

BARBADOS.

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL JURISDICTION

No. 687 of 2007

BETWEEN:

CHARLES IAN WALTER BRATHWAITE *Plaintiff*

AND

CHIEF PERSONNEL OFFICER *First Respondent*

PUBLIC SERVICE

COMMISSION *Second Respondent*

ATTORNEY GENERAL *Third Respondent*

Before the Honourable Madam Justice Margaret Reifer, Judge of the High Court.

2007: May 24;

July 05;

October 15, 16, 17, 18;

November 12, 13, 14, 15, 19, 20;

December 14, 18.

2008: January 25;

February 07, 08

July 15.

2009: May 08.

Mr. Maurice King QC, Mr. Edmund King and Mr. Adrian King for the Applicant.

Mr. Hal Gollop, Mr. Steve Gollop and Mr. Hilford Murrell for the Respondents.

DECISION

The nature of the action and its background

- [1] This is an application for Judicial Review filed by way of Notice of Originating Motion, Statement and Affidavits in Support pursuant to the provisions of the Administrative Justice Act Chapter 109B and Judicial Review (Application) Rules, 1983 of the laws of Barbados.
- [2] The Applicant is a public servant who first entered the Service in the 1970s. He left the service in 1978 to join the Barbados Defence Force where it appears he gave distinguished service and rose to the rank of major. He rejoined the Public Service in 1998 when on the 14th September 1998 he was appointed Principal Training Officer in the Department of Training Administration Division.
- [3] Appointment to the post of Principal Training Officer is made in accordance with section 94 of the Constitution by the Governor General acting on the advice of the Public Service Commission after consultation with the Prime Minister.
- [4] Between 1998 and September 2005 the position of Principal Training Officer was at the same level/grade as a Deputy Permanent Secretary in the Public Service. There was a re-grading in the Public Service which took effect from the 1st September 2005 and thereafter the post of Principal Training Officer fell below the level of a deputy-permanent secretary. This was apparently a feature of the 2005 re-grading and is in essence an endemic feature and/or weakness of re-gradings generally, since the fundamental object of such is to address the perceived imbalance in civil service grading.
- [5] He brings this action against the Chief Personnel Officer in her capacity as head of the Personnel Administration Division of the Ministry of Labour and the Civil Service; against the Public Service Commission as Second Defendant under its constitutional authority, in particular that of interviewing and appointment of Public Officers pursuant to section 94(1); and thirdly, the Attorney General and Third Defendant, as the representative of the Crown in right of its Government of Barbados pursuant to the provisions of the Crown Proceedings Act Chap. 197.

The issues to be determined

[6] The Applicant Charles Brathwaite identifies three circumstances as precipitating this application and they are as follows:

(A) A decision of the Permanent Secretary Ministry of the Civil Service made on the 2nd November 2005 and First Respondent the Chief Personnel Officer by letter on the 15th November 2005 seconding the Applicant as Principal Training Officer to the Post of Special Assignment Officer in the Ministry of the Civil Service with effect from 1st November 2005 until further notice;

(B) The decision of the Second Respondent not to interview the Applicant for the position of Deputy Permanent Secretary, thus depriving the Applicant of possible promotion in the Public Service;

(C) The decision of the First Respondent not to allow the Applicant to act as Deputy Permanent Secretary while the Deputy Permanent Secretary acted as Permanent Secretary.

The Relevant Facts

[7] This action was commenced by the Applicant by the filing of the three documents required under the Administrative Justice Act. In particular the Applicant's Affidavit of April 19th 2007 sets out the factual matrix as he sees relevant.

[8] Paragraphs 33 and 34 of this document appears to catalogue the start of the Applicant's growing conviction of his mistreatment by the Public Service. He states as follows:

"33. I headed the Training Administration Division from 14th September 1998 until 30th April 2002 before Mr. Frederick Forde, Permanent Secretary was assigned to that department to carry out the very functions I was appointed to perform. Therefore upon Mr. Forde's appointment, I had no duties until Mr. Forde was transferred from the department on the 15th November 2003."

[9] Affidavits were filed in response to the Originating Summons, Statement and Affidavit of the Applicant by the Head of the Civil Service Avril Gollop, Permanent Secretary in the Ministry of the Civil Service Ronald Fitt, Valda Alleyne, acting Deputy Principal Training Officer, and Chief Personnel Officer, Gail Atkins. The Applicant responded to all these affidavits.

[10] The Affidavit of the Head of the Civil Service confirmed receipt of letters sent by the Applicant and their subsequent meeting. She however denied telling the Applicant that there was a shortcoming in his secondment, and that she would undertake to have the matter rectified. She further went on to state that the Applicant had failed to date to make available to the Public Service Training Committee the revised Policy document which was to have been effected by mid-March 2007. In

other words that he had failed to complete the specific task for which he had been seconded. The Applicant took issue with these denials in his Affidavit in response.

[11] The Affidavit of Ronald Fitt principally challenges the Applicant's allegation that the position of Special Assignments Officer is below that of Principal Training Officer; that the Applicant was not given an opportunity to be heard on the issue of his secondment; and the reasons that the Applicant advances as to why he has been unable to date to complete the tasks assigned to him. The Applicant by affidavit in answer filed 26th June 2007, took issue with every allegation in this Affidavit save the admissions.

[12] The Affidavit of Chief Personnel Officer Gail Atkins was filed on June 13th 2007. Her Affidavit speaks principally to the process followed by her department in the 'secondment' of the Applicant to the post of Special Assignments Officer; her reasoned position on her stated opinion that the position of Special Assignments Officer equaled that of Principal Training Officer; a contextualization of the Applicant's request for a transfer and the letter written in support thereof by the then Permanent Secretary Mr. Freddie Forde; and a rationalization of the position that there was no refusal to interview the Applicant (more specifically the circumstances resulting in his not being interviewed);

[13] As with Permanent Secretary Fitt, the Applicant generally took issue with this Affidavit except where it contained admissions.

