**IN THE CARIBBEAN COURT OF JUSTICE**
**Appellate Jurisdiction**

**ON APPEAL FROM THE COURT OF APPEAL OF BARBADOS**

**CCJ Appeal No CV 2 of 2008**
**BB Civil Appeal No 34 of 1998**

**BETWEEN**

**WINTON CAMPBELL** **APPELLANT**

**AND**

**THE ATTORNEY GENERAL** **RESPONDENT**

**Before the Honourables** **Mr Justice Nelson**
**Mr Justice Saunders**
**Madam Justice Bernard**
**Mr Justice Wit**
**Mr Justice Hayton**

**Appearances**

**Mr Leslie F Haynes QC, Mr Deighton Kingsley Rawlins, Mr Kwame Deighton Rawlins and Ms Efia Jamila Rawlins for the Appellant**

**Ms Jennifer C Edwards QC, Ms Donna K Braithwaite and Ms Roslind R Jordon for the Respondent**

**JUDGMENT**
**of**
**The Honourable Justices Nelson, Saunders, Bernard and Hayton**

**Delivered by**
**The Honourable Mr Justice Hayton**
**on the 3rd day of April, 2009**
**and**
**JUDGMENT**
**of the Honourable Mr Justice Wit**

## JUDGMENT

### The Key Issues

[1] This appeal from the Court of Appeal of Barbados, pursuant to leave granted by it, raises important issues as to the rights of senior civil servants and requires consideration of "the dual dimension of the public employment relationship" to which we adverted in *Edwards v Attorney General of Guyana*[1].

[2] When he held the office of Chief Electrical Engineer, Mr Winton Campbell, "the Appellant", was one of many civil servants holding a public office which could be abolished by a statutory Order laid before the Barbados Parliament and approved by a resolution of each House (as provided for by section 2 of the Civil Establishment Act 1948, Cap. 21).

[3] On behalf of the Attorney General of Barbados, "the Respondent", it was argued that the inevitable consequence of the statutory abolition in good faith of a unique public office was a retirement from that then non-existent office, leaving the former office holder only with the accrued pension rights he had under the terms of his appointment to that office (unless appointed to a new office in the public service so as to continue his pensionable public service).

[4] On behalf of the Appellant, it was argued that, despite abolition of his office of Chief Electrical Engineer by statutory Order, he could only be removed from the public service under section 94 of the Constitution by the Governor General, acting in accordance with the advice of the Public Service Commission: moreover, the Governor-General could not act upon such advice without affording him the right to refer the matter to the Barbados Privy Council under section 98. Failure to comply with section 94 had meant that the Appellant

[1] [2008] CCJ 10 (AJ) at [15]

remained in the public service and was entitled to receive the emoluments that had been attached to the office of Chief Electrical Engineer. Alternatively, he was entitled to damages, including exemplary damages.

**The factual background**

[5] By letter of 10 April, 1987, the Appellant was informed that the Governor General acting in accordance with the advice of the Public Service Commission – and so complying with section 94 of the Constitution – had appointed him to the post of Electrical Engineer in the Electrical Engineering Department with effect from 2 June 1987 at the rate of $45,888 per annum, subject to his being passed medically fit. The principal terms and conditions were as follows:

> "(a) You will be subject to the provisions of the Service Commissions (Public Service) Regulations, 1978 (as amended from time to time) and to such other Regulations, Statutory Rules, General Orders and administrative directives as may be in force in the Public Service;
>
> (b) You are required to complete and submit the enclosed form of Declaration of Health to me by 1987-05-08. In this connection, you may be required at the discretion of the Chief Medical Officer to undergo a medical examination (Order No. 2.7 of the General Orders 1970);
>
> (c) Subject to the exigencies of the Public Service, you will be entitled to the grant of leave in accordance with the provisions of Chapter V of the General Orders 1970;
>
> (d) Your appointment is pensionable in accordance with the provisions of the Pension Act, 1947, Cap. 25, as amended by the Pensions (Miscellaneous Provisions) Act, 1985-18."

[6] This appointment was to provide for the carrying out of the key tasks required of the "Electrical Engineer" by the Electricity Act, 1936, Cap 277. When the Appellant took up this important office in June 1987 it happened to be established under the Civil Establishment (General) Order 1987 (SI 1987 No. 52) pursuant to powers conferred by the Civil Establishment Act 1948. The Civil Establishment (General) (Amendment) No.2 Order 1987 (SI 1987 No. 147) then amended the earlier Order: "Substitute the words 'S3' for the words S5 appearing in the column headed 'Code Number' opposite the office 'Electrical Engineer'." The Civil Establishment (General) (Amendment) Order 1988 (SI 1988 No. 50) further amended the earlier Order: "Delete all the words appearing under Electrical Inspection Department and substitute '1. Chief Electrical Engineer S3 … 1 [one] … 2. Senior Electrical Engineer S7 … 1 [one]." The reference in the Electricity Act to "Electrical Engineer" was then construed as a reference to "Chief Electrical Engineer" pursuant to a Notice under section 20(3) of the Interpretation Act, Cap 1, published in the Official Gazette on 22 August 1988.

[7] It appears that the Civil Establishment (General) Order 1987, as amended, was then replaced by the Civil Establishment (General) Order 1990 which continued the offices of one Chief Electrical Engineer S3 and one Senior Electrical Engineer S7. However, the Civil Establishment (General) (Amendment) Order 1991 (SI 1991 No. 170) required deletion of those offices, substituting for them "1. Chief Electrical Officer S4 … 1 [one] … 2. Deputy Chief Electrical Officer S7 … 1 [one]."

