

IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE COMMONWEALTH OF DOMINICA

IN THE HIGH COURT OF JUSTICE

(CIVIL)

CASE NO. DOMHCV2018/0077



IN THE MATTER OF SECTIONS 85(3), 86(2) AND 1-3 OF THE CONSTITUTION OF THE COMMONWEALTH OF DOMINICA CONTAINED IN SCHEDULE 1 OF THE DOMINICA CONSTITUTION ORDER 1978

AND

IN THE MATTER OF PART 56 OF THE CIVIL PROCEDURE RULES 2000 (As Amended)

AND

IN THE MATTER OF AN APPLICATION BY CLARE WALLACE PURSUANT TO SECTION 103 OF THE CONSTITUTION OF THE COMMONWEALTH OF DOMINICA FOR A DECLARATION AS TO THE CONTRAVENTION OF SECTION 86(2) OF THE SAID CONSTITUTION AND OTHER RELIEF

BETWEEN:-

CLAIRE WALLACE

Claimant

AND

[1] ATTORNEY GENERAL
[2] PUBLIC SERVICE COMMISSION

Defendants

Appearances:

Kondwani Williams of Williams and Horsford Chambers for the Claimant
Tameka Hyacinth Burton, Solicitor General for the Defendants

2019: March 1st
2020: June 8th & 29th

JUDGMENT
ON WRITTEN SUBMISSIONS

Introduction

- [1] **STEPHENSON J.:** This is a claim¹ brought by the claimant for various declarations arising out of her transfer within the public service of Dominica from the position of Postmaster General to the office of the Deputy Director of Audit and further to the post of Trade Officer 1.
- [2] In a nutshell the claimant seeks that following declarations that:
- 1) the decision of the Public Service Commission (the PSC) to remove and transfer her was contrary to sections 85(3)(a) and 86(2) of the Constitution of the Commonwealth of Dominica (The Constitution) and is therefore unconstitutional null and void and of no effect in law and she seeks a declaration to that effect;
 - 2) the PSC was not competent and had no power to appoint any person to hold or to act in any office or transfer or remove any such person to which section 86 of the constitution applies;
 - 3) her transfer to the post of Trade officer 1 was in effect an unlawful reduction in rank and or demotion which is unconstitutional null and void and of no effect in law because this post is not a post which is equivalent in grade or status to the post of Postmaster general;
 - 4) that she is and remains in her substantive post of postmaster general to which she was last substantively appointed by instrument of His Excellency the President in pursuance of Section 86(2) of the Constitution and in so doing he acted in accordance with the advice of the Public Service Commission dated 20th October 2011.
- [3] The claimant is asking that the appropriate and necessary arrangements be made for her to be restored to her substantive post with all due and speedy dispatch or in the alternative that this court makes a declaration that her purported transfer is in effect an unlawful termination of her

¹ Claimant filed a fixed date claim form Originating Motion on the 5th April 2018

appointment as postmaster general thus unlawfully removing her from the Public Service of Dominica.

- [4] The claimant also claims vindictory damages for breach of section 86(2) of the constitution and her costs.
- [5] The plaintiff filed an affidavit in support of her notice of originating motion for constitutional redress. In her affidavit she averred as follows:
- a. At the time of filing she was a public officer in the position of Trade Officer 1 in the Ministry of Trade, Energy and Employment;
 - b. That she was a public servant at that time for 31 years and 8 months;

Delay

- [6] The defendants firstly contended that there was undue delay by the claimant in bringing the application in the case at bar which amounts to an abuse of process. It was contended on behalf of the defendants that this amounts to an abuse of process which should operate as a bar to the proceedings. The defendants contend that the delay of one year and six months on the part of the claimant is undue in the circumstances of this case.
- [7] Learned Counsel on behalf of the defendants placed reliance on the CCJ case of **Stephen Edwards -v- The Attorney General of Guyana and another² (Stephen Edwards)**, on **Sealey -v- the AG of Guyana³ (Sealy)** and **Durity -v- The Attorney General of Trinidad and Tobago⁴ (Durity)**.
- [8] In the **Stephen Edwards** the period of delay was twenty years between bringing the action and when his cause of action which was his termination arose. The Caribbean Court of Justice on an appeal from Guyana upheld both judgment of first instance judge and the court of appeal and held that the delay of twenty years in that matter was an abuse of process. The court held

² CV33/2007

³ [2008] CC 11

⁴ [2002] UKPC 20

that the delay in seeking redress was so inordinate that in the absence of a cogent explanation for the delay the action must fail as an abuse of process.

