



# In The Supreme Court of Bermuda

CIVIL JURISDICTION

2010: 142

IN THE MATTER OF ORDER 53 OF THE RULES OF THE SUPREME COURT

AND IN THE MATTER OF A DECISION BY THE COMMISSIONER OF POLICE  
AND

THE MINISTER OF LABOUR, HOME AFFAIRS AND HOUSING AND THE  
PUBLIC SERVICE COMMISSION MADE ON OR ABOUT THE 13 TO 17 MARCH  
2010

BETWEEN:

ROMEO ALLEN

1<sup>st</sup> Applicant

-and-

EMMERSON DONALD

2<sup>nd</sup> Applicant

-and-

ADRIAN GEORGE

3<sup>rd</sup> Applicant

-and-

COURTNEY WILLIAMS

4<sup>th</sup> Applicant

-and-

CLETUS CYRIS

5<sup>th</sup> Applicant

-and-

THE COMMISSIONER OF POLICE

1<sup>st</sup> Respondent

-and-

THE MINISTER OF LABOUR, HOME AFFAIRS  
AND HOUSING

2<sup>nd</sup> Respondent

-and-

THE PUBLIC SERVICE COMMISSION

3<sup>rd</sup> Respondent

## JUDGMENT

Date of Hearing: June 22, 2010

Date of Judgment: June 22, 2010

Mr. Richard Horseman, Wakefield Quin,  
for the Applicants

Mr. Huw Shephard and Ms. Shakira Dill,  
Attorney-General's Chambers, for the Respondents

### **Introductory**

1. In or about July 2000, the Applicants joined the Bermuda Police Service ("BPS") from their homes in the Commonwealth Caribbean (Jamaica, St. Lucia and Trinidad and Tobago) where they each had previously served as police officers. By letter dated September 20, 2007, the then Commissioner of Police ("COP") wrote the Applicants advising that when their contracts expired on June 30, 2008, the Minister and the Public Service Commission had determined that they should be given further contracts of up to five years duration, "*subject to performance reviews and the suitability of Officers, which will be based on recommendations from Divisional Commanders.*" The letter also stated if this offer was accepted, the Applicants would enter pensionable service once they had completed 10 years' service. On January 29, 2008, the Human Resource Manager confirmed this offer to the Applicants by email, but further advising as follows:

*"Contracts will have to be drafted for a two year period initially then once you...have reached 10 years of service your conditions of service change to that of permanent and pensionable..."*

2. It is common ground that in or about February 2008 Divisional Commanders recommended the grant of two-year contracts for the period July 1, 2008 to June 30, 2010, based on underlying recommendations by more junior officers that each of the Applicants be granted pensionable employment. The Applicants were not advised that the grant of further contracts after June 30, 2010 was to be the subject of any further performance appraisal nor that any such further appraisal was being carried out. By letters dated on or about March 17, 2010 the COP (“the Non-Renewal Letters”): (a) notified the Applicants that their employment would terminate on June 28, 2010; (b) regretted that he could not offer the Applicants further employment; and (c) noted that their “*contribution to the police service and the wider Bermuda community over the past ten years is acknowledged and greatly appreciated.*” It is also common ground that of 17 officers in a similar contractual position, only the five Applicants were not offered the opportunity to continue on into pensionable employment. Those who were kept on were all recruited from the United Kingdom; those who were not were all recruited from the Caribbean. The COP’s unchallenged evidence is that the decision not to renew the Applicants’ contracts was not based on their place of origin.
3. On April 29, 2010 the Applicants sought leave to seek judicial review of this decision and were granted leave by me on May 4, 2010. The principal ground of their application was that the decisions contained in the Non-Renewal letters were unlawful in that they constituted an impermissible breach of a legitimate expectation. The legitimate expectation arose by way of an express promise contained in the BPS Human Resource Officer’s email of January 28, 2008, and its breach was both irrational, motivated by the improper purpose of depriving them of pensionable service and discriminatory on the grounds of their place of origin.

#### **Applicable law**

4. The Respondent’s counsel did not challenge the content of the well recognised principles relating to the public law doctrine of legitimate expectation upon which Mr. Horseman relied. He aptly cited paragraphs 12-016-12-017 of the leading text of ‘*De Smith’s Judicial Review*’, 6<sup>th</sup> edition in support of the legal test applicable to deciding when a legitimate expectation based on an express representation may arise:

*“An obvious example is where an express undertaking is given which induces an expectation of a specific benefit or advantage.*”

*The form of the express representation is unimportant as long as it appears to be a considered assurance, undertaking or promise of a benefit, advantage or course of action which the authority will follow...the analogy of the express representation giving rise to a legitimate expectation with the law of contract and the private law principle of estoppel is obvious and probably encouraged the acceptance by the courts that creating a legitimate expectation can have consequences in public law.”*

5. I also accept based on the same leading text, that “*where a legitimate expectation has been disappointed the onus should be on the authority to justify its frustration*” (paragraph 12-053). Since the Applicants complain not simply of an expectation relating to procedure but assert the public law right to a substantive benefit, paragraph 12-047 (c) of *De Smith* accurately summarizes what the Court must find to uphold the Applicants’ claims:

*“Where the court considers that a lawful promise or practice induces 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 of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied on for the change in policy.”*

6. Two further principles enunciated in *De Smith* upon which Mr. Horseman relied are particularly significant. Firstly, “*as was shown in Coughlan, representations which have ‘the character of a contract’ (and therefore not likely to affect a broader section of the public) are specially deserving of protection*” (paragraph 12-055). Secondly, the existence of the legitimate expectation is a matter which must be taken into account and weighed by a public authority in deciding to depart from the impugned promise or policy (paragraph 12-042).

