[2009] CA (Bda) 12 CIV

The Court of Appeal for Bermuda

CIVIL APPEAL No. 6 of 2009

Between:

PHILLIP JOHN PERINCHIEF

Appellant

-V-

THE PUBLIC SERVICE COMMISSION et al
HIS EXCELLENCY THE GOVERNOR
THE ATTORNEY GENERL

Respondents

Before: **Zacca, President**
Ward, JA
Auld, JA

Date of Hearing: **Friday, 5 June 2009**
Date of Judgment: **13 November 2009**

Appearances: **Eugene Johnson of Trott & Duncan**
Ben Adamson of Conyers Dill & Pearman

JUDGMENT

ZACCA, P

(1) This is an appeal against the Order of Bell J. against his refusal of the appellant's application for leave to issue Judicial Review proceedings. The

trial Judge found that the application was not made within the time frame provided for in the Rules and declined to extend the time on the basis that no good reason had been advanced for doing so.

(2) The relevant facts are as follows:

The appellant performed the duties of Crown Counsel, Principal Crown Counsel, and Acting Solicitor General from June 2000 - 2006.

He subsequently was appointed Attorney General, a post which he held until shortly after the general election in December 2007, the post of Attorney General being a political appointment.

(3) The post of Solicitor General was advertised by the Ministry of Justice with a closing date of September 12, 2007. It appears that the appellant made an application to the Public Service Commission for the post some time after September 2007, presumably after he had ceased being Attorney General.

(4) The appellant was interviewed on January 10, 2008 by a four-member committee which included Justice Charles Etta Simmons. On March 17, 2008, the appellant wrote to Mr. Kenneth Dill, the head of the Civil Service, enquiring as to the outcome of his application. In that letter he indicated his understanding to be that he was the only Bermudian amongst the eight applicants short listed.

(5) On April 16, 2008, the secretary to the Commission wrote to the appellant advising him that he had been unsuccessful in securing the position of Solicitor General. In his affidavit before the Court, the appellant expressed surprise at his non-appointment and stated that he awaited the appointment of a non Bermudian. In late October 2008 he learnt from a

former colleague that Mr. Barrie McKay, a non Bermudian, had been appointed to the post of Solicitor General.

(6) On April 7, 2008, the Commission made a decision to recommend that Mr. McKay be offered the post of Solicitor General. On May 12, 2008, after completing the process, the Commission wrote to the Governor and formally recommended that Mr. McKay be appointed. On May 14, 2008, the Governor formerly accepted that recommendation.

(7) Amongst the remedies claimed in his statement of grounds it was contended that the failure to recommend the appellant was in breach of regulation 19(6) of the Public Service Commission Regulations 2001. Rule 19(6) of the regulations provides as follows so far as is relevant:

> (1) This regulation states the principles that apply where under section 82 of the Constitution the Commission is to make a recommendation to the Governor about any appointment to an office.
>
> (2) Subject to this regulation, the person who is in the Commission's opinion the best candidate shall be preferred.
>
> (3) The commission shall not recommend a person for appointment to an office if he is not fit to be appointed.
>
> …...
>
> (6) A Bermudian shall be preferred to a person who is not a Bermudian.

(8) The statement of grounds emphasized that the appellant did not seek to quash the Governor's decision to appoint Mr. McKay but sought other declarations identified which would result in an award for damages. As Bell J. held "In practical terms, the reality no doubt is that these

proceedings are being pursued with a view to Mr. Perinchief receiving an award of damages."

(9) The issue before this Court is whether Bell J., finding that the application for Judicial Review was not made within six months, was correct and secondly, whether he properly exercised his discretion not to extend time.

(10) Order 53/4 of the Rules of the Supreme Court amendment rules 2005 provides:

> 4(1) An application for leave to apply for Judicial Review shall be made promptly and in any event within six months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made.
>
> 4(2) When the relief sought is an Order of Certiorari in respect of any judgment, order, conviction or other proceedings, the date when grounds for the application first arose shall be taken to be the date of that judgment, order, conviction or proceeding.

(11) Bell J. held at paragraph 33.

> (33) "In this regard it is important to bear in mind the terms of the declarations sought, which in relation to Mr. McKay are to the effect that his appointment was unlawful. It does seem to me to be detrimental to good administration for declarations to be made in relation to a senior Legal officer many months after his appointment was made. Taking all the relevant circumstances into account, I do not think that Mr. Perinchief's conversation with a former colleague in late October 2008 constitutes "good reason" for an extension of time within which to take Judicial Review proceedings. That conversation was more than six months after Mr. Perinchief had been informed that his own

application had been unsuccessful, and he did nothing during this six months period. Mr. Perinchief must or should have appreciated that the appointment of a non-Bermudian would be made during this period, as his affidavit indicated he anticipated. I do not see how that constitutes compliance with the duty to act promptly, and I do not accept that Mr. Perinchief's lack of knowledge of the appointment when it was made to constitute good reason for the grant of an extension of time, when taken together with his lack of action during the period in question."

