

ST. CHRISTOPHER AND NEVIS

IN THE HIGH COURT OF JUSTICE

MONTserrat

IN THE MATTER OF THE TRANSFER OF
CLAUDE GERALD FROM THE
MINISTRY OF AGRICULTURE TO
THE MINISTRY OF FINANCE

ACTION NO. M6 OF 2000

BETWEEN:

CLAUDE GERALD

Plaintiff

and

THE GOVERNOR OF MONTserrat
THE PUBLIC SERVICE COMMISSION
THE ATTORNEY GENERAL

Defendants

Mr Sydney Christian, Q.C. for the Plaintiff
Ms Anesta Weekes, Q.C. for the Defendants

2002: December 18, 19

2003: April 28

JUDGMENT

[1] **BAPTISTE J:** - Mr Gerald claims declaratory and other relief arising out of his transfer by the Governor of Montserrat from the post of Director of Agriculture in the Ministry of Agriculture to the post of Principal Assistant Secretary in the Ministry of Finance as a consequence of remarks made by him in a welcoming speech at an Agricultural Exhibition on 15th December, 1999.

[2] In his speech Mr Gerald effusively praised P. Autsin Bramble the former Minister of Agriculture. The speech caused deep embarrassment to the Government of Montserrat

and the matter was referred to the Department of Administration. By letter dated 5 January 2000 addressed to Mr Gerald, the Permanent Secretary of that Department stated inter alia:

"It has been reported to the Department of Administration that on 16th December 1999 at the opening ceremony of the Agricultural Exhibition you spoke in public, namely in your praise of the Honourable P.A. Bramble and in your failure to address any welcome to or recognition of the newly appointed Honourable Minister of Agriculture, Land, Housing and the Environment.

2. The charge laid against you is one of general misconduct contrary to General Order 311 (iv) in that:

(a) you spoke in public on a matter reasonably regarded as of a political or administrative nature, namely the appointment of the Honourable P. Meade as Minister in place of Honourable P.A. Bramble.

3. You are required to state in writing by Wednesday 19th January 2000 any reason(s) why disciplinary proceedings should not be instituted against you as indicated at paragraph 2 (a)."

[3] In his reply, dated 6 January 2000 Mr Gerald denied the charge and stated that his remarks sought to offer praise and commendation to the two individuals who were instrumental in the planning and execution of the exhibition: Messrs P.A. Bramble and Justin Cassell. Mr Gerald also stated that he did not seek to nor indulge in any reference to the appointment of or the replacement of Ministers, nor was it implied.

[4] On 17 January 2000 Mr Gerald appeared before the Public Service Commission to explain the remarks he made at the exhibition. Mr Gerald eventually wrote a letter of apology, approved by the Commission, to the Minister of Agriculture. On 18 April 2000 the Permanent Secretary of Administration wrote to Mr Gerald advising him that His Excellency the Governor had decided that the interests of the public service required that he be transferred from the Ministry of Agriculture. By letter dated 6 June 2000 Mr Gerald was advised that effective 5 June he had been relieved from the post of Director of Agriculture and that he had been appointed to the position of Principal Assistant Secretary in the Ministry of Finance.

RELIEF SOUGHT

[5] Being aggrieved by the circumstances surrounding the transfer and the transfer, Mr Gerald seeks the following relief: -

- “(a) A declaration that the charge of ‘general misconduct contrary to General Order 311 (iv)’ made against the plaintiff in that the matters about which the plaintiff spoke on 15th December, 1999 in his official capacity of Director of Agriculture were not capable of being regarded as of a political or administrative nature.
- (a) A declaration that the plaintiff has not been treated fairly in accordance with the rules of natural justice by the Governor and/or by the Public Service Commission and/or that there has been no adjudication on the disciplinary charge brought against the plaintiff.
- (b) A declaration that the act of transferring the plaintiff out of the Ministry of Agriculture was not effected in due course of law, was arbitrary and was without justification.
- (c) An order directing the Governor to transfer the plaintiff back to the Ministry of Agriculture as Director of Agriculture.
- (d) A declaration that the Governor has no power to transfer the plaintiff out of the Ministry of Agriculture without his consent and that the Governor and/or the Public Service Commission failed to show any or any sufficient cause for transferring the plaintiff against his will from the Ministry of Agriculture to the Ministry of Finance.
- (e) A declaration that the charge brought against the plaintiff for his remarks at the exhibition on 15th December, 1999 was an invalid charge, and as a result it amounts to a hindrance to his right to freedom of expression guaranteed under section 60 of the Montserrat Constitution 1989 and is an improper and invalid restriction upon him as a public officer.
- (f) A declaration that the plaintiff is entitled to compensation for the manner in which he has been treated for since his return to work in June, 2000.
- (g) Alternatively, a declaration that the plaintiff has been constructively dismissed from the Public Service, and is entitled to substantial damages for the arbitrary manner of such dismissal.”