[14] The final Affidavit filed by the Respondents was that of Valda Alleyne, who at the relevant time was Acting Deputy Principal Training Officer. She was the officer appointed to act Principal Training Officer with effect from November 2nd 2005 when the Applicant was seconded to the position of Special Assignments Officer. Her Affidavit deals with the changing of the locks after the Applicant was reassigned, the allegation from the Applicant being that it was done to embarrass him. She was instructed by Permanent Secretary Fitt to change the locks.

[15] She states the following at paragraph 8 of her Affidavit:

"That it is common practice to have the locks to the main entrance/front door changed after staff members who have access to keys have been transferred from the Division. The customary practice is for the Principal Training Officer to give such directions to the Senior Clerk. The Applicant was familiar with this practice as during his tenure as Principal Training Officer he had in fact executed it on the re-assignment of Mr. Frederick Forde former Permanent Secretary Training and on the transfer of Mr. Preston Broomes former Senior Executive Officer."

[16] The Applicant took issue with this Affidavit except in so far as it consisted of admissions. He sought to distinguish the changing of the locks on the departure of the two above-mentioned gentlemen as distinctly different from his circumstances.

[17] Several Notices To Produce documents were filed, some of these documents were produced, but the circumstances leading to the eventual withdrawal of these Notices and the refusal of a late

application to this court to re-open the case for discovery were outlined in the earlier decision in this matter delivered in February 2008.

[18] All deponents of Affidavits were tendered for cross-examination.

[19] The only witness for the Applicant was himself and he gave extensive evidence, was cross-examined and re-examined.

[20] The only witness for the Respondents was Chief Personnel Officer Gail Atkins. She gave extensive evidence in chief, was cross-examined extensively and was even recalled for further cross-examination.

[21] Permanent Secretary Fitt and Head of The Civil Service Avril Gollop were both tendered for cross-examination, but counsel for the Applicant declined to cross-examine them.

Preliminary Submissions by counsel for the Respondents

[22] Counsel for the Respondent made two preliminary submissions. Firstly, he submitted that the application was flawed in that it contravened the one year limitation provisions of the Limitation (Public Authorities) Act Chap 206. He argued that the Applicant assumed office on the 2nd November 2005, but filed suit on the 19th April 2007.

[23] This submission was erroneous as counsel had not taken account of the 1997 amendment to this Act, which changed the limitation period to three years from the date on which the cause of action accrued.

[24] Secondly he submitted that the court should, pursuant to the provisions of section 8 of the Administrative Justice Act, refuse to grant the relief sought on the grounds that the relief sought would be “detrimental to good administration.” He argued that the effect of declaring the appointment of the applicant null and void would impact on all that has been achieved with the appointment, which includes work carried out in a post which is ‘ultra vires’.

[25] In support of these submissions he cited the case of **Caswell v Dairy Produce Quota Tribunal For England and Wales 1990 HL 2 WLR at 1328, Judy Lloyd v Attorney General (distinguished) and Commonwealth Caribbean Public Law by Fiadjoe at pages 106 to 107.**

[26] **Caswell** was a case in which the House of Lords recognized their authority to extend the limitation period where an application was filed out of time, but held that a court may refuse leave or if leave was granted, refuse the relief sought where in the court’s opinion the granting of such relief was likely to cause hardship or prejudice, or would be detrimental to good administration independently

of hardship or prejudice. The court in that case declined to grant the relief sought on the grounds that it was detrimental to good administration, as the re-opening of the decision would lead to other applications to re-open similar decisions which, if successful would lead to a re-opening of the allocation of quota over a number of years. The court declined to attempt a precise definition of what constitutes 'good administration'. Lord Goff however made the following critical observation:

"...it is of importance to observe that section 31(6) recognizes that there is an interest in good administration independently of hardship, or prejudice to the rights of third parties, and that the harm suffered by the applicant by reason of the decision which has been impugned is a matter which can be taken into account by the court when deciding whether or not to exercise its discretion under section 31(6) to refuse the relief sought by the applicant. In asking whether the grant of such relief would be detrimental to good administration, the court is at that stage looking at the interest in good administration independently of matters such as these ... Matters of particular importance, apart from the length of time itself, will be the extent of the relevant decision, and the impact which would be felt if it were to be re-opened."

[27] In assessing this preliminary submission I acknowledge and follow the position taken by the Court of Appeal in **Judy Lloyd v The Attorney General Civil Appeal No. 9 of 1998** where on the same point Chief Justice Williams stated:

"These considerations may have weight when the substantive matter is heard and the court has to decide whether to grant relief. But the fact is that section 8 makes no provision for the Court to take such considerations into account before it is called upon to decide the question of substantive relief."

[28] The preliminary submissions are therefore denied and this court will proceed to assess the substantive submissions.

A . THE DECISION TO SECOND AND ITS RAMIFICATIONS

The Factual Background

[29] It is not in dispute that on or about the 2nd November 2005, (and subsequently confirmed by letter dated November 15 2005 from the Chief Personnel Officer to the Respondent) the Permanent Secretary in the Ministry of Labour and the Civil Service informed the Applicant that he would be 'seconded' to the post of Special Assignments Officer with effect from November 3rd 2005 until further notice.

[30] In her evidence before this court, the Chief Personnel Officer explained the procedure followed, and her perceived authority, as follows:

"... I wrote the letter confirming Brathwaite's appointment as Special Assignments Officer. Personnel Administration would have received the recommendation from the Permanent Secretary of the Ministry of the Civil Service on the relevant form PSC5 recommending that Major Brathwaite be seconded to the post of Special Assignments Officer. That recommendation would have been processed in the following way in view of the fact that it was a temporary position: The matter would have been prepared by the relevant clerk, submitted to the Chief Personnel Officer who would submit the matter for consultation to the Minister of the Civil Service. That authority is given by Administrative directive arising out of the 1974 Constitutional amendments which state that in terms of temporary appointments this should be done by the Chief Personnel Officer in consultation with the

