IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ON MONTSERRAT

CASE MNIHCV2021/0020

In the Matter of the refusal of the HRMU to pay an offered early retirement lump sum payment, and a responsibility allowance;

And

In the Matter of an Application for Judicial Review (Part 56 – CPR 2000)

BETWEEN

RAYMOND CABEY — APPLICANT

AND

HUMAN RESOURCES MANAGEMENT UNIT

OFFICE OF THE DEPUTY GOVERNOR

ATTORNEY GENERAL — RESPONDENTS

APPEARANCES

Mr Rushaine Cunnighman and Ms Chivone Gerald for the Applicant.

Crown counsel Ms Cedricia Shiell for the Respondents.

2023: JANUARY 20

JUDGMENT

On judicial review of inter alia refusing to pay a lump sum offered

1 **Morley J**: By letter dated 31.07.19 from the Human Resources Management Unit (HRMU) in the Government of Montserrat (GoM), Raymond Cabey (dob 08.08.62) as a public officer was offered a lump sum of $197052.48ec on becoming at 57 redundant, his public service position having been abolished, as three years' salary for 01.08.19 to 07.08.22, which was when he would otherwise be expected to retire when 60, plus immediately his pension and other gratuities. On 19.08.19, the lump sum offer was revoked by HRMU letter as being a mistake, ultra vires the rules pertaining to early retirement. He wants the money and argues the revocation is judicially reviewable as irrational and unfair, the offer having raised a legitimate expectation he would get the money offered. He also wants a responsibility allowance of $8761.50ec, effective between 19.07.18 and 31.05.19, for then having greater work responsibilities, about which there will be briefly more below. The big question is, does he get the large lump sum?

2 There has been a trial on 05-06.12.22, where evidence has been received from Cabey as Applicant, and as Respondents from the GoM Deputy Governor (DG) Lyndell Simpson and the HRMU head Cheverlyn Williams Kirnon.

3 Montserrat is a British Overseas Territory which receives the bulk of its financing annually from UK taxpayers. It is important money is not improperly given away in private understandings between officials. In the background of this case has been suggestion lump sums have been paid outside the rules on early retirement, as acts of favouritism or bonhomie, leading to a legitimate expectation by others, here Cabey, they can have the same. Leave for judicial review was granted on 26.01.22, inter alia in order to explore this impropriety if arising. As this ruling begins, I will say straight away this court is satisfied on the evidence presented the suggestion has not been shown true.

4 The history is as follows:

a. Cabey[1] became a Public Officer of the GoM on 01.10.80. He began as a trainee air traffic controller, then was an airport officer, senior airport officer, airport operations officer, and then principal assistant secretary in the youth affairs department. In 2012, he became head of the 'department of youth affairs', with the title 'principal youth and sports officer'

[1] The various parties will be referred to by their surnames or acronyms for ease of reading, and no disrespect is intended by not writing out full names and titles and the legalise of whether Applicants or variously numbered Respondents.

(PYSO). By cabinet memo 304/2018 dated 19.07.18, it was restructured as the 'community, youth and sports services department' and its head renamed as 'director of community youth and sports' (DCYS), with later recruitment of Billy Darroux and Wilston Scotland as two further staff into an expanded office. However, per Cabey, he was never told of the formal restructuring, and learned on 03.06.19 Lyston Skerrit had been appointed DCYS on 01.06.19, meaning to the job he thought he was doing though as the earlier named PYSO.

b. Affronted, he approached the HRMU on 03.06.19 and there was a discussion with Kirnon whether he had become redundant, in that the job he thought he had been doing had been abolished and someone else had taken up the new position. She keeps good handwritten notes of meetings, seen by the court, for 03.06.19 where there is 'make me redundant', then showing Cabey's situation was discussed internally on 04.07.19, and though Cabey says there was a further meeting on 26.07.19, there is no such note.

c. Also, on 25.06.19, Cabey saw the DG to complain and discuss settlement.

d. On 31.07.19, Cabey received a letter from HRMU while Kirnon was on leave (having left in the evening of 26.07.19), signed in her place by Sherlene Dyer, authored by Derona Semper. It said inter alia:

> Please be advised the DG...has approved:
> - The position of PYSO be abolished effective 19.07.18;
> - Your services with the GoM be terminated on the basis of abolishment of post with effect from 31.07.19.
>
> ...The **Pensions Act no. 3 of 2011 part 6 s21** makes provision for your eligibility for pension.
>
> The GoM is proposing to pay you a lump sum as a result of the abolishment of the post, in the amount of $197052.48.

e. On 13.08.19, Cabey wrote to Kirnon querying monies payable, seeking more.

f. On 19.08.19, Kirnon wrote to Cabey offering calculation of monies owing, making no mention of the lump sum, instead identifying payments under the **Pensions Regulations**, including an 'additional sum' arising for abolition of office of $11845.08ec.

g. On 31.10.19, Cabey's lawyer Counsel Gerald wrote demanding the lump sum and a responsibility allowance arising for having greater responsibility during 19.07.18 to 31.05.19 when de facto DCYS.

h. On 12.12.19, Crown Counsel Renee Morgan in the Chambers of the Attorney General (AG) explained the lump sum offer had been a mistake, writing:

> The letter of July 31 from the HRMU to your client made an error in proposing a lump sum payment of $197052.48 in respect of abolition of your client's post. The lump sum payment appears to have been based on a calculation of 3 years' remuneration in accordance with what would have obtained for an employee being made redundant after more than fifteen years of service under **s75(1)(d) Labour Code**. However, under **s4 Labour Code,** s75 does not apply to public servants. In addition, such an offer under the Labour Code would have been exclusive of pension benefits...
>
> Our position is there is no legal right to claim termination benefits outside what is provided for by the **Pensions Act**, including a lump sum payment of 3 years' remuneration.

i. There followed argument Cabey had accepted the lump sum offer and so the GoM was bound to fulfil it, while the GoM countered the letter of 13.08.19 had not been an acceptance. A complaint from Cabey dated 10.02.20 to the Complaints Commission led to a wordy report on 19.05.21 there had been an acceptance, but they had no power to enforce it as it related to a personnel matter falling outside the commission's jurisdiction, and in all the circumstances the argument withdrawing the lump sum did not amount to maladministration. In the interim AG Sheree Jemotte Rodney had written to the Commission on 05.11.20 to say:

> Please note the matter is not one of what was offered and accepted presumably giving rise to binding obligations. The matter is one of what, based on statutory provisions, Cabey would have been entitled to upon the abolition of his office. In error, the letter from the HRMU dated 31.07.19 made a reference to a lump sum payment. This sum was apparently based upon the calculation of the remuneration payable to an employee upon being made redundant in accordance with the **Labour Code (Cap 15.03)**. The Labour Code does not apply to public officers, and therefore Cabey had and still has no entitlement to such a payment.

j. Leave to apply for judicial review was filed on 27.07.21, and as above granted by this judge on 26.01.22 with hearing on 05-06.12.22, the ruling adjourned to today's date 20.01.23.

5 Concerning the responsibility allowance, on the one hand Cabey's case is he did not know of the restructuring; on the other, it was confirmed during cross-examination of Kirnon his staff had increased, as above, by two under the restructure. At one point in the litigation the Crown optimistically suggested the restructuring did not come into effect until the appointment of Lyston Skerrit on 01.06.19, but this cannot be right as the letter of 31.07.19 points to it being effective from 19.07.18. Although Cabey had not appreciated at the time he could claim further monies for greater responsibility in a restructured office, nevertheless I find it is irrational to deny him the sum, as it is the government's own position the restructuring was in effect from 19.07.18, while the office then expanded, meaning it is unreasonable to deny him the allowance he subsequently discovered owed up to 31.05.19, as sought, being $8761.50ec, assuming this calculated right.

