

152

IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
COLONY OF MONTSERRAT
(CIVIL)
A.D 2014

CLAIM NO. MNIHCV2013/0031

BETWEEN:

THOMAS WINSTON BUFFONGE Claimant

and

THE DEPUTY GOVERNOR

THE HON. ATTORNEY GENERAL Defendants

APPEARANCES:

Mr. Sylvester Carrott for the Applicant

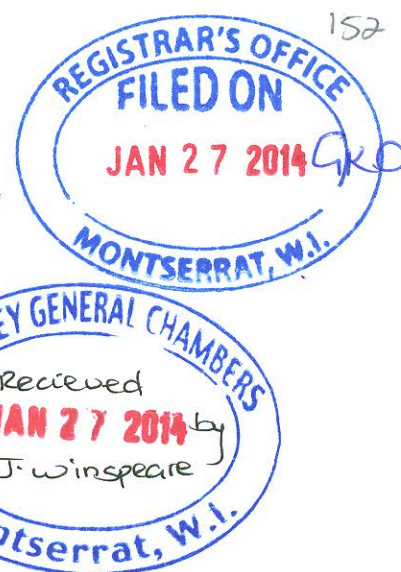
Ms Cilma Wade for the Respondents

2014: January 13

2014: January 27

JUDGMENT

[1] REDHEAD J (ag) The applicant Mr. Thomas Winston Buffonge has made an application for Judicial Review filed on 10th December 2013 in which he seeks the following reliefs:



- (i) A declaration that the said Thomas Winston Buffonge is entitled to be paid a pension in accordance with the Pensions Act.
- (ii) An Order of mandamus requiring the Respondents to pay according to law the Applicant's past and current pension with interest upon past payments at the rate of 10% per annum or such rate as the honourable court shall consider fit and proper.
- (iii) Interim Relief by way of an order that the Respondents do forthwith pay to the Applicant the sum of EC\$50,000.00 on account of the pension entitlement alternatively that the Respondent do within 14 days of the grant of Leave commence payments of the Applicant's current pension entitlement.
- (iv) An interim Order that the Respondents do forthwith disclose all documents in their possession relating to the Applicant's employment with the Government of Montserrat between the years 1959 and 1987 including any instruction by any officer that the Applicant's pension should be paid.
- (v) In so far as the Respondents have made any decision that the Applicant is not entitled to his pension, an order of Certiorari quashing the same.
- (vi) Damages for breach of statutory duty.

[2] The Applicant is now 70 years old. He would have been born on 14th March 1943. He worked in various departments of government from 1964 beginning as a Clerk in the Department of Labour ending up as Manager in

1975 as Manager of Montserrat Industrial Enterprises (MEIL). The Applicant has had many years of agreed unpaid study leave from 1980.

[3] On September 12, 1986 the Applicant wrote to the Permanent Secretary Administration inter alia:

“Dear Madam

Will you kindly refer to your letter ME 698 of April 24th “No Pay Study Leave...”

I understand that government would make study loans available to interested Montserratians pursuing educational programme abroad. If this is so, I would like to be considered for such a loan. If not then I request that my study leave be extended for a further period to December 31, 1988.....

If neither the above are [sic] acceptable, I would like to enter into discussion with you regarding early retirement from the service as indicated in your letter under reference...

Sincerely

Thomas W. Bufonge”

[4] There was a response to this letter from the Permanent Secretary in which she said in part as follows:

“Dear Mr. Buffonge

Your letter dated September 12 refers.

Government requested that you produce definite evidence from the School or University you are attending to show that you will complete your degree programme within four (4) years. In the absence of this evidence, your alternate option is to consider early retirement.....”

[5] I make the observation that this is the second occasion that the Applicant was offered early retirement.