- [31] This directive was later admitted as Exhibit GA2 and forms the bedrock of the Respondents’ argument as to their authority vis-à-vis temporary and unestablished posts.
- [32] The Applicant in his evidence stated that he pointed out to the Permanent Secretary in the conversation noted above why he (the Applicant) did not think it necessary to be given a special assignment to carry out a task which he could perform in his capacity as Principal Training Officer. Evidently the Permanent Secretary did not agree with him and the Applicant agreed in cross-examination, that Permanent Secretary Fitt, in spite of his submission and argument, told him that he wanted him to concentrate on certain outstanding matters, the most important of which being the development of a training policy. He also gave evidence, confirmed by Permanent Secretary Fitt in his Affidavit, that he questioned the Permanent Secretary as to the ‘*real reason*’ for his secondment.
- [33] On or about November 11th 2005 the Applicant wrote the Permanent Secretary requesting the reason for his reassignment. In a written response dated November 24th 2005 the Permanent Secretary re-iterated the reason given to the Applicant on 2nd November, namely, that there were a number of matters related to the administration of training which were outstanding and on which the Applicant was required to focus full time.
- [34] The Applicant was not satisfied with this response and he had the National Union of Public Workers write a letter dated November 17th 2005 to the First Respondent complaining of his secondment without his consent. There was a second letter written on November 28th 2005. There was no reply to either letter.
- [35] The matter was raised with the Head of the Civil Service in a letter of November 25th 2005 and a subsequent interview with her of December 6th 2005. The gravamen of this letter was that there was in his opinion no reason for the secondment, it was to an inferior position and there was expressed concern as to its impact on his career path in view of the fact that it was for an indefinite period. The Applicant was dissatisfied with the outcome of this meeting.
- [36] He next wrote to the First Respondent by letter of February 3rd 2006 through his attorney-at-law demanding re-instatement or alternatively suitable placement elsewhere to reflect his status (exhibit CB9).

The Applicant’s Argument

- [37] The Applicant’s submissions on his secondment can be summarized as follows:
1. That he was seconded from the substantive and established (under the Civil Establishments Act Cap 21) post of Principal Training Officer in the Training Administration Division of the Ministry of Labour and the Civil Service, to an unestablished and temporary post in the same Ministry of the Civil Service under the same Permanent Secretary, contrary to section 2.21 of the General Orders.

2. That the Chief Personnel Officer has no authority to second or confirm the secondment of a Public Officer such as the Principal Training Officer who is in an established position, to a temporary position; that power rests with the Governor-General acting on the advice of the Public Service Commission.
3. That the post of Special Assignments Officer (SAO) is not equivalent to, but in fact below the status of Principal Training Officer.
4. That the Applicant had a right to be heard on whether he consented to the secondment or otherwise stated, that he had a right to prior discussion or consultation before the secondment was effected;
5. That the post of Special Assignments Officer is not within the Public Service.

[38] Section 2.21 of the General Orders provides as follows:

“An officer or employee may, as the exigencies of the public service require be seconded to a post of identical grade and level in a ministry or department other than that to which he is substantively appointed.”

[39] The Applicant argues that the secondment is contrary to the provisions of section 2.21 for two reasons: firstly, because the post of Special Assignments Officer is an unestablished post and as such is not a post of identical grade and level as the post of Principal Training Officer; and secondly, that the post of Special Assignments Officer is in the same ministry as the post of Principal Training Officer.

[40] On the issue of the lack of authority of the Chief Personnel Officer and the Permanent Secretary to second the Applicant, he defines the scope and extent of the authority and duties of the Chief Personnel Officer by reference to section 9 of the ***Service Commission (Public Service) Regulations 1978***. It is however noted that in her cross-examination by this counsel the Chief Personnel Officer did not agree that this defined the scope and extent of her authority. She stated as follows:

“These reflect my duties with respect to the Commission only. The Chief Personnel Officer also has other duties ... These duties are spelt out in my job description. In the job description manual the Chief Personnel Officer has statutory responsibilities as well as others ...”.

[41] Counsel also argued that the Chief Personnel Officer’s authority is defined by the ***Constitution (Delegation of Functions - Public & Police Provisions) Order 1974***. This section however, relates only to the delegation of these functions vested in the Governor-General and the Chief Personnel Officer argues that her authority to ‘second’ comes from elsewhere, namely, a November 1976 Administrative directive arising out of a 1974 Constitutional amendment. While the Applicant

argues that this power rests with the Governor General acting on the advice of the **Public Service Commission** the First Respondent argues that it rests with her.

The Case for the Respondents

[42] In response the Respondents, in the first instance, raised two points, firstly, the proper meaning of the word 'secondment'; and secondly, the legal import of the word 'status' (addressing the seemingly unresolved issue of whether there is a contractual relationship between the Crown and the civil servant or not): **see Commonwealth Caribbean Public Law 2nd Edit. by Professor Albert Fiadjoe at pages 184 and 185 and Gladwyn Ophelia King and the Attorney General of Barbados Civil Appeal No.19 of 1992.**

[43] He refers to the General Orders and that section dealing with Transfer and Secondment at 2.21 and submits that a person's status is indicative of a person's legal rights and duties, powers and liabilities. The notion of lateral movement provided for in the General Orders puts paid to the Applicant's contention that the post of Special Assignments Officer is not equivalent to that of Principal Training Officer.

[44] The second plank of his argument is based on examining whether the Respondents acted Illegally, Irrationally, or were guilty of some Procedural Impropriety, the three grounds for judicial review: **see Council of Civil Service Unions v Ministry of Civil Service 1984 3 AER 935.**

[45] He argues that there was no Illegality justifying Judicial Review in the seconding of the Applicant and that it is undeniable that there is legal authority to second as the "exigencies of the civil service" require. A public servant has no right to affirm or challenge such secondment.

[46] On the issue of whether such secondment should be to a position of identical grade, he argues that there is nothing to the effect that the secondment must be to an established post; the General Orders do not make a distinction between 'established' and 'unestablished'.

[47] Secondly, the act of seconding the Applicant was neither Irrational or Unreasonable. It was effected "as the exigencies of the Civil Service require". The Applicant had a hearing with Permanent Secretary Fitt and his letter to the Head of the Civil Service (CB8) indicated compliance or acquiescence in the task assigned.

[48] He argued further that the relief of mandamus demanded in the Applicant's pleadings should not succeed as it would offend the rule against the fettering of discretion. This speaks to the Applicant's contention that as SAO he is no longer a head of department and his arguments as to the difference in the number of staff and managerial duties. Counsel submits that the issue is one of discretion and its exercise. (**see Principles of Public Law by Andrew Le Sueur at pages 244 to 246**).