ISSUES

[6] In his skeleton arguments Sydney Christian Learned Queen’s Counsel for Mr Gerald crystallized the principal issues as follows:

- (1) Did the plaintiff's speech of 16th December 1999 amount to general misconduct contrary to General Order 311(iv) as alleged?
- (2) Is the Montserrat General Order void for unconstitutionality?
- (3) Was the plaintiff accorded a fair trial according to the rules of natural justice?
- (4) Was the transfer of the plaintiff from the Department of Agriculture to the Ministry of Finance punitive and a direct result of the charge of general misconduct laid against him?
- (5) Can the Court inquire into the determination by the Governor of Montserrat that the plaintiff be transferred from the Ministry of Agriculture to the Ministry of Finance?

[7] It is prudent at this stage to reproduce the salient parts of the impugned speech and then consider the issue of whether General Order 311(iv) is unconstitutional.

THE SPEECH

[8] "His Excellency, The Governor
Hon Ministers of Government
Speaker of Legislature
Etc

I am very pleased to greet you and to welcome you to this exhibition on behalf of the entire Department of Agriculture.

But before I proceed I will like to punctuate this welcome by recognizing and paying a special tribute to the immediate past Minister of Agriculture, Mr. P. Austin Bramble. Mr. Bramble was instrumental in laying the foundation for the planning and formulation of this exhibition. Beyond that though, you would allow me to say that Mr. Bramble endeared himself to us as a man of honour, respect, and decency who should carry the title of Honourable for the rest of his life because he defines the word, and he lived the word and he was the word.

In office, Mr. Bramble was impeccably coherent, fit and mentally sharp who used his considerable experience to debate issues with staff to the benefit of the agricultural sector and any strides which we have been making in the last couple of years, Mr. Bramble is integral to them.

Just to give you a tangible idea of the nature of the ex-Minister. He called, on his return from a well-deserved vacation in the UK. I was in my office. He immediately asked how things were going in the Department he had left only weeks ago. Then he became specific. "DA, how did it go with the pineapples from Guyana," in

obvious reference to the intrigue we were experiencing in getting the planting material out of that country. "What of the exhibition and how are farmers responding to it all?" and further, "Those improved stock from Antigua, did they arrive?" and the questions went on and on about the plans and programmes he left behind.

This man is a special act. He is the stuff that leaders are made. He is broad-minded. He is well intentioned. The trappings of power do not affect him. He is not haughty and puffed up. He does not inflate his ego and seek to terrify others. He does not pick fights with his staff. He is humble and approachable. He is mild mannered and meek but yet he is current, he is with it and appropriately responsive. And you feel enriched when you would have discoursed with him. We thank him for his services to agriculture and indeed to this country for in the last thirty years.

Mr. Bramble's contribution to the quality of life on this island has been telling impressive and we say a fond farewell to you Sir for we know that in the fullness of time your noble ideas on development of a small island state will stand monumentally as your past programmes have been for this country. Mr. Bramble made the word sustainable real and alive on Montserrat long before it became an international buzzword. We therefore must hail your majestic works."

IS THE MONTSERRAT GENERAL ORDER VOID FOR UNCONSTITUTIONALITY?

- [9] Mr Christian, Q.C. submitted that laws amounting to blanket restrictions on all civil servants from communicating to anyone any expression of view on any matter of political controversy are deemed excessive and unconstitutional as they do not satisfy the qualification in modern constitutions that the restrictions be reasonably required for the proper performance of civil servants' functions. Reliance was placed on the case of **de Freitas v Permanent Secretary of the Ministry of Agriculture, Fisheries, Lands and Housing and Others** (1998) 53 WIR 131. Mr Christian stated that General Order 311(iv) read in conjunction with section 60 of the Montserrat Constitution Order 1989 subsection 2 is analogous to section 10 (2) of the Civil Service Act CAP 87 of Antigua read in conjunction with section 12 (1) of the Antigua and Barbuda Constitution. Section 10 (2) of the Civil Service Act was declared unconstitutional by the Judicial Committee of the Privy Council in **de Freitas v Permanent Secretary of the Ministry of Agriculture, Fisheries, Lands and Housing and Others**, and therefore the same must be true for Montserrat General Order 311 (iv) by analogy. It was therefore submitted that the charge levelled at Mr Gerald was therefore void for unconstitutionality.

