and subsequent decision to deny payment in lieu were policy decisions.

- [19] In response to the submission by the Respondents that the Crown Proceedings Act was relevant to the case, Counsel said that the Act applied only to private law proceedings involving public law officers and for this proposition she cited **Minister of Foreign Affairs, Trade & Industry v. Vehicles & Supplies Ltd. et anor.**³ She therefore had no alternative remedy.

The Respondents' submissions

- [20] The Respondents' submissions were brief. Counsel said that the Applicant was not entitled to payment for vacation leave as she had not satisfied the requirements for such leave and hence the decision in the letter of 30th June 2010.
- [21] Counsel also submitted that the application for leave was filed in excess of four (4) months post notification of the decision not to award the Applicant payment in lieu of leave, the decision having been communicated on 19th July 2010, and the application having been filed on the 20th October 2010. The Applicant was duty bound he said by CPR 2000 Part 56.5 to act with expedition in applying for leave.
- [22] Further, the evidence of the Applicant demonstrated that the Applicant had an alternative remedy therefore she failed to satisfy the requirements of CPR 2000 Part 56.3(3)(e). It was a case of contract between the Applicant and the Government, and she asserts that contract was varied by an implied term and so it was a case of breach of contract.
- [23] That by virtue of the Crown Proceedings Act, the First and Second Respondents were inappropriate parties in the application. The First Respondent was not a legal entity and so was incapable of being sued. In addition, in relation to the Second

³[1991] 1WLR 550 PC

Respondent, the Applicant had conceded that the Second Respondent was not the decision maker and therefore she ought not to have been joined in the suit.

- [24] Finally, the Respondents submitted that the Court could not grant an order of mandamus compelling the Respondents to produce all the documents utilized to render the decision not to make the payment in lieu of vacation leave.

Law:

The applicable law is cited hereunder.

- [25] The Respondents have submitted that the First Respondent is not a legal entity and therefore ought not to be joined in the suit. The Constitution⁴ at section 61 states:

“61.-(1) There shall be a Cabinet of Ministers for Saint Lucia which shall consist of the Prime Minister and the other Ministers.

(2) ...

(3) The functions of the Cabinet shall be to advise the Governor-General in the government of Saint Lucia and the Cabinet shall be collectively responsible to the Parliament for any advice given to the Governor-General by or under the general authority of the Cabinet and for all things done by or under the authority of any Minister in the execution of his office....”

The Antigua Constitution states the following:

“70. – (1) There shall be a Cabinet for Antigua and Barbuda which shall have the general direction and control of the Government and shall be collectively responsible therefore to Parliament.”

The issue of whether the Cabinet of Antigua could be the subject of judicial review proceedings came under consideration in **HMB Holdings Ltd v. Cabinet of Antigua and Barbuda**⁵ a case involving the Land Acquisition Act, which provided:

⁴ Cap. 1.01 of the Saint Lucia Revised Laws 2008.
Cap. 205

⁵ Privy Council Appeal No. 18 of 2006.
Chapter 12.08
Chapter 15.05

" 3(1) If the Cabinet considers that any land should be acquired for a public purpose they may, with the approval of the Legislature, cause a declaration to that effect to be made by the Secretary to the Cabinet in the manner provided by this section and the declaration shall be conclusive evidence that the land to which it relates is required for a public purpose."

Their Lordships said that the first question which arose was whether the Cabinet's decision was open to review having regard to the terms of the Land Acquisition Act. Their Lordships found that the decision of Cabinet in that matter was reviewable and it was open to **HMB Holdings Ltd**⁶ to challenge the Cabinet's decision on the ground that it was irrational.

[26] The Court has observed that there are several Acts at Saint Lucia where Cabinet is the decision maker, see for example the Insurance Act Chap. 12:08 section 166 which provides that Cabinet may authorize certain exemptions, the Custom (Control and Management) Act Chap. 15:05 which provides that Cabinet may remit or authorize the refund of any rent payable, to name but two (2).

[27] Counsel for the Respondents also submitted that there was a delay, the Applicant having received notice of the decision at 19th July 2010, and yet only filed her application for leave at 20th October 2010. While Counsel relied on authorities from outside the jurisdiction on the issue of delay, the Court refers to **Doolittles v. Doubloom International et al**⁷ and **Urban Dolar v. The Board of Governors, Sir Arthur Lewis Community College**⁸. On the issue of delay the Court was extremely grateful for the learning of Edwards JA in HCVAP 2010/023 **Roland Browne v. The Attorney General and The Public Service Commission**.

[28] Edwards JA. in HCVAP 2010/023 **Roland Browne v. The Attorney General** in addition to examining the position at England reminded us that the legislative context in England must be carefully examined when interpreting CPR 2000 Part 56.5(2). She added:

⁶ Ibid

⁷ Civil Appeal No. 9 of 2005 (unreported) (St. Lucia) in which the Court rejected the Attorney General's argument that the 3 months time limit applied under CPR 2000

⁸ Civil Appeal No. 30 of 2009 (unreported) (St. Lucia)

"[21] It is immediately noticeable that we have no rule in our CPR which is comparable to the English Order 53, Rule 4. Consequently, the absence of any rigid time limit for invoking the supervisory jurisdiction in Saint Lucia is salutary, subject of course to the Court's insistence on reasonable promptness in all the circumstances of each particular case, and rejection of stale claims.