[49] Thirdly, he argues that there has been no Procedural Impropriety. This argument was linked to the

second argument of the Respondent and is discussed below.

Secondment is not a transfer (?)

[50] There arose in this proceeding some conflict on the issue of whether the word 'secondment' and 'transfer' were being used correctly. Counsel for the Respondents maintained that this case involves an incorrect use and understanding of these two terms.

[51] The import of counsel's argument is that secondment is NOT a transfer. An attempt at clarification is made by Permanent Secretary Fitt in paragraph 3 of his Affidavit of June 12th 2007 where he states as follows:

"3. That the word secondment has a peculiar meaning in the context of the Civil Service. In accordance with the Operations Manual of the Ministry of the Civil Service secondment is defined at section 4.6 as a temporary transfer from an officer's substantive post to another position either within the public service or outside the public service. At section 4.7 a secondment within the Public Service is usually a position of identical level as that to which the officer is substantively appointed. The transfer is therefore lateral and the officer continues to function under similar terms and conditions as he would in his substantive post. Moreover the transfer is temporary in nature and usually lasts until the officer completes the task for which he is seconded. Such a secondment would be dependent upon the exigencies of the public service..."

[52] This distinction was further addressed by Chief Personnel Officer Atkins when she sought to explain to the court why the Applicant was not interviewed for the position of Deputy Permanent Secretary between February and September 2005. She stated as follows:

"As Principal Training Officer for Mr. Brathwaite to act as Deputy Permanent Secretary he would have to be seconded. He could not be sent to act, he would have to be seconded. From a post of similar grade you can be transferred on appointment. For an acting position you would have to be seconded."

[53] When this Respondent was being cross-examined by counsel for the Applicant, the following exchange occurred:

" Q: Do you consider there is any real difference between seconding and transferring?

A: In terms of how it is used at Personnel Administration Division Yes. For us transfer is a permanent arrangement whereas secondment is temporary.... I agree that secondment is a temporary transfer."

On the issue of secondment to a post outside the public service

[54] Counsel argues that the Applicant has not been appointed to an unestablished post, he continues to hold the post of Principal Training Officer. There has been no change in his salary and emoluments and his pension rights remain the same. He has merely been seconded to the post of SAO under the authority of 2.21 of the General Orders, that is, in accordance with "the exigencies of

the public service”.

[55] He continues to be a “public officer” (the holder of public office) in “public office” (‘any office of emolument in the public service’) in the “public service” as defined by section 117(1) of the Constitution, that is, “in the service of the Crown in a civil capacity in respect of the government of Barbados”. There is no doubt, he submits, that the Applicant remains in the public service.

[56] On the Applicant’s argument that the secondment contravenes section 117(7)(e) of the Constitution in that it is a transfer to an unestablished position in the Public Service, he argues that this is a literal interpretation of the Constitution. The proper approach is a Purposive Interpretation.

[57] This argument is also instructive, he further submits, of the error made in failing to distinguish secondment and transfer. To say that the applicant is not in the public service is to confuse Secondment with Transfer.

B. WAS THERE A DECISION NOT TO INTERVIEW THE APPLICANT FOR THE POSITION OF DEPUTY PERMANENT SECRETARY?

[58] In paragraphs 33 and 34 of his Affidavit of April 2007 the Applicant deposes that sometime in 2003 he applied to the Chief Personnel Officer for reasons therein outlined for a transfer from his position as Principal Training Officer. This followed his statement in paragraph 33, the effect of which is that he found himself redundant after the assignment of Mr. Frederick Forde in April 2002 to carry out the functions he was appointed to perform. He refers to the fact that Mr. Forde by letter dated June 12th 2003 (exhibit CB11) wrote to the First Respondent by memorandum dated June 12th 2003 recommending that he be ‘transferred to the office of deputy permanent secretary or any other suitable position.’

[59] He deposes that sometime in July/August 2005 he became aware of interviews being carried out for the post of Deputy Permanent Secretary in the Public Service. However, in his oral evidence he stated that it was not until September 5th 2005 that in his capacity as a council member of his union, he became aware that a number of persons were not interviewed for the post of deputy permanent secretary. It is to his knowledge that the Union intervened on behalf of all these people (himself included).

[60] By letter dated 12th September 2005 he then wrote the First Respondent requesting an interview for the position. He followed up his letter with two telephone calls and on each occasion the First Respondent indicated that she would look into the matter and get back to him. She never got back to him. Ms. Atkins in her evidence acknowledges receipt of the letter, but has no recollection of these telephone calls.

[61] He further states in paragraph 38 as follows:

“Interviews were conducted for the post of Deputy Permanent Secretary in 2005 and despite Mr. Forde’s recommendation and my letter requesting an interview, my seniority and my eligibility, I was never interviewed. I have been advised and I verily believe that this omission was clearly in breach of Rule 12 of the Service Commissions (Public Service) Regulations 1978...

39. Three of the officers who were invited to be interviewed for the said post, were all junior to me and were promoted with effect from 1 December 2005. The official Gazette ...

41. These promotions were announced 2 months after my request to be interviewed, dated 12th September, 2005 and the date of the last interviews held to fill the vacant posts.”

[62] The evidence of the Chief Personnel Officer Atkins is very critical on this point.

[63] In paragraph 21 of her Affidavit of June 13th 2007 she states as follows:

“That in response to paragraphs 36, 37, 38, 39 and 40 of the Applicant’s Affidavit I also re-iterate that interviews were indeed conducted in the year 2005 for the post of Deputy Permanent Secretary. The process for interviewing candidates commenced on the 14th February 2005 and was completed on the 7th September 2005. The Applicant did in fact make a request to the First Respondent for an interview for the post of Deputy Permanent Secretary by letter dated 12th September 2005. By then the process for interviewing candidates had been completed and the Applicant’s request was clearly out of time”.

[64] Her oral evidence makes clear the normal practice in respect of interviews and the reason why the Applicant was not listed for interview:

“As Principal Training Officer, for Mr. Brathwaite to act as Deputy Permanent Secretary he would have to be seconded. He could not be sent to act, he would have to be seconded. From a post of similar grade you can be transferred on appointment. For an acting position you would have to be seconded...