[8] This Order, made pursuant to the powers conferred on the Minister responsible for the Public Service, came into operation on 1st April, 1992 by virtue of the Civil Establishment (General) Notice 1992 (SI 1992 No. 25). It had the effect of abolishing the Appellant's office of Chief Electrical Engineer from that date, as pointed out to the Appellant by the Chief Personnel Officer's letter of 8th April, 1992 to him. The letter reads as follows:

> "I am directed to refer to my letter No. PH. 224/156 of 1991-11-18 informing you of a proposal to re-organize the Electrical Engineering Department. The reorganization has been finalized and the post of Chief Electrical Engineer held by you was abolished with effect from 1992-04-01. Arrangements will be made for the payment to you of any benefits for which you may be eligible as a result of the abolition of the post of Chief Electrical Engineer."

[9] This state of affairs came about after complaints both from members of the Electrical Inspection Department headed by the Appellant and from the Appellant himself about lack of collaboration and co-operation within the Department. This led the Head of the Civil Service in April 1989 to commission an inquiry to consider the operations of the Department and staff relations therein.

[10] As a result of the inquiry a report was submitted to the Government in August 1989. A meeting was held between senior officials in the Public Service and the authors of the report. It was proposed that the Department be reorganized and certain functions be transferred to the Traffic Section of the Ministry of Transport and Works. It was further proposed that this Ministry should set up a unit to undertake responsibility for providing for electrical design services so as to avoid the need for engaging expensive private electrical consultants. It was agreed that, subject to the Appellant's approval, he would be seconded from his post to head this unit.

[11] On 18th September, 1989, the Permanent Secretary, Ministry of the Civil Service wrote to the Appellant.

> "As promised at the meeting held today among yourself, the Chief Personnel Officer and myself, I refer for your information and comments, a copy of the report on the enquiry into the Electrical

Inspection Department which was conducted by Mr. F.A. Parris and Mr. Rudi Webster.

I am also directed to inform you that in keeping with the suggestion at paragraph 17(1) of the report it is proposed, as a temporary measure only, to seek to utilize your services on the following assignments which are most urgent to the planning requirements of the construction and development programmes of the Government -

- to provide electrical design services associated with major construction and maintenance projects;

- to provide professional services to the Ministry of Transport and Works on design and operational aspects of street lighting, traffic lights and signals and the metering for traffic control.

Included in the construction projects which are on-going or contemplated are the West Wing of the Parliament Buildings, the proposed new Marine House Complex, the Headquarters Building for the Fisheries Department and the Vendors Mall in Bridgetown. It is felt that the services required in this connection will last for up to two years.

Your comments on the proposal in the above paragraphs in relation to the required support staff, equipment and other facilities will also be appreciated. You will, doubtlessly, wish to comment on the entire proposal as it relates to you personally.

Above all I wish to assure you that these proposals are made not only to avoid am exacerbation in the relationships at the Government Electrical Inspection Department but more particularly in the interest of the speedy fulfilment of

Government's commitment to certain projects over the next two years.

Your early response to this letter, if possible by the end of September, would be greatly appreciated."

[12] On 3rd October, 1989, the Appellant replied:

"Thank you for your letter MP 6055 Vol. III dated 1989-09-18 and your offer for me to provide electrical design and other professional services to the Government programmes you outlined.

Your attention must be drawn to the Electricity Act Cap. 277, Section 3(d) which confers on the Chief Electrical Engineer the authority to be responsible for the execution and approval of all electrical installation work on Government property.

It must be noted that electrical installation design is a process of planning and involves the preparation of specifications, documents and drawings depicting the scope of work to be carried out. Since the Chief Electrical Engineer is accountable for the execution and approval of such work, it is his duty, if he so requires, to engage the services of persons to undertake any stage of his tasks. It is not the responsibility of the Ministry of Transport and Works.

Your proposals appear to impinge upon the statutory duties of whoever holds the office of Chief Electrical Engineer and also to split the functions of that officer between his Department and the Ministry of Transport and Work.

I must also inform you that architectural proposals are to be examined and site investigations undertaken to determine the extent of work required and the support staff, equipment and other facilities needed for the execution of the programmes. You must

> also take into consideration the difficulty in recruiting and training support electrical engineering personnel at this time in Barbados.
>
> The report of the recent investigations into the Electrical Department has been submitted to my lawyer for advice."

[13] On 27th October, 1989, the Permanent Secretary met with the Appellant to try to resolve matters, but the Appellant indicated unequivocally that the only option he favoured was his immediate return to his substantive office as Chief Electrical Engineer.

[14] Having him continuing as Chief Electrical Officer proved unsatisfactory, leading to the Cabinet on 29th August, 1991, approving a proposal for the reorganization of the Department, including the re-assignment of certain functions to the Ministry of Public Works Communications and Transport and involving the abolition of the office of Chief Electrical Engineer. The Cabinet agreed that the Appellant should be fully compensated in relation to retiring benefits within the provisions of the Pension Regulations 1947 referred to in the terms of his appointment. The Chief Personnel Officer by letter of 18th November 1991 (referred to in [8] above) directed the Appellant to proceed on special leave in the public interest from 19th November 1991. This was challenged by the Appellant in an action before Husbands J who held that "the Chief Personnel Officer's directions to the plaintiff were legal, in accordance with the rules of natural justice and in accordance with the General Orders and the Constitution of Barbados." No appeal was pursued.

