



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2015: No. 502

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN:-

(1) STEPHEN DENNIE
(2) ROBIN EVANS
(3) SEYMOUR FOOTE

Applicants

-and-

THE COMMISSIONER OF POLICE

Respondent

JUDGMENT

(In Court)

Application for judicial review – whether management decision not to grant permanent and pensionable employment at end of 10 years’ service amenable to judicial review – whether practice giving rise to legitimate expectation – whether legitimate expectation defeated by overriding public interest

Date of hearing: 2nd March 2016
Date of decision: 4th March 2016
Date of judgment: 11th March 2016

Mr Allan Doughty, BeesMont Law Limited, for the Applicants
Mr Brian Myrie, Attorney General's Chambers, for the Defendant

Introduction

1. The Applicants are police officers who were each awarded successive five year fixed term contracts of employment ("FTCs") with the Bermuda Police Service ("BPS"). The First Applicant is from St Vincent and the Second and Third Applicants are from Jamaica. As at the date of the hearing, they were all about to complete their second five year FTCs, and they have all now done so. They have therefore each completed 10 years of service with the BPS. None of them has had any disciplinary issues while serving.
2. In the case of the Third Applicant, there is on the face of the contractual documents an overlap between the last day of his first FTC and the first day of his second FTC. As a result, the total period which they cover falls one day short of 10 years. However I am satisfied that, as the Respondent accepted in evidence, this is a drafting error, and that both parties intended that the period covered by the two FTCs should be 10 years. For the avoidance of doubt, I order rectification of the second FTC to reflect the true position.
3. The Applicants claim to have a legitimate expectation based upon established practice that upon completing 10 years' service, and assuming that their performance has been satisfactory, they will each become entitled to permanent and pensionable employment with the BPS. They will be eligible to serve with the BPS without a further renewal of their contracts of employment until they reach the mandatory retirement age of 55, and will receive a deferred pension at the age of 60.

4. The Applicants further claim that when entering their second FTCs they each relied upon that expectation. In the case of the First Applicant, that reliance was detrimental, as he would have been able to re-enlist with the Royal St Vincent and the Grenadines Police Force at the end of his first FTC but is now too old to be eligible for that.
5. The Respondent denies that the Applicants have any such legitimate expectation. He has given notice that upon expiry of their second FTCs their employment with the BPS will not be renewed. The reason which he has given for this is budgetary constraints. In 2013 the Bermuda Government issued instructions to the Respondent to reduce all current account expenses (operating costs) by 7% in 2014/15; 5% in 2015/16 and 3% in 2016/17. His evidence is that a reduction in the payroll is necessary in order to meet those targets.
6. The Respondent explained in an email subsequent to the hearing¹ that at the beginning of the 2016/17 financial year the BPS employed 438 officers. To reach the 2016/17 budgetary target of 405 requires a reduction of 33 officers. Further, 12 police cadets will graduate from the Bermuda College in May 2016 and will be appointed as constables, as per the requirements of their contract of employment with the BPS. This means that 12 additional posts will have to be made available for them, bringing the total number of reductions to 45. A number of these reductions have been achieved through natural attrition and voluntary resignations. However, further reductions are required by way of allowing contracts to expire without renewal. These have included the contracts of four officers in September 2015; five officers in November 2015; and four officers in January 2016. The contracts of five officers are due to expire without renewal in March 2016, including the Applicants' contracts. It is anticipated that the contracts of a further eight officers will expire without renewal in 2016/17.
7. The Respondent gave evidence in broad terms as to how he had decided which officers would not have their FTCs renewed. He stated that it was

¹ Commenting, at the Court's request, on a schedule prepared by the Applicants.

less of an exercise of choosing which officers to let go, and more of a decision as to which officers to keep in the interests of the BPS and national security. He gave weight to any special police roles that the officers had which required specialized training and to officers who had undertaken voluntary activities engaging with the community.

8. To assist with the process, BPS management had drawn up a document known colloquially as “*The List*” which identified all the officers on FTCs expiring in 2015 – 2017. It contained information about these officers such as their special skills, the value of their contributions, and their disciplinary records.
9. A section of the List headed “*Pensionable terms*” showed all the officers on two five year FTCs who would complete 10 years’ service in 2015/16. Of those officers, only the Applicants remain on FTCs: since the List was compiled the others have either been employed on permanent and pensionable terms or left the BPS. There are no other officers on two five year FTCs as the BPS stopped issuing five year FTCs in 2011.
10. The Respondent stated that he had arranged for Superintendents to interview officers to “*populate the data base*” for the List. However he could not say whether the Applicants had been interviewed and they say that they were not.
11. The Applicants seek an order of *certiorari* quashing the decision of the Respondent not to renew the Applicants’ contracts of employment (“the Decision”) and a declaration that the Applicants may continue in their employment with the BPS until they reach the age of mandatory retirement.