[9] In the **Durity Case** which was referred to and discussed in the Edwards case the delay was for a period of five years and the Privy Council upheld the Court of Appeal of Trinidad decision and held that the lapse of time in that case and the absence of explanation amounted to an abuse of process.

[10] In the **Sealey** case, the period of delay was from 1984 when the cause of action arose to 2001 when Sealy sought to move the court in his cause which was a period of 17 years. Kissoon JA stated that:

“it is unjust to give a remedy to the appellant due to his neglect in filing his proceedings in a timely manner. His undue delay without any explanation has rendered the proceedings an abuse of the Court’s process which will undermine the integrity of the judicial system”

[11] Kissoon JA’s statements were endorsed by the judges of the Caribbean Court of Justice remarks and they upheld the decisions of the Court in Guyana and held that the application after such a long delay amounted to an abuse of the court’s process.

[12] In the case at bar what is the delay or the lapse of time between when the claimant’s cause of action arose and her commencing proceedings? Is this delay inordinate so as to amount to an abuse of process? The claimant was first purportedly transferred by letter from the PSC dated 22nd September 2016 she was subsequently further transferred as per letter dated 22nd December 2017 with the transfer to take effect 1st January 2018 and she commenced these proceedings on the 5th April 2018. A period of one year and six months passed since the first transfer. Included in the trial bundle before the court is a pre action letter dated the 23 January 2018 addressed to the Chairman of the PSC from the claimants’ lawyer Mr Kondwani Williams and this was followed by a response from the Chairman of the PSC advising Mr Williams that the letter should be addressed not to the Chairman but the Secretary and this was then followed by a copy of a letter addressed to the Secretary of PSC as directed.

[13] In her letter the claimant sought to have the PSC withdraw its letter and rescind its decision and demanding that she be returned to her substantive post.

[14] There is nothing on the Court's file or in the affidavits sworn to by the parties indicating there was any action on the Pre Action Letter sent by the Claimant. It is noted that the defendants did seek to deny the claim brought by the claimant on the ground of inordinate delay.

[15] The Privy Council Decision in **Durity** is of assistance on the issue of inordinate delay. Lord Nicholls of Birkenhead delivered the Board's opinion and in doing so he discussed first of all whether there was a time limit within which a person can seek redress for breach of their constitutional rights. The Learned Law Lord in looking at the issue of abuse of process said that the High Court has an inherent jurisdiction to prevent abuse of its own process. He also said that the court has a judicial discretion to grant or refuse applications for constitutional redress.

[16] It was held that the Constitution itself contains no express provision limiting the time within which a person can institute constitutional proceedings for breach of his or her constitutional rights he said:

“... and the grant or refusal of a remedy in constitutional proceedings is a matter in respect of which the court has a judicial discretion. These limitations on a citizen's right to pursue constitutional proceedings and obtain a remedy from the court are inherent in the High Court's jurisdiction in respect of alleged contraventions of constitutional rights and freedoms. But the Constitution itself contains no express limitation period for the commencement of constitutional proceedings. The court should therefore be very slow indeed to hold that by a side wind the initiation of constitutional proceedings is subject to a rigid and short time bar.”⁵

[17] Later on in the opinion rendered, Lord Nicholls of Birkenhead went on to say:

“In this context the Board considers it may be helpful if it makes certain general observations. When a court is exercising its jurisdiction under s 14 of the Constitution and has to consider whether there has been delay such as would render the proceedings an abuse or would disentitle the claimant to relief, it will usually be important to consider whether the impugned decision or conduct was susceptible of adequate redress by a timely application to the court under its ordinary, non-constitutional jurisdiction. If it was,

⁵ Ibid at paragraph 30

and if such an application was not made and would now be out of time, then, failing a cogent explanation the court may readily conclude that the claimant's constitutional motion is a misuse of the court's constitutional jurisdiction. This principle is well established."⁶

[18] It is noted that there was no other non-constitutional remedy available to the claimant so it can be said that she was seeking to circumvent an expired time limit in those proceedings.