(12) Bell J. therefore held that time began to run from May 12, 2008, the date of the appointment, and that the application which was made on December 3, 2008 had not been made within six months.
With this we agree.
At paragraph 34 Bell J. stated:

> "I therefore find that the application by Mr. Perinchief was not made within the time frame provided for in the Rules, and I decline to grant an extension of time within which to make the application for Judicial Review on the basis that no good reason has been advanced for doing so. It follows that I must, and I do, refuse Mr. Perinchief's application for leave to issue Judicial Review proceedings."

(13) Mr. Duncan for the appellant submitted that the trial judge failed to take into account when the applicant knew of the appointment of the Solicitor General in order to determine whether the application was made within the six months and whether it was appropriate to grant an extension of time.

(14) It was further submitted that the judge was in error in taking into consideration, in refusing an extension of time, "the detrimental effect to

good administration". He therefore took into account a matter which he ought not to and so exercised his discretion improperly.

(15) Mr. Duncan argued that the relevant provision in R.S.C.O. 53, r 4, (1) makes no mention of any detriment to good administration. He points to the English s 31 of the Supreme Court Act 1981 which provides:

> s. 31 (6) Where the High Court concludes that there has been undue delay in making an application for Judicial Review, the Court may refuse to grant—
>
> (a) Leave for the making of the application, or
>
> (b) any relief sought on the application, if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of any person or would be detrimental to good administration.

He therefore submits that "detriment to good administration was omitted from Order 53 or 4(1) and should not have been taken into account.

(16) In Re Burkett and another [2001] JPL 775, a Court of Appeal consisting of Ward, Sedley, Jonathan Parker LJJ., in considering the effect of s 31 (6), stated at paragraph 26:

> "Richards J., having concluded that the insufficiency of good reason for the delay was enough to preclude an enlargement of time, turned to the question of prejudice as a discrete issue. Alongside prejudice he mentioned detriment to good administration, which of course echoes s31 (6) but would still be relevant if s 31(6) were not there."

(17) In our opinion Bell J. was not in error in considering "detrimental to good administration." This appointment was to a high Legal Office where the office holder, if appointed unlawfully, would be performing his duties

unlawfully. He would be making important decisions which involved the government and citizens of Bermuda. In our view this is certainly one of the instances when the application should be made promptly and certainly within six months. The performance of such unlawful duties would be detrimental to good administration.

(18) In **Regina v Stratford-on-Avon District Council and another, Ex parte Jackson** 1985 1 W.L.R. 1319, Ackner L.J. (as he then was) in considering R.S.C. Order 53, r(4) (1) said at p 1322:

> "The essential requirement of the rule is that an application must be made "promptly". The fact that an application has been made within three months from the date when the grounds for the application first arose does not necessarily mean that it has been made promptly. Thus there can well be cases where a Court may have to consider whether or not to extend the time for making the application, even though the application has been made within the three month period. In this case, as is apparent from our brief reference to the dates, the applicant failed to make the application within the three month period."

(19) We accept the proposition that even when the application is made within the time limit, if it is a case which requires that the application should be made promptly, the Court has discretion whether it will extend the time for making the application.

(20) Having regard to the circumstances of this application we are of the view that this is an application which should have been made promptly. Bell J. held that is was not made within the six month period and exercised his discretion in not allowing an extension of time. We find that the Judge was not in error in his finding and in the exercise of his discretion.

(21) Having regard to the fact that the appellant had indicated that he was not asking the Court to quash the appointment of Mr. McKay, it is clear that

the appellant's main purpose is to achieve a decision in his favour in the award of damages if the appointment is held to be unlawful. The relief claimed includes damages for negligence and misfeasance.

(22) In the circumstances, if the appellant wishes to proceed with his claim for damages, he should do so by writ. His claim is primarily a claim for damages in negligence and misfeasance. Proceeding by writ would be the more convenient course, given that a properly particularized pleaded case would be appropriate, and discovery and oral evidence will probably be required.

CONCLUSION

(23) The finding of Bell J. that the application was not made promptly or within six months is not in error. The refusal to extend time for leave to issue Judicial Review Proceedings was a discretion exercised by the Judge. This decision was arrived at after considering the reasons for the delay when he held that there was no good reason established to extend time. We see no reason to hold that Bell J. exercised his discretion improperly.

(24) The application did not seek an Order of Certiorari to quash the decision of the appointment made by the Governor on the recommendation of the Public Service Commission. In effect this was therefore a claim, on behalf of the appellant, that he was entitled to damages as a result of what he alleged to be an unlawful appointment. It seems to us that this claim would be more appropriately met by a writ of action. We make no finding as to the merits of such an action which can now be pursued by the appellant.

(25) Appeal against the refusal of the Judge to grant leave for Judicial Review, dismissed.

(26) Costs of the appeal to be the respondent's to be taxed if not agreed. Costs in the Court below affirmed.

Signed

Zacca, President

Signed

I agree, **Ward, JA**

Signed

I agree, **Auld, JA**