**The Courts Below**

[15] Meanwhile, the Appellant had commenced these proceedings by originating summons in the High Court filed on 19th October, 1992. Essentially, he claimed that his public office had not been abolished, so that he was not entitled to any pension, but he was entitled to be regarded as having continued in public office entitled to the salary and other benefits attached to that office; alternatively, he was entitled to damages. The matter came before Waterman J who completed the hearing of the originating summons on 5th December, 1995 and delivered his judgment on 4th December, 1998 dismissing the Appellant's claims. The Appellant's office had been abolished in accordance with the law, leaving him entitled only to his pension rights. No order was made as to costs.

[16] Notice of appeal to the Court of Appeal was filed on 23rd December, 1998. The appeal was heard on 22nd and 23rd October, 2002 and 30th and 31st January, 2003. Well over four years later, on 26th June, 2007, the Court of Appeal delivered its reserved judgment. It pointed out that Appellant's counsel had been well advised to concede that the Crown in right of its Government of Barbados may lawfully abolish any office in the public services by an Order made pursuant to the Civil Establishment Act and approved by Parliament.

[17] The Court held that section 94 had no application where a public office was abolished. It was limited to appointments to a public office and to the exercise of disciplinary control including the power of removal from office, though no consideration was afforded to the extended definition of the power to remove a public officer in section 117 (8) of the Constitution (set out at [25] below. It followed that section 98 also had no application.

[18] However, the Court did hold that under section 13A (2) (c) of the Pensions Act, Cap 25, abolition of a public office is one of the ways in which there is retirement

from the public service, conferring a statutory right to pension benefits as referred to in the terms of the Appellant's appointment.

**Judicial Delays**

[19] Before addressing the above points, it is unfortunate that we cannot overlook that Waterman J took three years to deliver his judgment, while the Court of Appeal took almost four and a half years, despite section 18(8) of the Constitution conferring upon litigants the right for their case to "be given a fair hearing within a reasonable time", which necessarily requires that the judgment in the case be given within a reasonable time[2]. As de la Bastide P stated in the first appeal[3] we heard from Barbados (where there had been a delay of four years ten months in the Court of Appeal giving its reserved judgment), such delays "deny parties the access to justice to which they are entitled and undermine confidence in the administration of justice."

[20] Subsequently in *Reid v Reid*[4] (where there had been a similar delay of four years ten months) Saunders J, on behalf of the CCJ stated, "In our view, no judgment should be outstanding for more than six months and, unless a case is one of unusual difficulty or complexity, judgment should normally be delivered within three months." Such efficient justice is needed not just for the furtherance of the best interests of employers and employees but also for the proper protection and encouragement of investors and entrepreneurs whose activities are crucial to the welfare of Barbados and its people. Happily, the Chief Justice has taken steps to improve efficiency in the timely delivery of judgments.

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[2] See eg *Elaheebocus v The State of Mauritius* [2009] UKPC 5 at [18]
[3] *Mirchandani (No 1)* (2005) 69 WIR 35 at [45] at p 50
[4] [2008] CCJ 8 (AJ) at [22]

**The Scope of Section 94 in the Light of Sections 98 and 117(8)**

[21] Counsel for the Appellant conceded that it had to be accepted that the public office of Chief Electrical Engineer held by the Appellant had been validly abolished from 1st April, 1992. Parliament had fulfilled the constitutional requirements for valid law-making under section 2 of the Civil Establishment Act when it abolished the Appellant's office by secondary legislation. In the High Court there had been no allegations of a lack of good faith in the passing of such secondary legislation, so that the Court of Appeal rightly had refused to consider any judicial review issues on such grounds. When *mala fides* or any other issues of judicial review do arise in a future case, consideration will need to be given to intriguing developments in England[5] and in Canada[6].

[22] Counsel, however, contended that, despite the abolition of his office, the Appellant still remained in the public service until validly removed under section 94 of the Constitution (interpreted in the light of section 117 (8)) after any referral to the Barbados Privy Council under section 98. There had been no such removal, so the Appellant was entitled to the full salary and accruing pension benefits formerly attached to the office of Chief Electrical Engineer as if he had remained in the public service.

[23] Section 94 (1) states as follows:

> Subject to the provisions of this Constitution, power to make appointments to public offices and to remove and to exercise disciplinary control over persons holding or acting in such offices is hereby vested in the Governor-General, acting in accordance with the advice of the Public Service Commission.

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[5] *R (on the application of Javed) v Secretary of State for the Home Department* [2002] QB 129 at [33] – [37] and [47] - [51]

[6] *Dunsmuir v HM The Queen in Right of New Brunswick* [2008] SCC 9

[24] Section 98 states as follows:

> (1) Before the Governor-General acts in accordance with the advice of any Commission established by this Chapter that any public officer shall be removed from office or that any penalty should be imposed on him by way of disciplinary control, he shall inform the officer of that advice, and if the officer then applies for the case to be referred to the Privy Council, the Governor-General shall not act in accordance with that advice but shall refer the case to the Privy Council accordingly:
>
> > Provided that the Governor-General, acting in accordance with the advice of the Commission, may nevertheless suspend that officer from performing the functions of his office pending the determination of the reference to the Privy Council.
>
> (2) When a reference is made to the Privy Council under the provisions of subsection (1), the Privy Council shall consider the case and shall advise the Governor-General what action should be taken in respect of the officer, and the Governor-General shall then act in accordance with such advice.

[25] Section 117 (8) states as follows:

> References in this Constitution to the power to remove a public officer shall be construed as including references to any power conferred by any law to require or permit that officer to retire from the public service.

