

Horace Fraser

Appellant

v.

**(1) Judicial and Legal Services Commission
(2) The Attorney General**

Respondents

FROM

**THE COURT OF APPEAL OF
SAINT LUCIA**

JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL

Delivered the 6th May 2008

Present at the hearing:-

Lord Hoffmann
Lord Hope of Craighead
Lord Scott of Foscote
Lord Walker of Gestingthorpe
Lord Mance

[Delivered by Lord Mance]

1. Under the Constitution of St Lucia “[t]he power to appoint persons to hold or act in offices” which include the office of (inter alia) magistrate is vested in the Judicial and Legal Services Commission (s.91(2)), and “the power to exercise disciplinary control over persons holding or acting in [such] offices and the power to remove such persons from office” is likewise vested in the Commission (s.91(3)). It appears that in practice, once the Commission decides that a person should be so appointed, a written agreement to give effect to the appointment and deal with matters

such as salary is made between the person in question and the Ministry of Public Service.

2. Pursuant to decisions by the Commission, the appellant served as a magistrate in St Lucia under successive annual contracts, the first commencing on 6 September 2000 and the last on 6 September 2003. By letter from the Permanent Secretary of the Ministry of Public Service dated 15 January 2004, followed by a second letter stated to supersede it dated 16 January 2004, the appellant was dismissed from his office with effect from 19 January 2004. In respect of that dismissal, the appellant sought constitutional relief against both the Commission and the Attorney General representing the Government of St Lucia.

3. On 10 June 2005 Shanks J Ag gave judgment in his favour, declaring that both the Commission and the Government had contravened s.91 and ordering the Commission (only) to pay the appellant (a) his net loss of salary and other benefits (including gratuity) for the period 19 January to 5 September 2004 and (b) \$10,000 for distress and inconvenience. On 28th November 2005 the Eastern Caribbean Court of Appeal allowed the Commission's and Government's appeals in respect of the judge's finding that they had been in breach of s.91 of the Constitution. The Court held that the only breach was a breach of the appellant's contract by the Government. The majority (Barrow JA and Gordon JA) held that this breach consisted in a failure to pay one month's salary in lieu of notice; Rawlings JA, in the minority, would have awarded three months' salary. Against the Court of Appeal's decision, the appellant now appeals to the Board.

4. The relevant agreement for the appellant's employment was dated 29 October 2003 and was in a form which is, it appears, in long-standing and standard use in East Caribbean countries. The agreement recorded the appellant's engagement to perform the duties of magistrate for a "tour of one year resident service commencing from" 6 September 2003 (clause 1(1)) and stated the basic salary of the office per annum. It went on:

"4 (1) If the person engaged shall be compelled by reason of ill-health (not caused by his own misconduct) to terminate his office, or if at any time it shall be certified by a duly constituted Medical Board that he is incapable, by reason by infirmity of mind or body, of rendering further efficient service in the State, the Government shall pay his salary up to the date of such termination or certificate.

(2)

5 If the person engaged shall at any time after the signing hereof neglect or refuse from any clause [sic] (other than ill-health) not

caused by his own misconduct, (as provided in Clause 4) become unable to perform any of his duties or to comply with any order, or shall disclose any information respecting the affairs of the Government to any unauthorized person, or shall in any manner misconduct himself, the Government may terminate his engagement forthwith and thereupon all rights and advantages reserved to him by this Agreement shall cease.

6 (1) The Government may at any time determine the engagement of the person engaged on giving him three months' notice in writing or on paying him one month's salary.

(2) The person engaged may, at any time after the expiration of three months from the commencement of any residential service, and while serving in the State determine his engagement on giving to the Government three months' notice in writing or paying to the Government one month's salary.

(3) If the person engaged terminates his engagement otherwise than in accordance with this Agreement he shall be liable to pay to the Government as liquidated damages, three month's [sic] salary."

5. Further provisions entitled the appellant to 23 days leave per annum (clause 8) and to a gratuity of 25% of the total annual salary "on the satisfactory completion of the term of engagement provided for in Clause 1(1)" - i.e. at the end of the year (clause 10(a)) - and also required him to give notice in writing 6 months prior to the completion of his tour of service as to whether he desired to continue in office, whereupon the Government would decide whether to offer a further engagement. By clause 13, the agreement "is to be interpreted in accordance with the Laws of St Lucia".

