

MONTSERRAT

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO: M5 OF 2000

BETWEEN:

ORMOND SHOTTE

Applicant

and

THE ATTORNEY GENERAL

Defendant

Appearances:

Mr. George Kirnon for the Applicant
The Defendant appearing in person

2001: March 23
May 30

JUDGMENT

[1] **SAUNDERS, J.** The applicant is a former Police Inspector. He joined the Royal Montserrat Police Force in 1970. In 1997 he was repeatedly found guilty of serious breaches of discipline. The then Commissioner of Police recommended his dismissal from the Force. The applicant appealed to the Governor of Montserrat.

[2] If the applicant had been dismissed from the Force he would have lost his gratuity, his pension and even perhaps much of what was left of his reputation. The Governor informed the applicant that he would give him three days to consider resigning from the Force. If the

applicant exercised this option then he would be assured his gratuity and pension. The appeal process would be rendered otiose.

[3] The applicant elected to resign. He did so on 1st June, 1998. His resignation was accepted. He received a gratuity of over \$80,000.00. He has since then been drawing a monthly pension of \$1,300.00. This pension will continue until he dies. He appeared to me to be in good health. He is now 52 years old.

[4] After his resignation the applicant had some difficulty establishing his right to receive monies withheld from him while he was on suspension pending the hearing of the disciplinary charges brought against him. He however did eventually receive those funds. This case concerns his leave. At the date of his resignation the applicant was apparently eligible for 276 working days' leave. When he elected to resign, the Governor directed that he should be paid for three months (or 75 days) of that leave. The applicant now brings this action against the State claiming the rest of his leave, that is the remaining 201 days. He claims that he is entitled to be paid for that leave. He has filed a Motion for certiorari seeking the quashing of the Governor's directive that he should be paid for only three months' leave.

[5] His counsel developed the point in this way. Upon resignation, he submitted, the applicant was entitled to all the "natural benefits" that flowed as a consequence of the act of resignation. These included, according to counsel, the applicant's gratuity, his pension and his accumulated leave. Notwithstanding the less than becoming conduct of the applicant and the perceived leniency of the Governor in allowing him to resign and not risk losing

everything, the Governor had no lawful basis for interfering with any of those benefits once the applicant had resigned. The directive that the applicant should receive only three months of his 276 days leave amounted to a forfeiture of monies to which the applicant was entitled. This forfeiture, counsel argued, was an unconstitutional deprivation of property and should forthwith be refunded.

[6] The Attorney General, in the pre-litigation correspondence with the applicant and at trial, resisted the claim on several grounds. A great deal of effort was put into a submission that there was a binding agreement made between the applicant and the Governor that, as a condition for being permitted to resign, the former would accept the 75 days' leave in full satisfaction of all leave due. If there was any such agreement I am not satisfied that it has been proven before me. I therefore reject that defence.

[7] Several submissions were made by the applicant's counsel in support of the allegation that the applicant was unconstitutionally deprived of property. I consider these skillfully argued submissions to be all flawed because they proceed upon the premise that the 201 days' leave for which the applicant was not compensated amounted to "property" to which the applicant was entitled. I do not share that view.

[8] There are in existence General Orders governing the terms and conditions of all public officers in Montserrat. These General Orders took effect on 1st July, 1986. Section 6.02 of the General Orders defines leave as "the absence from duty with permission in accordance with the provisions of [the General] Orders". There are also specific Police Regulations that address the issue of leave for police officers. There is no definition of

"leave" specifically set out in the Police Regulations. In my view however the definition of "leave" contained in the General Orders is fully compatible with the provisions of the Police Regulations. I am therefore prepared to hold that leave for police officers can be similarly defined as absence from duty with permission in accordance with the Police Regulations and the General Orders (if and where applicable).