On 21st February 1987 the Applicant responded in the following terms:

“Permanent Secretary

Department of Administration

Government Headquarters

Plymouth Montserrat

Dear Miss Meade

Following discussion with the Permanent Secretary, Development and the Personnel Office during my visit to Montserrat on January 6, 1987, I have decided to take an early retirement from the service. I therefore ask that this letter be considered as my formal request for early retirement from the Civil Service

Thomas Buffonge”

[6] In my considered opinion on the face of it, it appears to me from the correspondence referred to above that the authorities offered the Applicant early retirement which he accepted. However in additional submissions by learned Counsel Ms Wade, she argued that the Department of Administration sent a letter to the Applicant on 30th October 1986, requesting that the Applicant produce evidence from the University he was attending and in the absence of the evidence to consider early retirement. Ms Wade further argued that when the letter was sent, giving the Applicant a deadline of 30 November 1986 in which to respond and indicating that in default his employment would be deemed to have been terminated. Ms Wade contends that the Applicant failed to respond within the time stipulated in the letter. The Applicant's employment would therefore have been deemed to have been terminated on December 01, 1986. In support of this contention Ms Wade referred to the Public Service Regulations 31 (1)¹ which stipulates:

“An Officer who is absent from duty without leave for a continuous period of one month unless declared otherwise by the Governor, shall be deemed to have resigned his office and thereupon the office becomes vacant and the Officer ceases to be an Officer”.

[7] I refer in part to the correspondence from the Permanent Secretary Administration of 30th October 1986: **“If no answer is received from you by**

¹ Public Service Regulation 1980

30 November, 1986, we will have no alternative but to terminate your employment”.

[8] I make the observation that the sentence referred to above does not indicate to the Applicant that in default of responding to the letter from the Permanent Secretary by the 30th November 1986 his appointment would be terminated. What the letter said is that if no reply was received by 30th November 1986 we will have no alternative but to terminate your appointment. It is a fact that the Applicant did not respond to the letter until February 21, 1987.

[9] There is no documentary evidence to show that the Applicant's employment was terminated. The Applicant's file is missing; this complicates the issues in this case. The Applicant's file was in the custody of the Government of Montserrat as it should have been but I am told it cannot be found. Moreover, Mrs. Theodora Veronica Walker, a retired Civil Servant who was assistant to the Permanent Secretary of Administration during the relevant time the Applicant was employed in the Civil Service of Montserrat, in an affidavit (paragraph 5) swore that she is not aware the Applicant's employment had been terminated.

Mrs. Walker further swore:

“I see that I myself was engaged in correspondence concerning his [Applicant's] pension contributions with another department in 1987. I can say that I would not have been instructed to write such

correspondence concerning his pension contributions unless the Applicant had indeed been granted early retirement.”

[10] Learned Counsel Ms Wade argues in her Skeleton Submissions that the affidavit of Mrs. Theodora Veronica Walker should not be admitted in evidence because it was sworn before Ms Marcelle Watts, Barrister-at-Law and who is an agent of Mr. Sylvester Carrott, Counsel for the Applicant.

In support of this argument Ms Wade refers to Part 30.5 (3)² which mandates: **“an affidavit may not be admitted into evidence if sworn or affirmed before the legal practitioner of the party on whose behalf it is to be used or before any agent employed or associate of such legal practitioner”**. In my opinion, this argument is misconceived because the affidavit is not to be used on behalf of Mr. Carrott.

[11] Ms Wade in her written submission contends that when, on 21st February 1987 the Applicant made a request for early retirement, his services with the Government of Montserrat would have already been terminated as he was deemed to have resigned and thus ceased to be an Officer. Ms Wade argues that consequently the issue of grant of pension does not arise.

[12] This submission is predicated on the assumption that the Applicant resigned / abandoned his employment on 1st December 1986. Miss Wade further argues that even if the Applicant was granted early retirement he

² Civil Procedure Rule 2000

would not have been qualified for a pension under the Pension Act³ to receive a pension.

[13] In an affidavit sworn by Mrs. Daphne Cassell the present Chief Human Resource Officer at paragraph 27 she deposes:

“By letter dated 21st September 2000, the Department of Administration wrote to the Applicant stating that there were no legal grounds on which payment of any benefit could be supported and the matter is now closed...”

[14] Learned Counsel argues on behalf of the defendants that the cause of action arose then, i.e on 21st September 2000, some thirteen years ago. Miss Wade contends that to make an application for Judicial Review now would be defeated by unreasonable delay.