6. The background to the appellant's dismissal was as follows. At a meeting on 10 September 2003, at which the appellant was present, the Commission decided to appoint a retired High Court judge to investigate what the Commission's chairman, Sir Dennis Byron, described in the letter dated 14 October to the appellant confirming the decision as "the unsubstantiated reports I have received of corruption in drug cases involving you". The letter recorded that the appellant had welcomed the investigation. Retired Justice Odel Adams was appointed and produced a report dated 3 November and submitted to Sir Dennis Byron on 11 November 2003. Justice Adams considered the papers in three drugs cases. In two he thought that the appellant had, in acquitting the defendants at the close of the prosecution case, reached a wrong decision, but not so wrong as to give rise to any adverse inference about his integrity. In the third, he found no acceptable excuse for a grant of bail involving the revocation of an order by Shanks J that the defendant

surrender his passport. On 20 November 2003 Justice Adams wrote to Sir Dennis Byron that in the light of his report he believed it to be justifiable to lay against the appellant a charge of gross incompetence (which he formulated in detail), but concluded the letter with this sentence:

“Having reflected on the matter however, I believe that the Commission may wish to consider that Magistrate Fraser’s service be terminated pursuant to the notice provisions in his contract.”

7. The Commission acted on the last sentence. On 5 January 2004 it wrote to the Ministry of Public Service reporting that Justice Adams had carried out an inquiry into reports and allegations of improper conduct on the appellant’s part and that:

“The inquiry has concluded and the findings of Justice Adams are that Mr Fraser’s actions amounted to improper conduct that justified the laying of charges that could result in Mr Fraser’s dismissal. However, upon reflection, Justice Adams recommended that Mr Fraser’s contract of engagement be terminated pursuant to the notice provisions in his contract.

The Commission has seen the report of Justice Adams and agrees with the recommendation for termination. In the circumstances, the Commission recommends that clause 6 of Mr Fraser’s contract be invoked, and that his contract be determined with immediate effect upon paying to him one month’s salary in lieu of notice.

Please find attached for your information and attention a copy of Justice Adam’s report and recommendations.

The Commission should be grateful for your immediate attention and action.”

8. The Ministry in turn wrote to the appellant a letter dated 15 January 2004. It said that it was in receipt of the Commission’s report, that “Having read and considered their report, we have found the said charges substantiated” and that it had therefore “no alternative” but to terminate his contract under clause 5 of the contract with effect from 19 January 2004 and would be paying one month’s salary in lieu of notice under clause 6. On the next day, by letter expressed to supersede its first letter, the Ministry said that the Commission had advised the Ministry that, due to improper conduct on the appellant’s part, his contract should be terminated with immediate effect from 19 January 2004. No mention was made in this second letter of payment of a month’s or any salary, and none was in the event paid.

9. Before Shanks J counsel for the Commission frankly accepted that the Commission had not complied with its own procedures or with any

procedure which entitled it to reach any conclusion that the appellant had misconducted himself in any way. Equally, he accepted that any decision by the Commission to remove the appellant under s.91(3) could only be made for reasonable cause, and that, if there was a removal in this case, the Commission was unable to show any such cause. The implied requirement of reasonable cause for any removal is established by the Board's decision in *Thomas v. Attorney-General of Trinidad and Tobago* [1982] AC 113.

10. Justice Adams's inquiry provided no basis for removal. Under the Commission's code for Disciplinary Proceedings, Justice Adams's role was simply to report whether the appellant had a case to answer, in which event it was for the Commission, after considering such report, to decide whether the appellant should be charged with an act of misconduct; further, if it did so decide, it had to inform the appellant in writing of the act of misconduct with which he was charged and then either hear the charge itself or refer it to a tribunal of two or more persons to do so. The code continues by laying down the procedure for the hearing of such a charge, giving the person charged the right to appear and be represented, providing for the calling and examination of witnesses and, in the case of a tribunal hearing, a report to the Commission and concluding with a Commission decision whether to exonerate the officer or to impose a penalty and, in either case, with information to the officer accordingly. In the present case, Justice Adams found that the appellant had a case to answer in disciplinary proceedings, but no further steps were taken in accordance with the prescribed disciplinary procedure. Instead, Justice Adams, the Commission and the Ministry evidently took the view that it was open to them to recommend or take a simple contractual step, consisting of termination under clause 5 and/or 6.

11. In support of this view, the Commission relied before the Board on a decision of the Court of Appeal in an appeal from St Christopher and Nevis in *Attorney-General of St Christopher and Nevis v. Inniss* Civil Appeal No. 68 of 2000. In that case the registrar and additional magistrate held a two year contract expressed, by a provision identical to clause 6(1) of the present agreement, to be capable of determination at any time on three months' notice or by paying one month's salary in lieu. She was summarily dismissed. S.83(3) of the Constitution of St Christopher and Nevis gave the power to exercise disciplinary control and to remove from office to the Governor General "acting in accordance with the recommendation of the Judicial and Legal Services Commission". The registrar argued unavailingly that this provision overrode or precluded the operation of the contractual provision for summary determination. The Court of Appeal did not accept the submission. It observed that members of the lower judiciary did not enjoy

the same security of tenure as the Board had recognised the higher judiciary to have in *Hinds v. The Queen* [1977] AC 195, and held that there was nothing to preclude either a short or fixed term or the exercise of a contractual right. In the present case Shanks J was not referred to the decision in *Innis*, but the Court of Appeal was and held (or in the case of Rawlings LJ felt constrained to hold in its light) that Shanks J had erred.