[26] In respect of retiring from the public service it is necessary to refer to section 13A(2) and (3) of the Pensions Act, Cap 25, which state as follows:

> (2) Subject to subsections (3) and (6), no pension, gratuity or other allowance under this Act shall be granted to an officer except on his retirement from the public service in one of the following cases:
>
> (a) …;
> (b) …;
> (c) on the abolition of his office;
>
> …
>
> (3) Subject to subsection (5) a pension, gratuity or other allowance under this Act may be granted to an officer who retires before attaining the age of 60 years but payment shall be suspended until
>
> (a) he has attained the age of 60 years or sooner dies; or
>
> (b) he satisfies the Governor-General that he is incapacitated and his condition is likely to be permanent.

[27] Moreover, Regulation 23 of the Pensions Regulations 1947 provides for payments of a pension varying according to length of service, "if an officer holding a pensionable office retires from the public service in consequence of the abolition or re-organisation of his office, and without refusing to accept another pensionable office not less in value than the office of which he was the substantive holder immediately before such abolition or re-organisation." No other pensionable office was offered after the Barbados Cabinet approved abolition of the Appellant's office in August 1991, nor is there any evidence that a pensionable office of comparable value was available.

[28] Regulation 23 takes account of negotiations that take place while abolition or re-organisation of a substantive office is being arranged and, in particular, takes account of Regulation 18 of the Service Commissions (Public Service) Regulations 1978, which is as follows:

> (1) Where an office (being one of a number of like offices) has been abolished but 1 or more than 1 of such offices remain, the Permanent Secretary or the Head of Department shall submit to the Chief Personnel Officer for consideration by the Commission a report thereon containing his recommendations, with reasons therefor, as to which substantive holder of such post ought to have his appointment terminated, and the Commission shall make such recommendation thereon to the Governor-General as it thinks proper, including a recommendation that the officer concerned be transferred to another office not lower in status nor carrying a smaller salary than that which has been abolished.
>
> (2) Paragraph (1) applies in relation to the termination of appointments for the purpose of facilitating improvement in the organisation of a Ministry or Department in order to effect greater efficiency or economy.

[29] Counsel for the Appellant submitted that this Regulation could support his contention that the Appellant still remained in the public service after abolition of his office. This submission has to be rejected because Regulation 18 is not concerned with the current case where the unique office of Chief Electrical Engineer has been abolished. It is concerned with the case where there are, say, four persons, each holding the substantive office of "Engineer," and an Order under the Civil Establishment Act reduces the number of offices of "Engineer" from four to three. However, it is not known which of the four office-holders is to

be removed from office and have his appointment terminated until the Permanent Secretary or the Head of Department has submitted to the Service Commission a reasoned report containing his recommendations, leading the Commission to make recommendations to the Governor-General.

[30] In the case of abolition of the unique office of Chief Electrical Engineer, the person who held that office knows that it is his office that has been abolished. He no longer holds an office established under the Civil Establishment Act and it is to be noted that by virtue of section 117 (7) of the Constitution "references to the public service shall not be construed as including service in … (e) an office not established under the Civil Establishment Act." Once the Appellant's office was abolished it immediately became impossible for him to exercise his abolished office and to obtain a salary and pension rights for future service therein, while he would also cease to be in the public service in the absence of special circumstances. There may, for instance, be circumstances where an office has been abolished but there are ongoing negotiations that within a short period result in the former office-holder taking up a new office, such that service in the public service would be considered as having continued. This is not such a case.

[31] We note, however, from the Permanent Secretary's letter of 18th September, 1989, at [11] above to the Appellant that there were negotiations between them after the report on the problems in the Electrical Inspection Department at [10] above. Adoption of such a procedure reflects the spirit of the latter part of Regulation 18(1) in dealing with a special case of abolition falling outside the Regulation and is in accord with principles of good public administration.

[32] In the absence of argument and evidence for judicially reviewing[7] the statutory Order abolishing the Appellant's office of Chief Electrical Engineer, the inevitable consequence of the abolition was the Appellant's retirement from the

[7] See [21] above

office and from the public service, triggering his accrued pension benefits, unless such retirement can be regarded as a removal from office within section 94 by virtue of the extended definition in section 117(8) of the Constitution at [25] above.

[33] Counsel for the Appellant concedes that a broad interpretation cannot be given to section 117 (8) such that Parliament's power under the Civil Establishment Act by Order to abolish an office - and so remove the office holder from that office - is constrained by being exercisable only if authorised by the Governor-General acting in accordance with the advice of the Public Service Commission under section 94(1).

[34] He contends, however, that the power to remove a public officer from the public service under section 94 (1) is construed under section 117(8) to include "any power conferred by any law to require or permit that officer to retire from the public service" and that the Parliamentary power by Order to abolish a public office under section 2 of the Civil Establishment Act that has the consequence of retiring the office holder is a power conferred by law to require that officer to retire from the public service.

[35] This broad contention must be rejected. In our view, despite dicta of the Privy Council[8] in the context of Trinidad and Tobago legislation, section 117(8) is concerned not with any Parliamentary power but with the power conferred by law on particular persons to require (or order or instruct) an officer to retire from a currently existing public office. We have in mind powers of the Governor-General acting in accordance with the advice of the Public Service Commission under the Service Commissions (Public Service) Regulations 1978, Regulation 19 (power to require premature retirement) and Regulation 20 (power to require retirement for inefficiency), so that section 94 extends beyond the disciplinary actions within Part V of those Regulations, especially Regulation 32(1).

