



[2018] JMSC Civ 1

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2016HCV03531

BETWEEN	DALE AUSTIN	APPLICANT
AND	THE SOLICITOR GENERAL	FIRST RESPONDENT
AND	THE PERMANENT SECRETARY OF THE MINISTRY OF JUSTICE	SECOND RESPONDENT

IN CHAMBERS

Hugh Wildman instructed by Hugh Wildman and Co for the applicant

Patrick Foster QC and Camille Wignall Davis instructed by Nunes Scholefield DeLeon and Company for the respondents

December 13, 15, 2017 and January 4, 2018

**JUDICIAL REVIEW – APPLICATION FOR LEAVE – WHETHER RECOMMENDATION
REVIEWABLE – WHETHER SOLICITOR GENERAL PROPERLY APPOINTED**

SYKES J

The context and the application

[1] This application for judicial review filed was in 2016. It has taken over one year to be heard. This time lapse is contrary to all the rules of practice and the Civil Procedure Rules ('CPR') that speak to these applications. Rule 56.4 (1) (a) of the

CPR states that an application for leave to 'make a claim for judicial review **must be considered forthwith by a judge of the Court**' (emphasis added). It would be helpful if the rules are observed.

- [2] Mr Dale Austin is an attorney at law assigned to the Attorney General's Chambers. He has had a long running dispute with Public Service Commission ('PSC') and the Attorney General ('AG'). That dispute led to an application for judicial review in 2012 ('the 2012 claim'). The court understands that that matter was only heard in March of 2017 and the judgment is still outstanding.
- [3] This second application arose out of the present Solicitor General's recommendation to the Permanent Secretary ('the PS') that Mr Austin be deployed elsewhere in the public service until his 2012 claim is fully resolved. The court need not specify the reasons for the recommendation. The evidence is that the PS had not made a decision one way or the other on this recommendation. Nonetheless, Mr Austin decided to seek judicial review. His application was refused on December 15, 2017 and these are the brief written reasons.

The applicable law

- [4] The court agreed with Mr Patrick Foster QC that this application was premature. The court also agreed that the test for judicial review, namely, that there is an arguable ground with a realistic prospect of success and not subject to any discretionary bar. The law on judicial review applications also goes on to say that it is not enough that the case is potentially arguable and secure leave on the basis that if leave is granted something may turn up during discovery which may strengthen the case. These principles are now so well embedded in Jamaican law that they can now be regarded as axiomatic. There is hardly any need to cite cases in support of this now well established test.

The appointment of the Solicitor General

- [5] Mr Austin had several arrows in his quiver. One was that the present Solicitor General was not properly appointed because the letter of appointment was in these words:

I am to inform you that the Governor-General, on the recommendation of the Public Service Commission, has approved the appointment of Mrs Nicole D Foster-Pusey, as the Solicitor General ...

- [6] The compound verb 'has approved' was said to be an indication that the Governor General did not himself appoint but that that appointment was done by someone else and His Excellency simply approved it. This was said to be contrary to section 125 of the Constitution of Jamaica. Section 125 (1) reads in relevant parts:

Subject to the provisions of this Constitution, power to make appointments to public offices ... is hereby vested in the Governor-General acting on the advice of the [PSC].

- [7] This is a matter of interpretation of the appointment letter and the Constitution which can be resolved without going to judicial review. The letter is compatible with section 125. The fact that it does not have the form of words that Mr Austin would like to see does not deprive it of legal effect. The letter means that the PSC has recommended and the Governor General agrees with the recommendation. This is the way that the appointment is expressed. Firmer terms may be more desirable but there is no doubt as to its meaning and effect. This means that one of the orders being sought on judicial review, namely, that the Solicitor General was not properly appointed to her office has no factual or legal foundation. The consequential declaration that would also have been sought on judicial view, specifically, that the Solicitor General's decision are null and void and of no effect cannot be granted because there is no factual or legal foundation for it.

[8] Another declaration that would have been sought was that the Attorney General is the head of Chambers and the Solicitor General is subject to the directions of the Attorney General. This is a self-evident proposition and there is no need for a judicial review hearing to make this point. The court now moves to the next significant point raised by Mr Austin on this application.