[65] At paragraph 23 she makes the following important statement:

“23. the fact still remains that by the time the Applicant submitted his request on 12th September 2005 the process for interviewing candidates for the post of Deputy Permanent Secretary had been completed and therefore the Applicant’s request would have been entitled to be considered when the next round of interviews for the post of Deputy Permanent Secretary were being held. No interviews for the post of Deputy Permanent Secretary have been held since then.”

[66] When asked the very important question whether it would have been possible to interview the Applicant at this stage, she responded;

“The Applicant’s letter came on the 12th September 2005, a few days after the Public Service Commission made its decision. I would have to say “No”, it was not practical in the circumstances.

...It would have been recognized that the appointments would have resulted in juniors appointed ahead of their seniors. We would have discussed the matter.

...There was a recognition that an anomaly was created as a result of the Job Evaluation Exercise. There was a recognition that the evaluation created an anomaly by the Public Service generally... This recognition would have occurred after the process was completed”.

The Applicant’s Argument

[67] The Applicant’s argument simpliciter is that the Second Respondent failed to interview the Applicant for the post of deputy Permanent Secretary in contravention of **Regulation 12 and 13 of the Service Commissions (Public Service) Regulations, 1978**. They failed to consider him and by so doing, frustrated his Legitimate Expectation.

[68] The upgrading of the post of deputy permanent secretary was as a result of a regrading exercise in which the First Respondent Atkins participated. The First Respondent is presumed to have had notice of the upgrade of the post of Deputy Permanent Secretary on 15th August 2005 and there was enough time for representation to be made to the Public Service Commission (the Second Respondent) for the Applicant to be interviewed.

[69] The case for the Respondents

On the issue of the failure of the Applicant to be interviewed, counsel for the Respondents submitted that there was no Procedural Impropriety in their failure to do so. He referred to the evidence of the Chief Personnel Officer on this point and submitted that it is not the type of anomaly which is fatal.

[70] He argued that the concept of Legitimate Expectation does not arise here, the important or relevant point being that the Applicant suffered no loss as a result of this occurrence. In any event he argued, it lay within the discretion of the authority to consider the Applicant for promotion to this post.

C. THE DECISION NOT TO ALLOW THE APPLICANT TO ACT AS DEPUTY PERMANENT SECRETARY WHILE THE DEPUTY PERMANENT SECRETARY ACTED AS PERMANENT SECRETARY

The Issue of “Supersession”

[71] The factual occurrence precipitating this head of complaint is set out in the Applicant’s Statement in Support of Notice of Originating Motion as follows:

“(35) On Monday 12th February 2007 the Applicant was informed by the acting Permanent Secretary Ministry of Labour and the Civil Service that with effect from 12th February 2007 until the 2nd

March 2007 Ms. Harriet Sealy (an officer junior to the Applicant) would be acting Deputy Permanent Secretary Ministry of Labour and the Civil Service for that period.

(36) The Applicant immediately expressed his concern that he was the next senior person in the Ministry and would have been expected to have been given this opportunity.

(37) The Applicant was never informed why he was being superseded nor given an opportunity to be heard.

(38) The First Respondent failed to observe the procedures required by law in the making of acting appointments

(39) Section 13(2) of Service Commissions (Public Service) Regulations, 1978 states:

“Where an acting appointment is to be made otherwise than as a prelude to a substantive appointment, the officer appointed shall as a general rule be the senior officer in the Ministry or Department eligible for such acting appointment.”

(43) As a result of the acts of the Respondents the Applicant has been denied his legitimate expectation of being considered for substantive promotion in the Public Service and has suffered public humiliation and damage to his reputation.

The Applicant's argument

[72] The Applicant argues that the Second Respondent failed in its duty by not allowing him to act in the post of Deputy Permanent Secretary, thereby frustrating his Legitimate Expectation.

[73] The Second Respondent acted in contravention of Regulation 13 of the Service Commissions (Public Service) Regulations 1978 and failed to follow the normal practice in the Public Service in these matters. This would have entailed, he argued, the officer being 'superseded' being informed in writing or verbally as to why he was being 'superseded'.

The case for the Respondents

[74] Counsel for the Respondents challenges the use of the word “supersession”, characterizing it in very strong terms as a ‘strong-arm tactic used by the unions which goes against the very grain of ability and merit.’ In her evidence in cross-examination, Chief Personnel Officer Gail Atkins had this to say:

“Supersession is used specifically by the Union to mean where a junior officer is promoted ahead of his or her senior. There is no use of the word ‘supersession’ in our regulations.”

[75] Counsel submits that 'supersession' cannot be a legitimate claim in the face of the provisions of the Service Commissions Regulations 12 and 13, the import of which is that while seniority is a criterion, the higher you rise in the service, the more weight is placed on merit and ability.

[76] On the issue of the Applicant's claim to a Legitimate Expectation he argues that the fact that the Applicant was not appointed to act is not in and of itself evidence that he was not considered. His 'legitimate expectation' can only be that he be considered (that there is fairness in the administrative process), and the Applicant cannot state with any degree of certainty that he was not considered. In other words he cannot claim a legitimate expectation of being appointed to the job, only a legitimate expectation that he would be given a fair consideration. In any event, he argues that the notion of Legitimate Expectation is incompatible with Civil Service Regulations 12 and 13.