[19] In her affidavit in support of the Fixed Date Claim Form the claimant in the case at bar spoke of her first transfer followed by the second transfer and that second transfer was to an inferior posting. She said that it was not as a head of department or deputy head of department referred to in section 86(1) of the Constitution. She further averred that the new appointment was inferior to her substantive appointment by instrument of appointment for His Excellency the President in that, it was lower in rank and status of her previous appointment and also she said it carries with it a diminution or reduction of emoluments.

[20] The claimant further averred that the post of Trade Officer 1 to which she was purportedly transferred to by the PSC is not a position of equivalent grade, status or challenge.

[21] It is clear to this court that it is the second transfer that was the proverbial straw that broke the camel's back so to speak. It is clear to this court that this second transfer which was on the 22nd December 2017 to take effect the 1st January 2018 injured the claimant so to speak as she spoke to it not being a position of less than the head or deputy head of department and of the reduction of her remuneration, status, grade and challenge.

[22] She commenced proceedings on the 5th April 2018 which was four months after the second transfer took effect which is in reality 3 months after her transfer took effect. I do not find that based on what is before the court this amounts to delay. The claimant cannot be said to have sat idly by while time eroded her rights.

[23] There is even no reason at this stage for the court to expect a reason to be produced for the expiration of 3 months. The court also takes judicial notice of the fact that there were some pre

⁶ Ibid paragraph 35

action steps taken by the claimant. Further, in this court's respectful view there is no prejudice to be suffered by or rendered to the defendants.

Whether the PSC had the power and or authority to take the action they did in this matter?

[24] **The issue to this court's mind can be stated as follows: whether section 86 (3) of the Constitution prohibits the PSC from transferring the claimant who is a member of the public service appointed by the His Excellency the President (the President) to a position of Head of Department as provided for by the Constitution to the post of a Deputy Head of Department thence to a position not provided for by section 86 (3)?**

[25] The main thrust of the claimant's argument as presented by Mr Kondwani Williams is that the claimant was appointed pursuant to Section 86 (1) of the Constitution of Dominica. Her appointment was as PMG which is a head of department as provided for by this section. The claimant was first transferred from her post by way of letter signed by the PSC. That in the circumstances of this case it was submitted that only the President was endowed with the power to transfer the claimant not the PSC and therefore the claimant's purported transfer in the very first place was unconstitutional null and void and without effect.

[26] The claimant contends that even though section 86 of the Constitution does not make mention of the President being empowered to transfer the officers to which the section refers Learned Counsel Kondwani Williams urged the court that like the Court of Appeal in the case of **Grenada Allied Technical Workers Union and Public Works Union –v- the Attorney General of Grenada and others**⁷ when Saunders JA agreed with the reasoning of the first instance judge that because the power to transfer was not expressly stated does not mean that the power did not exist.

[27] The statement of the trial judge which was agreed with by the court was:

⁷ Grenada Civil Appeal No: 11 of 2003

"I do not accept that because that power is not expressed it means that the power does not exist. The power to transfer, for example, is not expressed but no one can doubt that the PSC has the power to transfer persons within the service from one office to another. Such a transfer can be either on appointment or on temporary assignment. That latter type of transfer is in fact a secondment...Given that the PSC has the power to second within the service there is no reason why, subject to the proper safeguards, it should not be able to second outside the service. The difference with outside secondment is that it must be by agreement, it cannot be imposed upon the officer just as it cannot be imposed upon the receiving employer....."

I would respectfully agree with those conclusions. Contracting out of the Constitution [21]Counsel also argued that the fact that the workers had agreed to be seconded to the Corporation could not disentitle them from their constitutionally prescribed benefits. Reference was made to **The AG of Grenada v. The Grenada Bar Association**. In my view since the postal workers had never been required to retire this point does not arise for determination.⁸

[28]The court of appeal in that case was considering section 84(1) of the Grenada Constitution which addressed and provided for the power vested in the Public Service Commission "... to appoint persons to hold or act in offices in the public service (including the power to confirm appointments), the power to exercise disciplinary control over persons holding or acting in such offices and the power to remove such persons from office and the power to grant leave ...". This provision is very similar to the section 86 of the Dominica Constitution only the Grenada Constitution was considering the power of appointment by the PSC. Section 86 provides:

(PART 2)

Appointments, etc., to particular offices

Part 86

86. (1) **this section applies to the offices** of Secretary to the Appointment. Cabinet, Permanent Secretary, **head of a department of Government, deputy head of a department of Government**, Clerk of the House, any office for the time being designated by the Public Service Commission as an office of a chief professional adviser to a department of Government – officers and any office for the time being designated by the Commission, after consultation with the Prime Minister, as an office the holders of which are required to reside outside Dominica for the proper discharge of their functions or as an office in Dominica whose functions relate to external affairs.

