01 DEC 2010

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL JURIDICTION

No.1062 of 2008

IN THE MATTER OF THE ADMINISTRATIVE JUSTICE ACT CAP. 109B OF THE LAWS OF BARBADOS
AND IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN:

JAMES IFILL **APPLICANT**

AND

THE ATTORNEY GENERAL **FIRST RESPONDENT**
THE CHIEF PERSONNEL OFFICER **SECOND RESPONDENT**

Before: Dr. The Hon. Madam Justice Sonia L. Richards, Judge of the High Court

2010: March 10

December 01

Mr. Hal Gollop and Mr. Steve Gollop for the Applicant
Ms. Sharon Deane and Mr. Roger Barker for the Respondents

JUDGMENT

The Background

[1] In June 2003, Mr. James Ifill ("the Applicant") was found guilty in respect of seven of ten disciplinary charges. At that time he was a public officer appointed to the post of Transport Inspector, and attached to the Ministry of Public Works and Transport.

[2] The Public Service Commission advised the Governor-General that the Applicant should be required to compulsorily resign from the Public Service in accordance with Section 32 (1)(b) of the Service Commissions (Public Service) Regulations, 1978. Section 32(1) provides that:

> "The forms of disciplinary action which may be taken against an officer are:
>
> (a) removal from office;
> (b) compulsory resignation;
> (c) reduction in rank;
> (d) suspension of increment;
> (e) deferment of increment;
> (f) withholding of increment.".

[3] The Governor-General accepted the advice of the Public Service Commission, and this was communicated to the Applicant by letter dated July 31, 2003. The Applicant was also informed, in the said letter, of his right to have his case referred to the local Privy Council within twenty-one days. Paragraph 7 of the letter further stated that:

> "If you do not apply within the stipulated time limit, it will be considered that you do not wish to have your case referred to the Privy Council.".

[4] In another letter dated 2003-08-29, the Applicant was again informed of his right to have his case referred to the local Privy Council within twenty-one days of the date of this second letter. The Applicant declined to take this course of action, and as a result he received further correspondence, dated 2003-10-20, from the Chief Personnel Officer. The correspondence stated as follows :

> "Sir,
>
> You were informed by letter PH.948 Vol. 2/97 dated 2003-08-29 of His Excellency, the Governor-General's acceptance of the Commission's advice, that you should compulsorily resign from the Public Service.
>
> 2. The said correspondence further informed you that Section 98 of the Constitution conferred on you the right to make an application for your case to be referred to the Privy Council within twenty-one (21) days of the date of that letter.
>
> 3. Your decision not to invoke the procedure under Section 98 of the Constitution means that His Excellency, the Governor-General has acted on the Commission's advice.
>
> 4. Your compulsory resignation from the Public Service therefore takes effect from 2003-11-01.".

The Case For The Applicant

[5] The Applicant does not challenge the findings of the disciplinary tribunal. Neither does he challenge the decision that the disciplinary action against him should take the form of compulsory resignation. Rather, the Applicant takes umbrage with the process by which his compulsory resignation was implemented.

[6] The Applicant contends that his employer should not have decided the effective date of his compulsory resignation. It was for him as the employee to decide that he was leaving, and that the act of resigning should have been his act alone, even though the circumstances left him no choice but to resign.

[7] The Applicant never personally tendered his resignation from the Public Service, and he did not resume his duties at the Ministry of Public Works and Transport. He alleges that after receiving the correspondence of 2003-10-20 his salary and emoluments were stopped. He believes that the employer's specification of a date from which his compulsory resignation would be effective was erroneous and unlawful.

[8] The following relief is sought by the Applicant:

> "(1) a declaration that in the events which have happened a decision and/or administrative act and/or recommendation of the First

and Second Respondent or their duly authorised delegates to effectively dismiss the Applicant from the Public Service was unreasonable, unlawful and an abuse of discretion.

(2) an order for certiorari to quash the decision and/or advice and/or recommendation of the First and Second Respondent or their duly authorized delegate to dismiss the Applicant from the Public Service.