[9] Regulation 27 of the Police Regulations permits Police Officers to accumulate leave due up to certain specified maximums. The first proviso to this Regulation states that "...vacation leave shall only be granted when the exigencies of the Service permit". The second proviso outlines "that no Inspector shall be eligible for any compensation if it should not be possible to grant him the vacation leave for which he is eligible under this regulation or if it should be necessary to recall him from vacation leave before the expiration of the vacation leave granted to him". Regulation 34 bars police officers from being granted leave if they are "under punishment" or are facing pending disciplinary charges. Eligibility for leave does not amount to a right to leave as and when the officer requires the same or at all. The practice is that leave is applied for and not infrequently such applications are denied.

[10] A person who is eligible for leave will therefore only enjoy that leave after the person has fulfilled certain criteria and "the exigencies of the Service" allow for such leave to be granted and enjoyed. It seems to me therefore that eligibility for leave is one thing. Entitlement to leave and/or eligibility for compensation for such leave amounts to quite another. In my view the applicant's eligibility for leave does not amount either to "property" or to an "interest in or right over property" to which the applicant is entitled. In my

judgment "leave" does not fall within the definition of property encompassed by the fundamental right to property declared in the Constitution. A vital ingredient of "property" is that it can be alienated by its owner. I would be very surprised to learn that the applicant could transfer his leave to someone else or, in the event of his untimely death, that his estate could claim the same from the State. The constitutional clause protecting against the deprivation of property without compensation was therefore not triggered by the forfeiture of the leave for which the applicant was eligible.

- [11] There is another obstacle in the way of the applicant. His case proceeded upon the footing that the granting of leave due was a "natural consequence" of the act of resignation. Again, I have difficulty with that approach. Accumulated leave is an eligibility to the enjoyment of a future benefit from your employer provided of course you are still employed at that future date. Upon his resignation the applicant severed his links with his employers. Barring any statutory or contractual provision to the contrary, the applicant's act of resignation, with no prior arrangement or agreement as to how his accumulated leave should be disposed of, put an end to the possibility of the taking of leave. It must be stressed that leave is not money. It is absence from duty with permission. Upon his severance from the Force, the accumulated periods of absence from duty to which the applicant may have been entitled, had he remained in the Force, were now rendered superfluous. They could no longer be granted to him. He had no employer from whom to request or demand the same. I am not persuaded that there arises any onus on the State, in such circumstances, to convert that leave into money. This is why, upon retirement, a person takes any leave due prior to the date of retirement. Similarly, a person who is

resigning but who desires not to lose his accumulated leave ought, where possible, to arrange his affairs so that the leave due is taken prior to the effective date of resignation.

[12] Both the Attorney General and the applicant's counsel made submissions on the effect of Section 6.19 of the General Orders. It is unnecessary for me to address these submissions but I nonetheless welcome the opportunity to pronounce upon them. Section 6.19 states:

An officer or employee who -
a) is dismissed; or
b) has served for less than six months;
c) is discharged for misconduct; or
d) resigns to avoid disciplinary proceedings;
will forfeit any leave for which he may be eligible.

[13] The applicant's counsel submitted that this paragraph should be disregarded. In the first instance it was submitted that these General Orders do not apply to Police Officers. I shall address that submission shortly. Assuming that they do apply, the applicant claimed that he did not resign to *avoid* disciplinary proceedings because those proceedings had already commenced and were practically over by the time he had resigned. I disagree with that submission. I think that it represents too narrow an interpretation of the relevant phrase. In my judgment, it can be said that a person has resigned to avoid disciplinary proceedings if the person resigns at any time before the completion of the disciplinary proceedings and the necessary nexus between the resignation and the proceedings is established. I believe that the section embraces those who resign to avoid the trauma and embarrassment of proceedings that are likely to be initiated as well as those who resign to escape the possible sanction that may follow upon proceedings that have already commenced. Counsel's interpretation would have had merit if the section had referred only

to a person who "resigns to avoid *the commencement of* disciplinary proceedings". If the General Orders apply then I think that the circumstances of the applicant's resignation fell squarely within the ambit of the section as he did resign to avoid the likely sanction of dismissal.