(2) The power **to appoint persons** to hold or to act in offices to which this section applies (including the power to confirm appointments), and subject to the provisions of section 93 of this Constitution, the power to exercise disciplinary control **over persons holding or acting in such offices and the power to remove such persons from office shall vest**

⁸ Ibid at paragraph 20 & 21

in the President, acting in accordance with the advice of the Public Service Commission: (Emphasis mine)

[29] This court agrees with counsel's submission in this regard that it would appear that it is only the President who has the power to transfer the claimant in the case at bar.

[30] There is a procedure which has been laid down in the constitution as to how the appointment and removal of Heads of Department and Deputy Heads of Department should be dealt with. It is trite law that the Constitution is the supreme law of the land. Thus this procedure must be followed and in the circumstances of this case it is certainly not accepted by this court that the fact that the claimant was written to by the PSC and not by the President was only a procedural irregularity. The actions of the PSC were without a doubt unconstitutional null and void. The procedures as laid down by the Constitution must be followed; they are there for a purpose.

[31] This court has come to the respectful view that based on the language of the Constitution the claimant had the assurance that her appointment as a Head of Department and Deputy Head of Department was subject to the action of the President and that her employment would continue in those positions unless removed by the President as provided for by section 86 (1) of the Constitution.

[32] The power and scope of the PSC is well established in Law. The authors of Fundamental Constitutional Law⁹ present it in a very simple and easy to understand way, they say:

"Caribbean Constitutions go some way to establishing an intra-branch separation of powers in the executive between the political directorate who are part of the Cabinet and the public servants who undertake the day to day work of the executive. Although executive authority is vested in the Cabinet, a large portion of the business of government devolves, by necessity, on an extensive network of subordinate officers who are public servants. Caribbean constitutions attempt to protect these subordinate layers from improper political interference from Cabinet members. Separate chapters exist in the constitutions dealing with the public service. In **Thomas -v- AG**¹⁰ at page 382; Lord Diplock explained that these chapters were aimed at "*insulating members of the civil*

⁹ Tracey Robinson, Arif Bulkan and Adrian Saunders, Sweet & Maxwell

¹⁰ (1981) 32 WIR 375

service, the teaching service and the police service in Trinidad and Tobago from political influence exercised directly upon them by the government of the day.”¹¹

[33] The Constitution is written in clear and simple language whereby an autonomous body the Public Service Commission (the PSC) was created. The PSC is vested with the authority over all public officers in the public service.

[34] Does the PSC have the power to transfer the claimant as it has purported to do in the case at bar? Can the transfer of the claimant from the post of PMC to Deputy Auditor to Trade Officer 1 be construed as a removal of the claimant from office bearing in mind that by virtue of Section 86 of the Constitution only His Excellency the President is clothed with the power to remove a Head of Department and the Post Master General is a Head of Department?

[35] It would seem to this court that the grant or refusal of the declarations sought would depend of the resolution of the following questions:

- a. Was the transfer by the PSC of the claimant from PMG to Deputy Director of Audit a removal from office?
- b. Is the transfer tantamount to or as Counsel Kondwani Williams puts it “*axiomatic and must be taken as a removal from office*”?
- c. Did the law vest in the PSC the authority to transfer a Head of Department to a position of a deputy head of another department?

[36] Learned Counsel Kondwani Williams sought to submit to this court that even though section 86 of the Constitution makes no express provision empowering the president to transfer, he submitted that this power must exist by necessary implication. Counsel relied on the Judgment of Saunders JA in the **Grenada Allied Technical Workers Union and the Public Works Union –v- The Attorney General and another**.¹² In that case the judge of first instance had this to say:

"I do not accept that because that power is not expressed it means that the power does not exist. The power to transfer, for example, is not expressed but no one can

