

THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV2012/0145

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

AND

APPLICATION FOR RETIREMENT DESPITE THE APPLICANT'S APPLICATION BEING SUPPORTED
BY THE COMMISSIONER OF POLICE AND THE APPLICANT'S SUPERIOR OFFICER

AND

IN THE MATTER OF A CONSTITUTIONAL RIGHT TO PENSION AND GRATUITY.

BETWEEN:

[1] OSCAR RYAN

Claimant

and

[1] POLICE SERVICE COMMISSION

Defendant

Appearances:

Mr. Lawrence Daniels for the Claimant

The Attorney General Mr. Justin Simon, Q.C. for the Defendant

2014: September 24

JUDGEMENT

[1] **HENRY, J.:** Oscar Ryan is a Police Officer, having joined the Royal Police Force of Antigua and Barbuda (the Police Force) in 1987. His applications for early retirement starting in October 2009 have been refused by the Police Service Commission (PSC). He therefore claims the following relief:

- (1) An order of Certiorari to move into this Honourable Court and quash a decision made by the Defendant (PSC) not to approve the retirement of the Claimant when the Defendant has no authority to do so.
- (2) A declaration that the Applicant is entitled to retire from the Police Force having served 20 years in keeping with section 68 (2)(b) of the Police Act Cap 330 and the pension rights under the Constitution of Antigua and Barbuda
- (3) A Declaration that the Defendant has failed and/or refused to act independently, impartially and in accordance with the provisions of section 16 (2) and 16 (3) (C) of the Police Act Chapter 330 of the Laws of Antigua and Barbuda.
- (4) A Declaration that the letter dated 4th August, 2011 denying the Claimant his legal and voluntary rights to retirement is arbitrary, oppressive and manifestly unfair, null and void and of no legal effect.
- (5) An Order or Declaration that the Claimant has a legitimate expectation that he is entitled to voluntary retirement from the Police Force in keeping with the provisions of section 16 (2), (3) (c).
- (6) A Declaration that the claimant is entitled to a pension and gratuity having served over twenty five (25) years in the Police Force in keeping with section 68 (2) (b) of the Police Act Chapter 330 of the Laws of Antigua and Barbuda and the decision of the Defendant not to approve the claimant's retirement is unlawful and unjustifiable.
- (7) An Order that the Claimant's retirement from the Royal Police Force of Antigua and Barbuda is to take effect one (1) month from the date of his Application or from the date he gave notice of his retirement to the Defendant.
- (8) A Declaration that the Defendant has discriminated against the claimant contrary to Section 14 (2) & 3 of the Constitution of Antigua and Barbuda by not allowing the Claimant to retire from the Police Force while other officers were granted retirement.
- (9) An Order that the Claimant is entitled to a Leave Passage Grant upon his retirement.
- (10)A Declaration that the Claimant is not required by law to give reason for his retirement from the Royal Police Force of Antigua and Barbuda.
- (11) Damages including vindicatory and/or aggravated damages and/or compensation to be paid by the Defendant in respect of the contravention of the claimant's fundamental rights.
- (12) Bailiff and Court fees \$250.00
- (13) Prescribed costs
- (14) Interest pursuant to Statute "

[2] In his affidavit in support of his Fixed Date Claim, Officer Ryan asserts that he was recruited from his home land of St. Vincent to enlist in the Police Force as a constable. He has been attached to

the fire brigade. According to him, during his 25 years in the Police Force he has received only one promotion to the rank of Corporal. That was in 1998. After serving for 22 years and 9 months, on 25th October 2009 he made his first application to the Commissioner of Police for retirement. The letter reads in part:

" [I] am #239 Cpl Ryan-O informing you that I am retiring from the Royal Police Force of Antigua and Barbuda/Fire Service, effective the 20th March 2010, at the end of my vacation.

Sir am requesting my gratuity and a reduce pension after working 22yrs and 9 months, after being enlisted in the force on the 20th January 1987. . ."