[10] Learned Counsel Ms Weekes, Q.C. submitted on behalf of the defendants that there was no basis for the court to find that the charge was invalid. It was a lawful charge under section 311 (iv) of the General Orders. Ms Weekes submitted that the wording of section 60 of the Constitution Order allows the defendant to restrict the claimant's right to freedom of expression. Such a restriction is lawful and proportional to the aims that the restriction is designed to deal with, namely –

“Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision ... that imposes restrictions upon public officers or teachers.”

[11] Ms Weekes, Q.C. stated that there was no basis for drawing an analogy with section 311 (iv) and section 10 (2) (a) of the Civil Service Act 1984 of Antigua and Barbuda, as both sections of the Statutes are worded differently. The Antigua Statute is drafted in more specific terms which purports to exclude “any expression of an opinion on matters of national or international political controversy.” Ms Weekes, Q.C. submitted that section 311 (iv) does not exclude so specifically any opinion expressed by a public servant therefore the decision of **de Freitas** does not assist the claimant. Further there was no hindrance of Mr Gerald's right under section 60 of the Constitution Order.

[12] While Mr Gerald relies on the case of **de Freitas**, the defendants seek to distinguish that case. **de Freitas**, a civil servant, participated in demonstrations against Government corruption in Antigua. He along with other persons, peacefully picketed the Ministry of Agriculture. Some of the placards displayed by him were critical of the Minister of Agriculture. He engaged in activities which fell within the prohibition in section 10 (2) of the Civil Service Act. Section 10 (2) of the Civil Service Act 1984 of Antigua and Barbuda provides as follows:

“A civil servant may not in any document or any other medium of communication whether within Antigua and Barbuda or not, publish any information or expression of opinion on matters of national or international political controversy.”

Section 10 (3) states:

"The provisions of subsection 2 (a) do not apply – (a) where a civil servant is acting in the execution of his official duties, or (b) where the information or opinion is published in the course of a lecture or address, the subject matter of which is approved by the Minister to whose ministry the civil servant is attached, made or given at an educational institution in the bona fide pursuit of the professional or vocational activities of the civil servant or (c) where the information or opinion is expressed in an article or other literary contribution, the subject matter of which is approved by the Minister to whose ministry the civil servant is attached, to an approved journal or other periodical or document prepared in pursuit of the professional or vocational activities of the civil servant."

[13] Section 12 (1) of the Constitution of Antigua and Barbuda provides that "Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression."

Section 12 (4) however, provides that:

"Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision ... (b) that imposes restrictions upon public officers that are reasonably required for the proper performance of their functions; and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society."

[14] The Permanent Secretary interdicted **de Freitas** from the exercise of the powers and functions of his office. **De Freitas** sought redress in the High Court for breach of his constitutional rights and Redhead J granted a declaration that section 10 (2) (a) was unconstitutional. The respondents appealed to the Court of Appeal. The matter eventually reached the Privy Council where it was held:

(1) That any restrictions imposed on the freedom of expression and freedom of assembly of civil servants must be restrictions which were reasonably required for the proper performance of their functions and must be reasonably justifiable in a democratic society; the restrictions in section 10 (2) (a) of the Civil Service Act 1984, without qualification, did not satisfy the criterion of being reasonably required for the proper performance of a civil servant's functions. (3) That even had section 10 (2) (a) of the Act satisfied the criterion of being reasonably required for the proper performance of a civil servant's functions (cf. sections 12 (4) and 13 (2) of the Constitution), it would not have satisfied the criterion (in those constitutional provisions) of being reasonably justifiable in a democratic society; the quality of reasonableness in that criterion being infringed by arbitrary or excessive invasion of a guaranteed right; to determine whether or not a limitation was arbitrary or excessive it was necessary to consider

whether the legislative intent was sufficiently important to justify limiting the right whether the measures to effect the legislative intent were rationally connected to it, and whether the means used to limit the right were no more than was necessary; section 10 (2) (a) (albeit satisfying the other criteria of reasonableness) was otiose on the ground of being disproportionate in not distinguishing between classes of civil servants as to the restraints imposed on freedom of expression and freedom of assembly and association.