(3) a declaration that in the circumstances and events which have happened that the Applicant is entitled to be reinstated in the Public Service.

(4) damages for loss of expense by reason of an unlawful decision and/or administrative act and/or advice and/or recommendation of the First and Second Respondent or their duly authorized delegate.".

The Defence

[9] The Second Respondent filed an Affidavit on behalf of the defence. That Affidavit confirmed the factual matrix leading up to the correspondence in which the Applicant was informed of the date of his compulsory resignation. The Affidavit also informed that the Applicant will be entitled to his pension and gratuity when he reaches the age of sixty in the year 2019.

[10] Counsel for the Respondents relied on this Affidavit to argue that the Applicant's compulsory resignation was lawfully imposed; and that the employer rightfully decided his date of resignation. It was also submitted that the application should be dismissed because of a delay of six years in its filing. These are the two issues that the Court is required to consider.

Delay

[11] Section 8 of the Administrative Justice Act, Cap. 190B ("the Act"), provides that:

> "The Court may, if it thinks fit, refuse to grant any relief under this Act if it considers that there has been undue delay in making the application for judicial review, and that the grant of the relief sought would cause substantial hardship to, or would substantially

> prejudice the rights of, any person, or would be detrimental to good administration.".

[12] In **Judy Lloyd v. Attorney-General** (Civ.Ap. No. 9 of 1998), the Barbados Court of Appeal held that:

> "....whether the grant of relief sought would cause substantial hardship to, or would substantially prejudice the rights of any person, or would be detrimental to good administration are questions that are more appropriately decided after a full hearing.".

[13] When the **Judy Lloyd** case was fully heard (No. 979 of 1996 H.C; decision given 31 July 2004), Kentish J. found that Ms. Lloyd was responsible for an inordinately long period of delay prior to the filing of her application. The delay was a period of 6 years and 9 months. (See paragraphs [70] and [71] of the judgment.) However, Kentish J. did not dismiss the application because of this delay. The learned Judge found that Ms. Lloyd had suffered "very grave and substantial" harm; and that granting her relief would not open the floodgates for similar applications or be detrimental to good administration. The case stood alone on its own particular facts. (See paragraphs [76] to [83] of the judgment).

[14] The affidavit of the Second Respondent alleged undue delay by the Applicant. At paragraph 24, the Second Respondent pleaded that:

> "....the Applicant's failure to invoke the procedure under Section 98 of the Constitution of Barbados after having been informed of his right to do so and the subsequent instituting of Judicial Review Proceedings some six (6) years later amounts to undue delay in making the said application for Judicial Review.".

[15] The Applicant's delay in filing these proceedings was for a period shorter than that found by Kentish J. in the **Judy Lloyd** case. The Applicant gave no reasons for his delay in any of the documentation filed on his behalf. Therefore, the Court finds that his delay in filing these proceedings was for approximately five years, and that this was undue delay.

[16] But, although alleging undue delay, the Second Respondent offered no evidence either of substantial hardship or of substantial prejudice to the rights of any person. Her affidavit also failed to state how the grant of relief to the Applicant would be detrimental to good administration. In the absence of these essential pleadings in the affidavit, it is not for this Court to manufacture evidence to establish substantial hardship, substantial prejudice or detriment to good administration.

[17] Despite the Court's finding of undue delay by the Applicant, the Respondents have tendered no pleadings in support of the other grounds in Section 8 of the Act. In addition to undue delay, Section 8 requires evidence of substantial hardship or substantial prejudice, or detriment to good administration. The Respondents have not satisfied the Court that the Applicant should be refused relief on the basis of undue delay.

Compulsory Resignation

[18] Section 32 (1) of the Service Commissions (Public Service) Regulations, 1978, enumerates six forms of disciplinary action that can be taken against a public officer. Of these six forms, the five referred to in paragraphs (1)(a), (c),(d),(e) and (f) of section 32, are clearly enforceable by the employer. However, with respect to paragraph (1)(b), the regulations do not stipulate a procedure or process by which an officer compulsorily resigns.