[8] *Perch v Attorney General of Trinidad and Tobago* [2003] UKPC 17 at [15]

Parliamentary abolition of a unique public office is one way in which there is retirement from the public service, but such retirement is not achieved by virtue of a power conferred by any law on any person *to require* the person holding such office to retire therefrom: it is achieved by operation of the law itself extinguishing the office so that there is no office from which anyone can be required to retire.

[36] It follows that section 94 is inapplicable, so that the Appellant was effectively removed from his post as Chief Electrical Engineer but was entitled to accrued pension rights that he had under the Pensions Act 1947 and its Regulations (as amended) in accordance with the terms of his appointment at [5] above. It appears from section 13(3) of the Pensions Act at [26], as duly interpreted by the Court of Appeal, that payment of a pension is suspended until the age of sixty is attained unless the Governor-General considers that a case of permanent incapacity has been established. We have, however, been informed by counsel for the Respondent that, until the Court of Appeal decision, the practice had been to pay pensions immediately upon retirement from office and the Appellant had been a beneficiary of this practice. Such counsel's understanding was that persons in receipt of such pensions would continue to receive them, but that persons retiring after the Court of Appeal decision would not receive their pensions till attaining the age of 60 years.

**Can Abolition of a Public Office Lead to a Contractual Remedy?**

[37] The question arises as to whether the Appellant's actually received pension - or a recently retired senior civil servant's deferred pension - is the full extent of the entitlement of such a person who has retired before the age of 60 years, by virtue of the abolition of his unique public office, and who has no judicial review claim concerning the circumstances in which the statutory Order abolished his office. Is it possible that damages for breach of contract may be claimed based upon some contractual element of the holding of a public office? In the circumstances of the Appellant's actual accelerated receipt of a pension and in the absence of detailed

argument from counsel, no definitive answer need yet be given, but it is worthwhile canvassing the issues so that in future matters counsel may fully assist this Court when such an answer is required.

[38] What is the true nature of the relationship between public office holders and the Crown as executive authority of Barbados (through the Governor-General and the Government of Barbados under Chapter VI of the Constitution headed "Executive Powers")? In the light of Chapter VIII of the Constitution, headed "The Public Service" and of the Service Commissions (Public Service) Regulations containing detailed disciplinary conditions, public office holders are no longer personal servants of the Crown dismissible at pleasure because the Crown can do no wrong or because this is always implied in the relationship, as made clear by Sir Denys Williams CJ and the Barbados Court of Appeal in *King* v *The Queen*[9]. Sir Denys Williams CJ[10] and the Barbados Court of Appeal also treated King, a clerical officer, as being a public officer under a contract of employment, but a contract which had to be consistent with statutory provisions which affected the contractual relationship[11].

[39] After all, there may well be discussions between the executive and the prospective office holder giving rise to mutually agreed written terms as to starting date, salary grade and other conditions of the appointment within the framework of the Constitution (particularly Chapter VIII) and any other relevant primary or secondary legislation. While contractual terms cannot modify or exclude mandatory statutory provisions[12], it can be argued that the statutory framework stands within the common law and does not exclude common law

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[9] (1992) 44 WIR 42 and (1993) 45 WIR 50. See also *Gould v Stewart* [1896] AC 575 (PC) taking account of the Civil Service Act 1884 and *Thomas v Attorney General of Trinidad & Tobago* [1982] AC 113 at 127

[10] (1992) 44 WIR 42 at 73

[11] See (1993) 45 WIR 50 per Moe JA at 81

[12] See *Fraser v Judicial and Legal Services Commission* [2008] UKPC 25 at [18] where an express right to terminate a magistrate's appointment did not oust the constitutional protection in s. 91 of the St Lucia Constitution where there was a removal from office. *Fraser* was applied in *Panday v Judicial and Legal Services Commission*[2008] UKPC 52 at [10] - [11]

principles except expressly or by necessary implication[13] (as may be the case for judges, ministers of the Crown and others who fulfil constitutionally defined State roles).

[40] The relationship between the Crown and the public officer holder will then have significant contractual elements though these will be affected by statutory rights and obligations and in respect of which the office-holder is able to resort to administrative law remedies in the absence of adequate contractual remedies.

[41] The Appellant's office (like most public offices) can be abolished at will by an Order made by Parliament at the instigation of the Minister responsible for the Civil Service so long as such Order is not impeachable in judicial review proceedings. However, the Appellant's office has plenty of protection under the Service Commissions (Public Service) Regulations 1978, as amended from time to time, so that it can be submitted that his appointment to perform the tasks allocated to the Chief Electrical Engineer by the Electricity Act appears to be one that will endure until retirement age so long as he was not guilty of behaviour causing him to fall foul of the Regulations, subject, of course, to the overriding statutory power to abolish his public office at any time.

[42] It can be argued that this latter overriding power is so omnipotent that a public office holder can effectively be dismissed by the executive if acting in a fashion unimpeachable in judicial review proceedings and yet have no right to compensation for breach of contract. Thus the officer is in a precarious position.