12. Mr Padfield QC for the appellant submits that *Innis* is wrong or, if necessary, distinguishable. S.83(3) is somewhat differently framed from s.91. But the Board is unable to accept that this makes *Innis* distinguishable from the present case or explicable as a case where the relevant Constitution gave no real protection. Under s.83(3) the Governor General could only act in accordance with the recommendation of the Commission. The protection intended for lower judicial officers appears to the Board effectively the same as under s.91.

13. While the Commission submits that *Innis* and the present Court of Appeal decision are correct, the Attorney-General joins the appellant in submitting the contrary. In the Attorney-General's submission, *Innis* diminishes the protection available to the junior judiciary to an undesirable and unacceptable extent. However the Attorney-General submits that it is the Commission which should bear the consequences. He points out that Shanks J was of the same view when it came to awarding damages.

14. The Board has no doubt that *Innis* was wrongly decided and that the Court of Appeal's present decision should be over-ruled. The issue is ultimately a short one: were the Commission and the Ministry taking steps to "remove" the appellant from his office, when they recommended and gave notice to determine his term of office under contractual provisions prior to its natural expiry date? The Board accepts that there is nothing in the Constitution inconsistent with the agreement of a fixed contractual term of office - in the appellant's case one year. The permissibility of a fixed term is clear from *Hinds*: see per Lord Diplock at p.218F-G. But the distinction that Lord Diplock there drew, between the position of the higher and lower judiciary under Westminster model constitutions like that of St Lucia, related to the differing degrees of security enjoyed by these different levels of judiciary. Lord Diplock was not suggesting that the lower judiciary enjoyed no security at all. On the contrary, he mentioned that they had the protection - in *Hinds* under a similar though not identical provision in the Constitution of Jamaica to s.91 in the present Constitution - that they could not be removed or disciplined except on the recommendation of the Judicial Service Commission with a right of appeal to the Privy Council.

15. *Hinds* does not address the question what is covered by the concept of removal. But in *Thomas v. Attorney-General of Trinidad and Tobago*, Lord Diplock giving the Board's judgment emphasised the constitutional importance of the autonomous commission established under Westminster style constitutions with powers of discipline and removal relating to specific officers (pp.120C-D and 124C-G); at p.126C-D the Board said of a provision providing security of tenure for police officers that "To 'remove' from office in the police force in the context embraces every means by which a police officer's contract of employment (not being a contract for a specific period) is terminated against his own free will, by whatever euphemism the termination may be described, as, for example, being required to accept early retirement". This points to a broad interpretation of such provisions with which the Board fully concurs.

16. The expiry in the ordinary course of a fixed term cannot be described as a "removal". But provisions whereby the Ministry engaging a member of the lower judiciary can bring a term of office to an end prior to its natural expiry fall into a different category. If the Government, when engaging a member of the lower judiciary, could include and then operate such a provision independently of the Constitutional protection afforded by a provision such as s.91, the judicial officer in question would have little security at all. It is true that, in theory, the Government could engage members of the lower judiciary for very short fixed periods – even shorter than the one year "tour" here in question. But it may be doubted whether this would be acceptable politically or accepted in practice. It was not in any event what happened here.

17. Here, there was a series of one-year engagements. The terms of the covering agreement summarised in paragraph 4 above confirm the normal expectation - realised in the appellant's case in respect of each of the previous three years - that each such engagement would run to natural expiry. In ordinary language, the use of clauses 5 and/or 6 to bring an officer's engagement to an end prior to its natural expiry involves a "removal" of the officer. S.91 does not expressly refer to the need for or the making of any contractual agreement with the authorities in the local jurisdiction, or indicate how the protection afforded in respect of discipline and removal is to fit with any such agreement. If the two are inconsistent, the constitutional protection afforded by s.91 must prevail. But the present agreement provides for its interpretation in accordance with the laws of St Lucia. There is in the Board's view no difficulty in reading the two together in a manner which gives the officer the appropriate constitutional protection.

18. Thus, a purported contractual termination under clause 5 clearly constitutes a removal and cannot be effective unless the Commission has beforehand determined, in accordance with a proper procedure, that reasonable cause exists under one of the stated heads. As to clause 6, the Board has expressed its view that a notice to determine the engagement prior to its natural expiry constitutes a removal; and on that footing such a notice can once again only be justified in the event, determined by the Commission, that reasonable cause for such removal exists. The constitutional protection therefore operates over and above any contractual provisions for termination against the officer's will of the engagement prior to its natural expiry date.