[19] The Applicant contends that the act of compulsory resignation was his to make, and not for his employer to undertake. This argument finds some support in the wording of Exhibit GA5, attached to the affidavit of the Second Respondent. Exhibit GA5 is a memorandum to His Excellency, the Governor-General, from the acting Chief Personnel Officer dated 2003-07-04.

[20] Paragraph 3 of abovementioned memorandum states that:

> "….the Public Service Commission at its meeting of 2003-06-30 ….advised that [the Applicant] should be required to compulsorily resign from the Public Service …..".

The wording of this memorandum suggests that the Applicant was the person to take the action required, and that the action was not to be imposed upon him.

[21] The Applicant did not plead that the procedure followed in his case was not the usual procedure. And the affidavit of the Second Respondent did not set out the normal procedure implemented for the compulsory resignation of a public officer. Neither did it confirm that the procedure used in the Applicant's case is the usual procedure. This is an unfortunate omission, as the Applicant surely was not the first or only public officer to incur disciplinary action by way of compulsory resignation.

[22] Counsel for the Applicant relied on the dictionary definition of "resign" to support his argument that resignation, even though compulsory, is the voluntary act of the public officer. He added that the Applicant should have been permitted to voluntarily submit his resignation, and that if he refused to resign, then he could have been dismissed.

[23] Curiously, counsel for the Applicant made no reference to the dictionary definition of "compulsory". It is a word that is defined as meaning "obligatory", that is, having no choice. The Applicant was compelled or obliged to resign. If he had been allowed to submit his resignation, the effective date of that resignation had to be a date agreeable to his employer. Otherwise, a number of unsatisfactory situations could have arisen.

[24] The Applicant might have refused to submit a letter of resignation. Or he might have submitted his resignation with a date wholly unacceptable to the employer. Either situation would have been untenable. These were not unlikely scenarios, given the allegation at paragraph 11 of the affidavit of the Second Respondent that the Applicant had refused to accept correspondence forwarded to him by registered mail. This allegation was never refuted by the Applicant.

[25] Counsel for the Applicant further argued that had the Applicant proved unwilling to co-operate, he would be subject to dismissal. Had this scenario unfolded, the Applicant would have filed another application for judicial review, claiming that his employer had no authority to dismiss him when the penalty lawfully imposed was compulsory resignation. And if even a second disciplinary process could have been instituted, it would have taken some time to reach the ultimate discipline of dismissal. Such a convoluted and

drawn out result could not have been the intention of Section 32(1)(b) of the regulations.

[26] The Court is of the view that in all the circumstances, it was not unreasonable, within the context of compulsory resignation, for the Applicant's employer to determine the date of his resignation. The Applicant accepted the decision of the disciplinary tribunal, and he accepted the penalty of compulsory resignation. He did not ask to have his case referred to the local Privy Council. Therefore, he knew that he could not continue to work in the Public Service at the Ministry of Public Works and Transport. The Applicant would also have known that payment of his salary and emoluments would be discontinued as a direct consequence of compulsory resignation.

[27] It is not disputed that the Applicant has not lost his pension or other retiring benefits. These are stored until he reaches the age of 60 years in the year 2019. He would not have been so fortunate had he been dismissed from the Public Service. However, the Applicant did not convince this Court that the actual date of resignation imposed by his employer was unreasonable or otherwise detrimental to him.

Disposition

[28] Section 6 of Cap. 109B provides that:

> "The Court may on an application for judicial review grant relief in accordance with this Act
>
> (a) to a person whose interests are adversely affected by an administrative act or omission;".

The Court considers that the Applicant's interests were not adversely affected by his employer's initiation of the compulsory resignation process, and its unilateral fixing of a date for such resignation. The Court is also of the view that the circumstances of this case do not warrant the exercise of discretion in favour of the Applicant. Accordingly, the application is dismissed.

DR. SONIA RICHARDS
Judge of the High Court

Postscript: Upheld by the Court of Appeal and the CCJ in a Civ. App. No. 8 of 2014 James Ifill v. Attorney General and Chief Personnel Officer (29 June 2017); and in James Ifill v A-G and CPO) [2018] CCJ 15 (AJ).