¹¹ Ibid at paragraph 7-032

¹² Civil Appeal No 11 of 2003 (Grenada)

doubt that the PSC has the power to transfer persons within the service from one office to **another**. Such a transfer can be either on appointment or on temporary assignment. That latter type of transfer is in fact a secondment...Given that the PSC has the power to second within the service there is no reason why, subject to the proper safeguards, it should not be able to second outside the service. The difference with outside secondment is that it must be by agreement, it cannot be imposed upon the officer just as it cannot be imposed upon the receiving employer....."¹³

Justice of Appeal Saunders agreed with the learned trial judge's statement.¹⁴

[37] This court understands learned Counsel Williams on behalf of the claimant to be submitting that this court should apply the same interpretation to section 86(2) of the Constitution which was applied to section 84(1) of the Grenada Constitution that is to say that because the power to transfer is not expressed does not mean that it does not exist. That the power to transfer by the President exists by necessary implication. Based on the court's reading of the **Grenada Allied Technical Workers case** as quoted, the court agrees with Counsel in this regard.

[38] The answers to the questions raised above in this judgment have in fact been answered by the Court of Appeal in the case of **Gemma Bain-Thomas –v- The Attorney General of Grenada**¹⁵. In that case the appellant who was the Cabinet Secretary to the Government after general elections was transferred after some time from her position at Cabinet Secretary to be head of the Anti-Money Laundering and Counter Terrorism Financing Commission. The appellant was on the 6th February 2014 issued with an instrument from the Governor General to "*an office / the Public Service of Grenada at Grade "M" to be determined by the Public Service Commission.*" ("PSC-G")

[39] The PSC-G on the same date purported to issue Ms Bane-Thomas a letter of appointment appointing her to the Head of the Anti-Money Laundering and Counter Terrorism Financing Commission. In deciding whether or not the appellant's transfer and the appointment by the PSC-G was lawful, the Court of Appeal was required to interpret section 85 (1) and (2) of the

¹³ Ibid Quoted at paragraph 20

¹⁴ Ibid at paragraph 20

¹⁵ [2017] ECSCJ No. 213, GDAHCVAP2015/0013

Constitution of Grenada and the court was called on to enquire whether these section of the Constitution was complied with.

[40] The appellant argued that her transfer and subsequent appointment by the PSC-G was unlawful. The Attorney General on the other hand argued that the Governor General's actions were lawful in that the Governor General acted on the advice of the PSC-G. Learned Counsel on behalf of the respondents in that case sought to argue that the Governor General retained no residual discretion in the circumstances of the case.

[41] It was the respondents' position that the appellant's appointment could have correctly been made by the PSC-G as the post to which she was appointed was the same grade as the one she held previously.

[42] The Court of Appeal declared that the actions and the decision of the PSC-G was in contravention of section 85(2) of the Constitution of Grenada and was therefore null and void. The Court of Appeal also granted the appellant damages for her unconstitutional removal. These damages were ordered assessed if not agreed by the parties.

[43] Section 85 (2) of the Constitution of Grenada is found at Chapter VI headed '*The Public Service*'. It is important to note that these sections are identical to the Dominica Provisions save that the Grenada Constitution makes reference to Governor General whereas the Dominica Constitution makes reference to the President. The powers of the Heads of State of these two countries are identical in this regard.

[44] In her very helpful analysis of the Law the learned Justice of Appeal first of all addressed the Principle of the Supremacy of the Constitution and spoke to the fact that it has been read by the courts as the principle means of enforcing limits upon the legislature and executive branches of the Government.

[45] The Court of Appeal agreed with Learned Counsel for the Appellant that the creation of the Public Service Commission by the Westminster model constitutions was to insulate the public

service from political interference and manipulation. This is a well-accepted principle which has been repeated in many cases and texts on Caribbean Constitutional Law. There are provisions in the Caribbean Constitutions which makes provision for the Public Service Commissions to appoint transfer, remove and discipline persons under their remit.

[46] Justice of Appeal Blenman found that section 85(2) of the Grenada Constitution in the **Bane-Thomas Case** stipulated that the Secretary of Cabinet is to be appointed by the Governor General acting on the advice of the PSC-G and that in making this stipulation that it was clear that the framers of the Constitution sought to ensure that the office holder was even more protected from improper action or unfairness by adding an additional layer of insulation namely the Governor General.