The relief sought

[77] The Applicant pursuant to the evidence and submissions made, seeks the following relief:

- a. An Order of Certiorari quashing the decision of the First Respondent the Chief Personnel Officer exercising functions in relation to the decision of the First Respondent in placing the Applicant on secondment from his position as Principal Training Officer to the Position of Special Assignments Officer;
- b. An Order of Prohibition forbidding the First Respondent from continuing to second the Applicant from his position of Principal Training Officer to the Position of Special Assignments officer;
- c. An Order of Mandamus requiring the Second Respondent to consider the Applicant's entitlement to be considered for promotion in the Public Service;
- d. A Declaratory Judgement declaring that the decision of the First Respondent to second the Applicant from his post of Principal Training Officer to the post of Special Assignments Officer and the decision of the Second Respondent in failing to consider the Applicant's entitlement to be considered for promotion in the Public Service is invalid and is vitiated by:

(1) Acting in a way unauthorized or contrary to Law;

(2) Failure to satisfy or observe conditions or procedures required by law;

(3) Breach of the principles of natural justice in denying the Applicant the right to a fair hearing in accordance with the principles of fundamental justice;

- (4) Unreasonable and/or irregular or improper exercise of discretion;
 - (5) Excess of jurisdiction and therefore ultra vires;
 - (6) Conflict with the policy of the service Commissions Act Chapter 34 and the Service Commission (Public Service) Regulations 1978; and
 - (7) Absence of evidence on which the Commission's findings or assumptions of fact could reasonably be based.
- e. An Injunction restraining the First Respondent from continuing to second the Applicant from the position of Principal Training Officer to the position of Special Assignments Officer;
 - f. Damages; and
 - g. An order that the costs of and occasioned by this motion be paid by the respondents.

The Respondents on the relief sought

[78] Counsel for the Respondents reminded the court that all remedies herein are discretionary. Thus, even if there is a finding in favour of the Applicant the court need not grant the orders sought if the result is 'no good'. To quash the decision of the First Respondent would have the negative effect of disrupting the functions of the department: **see Commonwealth Public Law at page 272.**

[79] He argued further, that the Application for a writ of Prohibition is a flawed request, since there is authority to second.

[80] There is no basis, he said, for the grant of the relief sought. The Applicant is not entitled to damages as he has lost nothing and no damage has been done to him.

FINDINGS AND DISPOSAL

Was the Applicant's secondment outside of the public service?

[81] It is the view of this court that the Applicant was not seconded outside the Public Service. At all

times he remained within the Public Service as Principal Training Officer. He was seconded to the post of Special Assignments Officer which is a temporary post in the Ministry of the Civil Service. He was however 'seconded' from an established post to an un-established post within the Public Service.

[82] He remained an appointed officer with all his benefits and entitlements continuing as before secondment. He operated as an officer in the same Ministry, that is, Labour and the Civil Service.

[83] Under section 117(1) of the Constitution the Applicant is a 'public officer' holding 'public office' in the 'public service', and this court so finds.

Did the Applicant have a right to be heard on whether he should be seconded and/or to consent to his secondment and did he in fact have such a hearing?

[84] As a corollary to this question is the further question asked by counsel for the Applicant: Is the seconding from an established post to an unestablished post without the applicant's consent tantamount to the Applicant being constructively dismissed from his employment?

[85] I consider it an unnatural extension of the boundaries of the principles of Natural Justice to argue that the Applicant had a right to approve 'the secondment'. He does have a right to object which he did and was heard and responded to by Permanent Secretary Fitt. This would have been a more viable submission had the Applicant's case been that he was being 'seconded' as a punishment, but that is not the case for the Applicant.

[86] I hold similar views with respect to the submission that by seconding the Applicant to this temporary post without his consent amounts to the Applicant being constructively dismissed from his employment.

[87] **Wade & Forsyth on Administrative Law 8th ed** has this to say at p. 441 on the principles of Natural Justice and Legal Justice:

"Traditionally natural justice has been confined to two rules now to be discussed: that a man may not be a judge in his own cause; and that a man's defence must always be fairly heard. It has not, as yet, included a general requirement that reasons should be given for decisions ..."

[88] It is therein further stated that Natural Justice does not mean that there is a general duty upon administrative bodies to provide a fair and impartial hearing to all those affected by their decisions.

What is the Authority for Secondment

[89] The Respondents purported to 'second' the Applicant and it is important to identify their authority

to so do. All parties appear to have operated under the belief that there are two types of secondment, secondment within the public service and secondment outside the public service.

[90] One of the arguments of the Applicant is that he was seconded 'outside' the public service because the post of Special Assignments Officer is an unestablished post. I have already given my ruling on that point.

[91] In her evidence in cross-examination Chief Personnel Officer Alkins identified two types of secondment as follows:-

"Secondment as used in the Public Service has two meanings or is applied in two ways:

- (1) We use the term in the Public Service to denote the situation whereby an officer is temporarily transferred to a post of similar grade to the one which the officer is appointed or holds, for example, where an officer in the grade of S.3 is temporarily transferred to a grade of S.3; and
- (2) To refer to the situation where an officer who is offered a job or post by an entity outside the Public Services expresses his or her interest in accepting that offer and the matter is processed based on that officer's request; that is, can be seconded to work outside the Public Service."

[92] Counsel for the Respondents submitted the authority for secondment as being in **Chapter II of the General Orders, particularly 2.21.1** which is captioned "*Secondment to organizations outside the public service*". He also directed the Court to *Chapter 4 of the Operational Manual* of the Ministry of the Civil Service: Same conditions of service.

[93] A cautionary note is sounded here, as the **General Orders** are neither an Act of Parliament or subsidiary legislation. They are merely administrative guidelines or rules for the internal management of the Public Service. An authority such as 'secondment' especially if it relates to a category of public officer protected by the Constitution, must in my opinion have a statutory base.

[94] "Secondment" in **The New Shorter Oxford English Dictionary** means generally to "transfer temporarily to another position or employment", secondment being "an instance of temporary transfer to another position or employment".

[95] 'Transfer' in this same text is defined as a "change or move to another group, club or department".

[96] There is no introduction in this definition of the concept of 'temporary' or 'permanent'. Thus in its ordinary and literal interpretation a transfer may be 'temporary' or 'permanent'. Counsel for the Applicant in his submissions refers us to some persuasive authority in the form of the Public Service Regulations No. 31 of 1975 of Dominica which provide a definition of this word. Regulation 2(3)

states as follows:

“Transfer means the conferment whether permanently or otherwise of some public office other than that to which the officer was last substantially appointment not being a promotion”.