Whether the Solicitor General's recommendation is subject to judicial review

[9] Mr Wildman, on behalf of Mr Austin, submitted that recommendations are amenable to judicial review. Learned Counsel cited this court's decision in **Deborah Patrick-Gardner v Mendez and another** [2016] JMSC Civ 121 where a recommendation was made by the PSC to retire Mrs Patrick-Gardner. This court granted leave to Mrs Patrick-Gardner to apply for judicial review.

[10] The court does not resile from its position in that case. However, not all recommendations are susceptible to judicial review. Much depends on the type of recommendation and its status in the decision making process. In the case of Mrs Patrick-Gardner the PSC's recommendation would in all likelihood be followed by the Governor General. The PSC in effect does all the leg work necessary and then makes its recommendations to His Excellency who usually acts upon the recommendation. In that context the recommendation has great weight and significance because it will be followed unless there is some unusual development. Thus in a sense the recommendation in that context is tantamount to the decision and so there was no need for Mrs Patrick-Gardner to wait until His Excellency made a decision on whether to act on it or not. Also the recommendation would have had the effect of separating Mrs Patrick-Gardner from her job. Nothing of the sort is happening in the present case.

[11] The court agreed with Mr Foster QC's submission that in the present case the recommendation from the Solicitor General did not affect any rights of Mr Austin. It was some distance away from and therefore not proximate enough to any final decision that may have been made. This stands in sharp contrast with Mrs

Patrick-Gardner who stood to be separated from her job based on the recommendation which would be the final decision unless it was deflected.

[12] Mr Foster pointed out that no procedural impropriety occurred when the Solicitor General made her recommendation. The plain evidence from the Solicitor General is that she communicated with Mr Austin. She told him what she was thinking. He responded in writing to her. This means that the various orders sought in judicial review against the Solicitor General and the PS that Mr Austin was:

(a) denied a fair hearing;

(b) being involuntarily deployed;

(c) being removed from his substantive post and deprived of protection under sections 13 (3) (h) and 125 of the Constitution of Jamaica;

(d) being deployed or otherwise transferred was an abuse of power and also Wednesbury unreasonable

have no factual basis because no decision has been or is being taken by the Solicitor General or the PS to deploy Mr Austin anywhere.

[13] The Solicitor General in her affidavit has expressly disclaimed that she has any power to deploy Mr Austin anywhere in the public service. The PS for her part has said she has not made any decision on the recommendation. There is no evidence contradicting this. The application therefore in so far as it was seeking the orders just referred to was based on an imperfect factual premise.

[14] It follows from what has been said that certiorari could not issue to quash any decision by the Solicitor General or the PS to deploy Mr Austin in some other part of the public service because no decision to deploy Mr Austin was made or about to be made by the Solicitor General or the PS.

[15] Learned Queen's Counsel submitted that no decision was made but even if one had been made there is no evidence of any adverse consequences to Mr Austin. The recommendation has not resulted in or is likely to result in any loss of salary or loss of any pension benefits.

[16] According to Mr Foster for the recommendation to subject to judicial review Mr Austin needs to show that it has consequences that affect him in either of the following ways:

(1) alteration of rights or obligations which are enforceable in private law;

(2) deprivation of some benefit or advantage which he has enjoyed in the past and to which he legitimately expected would continue until he was told otherwise or he had received assurance that the benefit would not be withdrawn.

[17] Mr Foster submitted that none of these criteria have been met. These submissions are based on Lord Diplock's justly famous judgment in **SSCU v Minister for the Public Service** [1984] 3 All ER 945, 949. The court agrees with Mr Foster.

[18] Finally, the proposed declaration that the Solicitor General acted ultra vires and in excess of her jurisdiction by making the recommendation to the PS has no hope of being granted. The court examines the final major submission by Mr Wildman.

Whether recommendation was breach of stay

[19] At the leave state of the 2012 claim Frank Williams J (now Justice of Appeal) made this order:

The order granting permission to apply for judicial review shall operate as a stay of the decision of the [PSC] to terminate the services of the applicant.

[20] Mr Wildman made the argument that the recommendation by Solicitor General was a breach of this order. The court does not agree. The order speaks to termination of services. The recommendation said nothing about termination of Mr Austin's employment. There is nothing in the voluminous affidavit evidence that remotely suggests that the recommendation would or may end in Mr Austin's employment being terminated. The recommendation does not breach the court order.

Disposition

[21] The application for leave to apply for judicial review is refused. No order as to costs.