6 Concerning the lump sum, the parties argued variously.

a. It has been accepted by both parties in the way this case has progressed the suit is not founded in contract. The offer of 31.07.19, being arguably accepted by the letter of 13.08.19, though not deciding it, has not given rise to an enforceable agreement, presumably as there has been no consideration. Instead, the suit arises owing to Cabey arguing the offer created a 'legitimate expectation' he would be given the lump sum, not because it is fixed in the pension regulations, but because of how a lump sum had become a local administrative practice on which he relies.

b. Further, it has been accepted by both parties the lump sum does not arise under the pension regulations, or any other, so that this is not a case of enforcing them. For this reason, I do not propose to examine the legislation concerning the **Pension Act** and the **Labour Code**, as none argue the lump sum derives from them.

c. Therefore, it is clear the lump sum offer of 31.07.19 was either a 'mistake' or what can only be described as a 'gift', or gratuity unfounded in regulation, arising from a local practice, then supposedly giving rise to a judicially-reviewable enforceable 'legitimate expectation' of the gift.

d. Cabey argues he would never have consented to being made redundant without the lump sum offer, though Kirnon says it was his idea, recorded in her notes for 03.06.19

as 'make me redundant'. In a sense, it does not matter whose idea redundancy was: it is a fact he was redundant on the appointment of Lyston Skerrit, so Cabey's consent is otiose. Instead, he could have been placed elsewhere, but according to Kirnon he felt any other role a demotion, which I accept from her is probably true, so that he had a choice as to taking early retirement, which I find he chose, captured in the entry in Kirnon's note as Cabey asking to be made redundant and so start to claim his retirement benefits three years early.

e. Cabey says the DG on 25.06.19 and Kirnon on 26.07.19 approved the lump sum. On balance I find this did not happen. It may have been discussed with the DG, and there may have been a passing interaction with Kirnon about to go on leave, with a lump sum mentioned, but I do not accept whatever occurred orally is pivotal of the issue, which instead turns not on words exchanged but on past practice, if such can be established.

f. The case has generated much paperwork and treatise. At its heart however is Cabey thinks he can expect to be given 3 years' net salary, payable ultimately from the UK, for nought, no work, and to receive in parallel his pension, on the ground he could at 57 have stayed on in the public service a further three years up to retiring at 60, but chose not. He suggests he should have a sizeable sum gratis, along with early pension, when he could also work elsewhere, begging why?

g. The answer is he says this is what has been happening for others, so that he has a legitimate expectation it should happen for him and why it was therefore offered. In the build up to granting leave on 26.01.22 it was discussed in court he hoped to gather evidence of this practice, by calling witnesses at a substantial hearing, inter alia provoking leave being granted, but this has not materialised, his saying under cross-examination on 05.12.22 no one will come forward to help him. It follows he has not produced evidence of a local practice, the burden being on him to do so, to begin possibly to establish such legitimate expectation.

h. The one curiosity here has been the retirement of Eugene Skerrit. He was a permanent secretary who in 2012 retired in ill health 19 months before his due age when his post had been abolished, and the Governor in cabinet had approved a package which had included his pension plus a lump sum of 19 months' net salary. The Skerrit case had been the reason the letter to Cabey of 31.07.19 had been written, as it had been thought,

with post abolition, it being said the only earlier example at HRMU, if Skerrit got 19 months' salary up to his due age, then Cabey might get the same up to his, though this was corrected as ultra vires upon legal analysis by the AG Chambers.

i. There are two features to the Skerrit case which require focus, noting first **s24 Montserrat Constitution**:

> **24 Functions of Deputy Governor**
> (1) The Deputy Governor shall assist the Governor in the exercise of his or her functions, and shall have such functions, not of a ministerial nature, as (subject to this Constitution and any other law) may be assigned to him or her by the Governor, acting in his or her discretion.
> (2) Under the authority of the Governor, the Deputy Governor shall be responsible for—
> (a) in accordance with section 84, the appointment of persons to public offices, the suspension, termination of appointment, dismissal or retirement of public officers, and the taking of disciplinary action in respect of public officers;
> (b) the application to any public officer of the terms or conditions of employment of the public service (including salary scales, allowances, leave, passages or pensions) for which financial provision has been made; and
> (c) the leadership and management of the public service, and the organisation of the public service in so far as it does not involve new financial provision.
> (3) The Governor, acting in his or her discretion, may give directions to the Deputy Governor as to the exercise of the responsibilities referred to in subsection (2)(b) and (c), and the Deputy Governor shall comply with any such directions.
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> [Underlining added]

i. Crucially Skerrit's case was decided by cabinet, per the evidence, where under **s24(3) supra** the DG can be directed specifically by the Governor, from sitting in cabinet, to make discretionary retirement provisions outside the regulations, as happened to Skerrit, where in Cabey's case there was no such intervening Governor approval; and
ii. In any event, one case in 2012, seven years earlier, does not create a local practice on which to found a legitimate expectation for Cabey of the same, the burden being on him to show, where in addition on the limited materials offered there is distinction in that Skerrit was ill, presumably therefore unable to work further, unlike Cabey, and the salary was for a period 50% shorter.