[15] Mr. Carrot learned Counsel for the Applicant on the other hand contends that the cause of action did not arise in 2000 but rather in 2013 after the current Attorney General’s letter.

On 14th June, 2013 the Honourable Attorney General wrote to Mr. Kelsick in the following terms:

³ Pensions Act Chapter 48 Section 6(1)(a)

“Dear Mr. Kelsick,

Re: Claim for Pension – Thomas Buffonge

Please refer to correspondence exchanged between us on the above referenced and my letter of June 6, 2013. Since writing that recent letter to you, we have had a response from the Human Resource Management Unit. They were unable to advance this case further than previously communicated to your Client. In the circumstances I regret to inform you that there is no material on which we can advise that there is a legal basis to accede to your client’s request for pension benefits under the Pensions Act”.

[16] Mr. Carrott argues that the decision of 21st September 2000 no longer exists, it is gone, they have reconsidered the matter. Learned Counsel on behalf of the Applicant contends that fresh evidence was presented since 2000 and was considered by Respondents, as they had the right to do (See **R v Sheffield City Council ex Parte Leeke**)⁴.

[17] In a letter from the Department of Administration to Mr. Emmanuel Irish (Applicant’s Lawyer) dated 1st December 2009, the Acting Permanent Secretary referred to a letter of October 20, 2008. The Permanent Secretary (ag) then indicated to the Applicant’s Lawyer that by their letter of January 2003 there existed no evidence upon which an award of pension could have been made. He pointed out that the Applicant’s letter of 21st February 1987

⁴ (1999) 2 ALR 669

advanced the matter no further as it was merely a request for early retirement which did not establish that it was in fact granted.

[18] I make the observation that if the request was made, in the ordinary course of events, a reply should have been forthcoming. The Respondents cannot produce any document to show that that request was denied because the Applicant's file is missing.

[19] In a letter dated 24th June 2011, the Applicant wrote to the Honourable Attorney General in the following terms inter alia:

“Dear Sir

...I have been in constant contact with the Department of Administration throughout the years and the file went missing only after I made a formal request for early retirement. At that time, people with twenty (20) or more years of service were entitled to early retirement. By then, I had served the Government of Montserrat in various capacities for over 29 years culminating with an appointment as Assistant Permanent Secretary (supernumerary Administration) before I came abroad on Government approved study leave in 1980... I have had numerous correspondences from Administration stating that the matter of my pension is closed. I am hereby requesting that the matter be reopened and that it be properly reviewed so that my pension can be settled without prejudice.

Sincerely

Thomas Buffonge

Cc: Hon Reuben Meade

Chief Minister”

[20] On 2nd August 2011 the Hon. Attorney General wrote yet again to the Applicant saying inter alia:

“Dear Mr. Buffonge

Your recent letter has not added any new matter for consideration which would justify re-opening this matter for example there is no information as to the dates for which Study leave was approved. Was Study leave approved? When? When did the approved course come to an end? In all the circumstances, I must remind you that the matter is closed. There is no legal basis on which I can advise the Government of Montserrat to re-open this case.

Sincerely Yours

Esco L. Henry

Hon. Attorney General

Cc: Hon. Chief Minister.”

[21] In my considered opinion, all the queries raised in the above correspondence could have been answered had not the Applicant's file gone missing.

In response to the letter of 2nd August 2011 the Applicant again wrote to the Honourable Attorney General. On 7th September 2011 inter alia:

“Dear Ms Henry

I have been in contact with several Permanent Secretaries of Manpower and other GOM Officials and have sent numerous copies of the letters and documents of approval sent to me over the years, in an effort to help the Department of Manpower and Administration to rebuild the lost file. I feel I have done my part and that the onus is on the Department of Manpower to do their part.

I began writing to GOM in 1959 and entered the Civil Service in 1964 where I remained a Civil Servant until 1987 when I applied for early retirement.

I am asking that the matter be re-opened with a view to reach a conclusion that is fair to me. I am willing to send more of what I have available if you think it necessary that I do so.