[47] The learned Appellate Judge opined that it seemed obvious that there was the intention that there was a safeguard in the nature of the appointment, removal or transfer to be affected by the Governor General. The learned Justice of Appeal as stated previously went on the hold that *"the framers of the Constitution sought to ensure that the principles of security of tenure that was enshrined in the Constitution was immutable"*¹⁶

[48] The learned Justice of Appeal said further that *"...various strides in constitutional jurisprudence which ensure that the immutable principles of modern Westminster Constitutions are adhered to and if violated would be declared by the courts to be repugnant to the constitutional provisions which they infringe."*¹⁷

[49] It was the finding of the Court of Appeal in that case that there was no lawful transfer of the appellant. The Court of Appeal went on to find that in the circumstances of the case the appellant could not have been holding her substantive post and was therefore removed therefrom.

¹⁶ Ibid at paragraph 77

¹⁷ Ibid

[50] The Court of Appeal concluded that the purported transfer of the appellant was a clear infringement of section 85(2) of the Grenada Constitution. Justice of Appeal Blenman stated categorically that “*The only person who can transfer, appoint or remove Ms. Bain-Thomas from office is the Governor General, albeit acting on the advice of the PSC, and this did not occur*”¹⁸.

[51] In this court’s respectful view the ruling in the **Bain – Thomas Case** is to be applied to the case at bar for the following reasons:

- a. The claimant was appointed to the post of PMG by the President pursuant to Section 86(1) of the Constitution. Her appointment clearly puts her into that category of “*protected*” public servants as was decided in the Bain-Thomas Case. Ms Bain –Thomas a position was provided for by section 86(1) of the Grenada Constitution.
- b. The language of section 86(1) of the Constitution of Dominica is clear and speaks for itself. It is His Excellency the President who is clothed with the jurisdiction to remove Public Servants who hold the rank of Head of Department.
- c. In the case at bar, the claimant in the first instance was purportedly transferred by the PSC to a position which was not a head of department that is to the position of Deputy Director of Audit. It is to be noted that the Office of the Director of Audit does not come under the umbrella of protection afforded for by or within the provisions of Section 86 as section 86(3) states; “*References in this section to a department of Government shall not include ... the office of the Director of Audit*”. Therefore the purported transfer by the PSC of the claimant did in fact unlawfully remove her from her protected status under the Constitution. Something which could only have been done by His Excellency the President.

[52] In the **Bain-Thomas Case** Justice of Appeal Blenman in her judgment made reference to the Privy Council Decisions in the **Attorney General of Antigua and Barbuda –v- Lake Case**, the **Horace Fraser –v- The Judicial and Legal Service Commission** and **Angela Inniss –v- The Attorney General of St Christopher and Nevis**¹⁹ in support of her applying the legal

¹⁸ Ibid paragraph 80

¹⁹ Ibid at paragraph 96

principles laid down in the **Endell Thomas**²⁰ matter and followed and applied in these cited cases.

[53] In the **Endell Thomas Case** in delivering the Court's opinion Lord Diplock had this to say about the purpose of constitutional commissions:

"The whole purpose of Chapter VIII of the Constitution which bears the rubric 'The Public Service' is to insulate members of the civil service, the teaching service and the police service in Trinidad and Tobago from political influence exercised directly upon them by the government of the day. The means adopted for doing this was to vest in autonomous commissions, to the exclusion of any other person or authority, power to make appointments to the relevant service, promotions and transfers within the service and power to remove and exercise disciplinary control over members of the service. These autonomous commissions, although public authorities, are excluded by section 105(4)(c) from forming part of the service of the Crown."²¹

[54] In the *Lake Matter*²² the Privy Council held that Dr Lake who was appointed as Chief Medical Officer by the Governor General of Antigua and Barbuda could only be removed by the Governor General. The Privy Council held that upon his removal from his post he could not be said to be holding his post thereafter.

[55] Applying the law as stated in the **Bain-Thomas** and **Lake** decisions and applying the doctrine of '*Stare Decisis*'²³ this court is obliged to follow the decisions of the Court of Appeal and hold in the case at bar that the PSC's actions to purportedly transfer the claimant who was appointed to the post of PMG by His Excellency the President of Dominica pursuant to section 86(1) of the Constitution of Dominica was unconstitutional, null and void.

[56] It is also clear to this court that the purported transfer by the PSC from the position of PMG to the position of Deputy Auditor General and to Trade Officer 1 was a clear demotion in this Court's respectful view.