Findings

12. The Applicants’ complaint is amenable to judicial review notwithstanding that it was a management decision regarding the renewal of contracts of employment. It satisfies the three criteria for determining whether a public body with statutory powers was exercising a public function which was

amenable to judicial review or a private function which was not. Namely, the Respondent holds a public office and was exercising statutory powers; the function being performed in the exercise of those powers was a public not a private one; and the Respondent was performing (or failing to perform) a public duty in relation to the Applicants in the particular circumstances under consideration. See Commissioner of Police v Allen [2011] Bda LR 13 CA at para 33, applying R (Hopley) v Liverpool Health Authority and another [2003] PIQR P10.

13. The Applicants were among a group of officers awarded consecutive five year FTCs. They formed a sub-group who were not offered permanent and pensionable employment upon the completion of 10 years' service. The Decision was based upon policy considerations, namely the need to make budgetary savings. There was no suggestion that absent budgetary constraints the Applicants would not have been retained. They claim that the Decision breached a legitimate expectation founded upon established practice. Their complaint gives rise to a properly arguable question of public law.
14. As to the basis of this expectation, the Applicants gave unchallenged affidavit evidence that when they entered into the second FTCs, each understood on the basis of the then recent decision of the Court of Appeal in Allen and on the basis of prior discussions with the BPS that upon the completion of 10 years' service their employment would become permanent and pensionable. However they give no further details of those discussions.
15. In Allen the respondent officers had completed eight years of service on successive FTCs. The BPS offered them employment for up to a further five years, on the basis of an express representation that once they had each completed a further two year FTC (so as to bring their length of service up to ten years) their employment would become permanent and pensionable. However towards the end of the two year period the Respondent (who was the appellant in that case) wrote to notify the respondents that upon the expiry of their two year FTCs their employment would not be extended. The Court of Appeal held that based upon the express representation made

by the BPS the respondents had a legitimate expectation that they would be offered permanent and pensionable employment at the end of their two year FTCs. The Respondent's decision not to do so was therefore quashed.

16. Allan Doughty, who appeared for the Applicants, submitted that in Allen the respondents' FTCs finished two days short of two years, and that the effect of the Respondent's decision not to renew them was to prevent the respondents from reaching the ten year "finishing line". Once ten years' service had been completed, he submitted, it was uncontroversial that the respondents would have been entitled to permanent and pensionable employment.
17. That was a clever submission, but it was not a correct one. The letter from the Respondent to one of the respondents notifying him that his two year FTC would not be renewed stated that his contract ended two days short of two years but that was an error. As Scott Baker JA stated at para 12:

"It is pointed out that the letter contains an error as to the end date of the second respondent's contract. His contract ended on 30 June 2010 and not, as the Respondent had said, 28 June 2010. An end date of 30 June 2010 means ten years completed services with the pension implications that that carries. An end date of 28 June 2010 means that the employment falls two days short of ten years."
18. Thus in Allen the Court's finding that upon completion of 10 years' service the respondents were entitled to permanent and pensionable employment was based upon an express representation made to them and not upon an established practice. There was no analogous express representation in the present case.
19. The Applicants were among the 12 officers identified in the List as serving on a second five year FTC. Another of these officers was Curtis Charles, who gave evidence for the Applicants on affidavit. He stated that he was initially advised that upon completion of the second FTC his contract would not be renewed. He instructed Mr Doughty, who wrote to the Respondent asserting that his client had a legitimate expectation that upon completion of 10 years' service his employment would be made permanent and pensionable. It was a quirk of Mr Charles' second FTC that it was expressed

to expire on the first day of his eleventh year of service rather than the last day of his tenth. Ostensibly based on that quirk, Mr Charles was reinstated on a permanent and pensionable basis.

20. Mr Charles stated that of the remaining eight officers in that section of the List, two had voluntarily left the BPS and the other six had upon completion of their second FTCs been offered employment with the BPS on a permanent and pensionable basis. The Applicants rely upon this as evidence of an established practice.
21. The Respondent was cross-examined about the existence of an established practice. He stated that there was no guarantee that an officer approaching 10 years' service would be made permanent and pensionable and that this was entirely within the Respondent's discretion. He further stated that in his experience officers had expressed nervousness when approaching the ten year mark.
22. The Respondent was asked about his decision to offer Mr Charles permanent and pensionable employment. He said that he was contractually obliged to do so as Mr Charles' second FTC expired on the first day of his eleventh year. I confess that I do not understand how such a contractual obligation could be said to arise. However the underlying point was that the Respondent saw this quirk of Mr Charles' contract as a reason for treating him differently to his subsequent treatment of the Applicants. I do not regard it as a sound reason for doing so as any legitimate expectation which Mr Charles may have had regarding his future employment came into play upon the completion of his tenth year of service and not upon the first day of his eleventh.
23. The Respondent gave evidence about events in 1993 and 1994 (long before he became Commissioner) which the Applicants submitted tended to support the existence of the established practice for which they contend and which the Respondent submitted showed that since at least that time there had been no such practice. Suffice it to say that whatever the purport of those events, they do not assist me as to the existence of an established practice in 2011 and thereafter.