[43] On the other hand, it can be argued that a purposive approach to interpreting[14] the Crown-public officer relationship indicates that the Appellant reasonably would not consider himself to be in such a position when the terms of his appointment

[13] See *Jarratt v Commissioner of Police for New South Wales* (2005) 224 CLR 44 at [10] per Gleeson CJ and at [58] per McHugh , Gummow and Hayne JJ

[14] See *Investors Compensation Scheme v West Bromwich BS* [1998] 1 WLR 896 AT 912-913 per Lord Hoffmann

were offered to him. Did he not reasonably expect that he was acquiring a specially protected position, essentially a tenured position, for the performance of the statutory tasks[15] of the Chief Electrical Engineer, with substantial financial benefits and security? These are intended to protect his independence in decision-making in the public interest and to attract able persons to take up public offices rather than seek employment in the private sector where remuneration is usually better. Surely the Minister for the Civil Service did not view his powers under the Civil Establishment Act as enabling him with the assistance of a statutory Order to destroy the security of employment and the conditions of employment which the Public Service Regulations were designed to protect[16]. Thus, it can be argued that the Appellant was reasonably entitled to expect that he would continue as part of the permanent establishment in the public service performing the tasks allocated to the Chief Electrical Engineer until the retiring age unless removed or retired for disciplinary reasons under the Public Service Regulations.

[44] The only qualification upon such an interpretation of the employment relationship would be the outside possibility that a statutory Order could be made to abolish his office properly and in good faith in the interests of efficient public administration. This will deny him the remedy of a declaration that his office continued and prevent him claiming a salary and other ongoing benefits attached to that office. Nevertheless, he will have the right to a deferred pension under section 13A (2) and (3) of the Pensions Act. It can be argued in the interests of the Crown that this right alone is sufficient. On the other hand, why should he not be entitled to some damages for breach of contract for loss of an employment providing him with substantial financial security?[17] How should one balance the interests of the Crown and the interests of the office holder?

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[15] Cp the contract for the duration of a task in *Bryant v Defence Housing Authority* [2002] ACTSC 43 at [39]

[16] See *Director-General of Education v Suttling* (1987) 162 CLR 427 per Brennan J at [15] with whom Mason ACJ and Deane J concurred

[17] See *Bryant v Defence Housing Authority* [2002] ACTSC 43 at [28] (18 months contract) and *National Gallery of Australia v Douglas* [1999] ACTSC 79 at [39] – [40] (contract to fulfil task), both cases where the Australian Capital Territory's Supreme Court awarded damages for breach of contract to a public employee, despite an overriding statutory power of a Departmental Secretary at any time to terminate

[45] To answer this, one needs to take account of the judgment of Major J, giving the unanimous judgment of all nine members of the Supreme Court of Canada in *Her Majesty the Queen in Right of Newfoundland v Wells*[18], and to consider its relevance in contemporary Barbados**.** It concerned the office of "Commissioner (Consumer Representative)" on a Public Utilities Board, held by Wells during good behaviour until attaining the age of 70 years, but which had been abolished by a new Public Utilities Act. Major J stated, "The apparent anomaly of a tenured position in a realm where the government has an unfettered right to change an administrative structure is resolved by observing the distinction between the respondent's right to hold office as a Commissioner and his right to the financial benefits of having agreed to serve in that capacity. While the legislature is free to remove the power and responsibility of the office, in doing so it does not strip the respondent of the compensation flowing from the contract unless it specifically so enacts."

[46] A further issue arises because, according to the advice of the Privy Council in *Reilly* v *The King*[19] in 1933, there can be no breach of contract where Parliament abolishes a public office: such abolition renders further performance of the contract impossible, so that the contract is discharged under the doctrine of frustration of contract. Nevertheless, the Supreme Court of Canada in *Wells*[20] held that "it is disingenuous for the executive to assert that the legislative enactment of its own agenda constitutes a frustrating act beyond its control." It held that the frustrating act is to be regarded as an instance of self-induced frustration that cannot be relied upon by the Crown. After all, if a company abolished the posts of Legal Officer and Assistant Legal Officer, having decided that legal services

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the employment of an employee in the Department. They followed the views of McHugh JA in *Suttling v Director-General of Education* [1985] 3 NSWLR 427 at 445-447, later endorsed in *Jarratt v Commissioner of Police for New South Wales* (2005) 224 CLR 44 at [71] per McHugh, Gummow and Hayne JJ

[18] [1999] 3 SCR 199 at [43]: also see at [35] - [36]
[19] [1934] AC 176
[20] [1999] 3 SCR 199 at [52]

could be more efficiently and cheaply provided by firms of attorneys, it could not possibly assert that the contracts of those two employees had been frustrated.

**No Award of Damages**

[47] Even if the Appellant could establish that there had been a breach of contract that entitled him to claim damages (as to which we leave matters open), we would not make any award of damages in the circumstances of his case. We have been informed by his counsel that he has in fact received a pension covering the period since the abolition of his office on 1st April 1992 when he was 37 years old, and that he should continue to be paid a pension until his death, counsel for the respondent confirming that this was her understanding of the position.

[48] The accelerated payment of a pension to the Appellant before the normal retirement age of 60 years should be regarded as adequate compensation, especially having regard to the contingencies of life, the duty to mitigate loss and the absence of evidence in relation thereto (though his counsel informed us that he has been engaged in part-time employment at the University of the West Indies, which, together with his receipt of a pension, seems inconsistent with his main claim to be paid as if still in office).Nearly seventeen years after the loss of the Appellant's office, this is not the occasion to make an order for damages to be assessed in the High Court after any necessary amendment of pleadings.

**Conclusion**

[49] The appeal is dismissed but no order is made as to costs.

**JUDGMENT OF THE HONOURABLE MR. JUSTICE JACOB WIT, JCCJ**

[50] I am in the unfortunate position of having to disagree with the majority of the Court on the main issue of this matter. I am of the view that section 94 of the Barbados Constitution is applicable to this case and that, since this provision has not been applied, the Appellant's retirement from the public service is null and void. I am also of the view, however, that in the circumstances of this case no damages should be awarded. Therefore, although I disagree with their reasons, I concur almost entirely in the result the majority of the Court has reached. These are my reasons.