**Findings: did the Applicants have a substantive legitimate expectation of being offered pensionable employment on the expiration of their two-year contracts in June 2010 and, if so, what was the scope of such expectation and ?**

7. I find that the then COP’s letter of September 20, 2007, as read with the BPS email of January 29, 2008 and the recommendations made in respect of the

Applicants prior to the parties concluding two-year contracts of employment in or about June 2008 evidence an express promise that:

- (a) the Respondents subject to satisfactory performance appraisals to be obtained prior to June 2008 would employ the Applicants for up to five more years from June 2008 so that they would become pensionable in June 2010;
- (b) the Applicants' contractual rights would be limited to being employed under an initial two-year contract which would expire at the end of June 2010.

8. I find that the Applicants entered into their two-year contracts in June 2010 in reliance on this express promise. No contrary interpretation of the contemporaneous documentation is fairly open to this Court. Mr. Shephard correctly noted that the COP would reasonably wish to review the Applicants' performance between 2008 and 2010. In my judgment, the express promise made by the Respondents would only be legitimate if it is construed as including by necessary implication the following terms. If any overriding public interest arose between the execution of the 2008 contracts of employment and their renewal in 2010 which made it unreasonable for the Applicants to expect to be able to enforce the original promise, the legitimate expectation which arose from the express promise could lawfully be departed from by the Respondents. The most obvious public interest factors which would operate against the Applicants would be either (a) gross misconduct on their part occurring after June 2008, or (b) the interests of national security.
9. It must also be implied to ensure compliance with the rules of natural justice that if any matters arose after the execution of the two-year contracts in June 2008 that the Respondents would afford the Applicants an opportunity to respond to the relevant allegations before deciding to deprive them of their substantive legitimate expectation.
10. In summary, I find that the Applicants had a legitimate expectation of having their employment continued beyond June 2010 unless they were guilty of conduct entitling the Respondents to terminate their employment or their re-employment was inconsistent with some other overriding public interest.

**Have the Respondents shown they were reasonably able to disappoint the Applicants' legitimate expectations or would such disappointment be so unfair as to constitute an abuse of power?**

11. I find that the Respondents have not shown that their breach of the express promise made in 2008 to renew the Applicants' contracts in 2010 was legally permissible. The evidence filed on their behalf fails to show that either (a) the Applicants' conduct and/or job performance since 2008 was so deficient that it justified not renewing their contracts, or (b) that any other identifiable public interest factors justify departing from the express promise made in 2008 that the Applicants would be employed until they became pensionable in 2010.
12. I take judicial notice of the fact that the current COP was appointed in mid-December 2009 and also that he was confronted by a number of pressing law enforcement problems of far greater public concern than the employment status of the five Applicants. The evidence strongly suggests that he did not appreciate that their re-employment had been the subject of an express promise enforceable in public law which could not be departed from without compelling grounds for so doing. The COP's Affidavit sets out no such compelling grounds for non-renewal and (as regards the Second Applicant) sets out no reason whatsoever for non-renewal. Instead, it appears that the Applicants' renewals were considered under a new appraisal system adopted for contract renewals generally and which did not take into account the special public law position of the Applicants.
13. Even if the COP's Affidavit had set out a more fulsome explanation of why the Applicants were not offered fresh employment (although it seems highly improbable that sufficient cause exists to justify this decision), the decision would still be unlawful for breach of the implied legitimate expectation that the decision would not have been made without first affording the Applicants an opportunity to respond to the matters relied upon by the Respondents for changing course.
14. For the above reasons, I find that the Respondents' (in substance the COP's) decision made in or about March 2010 not to allow the Applicants to become permanent pensionable staff after June 2010 is in breach of the promise to this effect which they (in substance the COP) made in June 2008 when the Applicants' present contracts were concluded.

**Findings: relief and discretion to grant relief**

15. The Respondents' counsel did not suggest any reasons why the relief sought by the Applicants should be refused on discretionary grounds. While there is no evidence that the impugned decision was motivated by discriminatory intent, employers (both public and private) in a multicultural environment such as Bermuda should be astute to shun any appearance of differential treatment. There is an obvious public interest in a unified Police Force able to focus on pressing

law enforcement concerns un-distracted by the different cultural elements which exist amongst its ranks. The Applicants' perception that they have been singled out based on their national origin would be impossible to dispel were this Court to refuse them relief in circumstances where: (a) their legitimate expectations have been obviously breached without any apparent rational justification, and (b) others with a different national origin in a similar position have been more favourably treated.

16. Mr. Shepherd suggested that the relief sought was akin to specific enforcement of contracts of employment and unprecedented in these Courts. Similar relief was sought and granted in other public sector employment cases, such as *Evans-v-Minister of Education* [2006] Bda LR 52.
17. Accordingly, the Applicants are entitled to orders of certiorari quashing the decision not to renew their employment and a declaration that their employment should continue until they become pensionable.

### **Conclusion**

18. I will hear counsel as to the precise terms of the order required to give effect to this Judgment and as to costs although it is difficult to see why costs should not follow the event.

Dated this 22<sup>nd</sup> day of June, 2010 \_\_\_\_\_

KAWALEY J