- [15] How does the position in the instant case differ from the position in **de Freitas**? General Order 311 of Montserrat provides:

"No officer, whether he is on duty or leave of absence, shall - (iv) speak in public or broadcast in any way on matters which may reasonably be regarded as of a political or administrative nature. Provided also that the provisions of this Order shall not apply to an officer acting in pursuance of his official duties or as editor of and contributor to a publication issued by a recognized Staff Association or Union and with prior permission of the Governor.

Provided also that statements of factual and technical information may be made by Permanent Secretaries, Heads of Departments and other senior officers, if authorized by the Governor."

- [16] Section 60 of the Montserrat Constitution Order 1989 states –

"(1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, and for the purposes of this section the said freedom includes freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision –

(b) that imposes restrictions upon public officers or teachers, except so far as that provision or, as the case may be the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

(3) For the purpose of subsection 2 (b) of this section in so far as it relates to public officers, "law" in subsection (2) includes directions in writing regarding the conduct of public officers generally or any class of public officer issued by the Government.

- [17] Ms Weekes, Q.C. sought to distinguish between the provisions in section 10 2 (a) of the Civil Service Act 1984 of Antigua and General Order 311 (iv) of Montserrat. Having looked

at both provisions I can discern no difference of substance between them and I respectfully adopt the reasoning of the Privy Council in **de Freitas**. It is pellucid that General Order 311 (iv) applies to all civil servants without distinctions. It does not distinguish between different categories of civil servants. It is all embracing. The rank or function of the civil servant is of no moment. As Lord Clyde said in **de Freitas** at page 141:

“The rule applies to all civil servants without distinctions so that it is left to the individual in any given circumstances to decide whether he is or is not complying with the rule.” At page 144 Lord Clyde said: “The blanket approach taken in section 10 imposes the same restraints upon the most junior of the civil servants as are imposed upon the most senior.”

[18] Are the restraints imposed by the General Order reasonably justifiable in a democratic society? In **de Freitas**, Lord Clyde said, at page 141:

“It cannot be that all expressions critical of the conduct of a politician are to be forbidden. It is a fundamental principle of democratic society that citizens should be entitled to express views about politicians, and while there may be legitimate restraints upon that freedom in the case of some civil servants, that restraint cannot be made absolute and universal. But where the line is to be drawn is a matter which cannot in fairness be left to the hazard of individual decision.”

[19] At pages 139 to 140 Lord Clyde stated:

“A blanket restraint on all civil servants from communicating to anyone any expression of view on any matter of political controversy would in the view of their Lordships be excessive. It would not satisfy the qualification in the constitution that the restriction be reasonably required for the proper performance of their function.”

[20] By parity of reasoning the same would apply to General Order 311 (iv) of Montserrat in terms of section 60 (2) (b) of the Montserrat Constitution Order 1989, that is whether the restraint satisfies the requirement of being “reasonably justifiable in a democratic society.”

[21] Lord Clyde in **de Freitas** referred to the case of **Nyambirai v National Social Security Authority** (1996) 1 LRC 64, at page 25, where Gubbay CJ saw the quality of reasonableness in the expression “reasonably justifiable in a democratic society” as depending upon the question whether the provision which is under challenge –

“arbitrarily or excessively invades the enjoyment of the guaranteed right according to the standards of society that has a proper respect for the rights and freedoms of the individual.”

[22] In determining whether a limitation is arbitrary or excessive Gubbay CJ said that the court would ask itself -

“Whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.”

[23] In **de Freitas**, Lord Clyde stated at page 144: “Their Lordships accept and adopt this threefold analysis of the relevant criteria.” His Lordship continued:

“Their Lordships would be prepared to accept in principle that the first two of these criteria would be met in the case of civil servants once it is noted that their special status, with its advantages and restraints, is recognized as proper in the administration of a free society. But the third criterion raises a question of proportionality. The blanket approach taken in section 10 imposes the same restraints upon the most junior of the civil servants as are imposed upon the most senior. The point was made by Redhead J that in the United Kingdom there are classes of civil servant related to the seniority of the posts which they fill and a distinction is made between the classes as to the extent of any restraints imposed upon them in regard to their freedom of political expression. In the Civil Servant Act 1984 of Antigua and Barbuda a considerable analysis of the grades of civil servants is set out in the First Schedule and it would plainly be practicable to devise a comparable system of classification as has been adopted in the United Kingdom. Without some such refinement their Lordships are not persuaded that the validity of the provision can be affirmed.”