- [3] The letter was treated by PSC as an application for leave to retire. By letter dated the 28th January 2010, the Commissioner of Police informed Officer Ryan that the PSC did not approve his retirement.
- [4] Thereafter he was advised by his superior officer, ASP Whitfield Joshua to set out his reasons for wanting to retire. He did so by correspondence dated 8th February 2010. Officer Ryan gave two reasons: his family – an aging mother and young son in St. Vincent and (2) frustration with the job. By letter dated 12th February 2010, Officer Ryan was invited to a meeting with the PSC, which he attended on 16th March 2010. However, by letter dated 6th April 2010 he was informed that they were still not satisfied with the reasons given for his request for retirement. He was also informed that although the police administration was supportive of his request, unless a stay of proceedings or other judicial intervention was received from the court, he would either have to return to active duty or resign from the Police Force.
- [5] A further application for retirement was submitted by Officer Ryan on 10th January 2011. At this point he had served 24 years. The application was supported by the Commissioner of Police. He submitted a further request on 26th April 2011. His superior Officers again indicated the Police Administration's support of Officer Ryan's request. By letter dated 4th August 2011, Officer Ryan was informed by the Commissioner of Police that the PSC had not approved his retirement.
- [6] Officer Ryan made one last application dated 11th October 2011. This application was supported by both Assistant Commissioner Sylvester Jackson and the Police Commissioner. His request has not been approved.
- [7] Officer Ryan asserts that the PSC has denied him the opportunity to retire in keeping with his constitutional rights and his rights under the Police Act. Further that he has a legitimate expectation that there would be no hindrance to his retirement having served over 20 years. Furthermore, he is being discriminated against since other members of the Police Force were granted early retirement.
- [8] In response the chairman of the PSC, Mr. Stephans Winter, filed an affidavit. In it he admits that the PSC received the several Notices/Letters from Officer Ryan which were treated as applications.

He states in essence that the PSC gave due consideration to Officer Ryan's application and the reasons that he gave and that the PSC declined to grant approval since the reasons advanced did not, in their view, justify the grant of early voluntary retirement. Additionally, he states that no documentary evidence was provided in respect of Officer Ryan's mother's age or her state of health or her general condition.

- [9] According to the Chairman, the Police Act does not confer on Officer Ryan an automatic right to early voluntary retirement. It is for the Officer to submit to the PSC an application for early retirement. It is then within the sole discretion of the PSC to grant or deny an officer's application upon an objective analysis of the reasons given. Officer Ryan, he concludes, cannot claim a legitimate expectation to early voluntary retirement. Finally, he asserts that the PSC, having given its reasons for not approving Officer Ryan's application, there are no reasons to support Officer Ryan's allegation that the PSC has discriminated against him. No evidence has been submitted to show that other officers have been granted early retirement under similar circumstances.

Submissions

- [10] Counsel for Officer Ryan submits that section 16 (3) of the Police Act cap 330 (the act) makes provision for voluntary retirement. In order to trigger the section, all that is required is that the appropriate "notice" be given of at least 1 calendar month. Under the provisions of section 16 (2), once the notice is given unless the PSC responds within 30 days, Officer Ryan can rightly presume that permission has been granted. He refers the court to the cases of **Cooper v Wilson**¹ and **Marshall v Linard**². He therefore concludes that Officer Ryan has complied with the Act by giving 1 month's notice. The decision of the PSC, he says, is unreasonable and arbitrary.
- [10] Further, during Officer Ryan's recruitment, he was told that after service of 20 years, an officer is entitled to early retirement or compulsory retirement at age 55. He saw a number of officers leave the force having served 20 years. He therefore had a legitimate expectation that there would be no hindrance to his retirement.
- [11] Further, there is nothing in the law which mandates an officer to give reasons for his retirement. Therefore when he was interviewed by the PSC and asked to give reasons, the PSC was acting outside the scope of their authority and taking into consideration irrelevant matters.
- [12] Officer Ryan's claim based on discrimination was withdrawn.