[29] The Civil Procedure Rules Part 56.3 (3) provides for mandatory matters which must be set out in an application and the issue has arisen as to whether the Applicant has complied with the requirements. Part 56.3(3) provides:

"56.3 (1) ...
(2) ...
(3) The application must state –
(a) the name, address and description of the applicant and respondent;
(b) ...
(e) whether an alternative form of redress exists and, if so, why judicial review is more appropriate or why the alternative has not been pursued;"

[30] Contrary to the Applicant's submission, the authorities appear to have been quite decisive about judicial review not being available where alternative remedies are available. In **R v. Ministry of Agriculture, Fisheries and Food, ex p. Live Sheep Traders Ltd**⁹. it was said:

"It is a cardinal principle that, save in the most exceptional circumstances, the jurisdiction to grant judicial review will not be exercised where other remedies are available and have not been used".

And in **R (Bancoult) v. Secretary of State for the Foreign and Commonwealth Office**¹⁰ it was said:

" judicial review is a legal recourse of last resort and [a claimant] must exhaust any proper alternative remedy open to him before the judicial review court will consider his case."

And again in **R(Lloyd) v. Dagenham London Borough Council**¹¹ it was said:

"The Court is here as a last resort where there is illegality."

⁹ [1995] COD 297

¹⁰ [2001] QB 1076 at [27]

¹¹ [2001] 4 CCLR 196 at [27]

[31] Counsel for the Respondents relied on the Crown Proceedings Act which provides: -

2. (3) Any reference in Parts 3 or 4 to civil proceedings by or against the Crown, or to civil proceedings to which the Crown is a party, shall be construed as including a reference to civil proceedings to which the Attorney General, or any Government department, or any officer of the Crown as such, is a party.

However, the Crown shall not for the purposes of Parts 3¹² and 4¹³ be deemed to be a party to any proceedings by reason only that they are brought by the Attorney General upon the relation of some other person."

Findings:

[32] The Court's first finding is that since none of the facts deposed to by the Applicant about the existence of the original and renewed contracts, and the duties and work carried out pursuant and connected with them are denied then the contracts are deemed to be valid and the other evidence reliable.

[33] It is required of the Applicant when looking to file an application for leave to file judicial proceedings that she consider 5 questions: (i) whether there is a reviewable act or omission? (ii) on what ground might it be challenged? (iii) when would be the right time for challenge? (iv) what judicial review would achieve? (v) whether it can be achieved by any other means?¹⁴

[34] On perusal of the Applicant's application the Court could not find any grounds which set out for example bad faith, bias, improper motive, unfairness, unreasonableness, or unlawfulness but rather the Applicant appears to have set out under what is prescribed for at Part 56.3(3) (a) name, address, and description the following:

"1. The Applicant, Sonia Johnny of 5191 Cottingham, Alexandria, Fairfax County, Virginia, USA was appointed to the Public Service as the

¹² Right to sue the Crown

¹³ Liability of the Crown in delict
Chapter 2.05

¹⁴ Judicial Review Handbook, Michael Fordham Q.C. 5th edition p.5

Ambassador for Saint Lucia to the United States and the Organization of American States (OAS) on or about November 17th 1997. The First Respondent, the Cabinet is sued for illegally advising that the Applicant was not entitled to payment in lieu of leave. The Second Respondent is sued for failing to exercise her responsibility to make arrangements to allow the Claimant from utilizing her vacation leave, and the Third Defendant (Respondent) is sued as the nominal representative of the Government of Saint Lucia which is the Second Respondent's Employer."

Therefore there is failure in the application.

- [35] It is not doubted that a decision was rendered not to pay the Applicant as this is the content of the letter dated 30th June 2011. There is no indication in the letter that the decision was made personally by the Second Respondent and as Counsel for the Respondents submitted, the Applicant ultimately from the content of her affidavits knew this yet persisted in joining the Second Respondent. Indeed the nature of the relief sought indicates to the Court who the Applicant believes made the decision, the First Respondent. Therefore, based on the Applicant's own statements as to who she believed made the decision not to pay her, the Court is of the view that the Second Respondent ought not to have been made a party to the proceedings.
- [36] On the authority of **HMB Holdings Ltd. v. Cabinet of Antigua and Barbuda**¹⁵ the Court rejects Counsel for the Respondents submission that the First Respondent could not be a party to the proceedings. The question left for the Court is whether on the facts before the Court, the Applicant is entitled to seek leave to file judicial review proceedings.
- [37] Going back to first principles guiding judicial review, the Court must decide whether there is a reviewable act or omission and on what ground might it be challenged on. In the contracts between 1997 to 2003 provided to the Court, the provision for leave contradict the Applicant's assertions (i) that accumulated leave could/would be rolled over from contract to contract, (ii) that it was an implied term that she would be paid for accumulated leave. The contracts for 1997, 2000 and

¹⁵ Privy Council Appeal No.18 of 2006.

2003 clearly provided that leave was to be taken within the time-frame of the contract. From the Applicant's evidence it would appear that where there were alleged variations of the contract, she was a willing participant and now that there is a decision with which she disagrees she seeks leave to file judicial review proceedings. It appears to the Court that as what is being sought is further deviation from the stated terms of the contract, then the Applicant ought to proceed by way of an alternative remedy.

[38] The Court therefore refuses the Applicant leave to file judicial review proceedings.

The Court Order:

1. Leave to file judicial review proceedings is refused.

Rosalyn E. Wilkinson
High Court Judge