[14] I agree with Counsel for the applicant however that, contrary to what they purport to do, the General Orders cannot supercede the Police Regulations. Since section 6.19 of the General Orders addresses an area (circumstances where leave is not granted) that is already covered by the existing Police Regulations, one must have regard not to section 6.19 but rather to the Regulations. Only where the Regulations are silent on an issue can one look to the appropriate General Orders for guidance.

[15] The section of the General Orders that I think is relevant is section 7.01, sub-sections (2) and (4). The sub-sections state:

(2) "An officer who has been confirmed in his appointment to a pensionable post may resign after giving not less than three months' notice (exclusive of leave) in writing to the Permanent Secretary, Administration"

(3).....

(4) "Notwithstanding the provisions in paragraph[s] (2) of this Order, an officer other than an officer appointed on contract terms may instead of giving due notice resign his appointment at any time after paying to the Government one month's salary in lieu of notice. In such cases the officer will forfeit all leave and passage privileges for which he might be eligible".

[16] Neither the Police Act nor the Police Regulations contains provisions that speak to the issues addressed in sub-sections (2) and (4) above. I therefore hold that those sub-

sections are applicable to police officers. By opting to resign the applicant had brought himself within sub-section (4) with the result that all his leave was liable to be forfeited.

[17] Other very interesting submissions were made in this case. For example, the applicant's counsel quoted, from *Ridge v. Baldwin* (1963) 2 W.L.R. 935 @ 943, the words of Lord Reid regarding the difference between dismissing someone and requiring that person to resign. The learned Law Lord there stated that "...dismissal involved forfeiture of pension rights whereas requiring him to resign did not..." It was sought to put the case for the applicant in the context of this distinction between dismissal and resignation. The fact is that the applicant's pension rights were not forfeited and, for the reasons I have already given, the comparison between pension rights and accumulated leave is misconceived. The notion that the granting of accumulated leave is a natural consequence of resignation is one that I cannot share.

[18] It was also argued that the applicant had a legitimate expectation that he would be compensated for his accumulated leave upon resignation and therefore such leave ought not to have been forfeited without him having first been heard on the matter. I have two difficulties with this submission. First of all, there was not adduced in this case any body of evidence to convince me that there was a basis for the entertaining by the applicant of any such expectation. No evidence was led to suggest that it had been the practice in the past that after a person had effectively resigned from the Force he could thereafter be granted money in lieu of leave that would otherwise have been due had he not resigned. Nor was there evidence led of any representation or promise held out to the applicant or others

before him that resignation carried with it a right to compensation in lieu of leave that was due.

[19] Secondly, even if there were any such body of evidence, it cannot be said that, prior to the decision to forfeit a portion of his leave, the applicant was deprived of the opportunity carefully to consider his options. I maintain that, upon resignation, the applicant became disentitled to leave that otherwise might have been due. If the applicant was unaware of that circumstance then his ignorance cannot be laid at the feet of the State. He was given by the Governor three days to decide whether he would opt to resign. The evidence discloses that he was offered this option in the presence of his legal adviser. He therefore had a full opportunity with his legal counsel to consider his position, to weigh all his options and to make such representations or take such steps that he and his legal adviser thought to be in his best interests.

[20] The cases on legitimate expectation are different from what occurred here. They all follow a similar pattern. In those cases the fruit of the expectation was denied peremptorily, without notice, with no opportunity to be heard. See for example: *C.C.S.U. v. Minister of Civil Service (1984) 3 W.L.R. 1174* and *A.G. of Hong Kong v. Ng Yuen Shiu (1983) 2 W.L.R. 735*. It cannot be said that this was the position into which the applicant here was placed.

[21] I would give judgment for the respondent in this case. The facts of this case do not show up the applicant in a very favourable light. I am sorely tempted to award costs against him. The Governor of Montserrat was overly generous to him. He has chosen to repay that

generosity by bringing this action against the State. I hesitate to make an award of costs only because I accept that this Motion was brought in good faith to test a matter of public importance. As a matter of principle, in such instances I do not believe that it is fair to award costs against the citizen.

Adrian D. Saunders
High Court Judge