Sincerely

Thomas W. Buffonge”

[22] On 23rd September 2011, the Honourable Attorney General replied to the Applicant’s letter of 7th September 2011 saying inter alia:

“Dear Mr. Buffonge

I note that paragraph 3 states that further study leave without pay will be considered on an annual basis. Kindly provide the approvals for no

pay Study leave for the period December 6, 1981 through February 20, 1987...I will once again remind you that the matter is closed and you are yet to provide cause [sic] why this case should be reopened.

Sincerely Yours,

Esco Henry

Hon. Attorney General”

[23] On 27th October 2011, Mr. Thomas Buffonge in response to the Hon. Attorney General’s letter of 23rd September 2011 told the Hon. Attorney General that he had found enough (13 pieces) of documents which he enclosed to her. Mr. Buffonge also pointed out that in a letter dated 30th October 1986, The Permanent Secretary Administration gave him the option to take early retirement. He said that after several telephone conversations in November and on a visit to Montserrat in December 1986, he opted for early retirement and confirmed this in writing in January 1987. He also said that various correspondences sent to him indicated that work was being done on calculating his pension, then suddenly the process was inexplicably stopped and when he raised the issue, he was told verbally and in writing that the file was missing. He expressed the hope that these documents would be sufficient to have the matter re-opened.

[24] Finally the Hon. Attorney General replied to Mr. Buffonge’s letter of 27th October, 2011. She said inter alia:

“Dear Mr. Buffonge

...There is no evidence that you received further study leave after the period [5th December 1984] you would therefore be deemed to have resigned in the absence of further communication from you or approval of further study leave.

Unless you can demonstrate that you received approval for no pay study leave for the period December 6, 1981 through February 20, 1987 or that you retired from the Public Service during that period, there is no legal basis on which you can receive pension benefits.

Sincerely Yours

Esco Henry (Ms)

Hon. Attorney General”

[25] I have quoted and referred to all of the above to say that in my opinion that after September 2000 fresh evidence was presented to the Defendants and they considered that evidence. Even if they had not considered it, they have a duty to do so. I am therefore in agreement with Mr. Carrott’s contention that the action did not arise in 2000 but rather on 14th June 2013 the date of the Hon Attorney General’s last letter to Mr. Kelsick.

[26] In my Judgment, I am of the view that Ms Wade correctly identified the issues to be determined for leave to apply for judicial review: Except I would say considered

- (i) In what circumstances was the Applicant's employment with Government of Montserrat (GOM) terminated – by abandonment or early retirement?
- (ii) On which date was the Applicant's employment terminated? [If in fact it was]
- (iii) On what date did the course of action arise?
- (iv) Whose decision is the Applicant seeking Judicial Review of?
- (v) Whether there has been undue delay by the Applicant in seeking redress from the Court through judicial review?
- (vi) Whether leave for judicial review should be granted to the Applicant.

[27] Mr. Carrott learned Counsel for the Applicant is in agreement with learned Counsel for the Respondents when he contends in his submission that the central issue for the Court is the determination of the precedent fact in issue namely: Did Mr. Buffonge abandon his office? If he did, he is not entitled to a pension; if he did not abandon his office then he is entitled to a pension.

[28] In a memorandum to Permanent Secretary Ministry of Agriculture, Trade and the Environment from Permanent Secretary Administration dated 7th March 1994

“PENSION CONTRIBUTION – MR. THOMAS W. BUFFONGE

169

The Permanent Secretary Administration wrote

Your Memo MATE4/2 – 111 dated 1st March 1994 on the above Subject refers.

2. Please find enclosed various documents confirming Mr. Buffonge’s Secondment to DFHC/MIEL.

3. Hon. Attorney General’s letter (copy attached) is quite explicit as to the payment of Pension to Mr. Buffonge.

Your urgent attention in this matter is requested.

F.E Daley”

[29] My task at this stage is to make a determination whether the Applicant has an arguable case. On the materials and submissions placed before me I have no doubt that the Applicant has a strong arguable case. His application as I have said above is not defeated by delay.

[30] Leave is therefore granted to the Applicant to make a Claim for Judicial Review to be filed within 14 days of today’s date. I shall not grant the interim reliefs and orders sought by the Applicant.

Costs to the Applicant to be agreed, if not agreed to be assessed on a Prescribed Cost basis.



.....

Albert J. Redhead

High Court Judge