[51] I have no disagreement with the facts as set out by Justice Hayton for the majority, so I will simply refer to these facts as stated in paragraphs [5] – [20] of his judgment.

[52] This is a case about the abolition of a unique office in the public service of Barbados. In this country, the decision to abolish a public office is a matter which lies entirely in the hands of the Executive. The Constitution does not require any involvement of the Public Service Commission in reaching that decision. But it does need the approval of both Houses of Parliament. It has to be understood, though, that such approval does not in any way elevate the decision to the level of primary legislation. It is and remains subordinate legislation. This distinction is of fundamental importance in a legal system such as that of the United Kingdom where primary legislation - in contradistinction to subordinate or delegated legislation - cannot be reviewed by the courts. In Barbados this is not so. Under its Constitution, primary legislation also can be reviewed and held against the light of the constitutional provisions. This does not mean, however, that this distinction would be irrelevant in Barbados. Subordinate legislation can generally, depending on its subject-matter, be judicially reviewed on much broader grounds than primary legislation. These grounds can *grosso modo* be found in section 4 of the Administrative Justice Act, Cap. 109B. A decision to abolish an office is therefore in my view clearly not unimpeachable. The majority also seems to

indicate this in [21] of the judgment. I would agree with them that *mala fides* is just one of many grounds. Although, where there is a decision to abolish an office, the principles of natural justice, as mentioned in section 4 (d) of the Administrative Justice Act will not require a formal "hearing" of those who will be affected by it (as it is not a measure against them as such), some form of consultation, which in fact occurred in the present case, may still be necessary. At any rate, a legal attack on such a decision does not have to be limited to bad faith.[21] I will leave it at this as no such attack has been launched against the abolition of the office as such.

[53] A distinction has in my view also to be made between "removal from office" and "retirement from the public service". These concepts are not the same. The latter is the consequence of the former. There are, for example, other grounds for retirement from the public service, such as reaching a certain age or, as in this case, the abolition of the office held by the public officer (for reasons of reorganisation or otherwise). The majority states, in [32] of the judgment, that the Appellant's retirement from the public service was the *inevitable* consequence of the abolition of his office. I take it that this statement is confined to the particulars of this case. But, generally speaking, I would be unable to agree that that consequence is as inevitable as the majority holds it to be. As a matter of fact, the majority itself seems to have conceded this in [30] of the judgment where it is stated that "(o)nce the Appellant's office was abolished… he would … cease to be in the public service *in the absence of special circumstances.*" In the view of the majority these special circumstances were absent in the present case. Hence, in this case the retirement was deemed inevitable. Be that as it may, the point is that if these special circumstances do occur, a public officer whose office is abolished would not cease to be in the public service. If that is so, the retirement is not inevitable.

[21] See also *R(on the application of Javed) v Secretary of State for the Home Department* [2002] QB 129 at [50]

[54] The special circumstances the majority has referred to are situations wherein an officer whose office has been or is about to be abolished, has been offered "another pensionable office not less in value than the office of which he was the substantive holder immediately before such abolition or reorganisation" and subsequently has accepted that offer. This is a situation which is expressly referred to in Regulation 23 of the Pensions Regulations 1947 to the extent that it provides that the officer is not entitled to receive a pension if he refuses the offer. On the face of it, this provision merely seems to provide the Government with an reason not to grant a pension if this particular situation occurs. And in 1947 that was probably exactly what it was meant to provide. It clearly does not say that there is any obligation on the part of the Government to make an endeavour to offer the officer alternative employment within the public service. However, time has not stood still. Barbados has come a long way since 1947. More elevated norms and standards have emerged with regard to the treatment of employees in general and public servants in particular.

[55] For some decades now it has been accepted in countries which have legislated the concept of unfair dismissal that in cases of genuine redundancy the employer is required to make reasonable efforts to find suitable alternative employment for the employee within the company or possibly within the grouping to which the company belongs.[22] This is to a certain extent also common in parts of the Commonwealth Caribbean.[23] Such a requirement can, for example, be found in many collective labour agreements in the region. In this part of the world, and Barbados is no exception, the Government is usually the predominant employer. As such, it has a duty to lead by example. Principles of fairness and good administration, imbued as they are in the Constitution, require this. In this respect, Regulation 18 of the Service Commissions (Public Service) Regulations 1978 is

[22] *Vokes Ltd v Bear* [1074] ICR 1, [1973] IRLR 363, *Modern Injection Moulds Ltd v Price* [1976] ICR 370, [1976] IRLR 172, *Williams v Compare Maxam Ltd* [1982]ICR 156, [1982] IRLR 83

[23] See eg, although in a broad brush stroke, George Kirkaldy, *Industrial Relations Law and Practice in Jamaica*, p. 44

in my view highly relevant. Although it is true to say that this Regulation is not concerned with a situation where, as in this case, a unique office has been abolished but rather with a situation where one or more offices of a greater number of like offices are to be abolished and therefore a choice has to be made as to which of the office holders will have to leave the service, the last part of the Regulation makes it clear that efforts should be made to transfer those officers who were not selected to keep their post to "another office not lower in status nor carrying a smaller salary than which has been abolished." As far as this part of the Regulation is concerned I do not see a relevant difference with the present case. In both situations, a public officer will have to leave the service if no other suitable position within the public service is found or offered. It does not make any sense to me why in the one case there should be an obligation to make an effort to find such a position for the unfortunate officer while in the other case there would be no such obligation.