j. In sum, on the facts, Cabey has not shown a practice on which to found the beginnings of an argument to raise legitimate expectation, while I am satisfied instead the Crown has made an intelligent case the offer letter of 31.07.19 signed by Dyer was ultra vires the regulations, unenforceable, and wholly a mistake.

k. Put simply, to give Cabey the lump sum would be outside the rules and therefore illegal.

7 The legal doctrine for how a mistaken offer may not give rise to a legitimate expectation can be found in **R v Jockey Club. exp RAM Racecourses 1993** 2 All ER 225, 236h-237b where Stuart-Smith LJ noted:

> [Concerning legitimate expectation, its...] doctrine has many similarities with the principles of estoppel in private law. In my judgment the matters that the applicant has to prove in this case are these: (1) A clear and unambiguous representation (see per Bingham LJ **in Exp MFK Underwriting Agencies Ltd 1990** 1 All ER 91).... (2) ...that it was reasonable for the applicant to rely upon it without more (see **AG of Hong Kong v Ng Yuen Shiu 1983** 2 All ER 346). (3) That [he] did so rely upon it. (4) That [he] did so to [his] detriment, ...[and] (5) That there is no overriding interest arising from duties and responsibilities of [here the HRMU which entitles them to change the representation]...
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> [Square brackets inserted for applicable context]

a. To establish a legitimate expectation arising from the letter, Cabey must show: there was a clear and unambiguous representation in the letter; he was entitled to rely on it without more; he did rely on it; to his detriment; and there is no overriding interest arising from the duties and responsibilities of the HRMU which entitles them to change the representation. Here, there was a clear representation, though he has not shown he relied on it to his detriment as he had from the outset asked to be made redundant and has not shown he could not work further; and even if he had acted to his detriment, he cannot claim entitlement to rely on the letter 'without more', where it was a mistake, and in parallel the HRMU can claim an overriding interest to withdraw the offer, as a mistake, so that the representation is therefore ultra vires, arising from their duty to act within the regulations.

b. Further, and specifically, an ultra vires representation cannot create an enforceable legitimate expectation, per **Silly Creek Estate v AG Turks and Caicos 2021** UKPC 9, the Privy Council noting:

> ... [It is] a well-established principle of public law: that statutory powers entrusted to the executive branch of government must be exercised within the four corners of the relevant statutory powers, and that when the executive acts outside these boundaries, its decision is ultra vires and unenforceable ...

8 I remind myself of my powers under judicial review. Broadly, the court may look to review an administrative decision because of breach of natural justice (namely, being granted no audience or where the Crown is judge in its own cause), there has been an error on the face of the record, an irrational decision, or legitimate expectation has arisen such that it would be unfair, meaning no reasonable tribunal would so decide, to deny the expectation. Here the only issue is the last, and as to the lump sum it does not arise on the facts, though it does, belatedly, as to the responsibility allowance. As such I can use the court power of mandamus under **r56.1(3) CPR 2000** to compel the payment of the $8761.50ec, though take no action on the lump sum offer.

9 As this is a matter of reviewing an administrative decision, with sensible arguments offered by both sides, and where each has won an aspect, ordinarily there would be no order as to costs. However, although Cabey did not win his primary action on legitimate expectation, the court has some sympathy as it was created by the mistaken letter of 31.07.19, in error tied to the Skerrit case, raising hope of a big payout, naturally creating this litigation, and so in my discretion under **rule 64.6(2) CPR 2000**, I will order his costs payable by the Crown, inviting the HRMU to be more careful what it writes.

10 Concerning Cabey's costs, these will therefore be assessed, with bill and submissions to be filed by 10.02.23, with responses by 24.02.23, and to be listed on 06.03.23.

The Hon. Mr. Justice Iain Morley KC

High Court Judge

20 January 2023