24. The Respondent put in evidence emails dated 27th March 2015 and 1st July 2015 warning of the need for budget reductions including, in the July email, the non-renewal of FTCs. These go to whether the Respondent was justified in departing from an established practice if one was in place at the time, but not to the existence of that practice in the first place.
25. The Respondent did not accept that there was an established practice that upon completion of 10 years' satisfactory service the Applicants would have the opportunity to enter permanent and pensionable employment with the BPS. However it is implicit in his evidence that but for the instructions from the Bermuda Government to reduce operating costs the Applicants would most probably have been offered permanent and pensionable employment when their second FTCs expired.
26. Having weighed all the evidence, I am satisfied that when the Applicants entered into their second FTCs in 2011 there was an established practice that upon completion of 10 years' satisfactory service an officer on a FTC would be offered permanent and pensionable employment with the BPS. This practice continued at least up until the receipt of instructions from the Bermuda Government to reduce operating costs.
27. It is well established that a legitimate expectation may arise from the existence of a regular practice which the claimant can reasonably expect to continue. See Civil Service Unions v Minister for the Civil Service [1985] AC 374 HL at 401B. I am satisfied that when the Applicants entered into their second FTCs they had a substantive legitimate expectation that at the conclusion of those FTCs they would be offered permanent and pensionable employment.
28. The Court's task in such circumstances was summarised by Lord Woolf in R v North and East Devon HA, Ex p Coughlan [2001] QB 213 at para 59, in a passage which was cited with approval by Kawaley J (as he then was) in Allen [2010] Bda LR 42 SC at para 5 and Bell J (as he then was) in Marshall v Minister of Labour [2006] Bda LR 15 at para 59:

“Where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change in policy.”

29. I accept that the Respondent’s need to make budgetary cuts was an overriding public interest. Determining where those cuts would fall required him to make a number of difficult and challenging decisions. They were his decisions to make and not the Court’s. I also accept that the Applicants’ legitimate expectation did not confer immunity upon them from the risk that as a result of those cuts they would lose their jobs.
30. However the onus lies on the Respondent to explain why that overriding public interest justified his failing to meet the Applicants’ legitimate expectations. See Allen per Scott Baker LJ at para 36. He has not done so in that he has failed to explain in concrete terms in relation to each Applicant why that Applicant has not been retained. Instead he has provided only broad generalities.
31. The Decision was further flawed in that when making it the Respondent was required to take into account the existence of the Applicants’ legitimate expectation but failed to do so. Indeed he did not even acknowledge its existence. See De Smith’s Judicial Review, Seventh Edition, at para 12-043:

“However, although it may be free to depart from its representation or policy, the authority is by no means free to ignore the existence of a legitimate expectation. Now that the legitimate expectation has been accepted in law as an interest worthy of protection, its existence itself becomes a relevant consideration which must be taken into account in the exercise of discretion. It is placed upon the scale and must therefore be properly weighed.”
32. It appears that part of the decision making process involved consideration of the comments made in the List about the contributions made by the various officers who were on FTCs. The Applicants’ input into the contents of the

entries relating to them on the List was not sought and they were not given an opportunity to comment on those entries. This was a clear breach of natural justice. It was all the more serious given their legitimate expectation of continued employment. As Lord Woolf stated in Ex p Coughlan at para 57:

“... the court may decide that the promise or practice induces a legitimate expectation of ... being consulted before a particular decision is taken. Here, it is uncontentious that the court will require the opportunity for consultation to be given unless there is an overriding reason to resile from it”

33. When weighing the requirements of fairness against the overriding interest relied upon I also take into account the fact that, as stated above, the Applicants entered into their second FTCs in reliance upon the legitimate expectation that they would be offered permanent and pensionable employment upon completion of 10 years' service. That reliance will prove detrimental to the First Applicant if he is not offered such employment.
34. To adopt the language of Lord Woolf and refer to the Decision as an abuse of power would in the circumstances of this case be needlessly tendentious. I am satisfied that the Respondent was throughout acting in good faith. However, I am also satisfied that in frustrating the Applicants' substantive legitimate expectation the Decision was so unfair as to be unlawful. Accordingly, the Applicants are entitled to orders of *certiorari* quashing the Decision and to a declaration that they may continue in their employment with the BPS until they reach the age of mandatory retirement.
35. I shall hear the parties as to costs.

DATED this 11th day of March, 2016

Hellman J