19. One aspect of the reasoning in *Inniss* was that the Commission must be taken to have been aware of and to have agreed both to the inclusion in the engagement agreements made with lower judicial officers of provisions such as the present clause 6(1), and to their operation by the relevant Government without any prior reference back to the Commission: see per Archibald JA (Ag) at paragraph 77 in *Inniss*. But, even if one assumes that as fact, it begs the question whether it is open to the Commission, in the light of a constitutional provision like s.91, to give carte blanche to the Government's operation of such a provision. In the Board's view, it is clearly not. Removal, whether outright or under a contractual provision, is, in the light of s.91, only permissible if made pursuant to a decision reached by the Commission at the time of removal. Such a decision can only validly be reached if the Commission at that time determines, in accordance with a proper procedure, that reasonable cause exists for the officer's removal.

20. The Board in these circumstances considers that Shanks J was right to conclude that there had been a breach of s.91. The Commission was in breach of its constitutional duty by its letter of 5 January 2004 in recommending, and making clear that it expected immediate action by, the Government to remove the appellant when it is accepted there was no reasonable cause for such removal. The question then is whether the Government was also in breach of constitutional duty by acting on the Commission's letter. Mr Dingemans QC submits that it was not, that under s.91 the Ministry had no option but to act on the Commission's decision and that it could not itself be in constitutional breach as a result of doing so. This analysis would have the consequence that magistrates such as the appellant could be validly removed from office without cause, and their only remedy for the constitutional breach involved would lie against the Commission. They could not refuse to accept their removal and seek to establish their right to remain in office. That would water down the constitutional protection of their office in an unacceptable manner. Again, it is necessary to interpret and read together the

Constitution and the contractual arrangements in a way which provides the intended protection. The agreement between the appellant and the Ministry must be read as permitting removal under the agreement only in the event, determined by the Commission, that reasonable cause for such removal actually exists. Here, no such reasonable cause was determined to exist. Both the Commission and the Government were therefore rightly held by Shanks J to have been in breach of constitutional duty, and the Court of Appeal was wrong to reverse his decision.

21. The first limb of damages awarded by Shanks J is on this basis uncontroversial as to amount. It consists of the appellant's net loss of salary and other benefits (including gratuity) for the period 19 January to 5 September 2004. But the question arises whether Shanks J was right, as a matter of discretion, to award such damages only against the Commission. The Commission contends that he was not; and that, since both the Commission and the Government were in breach of their constitutional duty to the appellant, the right course would have been to award such damages against both. The Board agrees. But, when it comes to apportionment of liability as between the Commission and the Government, the Board sees the force of the point made by Shanks J and by Mr Dingemans in his submissions to the Board. The Government was in practice bound to follow the Commission's instructions, and it would be dangerous if a Government were encouraged to think otherwise. The root cause of the present problem is the recommendation which the Commission made for the Government's immediate attention and action. In all the circumstances, the Board considers that, as between the Commission and the Government, it is the Commission that should bear and pay the whole of the damages, indemnifying the Government for any thereof that the Government may in the first instance pay to the appellant.

22. As to the \$10,000 awarded by Shanks J for distress and inconvenience, the Court of Appeal, in the light of its decision that the only remedy was contractual, set this award aside. Rawlings LJ referred to the limitations on the damages recoverable in contract recognised in *Addis v. Gramophone Co Ltd.* [1909] AC 488. But courts can and do award damages for distress and inconvenience in some other contexts (cf the tortious and statutory contexts mentioned in *McGregor on Damages* (17th ed.) para. 3-011). The Board is concerned with constitutional claims which involve different considerations to those arising in a contractual context. The Constitution empowers the court to "grant such remedy as it considers appropriate, being a remedy available generally ... in proceedings in the High Court" (s.105(3)). Interpreting the power to grant "redress" for constitutional wrongs which existed under s.14 of the Constitution of Trinidad and Tobago, the Board said in *Attorney-General of Trinidad and Tobago v. Ramanoop* [2005] UKPC 15, para 19:

“An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches. All these elements have a place in this additional award. “Redress” in section 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances.”

The Board considers that s.105(3) of the present Constitution is in terms wide enough to permit of a similar construction. The Board sees no basis for criticising the level of the second limb of damages awarded by Shanks J.

23. In the result, the Board will humbly advise Her Majesty that the appeal should be allowed, the decision of the Court of Appeal set aside and the decision of Shanks J restored, varying it only so far as to order that both the Commission and the Government are liable to the appellant for the damages awarded under s.91, but ordering that as between the Commission and the Government the Commission shall bear and pay any such damages. The parties will have 28 days in which to make representations in writing as to costs.