PSC's Submissions

- [13] Counsel for PSC submits that there is a distinction between the term "withdraw himself" as used in section 16 (2) and the term "leave" used in section 16 (3). When the section speaks of an officer withdrawing himself, it is a voluntary act that needs no permission, such as resignation. Section 16

¹ [1937] 2 All ER 720

² (1965) 9 W.L.R. 293

(3) sets out modes by which an officer "leaves" the force. They include by operation of law, by resignation, by retirement.

- [14] Section 68 (1) and 67 (2) addresses compulsory retirement while section 68 (2) and 47 (2) refers to voluntary retirement, that is, retirement before the time stipulated by law. An officer needs permission for the latter. It is not automatic. If an officer does not have permission and simply gives notice and walks away, then it is tantamount to resignation and the officer is not entitled to any pension.
- [15] With regard to Officer Ryan's rationale for seeking to retire, he submits that it is clear that the PSC gave him a hearing on three occasions in respect of his application.
- [16] Counsel further submits that Officer Ryan's argument that PSC had to respond within one month (28 days) and that Officer Ryan's permission was presumed in the absence of such response can only hold water if the court finds that section 16 (1)(2) applies to retirement. Counsel's submission is that section 16 (1)(2) applies only to resignations where the officer withdraws himself from the force.
- [17] With regard to the claim based on legitimate expectation, Counsel submits that Officer Ryan has given evidence of what he was told. However, while the law permits retirement after 20 years, it contemplates permission being given. Officer Ryan has not given any evidence of instances where permission was automatically given. He therefore asks that the claim be dismissed.

Issues

- (1) Whether Officer Ryan is entitled to voluntary retirement as of right
 - (2) Whether the PSC has authority to grant or refuse Officer Ryan's application for voluntary retirement
 - (3) Whether Officer Ryan had a legitimate expectation that having served 20 years, there would be no hindrance to his voluntary retirement upon the giving of one month's notice.
- [18] The facts in this matter are not in dispute. It is not disputed that Officer Ryan has served over 20 years in the Police Force; that he has submitted at least 3 letters to the PSC which have been treated as applications for voluntary retirement and that permission, in each instance, has been denied. The issues that arise herein turn on the interpretation of certain sections of the Police Act. Because of their importance they are set out in full.
 - [19] Sections 16, 47 (1) & (2) and 68 (1) & (2) provide:
 - " 16. (1) No subordinate police officer or constable shall during the period of his probation or any extension thereof be at liberty to withdraw himself from the Force unless he obtains the permission of the Commission to do so.

(2) No police officer whose appointment to the force has been confirmed, shall be at liberty to withdraw himself from the force until the expiration of at least one calendar month from the time when he gives notice in writing of his intention to do so to the Commission.

(3) Subject to the foregoing provisions of this section the modes by which a police Officer may leave the force are as follows-

(a) on dismissal or removal in consequence of disciplinary proceedings;

(b) on compulsory retirement;

(c) on voluntary retirement;

(d) on retirement on account of injuries received or diseases contracted in discharge of duty;

(e) on retirement following upon the findings of a Medical Board;

(f) on resignation;

(g) on expiry or other termination of an appointment for a specified period;

(h) on the abolition of office;

(i) on attaining the prescribed age of retirement.

47. (1) Subject to the provisions of subsections (2) and (3), no pension shall be granted to any inspector, subordinate police officer or constable who has not attained the age of fifty years unless the commission is satisfied by the findings of a Medical Board that such Inspector, subordinate police officer or constable is incapacitated by some infirmity of mind or body for further service in the force and that such infirmity is likely to be permanent.

(2) Every Inspector, subordinate police officer and constable who is required or permitted to retire from the Force after he has served in the force for twenty years shall be eligible for pension, gratuity or other allowance under this part.