²⁰ Op Cit (1981) 32 WIR 375 (PC)

²¹ Ibid pages 381 to 382

²² **Attorney General of Antigua and Barbuda v Lake** (1998) 53 WIR 145

²³ Under stare decisis, once a court has answered a question, the same question in other cases must elicit the same response from the same court or lower courts in that jurisdiction.

[57] The first purported transfer for reasons stated above was not a lawful one and a clear breach of the protection afforded the claimant as PMG by section 86 of the Constitution. The claimant was transferred illegally and transferred to positions in the Public Service of Dominica where she lost her protection from the whimsical and capricious acts of the PSC. There is no doubt in this court's mind that the purported transfer of the claimant was a clear removal and or effectively removed the claimant from her office as PMG.

[58] This court will go further and say respectfully, that it is a demotion to transfer the claimant to another post which was not clothed with the same constitutional protection that she enjoyed by virtue of her appointment pursuant to Section 86(1) to a position where her appointment and tenure and removal can be affected and effected only by a decision of the PSC. This right is one which is entrenched in the constitution in favour of the claimant.

[59] It is important to make reference to section 85²⁴ of the constitution which makes provision for the powers of the PSC and it is noted that at 85(3) (a); it states specifically that the powers with which the PSC are clothed with do not extend to any office to which Section 86 applies.

[60] It has been the finding of this court that the office of PMG is one to which section 86 applies and therefore the PSC cannot exercise the powers it is clothed with by section 85 of the Constitution.

[61] I pause to make reference to two Jamaican cases²⁵ which both essentially held that a person appointed by the Head of State under the relevant sections of the Jamaican Constitution could

²⁴ **Section 85:**

85. (1) The power to appoint persons to hold or act in offices in the public service (including the power to confirm appointments), and, subject to the provisions of section 93 of this Constitution, the power to exercise disciplinary control over persons holding or acting in such offices and the power to remove such persons from office shall vest in the Public Service Commission.

(2) The Public Service Commission may, by directions in writing and subject to such conditions as it thinks fit, delegate any of its powers under subsection (1) of this section to anyone or more members of the Commission or, with the consent of the Prime Minister, to any public officer.

(3) The provisions of this section shall not apply in relation to the following offices, that is to say:

(a) any office to which section 86 of this Constitution applies;

²⁵ (A) **McPherson –v The Ministry of land and Environment (SCCA) No.85/2007**; where it was held that once a public servant is appointed by the Governor General acting on the advice of the PSC under Section 125(1) of the Constitution; that person can only be removed from the office by the Governor General acting on the advice of the PSC.

not be removed from the office without the process laid down by the provisions of the constitution being followed. The Jamaican Courts reviewed and applied the judgments of Fraser and Inniss which emanated out of our courts.

The powers of the President

[62] Learned Counsel urged this court to consider that the transfer which took place in the case at bar is essentially a removal from office and that the word “remove” as appears in section 86(2) “embraces every means by which the continuous service contract of a public servant is terminated.” Counsel referred the Court to the well-known **Endell Thomas case**²⁶ in support of this submission.

[63] The defendants submit that the action by the PSC that is the claimant’s transfer from the post of PMG to Deputy Director of Audit was merely a procedural breach due an error by the PSC.

[64] The defendants contend that the error was not a deliberate or egregious disregard for the constitutional protection with which the claimant is clothed.

[65] Learned Counsel on behalf the defendants submitted that it is settled law that the PSC has the power to transfer a public officer. Further, that the authority of the President to remove Public Officers is provided for by section 86(2) of the Constitution and it must be exercised with and in accordance with the advice of the PSC and therefore the President is not empowered to act in his own discretion or deliberate judgment but that he is mandated to act in accordance with the advice of the PSC.

[66] Counsel on behalf of the defendants sought to mount an argument that the breach was a technical breach and even if the PSC complied with the constitutional provisions the outcome

(B) **The Minister Of Finance And Planning & Public Service –V- Viralee Bailey-Latibeaudiere** ([2014] JMCA Civ 22) This case applied the McPherson case in so far as the right to remove a public servant who has been appointed by the Governor General acting on the advice of the PSC. Justice of Appeal Morrison agreed with Sykes J where in Sykes J held that it mirrored the McPherson case on this point.

²⁶ (1981) 32 WIR 375 (PC)

would have been the same for the claimant as the President is essentially obliged to act in accordance with the advice of the PSC.