[97] A clear interpretation is that transfer in that jurisdiction may be permanent or temporary: See also Moe J. in **Smith et al v A.G. No. 369 of 1982** of the Supreme Court of Belize **1985 LRC (Const) 1128** where in a dispute as to whether applicants had been ‘posted’ or ‘transferred’ Moe J. stated:

“The effects of the respective letters was to require the person concerned to “shift” “move” or “go” from duties in one post to duties in another post. To move from one place to another place is a transfer and it is a transfer by whatever term the move is described, whether it be shift, move, post or transfer (or as in this case “second”). Further, it is a transfer notwithstanding that the ‘shift’ or ‘move’ or ‘posting’ is not permanent”

[98] In the absence of statutory definition of these two terms in our legislation, I must perforce adopt their ordinary and literal meaning. Secondment thus defined is a ‘temporary transfer’.

[99] This meaning appears to me to be consistent with the Public Service interpretation that a ‘secondment’ is merely a temporary transfer. It is also consistent with the views expressed in the affidavit of Permanent Secretary Fitt, the evidence of Chief Personnel Officer Atkins and section 4.6 of Operational Manual of the Ministry of the Civil Service which states:

“4.6. A secondment is a temporary transfer from an officer’s substantive post to another position either within the public service or outside the public service”.

The Authority to transfer

[100] All parties are agreed that the combined effect of sections 94 and section 117(3) of the Constitution of Barbados is that appointments in the Public Service, including promotion and transfer, are made by the Governor General acting upon the recommendation of the appropriate Service Commission.

Section 94 states:-

(1) 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.

[101] Section 117(3) Chapter X Miscellaneous and Interpretation Act states:-

“Any reference in this Constitution to power to make appointments to any office shall be construed as including a reference to power to make appointments on promotion or transfer to that office and to power to appoint a person to act in or perform the functions of that office during any period during which it is vacant or during which the holder thereof is unable (whether by reason of absence or infirmity of body or mind or any other cause) to perform those functions.

[102] This authority is further codified in the General Orders and Operational Service Manual of the Ministry of the Civil Service which makes clear where the authority to transfer established and unestablished staff lies. It goes on in the same section to deal with secondment, both in and outside the public service.

“2.17 The authority to effect appointment on transfer in respect of the holders of public office is vested in the Governor-General acting in accordance with the advice of the appropriate Services Commission except that in relation to the offices specified at section 99 of the **Constitution**, the Commission is required to consult the Prime Minister before effecting such an appointment and in respect of the holder of an office of Permanent Secretary the authority to make an appointment on transfer is exercised only on the recommendation of the Prime Minister.

2.18 Appointment on transfer in respect of the holders of offices **other than established offices** is vested in the Chief Personnel Officer.

2.19 An officer or employee who is transferred to another ministry or department is not entitled to any special allowances or other peculiar conditions of service which he might have enjoyed in his previous ministry or department.

2.20 The Permanent Secretary of a ministry may by authority delegated to him by virtue of the **Delegation of Functions (Public and Police Services) (Miscellaneous Provisions) Order, 1974** transfer an officer holding a post in the General Service to any section, division or department at an identical level within that ministry.

2.21 An officer or employee may, as the exigencies of the public service require, be seconded to a post of identical grade and level in a ministry or department other than that to which he is substantively appointed.

[103] I am of the view that secondment is merely a form of transfer and as such the authority to so do emanates from sections 94 and 117(3) and is merely codified in the General Orders. It is my submission therefore that the core issue here is not the distinction between transfer and secondment, but rather, **whether a transfer/secondment from an established position (the authority for which is vested in the Governor General) to an unestablished and temporary position (the authority for which is vested in the Chief Personnel Officer) can be carried out by the Chief Personnel Officer, as in these circumstances.**

[104] The answer in my opinion is to be found in a determination of the scope and intent of Chapter VIII of the Constitution.

[105] Having resolved that a ‘secondment’ is a ‘transfer’ within the meaning of the Constitution, it must perforce be covered by the protective provisions which the Constitution so clearly extends to ‘established’ officers in the public service. It stands to reason that unless expressly stated otherwise the statutory intentment was that an established officer should not be transferred except by the

authority of the Governor-General.

[106] To place a public officer in the protected position of being an ‘established public officer’ and then create a situation where he can be stripped of that protection by merely ‘seconding’ or ‘transferring’ him to an unestablished, temporary position outside the coverage of the protective provisions would, in my opinion, subvert the intendment of these constitutional provisions.

[107] Recent legal (judicial opinion) thought has demonstrated unequivocally that the Constitution must be interpreted purposively, and not in a narrow technical sense: ***Minister of Home Affairs v Fisher [1980] AC 3219 and Whiteman v A.G. [1991] 39 W1R397.***

[108] I found useful and supportive of my line of thinking Chapter 12 (on transfer) of the text ***The Public Service and Service Commissions by Kenneth R. Lalla.*** In this chapter he explores the power to transfer a public officer, its history and rationalization. It is apparent from this that one of the primary reasons this authority was given its prominent place in the Commonwealth Caribbean Constitutions is to avoid transfer being used as a penalty or means of victimisation; and to protect civil servants from such: see also Moe J. in ***Smith et al v A.G. (Supreme Court of Belize) and Thomas v Attorney General of Trinidad & To [1982 AC 113.***

[109] In this scenario the Applicant flirts with this but never directly faces or establishes on the balance of probabilities that this is the ‘real reason’ for his secondment. It is therefore not an issue to be determined in this case.

[110] In Trinidad this concern was so paramount, that not only were similar provisions as set out in our Constitution inserted in their Independence Constitution of 1962, but more extensive directives on the process of transfer, not found in the Barbados Constitution, are provided for therein.

[111] At p. 308 of this text the author Kenneth R. Lalla speaks to these provisions when he states:

“Although the Constitution and the Public Service Commission Regulations make it abundantly clear that the Public Service Commission is the sole authority to transfer an officer from one Ministry to another or from one division to another, Permanent Secretaries and Heads of Departments not infrequently, transfer public officers in complete disobedience of the Commission’s regulations. Such malpractice would, however, only come to the knowledge of the Commission obliquely by the aggrieved officer complaining to the Commission. In such circumstances the Commission will require the legislative provisions to be observed by Permanent Secretaries and Heads of Department”.

[112] It is my finding in keeping with the opinions expressed above that the actions of the Chief Personnel Officer in purporting to second the Applicant were contrary to law and in consequence void and of no effect.

Was the position of Special Assignments Officer below that of Principal Training Officer?