(3) Where the services of an Inspector, subordinate police officer or constable in the Force are terminated as provided in subsection (2) of section 67, and a pension gratuity or other allowance cannot otherwise be granted to him under the provisions of this part, the Government-General may, if he thinks fit, grant such pension, gratuity or other allowance as he thinks just and proper, not exceeding in amount that for which such

Inspector, subordinate police officer or constable would be eligible if he had retired from the Force on the Findings of a Medical Board as provided in subsection (1)

68. (1) Every Inspector, subordinate police officer and constable shall retire from the force on attaining the age of fifty five years.

(2) Every Inspector subordinate police officer or constable may be required or permitted to retire from the force-

(a) on attaining the age of fifty years; or

(b) after he has served in the force for twenty years. "

[20] Section 16 cannot be read in isolation. The Act must be viewed as a whole and in particular section 16 must be read in conjunction with sections 47 and 68 for their full import. The court cannot agree with Officer Ryan that upon the expiration of 1 month after submission of his letter/application, permission to retire can be inferred. While voluntary retirement is one of the modes by which an officer leaves the force listed in section 16 (3), where the officer having served twenty years wishes to retire before the prescribed age set out in section 68 (1), section 68 (2) makes it clear that permission must be obtained. Once permission is obtained, section 47 (2) provides that the officer shall be eligible for pension, gratuity or other allowance under that part.

[21] The cases submitted on behalf of Officer Ryan mostly dealt with resignations. In none of the cases did the court have under consideration a statutory provision similar to section 68 (2) of the Police Act. The cases were therefore not applicable. The court therefore cannot agree that an application for voluntary retirement based on 20 years of service is an automatic process on the giving of one months notice under section 16 (2).

The PSC' Authority

[22] Counsel for Officer Ryan submits that section 105 (5) of the Constitution vests power in the Commissioner of Police in respect of persons below the rank of Sergeant. Therefore only the Commissioner of Police can exercise powers in respect of Officer Ryan by virtue of his rank as a Corporal of Police.

[23] Section 105 (5) of the Constitution provides:

105. "(5) The power to appoint persons to hold or act in offices in the Police Force below the rank of Sergeant (including the power to confirm appointments) and, subject to the provisions of section 107 of this Constitution, the power to exercise disciplinary control over persons holding or acting in such offices and the power to remove such person from office shall vest in the Commissioner of Police."

[24] Counsel's argument is interesting. His case as presented is that Officer Ryan's "application" for voluntary retirement falls under section 16 (2) of the Police Act and that upon the expiration of one months notice his retirement takes effect. Both sections 16 (1) and (2) makes reference to the PSC. Section 16(1) requires that the permission necessary for a constable or subordinate officer to withdraw himself from the Force during the period of probation is to be obtained from the PSC. Section 16 (2) requires the said 1 month's notice, in writing, be given to the PSC. But Counsel submits that the PSC has no authority due to the provisions of section 105 (5) of the Constitution.

[25] The court notes that the power to decide issues affecting retirement is not mentioned in section 105 (5) of the Constitution. Counsel seeks to place this matter under the power to remove a person from office mentioned in that section. However, Officer Ryan is not being "removed" from office by the Police Force. He is voluntarily seeking to retire. The court is of the view that the permission required pursuant to section 68 (2), like the permission required by section 16 (1) are statutorily authorized to be obtained from the PSC and that section 105 (5) of the Constitution is not applicable.

Legitimate Expectation

[25] A legitimate expectation may arise either from an express promise given on behalf of a public authority, or from the existence of a regular practice which the claimant can reasonable expect to continue.³

[26] There is no evidence by Officer Ryan that an express promise was made to him that he could leave the Police Force after 20 years service *without permission being granted*. There is also no evidence of persons leaving the police force after twenty years service without permission first being obtained. In light of the absence of the evidence and the clear statutory provision contained in section 68 (2) of the Police Act, that permission is necessary, Officer Ryan's claim based on legitimate expectation fails.