[67] The court is unable to agree with counsel's submission in this regard in its entirety. This submission in the court's respectful view misses the point and is totally misconceived.

[68] In the court of appeal decision in **Bain Thomas**, Justice of Appeal Blenman in delivering the court's judgment did discuss very briefly the nature and character of the Governor General's action which are as stated *mutatis mutandi* in the Grenada Constitution upon the advice of the PSC – G.

[69] It was stated by the learned Justice of Appeal:

“that the Governor General, who, by convention, **was required to be independent and, by law, was mandated to act fairly and objectively. It was evident that the Governor General was not merely to 'rubber stamp' the decisions of the PSC.** The framers of the Constitution would not have expected the PSC, by its advice, to embarrass the Head of State who was required to act on its advice”. (Emphasis mine)

I could do nothing else but accept the learned justice of appeal's opinion and adopt it as my own.

[70] This court turns to the Court of Appeal Decision in the **Gemma Bain Thomas Case** as the judgment lends direction as it regards the defendants' submission regarding the fact that the President is obliged to act in accordance with the advice of the PSC.

[71] In the **Gemma Bain Thomas case**²⁷ the Learned Solicitor General acting for and on behalf of the defendants relied on the principle that the Constitutions in our region are founded on the Westminster Model and sought to submit to the court the following:

- a. that the Governor General is required to act on the advice tendered to her by any authority designated under the Constitution to so advise her;
- b. the Governor General retains no independent discretion, or any discretion whatsoever, relative to the advice tendered to her by the PSC; and

²⁷ HCVAP2015/0013 (Grenada)

- c. the Governor General must act on the advice of the designated authority except where the Constitution specifically affords her an independent deliberate judgment;

Conclusion:

[72] The court is respectfully unable to agree with the defendants' submission that the matter should be dismissed as an abuse of process on the ground of inordinate delay. Further, the decisions relied on by the defendants in support of their submission in this regard does not assist them in any way. It is to be noted that the years of delay in all three of the cases cited and relied on was far longer than the supposed delay in the case at bar. There is insufficient reason for the court to turn the claimant away from the seat of litigation based on the time that this court finds to have expired.

[73] This court therefore finds in favour of the claimant and holds and declares that:

- a. The PSC was not competent and had no power to appoint any person to hold or to act in any office or transfer or remove any such person to which section 86 of the constitution applies;
- b. The letter from the Secretary of the PSC dated 22nd September 2016 was a contravention of Section 86(1) of the Constitution of Dominica which vests the power to remove her which impliedly includes the power to transfer her vests solely in His Excellency the President of the Commonwealth of Dominica further that the said letter is null and void as the PSC by issuing this letter purported to usurp the power of His Excellency the President of the Commonwealth of Dominica to remove the claimant from the post of PMG which is unconstitutional;
- c. The decision of the Public Service Commission to remove and purportedly transfer the claimant from the post of PMG was contrary to sections 85(3)(a) and 86(2) of the Constitution of the Commonwealth of Dominica and is therefore unconstitutional null and void and of no effect in law;

- d. The further purported transfer by the PSC of the claimant to the post of Trade officer 1 was in effect an unlawful reduction in rank and or demotion which is unconstitutional null and void and of no effect in law;
- e. That in all the circumstances of the case the claimant is and remains in her substantive post of postmaster general to which she was last substantively appointed by instrument of His Excellency the President in pursuance of Section 86(2) of the Constitution and in so doing he acted in accordance with the advice of the Public Service Commission dated 20th October 2011 and it is hereby ordered that the appropriate and necessary arrangements be made for the claimant to be restored to her substantive post of PMG with all due and speedy dispatch. In the alternative this court declares that the unconstitutional transfer is in effect an unlawful termination of her appointment as postmaster general thus unlawfully removing her from the Public Service of Dominica.
- f. The Claimant is awarded damages against the defendants for her unconstitutional removal from the office of Postmaster General, damages to be agreed between the parties within 45 days hereof failing which the matter is to be listed for damages to be assessed by the court;
- g. Costs is also awarded to the claimant herein to be assessed if not agreed.

[74] This court wishes to thank Counsel for their kind assistance rendered to the court in their written submissions and wishes to profusely apologise for the delay in delivering this judgment. The constraints faced by this court are well known to counsel and the delay was not intentional.

M E Birnie Stephenson
High Court Judge



BY THE COURT

REGISTRAR