[113] It is my finding that the position of Special Assignments Officer equates with that of Principal

Training Officer. There was no diminution in salary and other emoluments or status. Had the authority to second been properly exercised, it is my view that the secondment to such a position would have been lawful.

Did the Respondents refuse to interview the Applicant

[114] It is the view of this court, on the evidence, that there was no refusal by the Respondents to interview the Applicant. An anomaly (the word used by the Chief Personnel Officer) was created. Chief Personnel Officer Atkins in her cross-examination by counsel for the Applicant states:

“My understanding of the anomaly is that as a result of the Job Evaluation Exercise the post of deputy permanent secretary was deemed to be worth more than a number of other posts with which it was similarly graded before. The Applicant’s position is now a grade lower than that of deputy permanent secretary.... **We know that an anomaly had been created . I cannot speak to whether there is a plan to address this.**”

[115] An anomaly is an irregular or deviant feature, an abnormality. (See the Oxford English Reference Dictionary). This occurrence was the likely result, in my opinion, of a re-grading and is not strictly speaking anomalous, but the issue does not turn on the use of this word.

[116] The regrading came about after persons were selected for interview. The Applicant did not apply at that time because there was no advantage in applying. By the time he signaled his interest, other persons had been identified and interviewed. It was neither practical or in the interest of good administration to do so.

[117] There was no ‘refusal to interview’ as alleged by the Applicant.

Was the Applicant ‘Superseded’?

[118] The only evidence of the alleged ‘supersession’ is the acting appointment of 2007. There is no allegation or evidence that it occurred before or since 2007. Counsel for the Respondents (at that time Mr. Barker from the Solicitor General’s Office) put to the Applicant a series of questions , which in the opinion of this court put this issue in perspective.

[119] He put to the applicant that in the case of temporary appointments it is possible that there can be exceptions to the general rule, that is, Regulation 13 of the Service Commissions (Public Service) Regulations, 1978. The Applicant readily agreed. He further agreed with counsel that the appointment referred to in his paragraph 48 to which he attributed the label “supersession” was for a period of acting. This exchange next followed:

“Q: Do you agree that if you were removed from your appointment it would disrupt the work that you are supposed to do?”

A: No, I do not agree.

Q: Do you agree that if you were placed in that position it would be more disruptive than productive?

A: I do not agree.

[120] Significantly, this was not a permanent appointment on promotion, but an acting appointment of a mere three (3) weeks duration.

[121] I entirely agree with the submissions put to the Applicant by Mr. Barker. It does not appear to me that it was in the interest of good administration to remove the applicant from the pursuit of his special assignment in such circumstances and the decision not to do so was a reasonable exercise of administrative authority.

Summary of Findings and Disposal

[122] 1. The power to transfer is vested in the Governor-General in accordance with the advice of the Public Service Commission: see section 94 and section 117 (3) of the Barbados Constitution.

2. A secondment is a transfer, albeit a temporary one, therefore, such power or authority is vested in the Governor General as above.

3. There is no evidence (nor is it argued) that this particular authority of power (see section 94) was or has been delegated under section 95 on the Constitution or section 47 of the Interpretation Act by virtue of the of the **Constitution (Delegation of Functions - Public and Police Services) (Miscellaneous Provisions) Order, 1974 to the Chief Personnel Officer.**

4. The Chief Personnel Officer admittedly did not have the authority to 'transfer' and by extension 'second' this Applicant. The 1976 Administrative Directive used by her as such authority does not so provide. In consequence, the purported secondment is null and void.

5. The Applicant was not seconded to a post outside the Civil Service and said post was not below the standard of Principal Training Officer. The Applicant remained and remains the holder of the substantive established post of Principal Training Officer. There was no diminution in his status, his salary and no constructive dismissal.

6. The Applicant had no right to be heard or consulted as to whether he should be seconded as long as he was being seconded within the Public Service. The core issue was and is, where does the authority to second lie and was it properly exercised?
7. The circumstances of 2005 do not establish a refusal to interview the Applicant. The unchallenged evidence of Chief Personnel Officer Atkins is that no interviews have been held for the post of deputy permanent secretary, since that time.
8. It was not 'good administration' to have the Applicant act for a brief period as deputy permanent secretary in 2007. It was however bad administrative practice and contrary to the normal practice in the public service not to have orally or in writing informed the Applicant why he was not allowed to act as deputy Permanent Secretary in what in my opinion was a reasonable exercise of its discretion. It is noted that in her evidence Chief Personnel Officer Atkins stated that she encourages her permanent secretaries to follow this practice.

Disposal

[123] Since it is my finding that there was no refusal to interview the Applicant in 2005, nor was he "superseded" in 2007, nor is there any evidence to support the contention that there has been a refusal to consider the Applicant for promotion in the Public Service, the relief requested at (c), is denied.

[124] I however grant the following orders:

1. A Declaratory Judgment declaring that the decision of the First Respondent to second the Applicant to the post of Special Assignments Officer was contrary to law;
2. An Order of Certiorari quashing the decision of the Chief Personnel Officer exercising functions in relation to the decision of the First Respondent in placing the Applicant on secondment from his position of Principal Training Officer to the position of Special Assignments Officer;
3. An Order of Prohibition forbidding the First Respondent from continuing to second the Applicant from his position of Principal Training Officer to the position of Special Assignments Officer;

4. The Plaintiff is awarded costs fit for two counsel to be agreed or taxed.

Injunction

[125] For the same reasons given by Adams J in the case of ***Dyer v Williams et al Suit No 4 of 1991 of the Commonwealth of Dominica***, I decline to grant an injunction in this matter.

Damages

[126] In view of my finding that there was no refusal to interview the Applicant, and that there is no evidence of a refusal to promote him, or of lost promotion prospects, I decline to award him damages. He has always been and remains the Principal Training Officer with full benefits and entitlements and has suffered no loss: **Bolden v Attorney General No. 905 of 1985, C. O. Williams Construction Ltd. v AG [1995] W.L.R. 102; Dr. Sally Cools v**

The Medical Council No. 1640 of 1996 and Sandiford et al v Public Service Commission et al are all distinguished.

Margaret A. Reifer

Judge of the High Court.