Was the refusal of permission Irrational or Unreasonable

[27] Section 68 (2) clearly gives a discretion to grant or refuse permission. However a person entrusted with discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider.⁴ The crucial factor that the court is concerned with is whether sensible decision-makers, properly directed in law and properly applying their minds to the matter, could have regarded the conclusion under review as a permissible one.⁵

[28] Although the Police Act does not expressly require an applicant to give reasons for requesting permission under section 68 (2), the reasons provided by the applicant give the decision-makers

³ Per Lord Fraser of Tullybelton in *CCSU v Minister of Civil Service* [1985] AC 374 at 401

⁴ *Associated Provincial Picture House Ltd v Wednesbury Corporation* [1948] 1KB 223

⁵ *Judicial Review* by Michael Supperstone Q.C., James Goudie Q.C. and Paul Walker, 4th edition.

the basis upon which to exercise their statutory discretion. Otherwise, the decision may be subject to attack as arbitrary.

[29] Officer Ryan gave 2 substantive reasons: 1) his ailing aged mother and 2) what was termed frustration with the job. In his letter to the PSC dated 8th February 2010 he states:

"Sir, I have had years of frustration during my career so far, I have put them behind my back move on like a true professional. After twenty-three (23) years of serving, Sir from the bottom of my heart I am drained, I have had enough, the will power to get up every day and be dedicated to my job is not there. Sir I have always been dedicated to my work, I ask God everyday to be the best I can be at my work to do the best I can to the government and citizens of this country in my work. Now Sir my heart and mind is not with it any more, its hard for me to put on a show, so am asking again please sir for you and the rest of the commission to again consider my request that I may be allowed to retire from the Royal Police Force of Antigua & Barbuda."

[30] Interviews were conducted with Officer Ryan by the Commissioner of Police and Assistant Commissioner Sylvester Jackson. Both supported his application of 11th October 2011.

[31] In his affidavit in opposition, the Chairman of the PSC Mr. Winter states that the PSC was not satisfied with the reason advanced by Officer Ryan as justification for early voluntary retirement because he still had not provided any supporting documentation in respect of his mother. However, at no time has the PSC requested supporting documentation, medical or otherwise, in respect of Officer Ryan's mother.

[32] There is no evidence before the court that the PSC properly addressed its mind to the second reason as expressed above.

[33] The court finds that no reasonable tribunal, properly applying their minds to this matter could have regarded the conclusion under review as a permissible one.

Conclusion

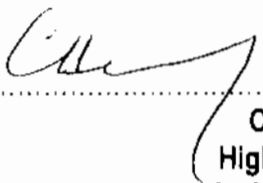
[34] The court makes the following findings:

1. That Officer Ryan is not entitled to voluntary retirement automatically. He has the right to apply to the PSC in accordance with section 68 (2) of the Police Act upon completion of 20 years service or on reaching age 55. The PSC's permission is required in order for him to proceed to retirement.
2. The PSC has authority by virtue of the provisions of the Police Act to grant permission in this regard.
3. Officer Ryan's claim that he has a legitimate expectation that there would be no hindrance to his voluntary retirement upon the giving of one month's notice fails.

4. However, the Court concludes that the refusal by the PSC to grant the requested permission was unreasonable in the circumstances.
5. The Court finds no violation of any fundamental rights, the claim based on discrimination having been withdrawn.

[35] The court therefore makes the following Declaration and Order:

1. A declaration that the decision made by the PSC not to approve the application by Officer Ryan for voluntary retirement dated 11th October 2011 was unreasonable and therefore void and of no effect.
2. An order that Officer Ryan's retirement is to take effect 60 days from the date of this decision.
3. The other declarations and orders sought are denied
4. Cost to the applicant to be prescribed cost.


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CLARE HENRY
High Court Judge
Antigua & Barbuda