[56] Quite another question would be which branch of the Government would have the duty to search for a suitable alternative office when an officer is about to lose, or has lost, his office? Would that be the Executive or the Public Service Commission? It follows from Regulation 18 that the latter would be the appropriate body to do this although it would most certainly need the cooperation of the Executive. Although it is not always easy to draw the line, it would seem that generally speaking the Executive deals with the offices (the general policy) while the Public Service Commission deals with the office holders (the human resources).[24] Logically, a decision as to whether there would be a fitting office for a public servant who without any fault of his own is about to lose his current office is basically a human resources decision and therefore a decision that should be taken by the Public Service Commission (formally the Governor- General) and not by the Executive (even though their involvement is needed to resolve the matter).

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[24] *Cooper and Balbosa v Director of Personnel Administration and the Police Service Commission*, [2006] UKPC 37 at [22] – [29]

[57] Against this background, I now turn to section 94(1) of the Constitution which states that, subject to the provisions of that Constitution, the power to, *inter alia*, remove persons holding a public office is vested in the Governor-General acting in accordance with the advice of the Public Service Commission. Section 117(8) of the Constitution extends the meaning of "the power to remove" to "any power conferred by any law to require or permit that officer to retire from the public service." The majority interprets this section as dealing with "any power conferred by law *on particular persons* to require or permit an officer to retire from *a currently existing public office*." They reason that where an office is being abolished, the office holder is not required by any person to retire from the public service but that the officer's retirement is achieved by operation of the law itself.

[58] With respect, I think that this interpretation of the Constitution is too narrow. Words have to be read into the text and even changed, in order to reach this result, such without a proper justification. Again, it is not the abolition of the office that automatically or inevitably prompts the holder of the office to retire. Only if and when the Public Service Commission has established that no suitable alternative office is available for the office holder or when the office holder has refused to accept such an alternative office will he be required or permitted, as the case may be, to retire from the public service. Not only will the Commission have to examine if there is an alternative office available (and for this it will no doubt depend heavily on the Executive) but they, or in case section 98 of the Constitution is invoked, the Barbados Privy Council, will also have to decide whether this office is suitable. This decision-making process will ultimately lead to a point where the officer will or will not be required or permitted to retire. Interpreting the Constitution in a broad, liberal and purposive way, leads me to accept that this process amounts to a power within the meaning of section 117(8) of the Constitution.

[59] There is another, more practical reason to embrace this broader interpretation. The purpose of the law is not only to resolve disputes and provide remedies, although courts will understandably and by nature be focused on that aspect of it. An even

more important purpose of the law is the avoidance or containment of disputes. By interpreting section 117(8) of the Constitution in a manner as to suggest that in a case as the present one compliance with section 94 and, if need be, section 98 of the Constitution is required, the Court ensures as far as possible that proper solutions can be reached within the confines of the governmental powers themselves, without the public servant having to resort unnecessarily to, what often proves to be, expensive, tortuous and extremely lengthy litigation.

[60] It follows that in my view an award for damages for breach of the Constitution would in principle have been appropriate. But this could not have been more than a modest award. As the majority has pointed out in [27] of the judgment, there is no evidence that in this particular case a pensionable office of comparable value was available. And neither is there any evidence that the Appellant ever requested the government to provide him with such an office. The breach of the Constitution in this case is therefore merely a formal one, which would only require an award of damages "limited to what is adequate to mark an additional wrong in the breach and, where appropriate, to deter future breaches."[25] As the majority rightly states, the Appellant has already been compensated as he is being paid a pension since 1992 without having any entitlement thereto before 2019. In fact, the Appellant who had been in office for only four years before his office was abolished must by now already have received an amount of BB$ 122,588.87.

[61] In arguing that he has never ceased to be a public officer and by reason thereof is entitled to receive the emoluments attaching to the post he last held in the public service, the Appellant seems to confuse a removal from office with retirement from the public service. Only where a removal from office violates the Constitution or other legislation, and the officer **promptly**[26] seeks constitutional

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[25] Elias CJ in *Taunoa and others v Attorney General* cited in *Inniss v Attorney General of Saint Christopher and Nevis*, [2008] UKPC 42 at [26]

[26] In *McLaughlin v the Governor of the Cayman Islands*, [2007] UKPC 50, the public officer apparently applied for and obtained leave to move for judicial review 18 months after he had been removed from office. I would not call that prompt. Three months would be about the limit, I would think.

or administrative relief in order to have the removal quashed and to be reinstated in his office, could there be a situation in which the officer, never having been properly dismissed in law, would be entitled to all his emoluments. In any other case, the officer would have to content himself with an award for damages on the basis of either wrongful dismissal at common law, if and when applicable, or constitutional and administrative relief, or both of them. Clearly, a public officer whose office has been abolished in accordance with the law and who subsequently has been retired from the public service in violation of the law is not in a position to be reinstated in an office that no longer exists and can therefore not be deemed to have remained in his post such as to entitle him to continued payment of emoluments. Suffice it to say, that also and especially in a case of unlawful removal from office where the officer has filed his case promptly, the courts have a duty to hear and decide the case expeditiously considering the financial consequences for the state and its taxpaying citizens. The public interest clearly requires such an approach. I therefore, sadly, have to join the majority in what they state in [19] and [20] about the judicial delays in this case.

[62] In conclusion, I would allow the appeal but only with respect to the declaration that the appellant has been retired from the public service in violation of section 94 of the Constitution. But for the reasons above I would make no order for damages.