[24] I respectfully accept and adopt the reasoning of Lord Clyde. In the circumstances I hold that General Order 311 (iv) of Montserrat does not satisfy the criterion of being reasonably justifiable in a democratic society on the ground of it being disproportionate in not distinguishing between classes of civil servants as to the restraints imposed on freedom of expression. It is therefore void for unconstitutionality. I therefore declare that the charge brought against Mr Gerald for this remarks at the exhibition on 15th December 1999 was an invalid charge. It amounted to an hindrance to his right to freedom of expression guaranteed under section 60 of the Montserrat Constitution 1989 and is an improper and invalid restriction upon him as a public officer.

[25] Having arrived at that conclusion it is otiose to consider the issues whether Mr Gerald's speech amounted to general misconduct contrary to section 311 (iv) of the General Orders or whether there was a breach of natural justice. However, assuming I am wrong on the

constitutional issue, I would agree with Ms Weekes Q.C. that the question for the court is whether the decision to lay the charge in question was Wednesday unreasonable. Ms Weekes submitted and I agree, that it was reasonable for the Department of Administration to conclude that the speech was capable of falling within General Order 311 (iv). I would also agree with Ms Weekes that there was no breach of the rules of natural justice.

[26] **THE TRANSFER AND OUSTER OF JURISDICTION**

I now consider the declaration sought by Mr Gerald that the act of transferring him out of the Ministry of Agriculture was not effected in due course of law, was arbitrary and was without justification. Before I do so I will consider the question as to whether the court's jurisdiction to consider that issue is ousted.

[27] It was argued on behalf of the defendants that section 16 (5) of the Constitution ousted the court's jurisdiction to enquire into the determination by the Governor that Mr Gerald be transferred from the Ministry of Agriculture to the Ministry of Finance. Section 16 – (1) states:

“The Governor, acting in his discretion, shall be responsible for the conduct, subject to the provisions of this Constitution, of any business of the Government of Montserrat with respect to the following matters –

(e) the appointment of any person to any public office ...”

[28] Section 16 (5) states:

“The question of whether a matter falls within the scope of sub-section (1) shall be determined by the Governor acting in his discretion, and the determination of the Governor therein shall not be enquired into any court.”

[29] In paragraph 27 of his skeleton arguments Mr Christian, Q.C. stated:

“Section 16 (5) of the Montserrat Constitution Order 1989 does appear to give the Governor exclusive discretion as to whether a matter falls within the scope of Section 16 (1). The determination of the Governor therein (i.e. in whether a matter falls to be considered under section 16 (1) cannot be inquired into by any court. This ouster clause in section 16 (5) is referable to questions of whether or not a matter falls within the scope of section 16 (1). Having made that determination, this ouster clause is no longer applicable.” I agree.

[30] It is settled law that a provision ousting the ordinary jurisdiction of the court should be construed strictly. If such a provision is reasonably capable of having two meanings that meaning shall be taken which preserves the ordinary jurisdiction of the court. See **Anisminic Ltd. V. Foreign Compensation Commission and Another** [1 ALL ER (1969) 208, at 213. I accept and adopt that principle of law and hold that the court can inquire into the determination by the Governor of Montserrat that Mr Gerald be transferred from the Ministry of Agriculture to the Ministry of Finance.

[31] In his skeleton Mr Christian, Q.C. referred to the letter of 18th April, 2000 where Mr Gerald was advised that the Governor of Montserrat had instructed that he be transferred out of the Ministry of Agriculture. It was submitted that the letter represents a clear acknowledgment that Mr Gerald's transfer was a direct result of the charge of misconduct laid against him.

[32] Section 16 (1) of the Montserrat Constitution states:

"The Governor, acting in his discretion, shall be responsible for the conduct, subject to the provisions of this Constitution, of any business of the Government of Montserrat with respect to the following matters –

(e) the appointment, of any person to any public office, the suspension, termination of appointment, dismissal or retirement of any public officer, or the taking of any disciplinary action in respect of such an officer ..."

[33] Section 68 of the Constitution states:

"(7) In this Constitution, unless it is otherwise provided or the context otherwise requires -

(a) any reference to power to make appointments to any public office shall be construed as including a reference to power to make appointments on promotion and transfer."

[34] General Order 219 provides that: "Officers are liable for transfer to any post of equivalent grade in the territory." While General Order 220 states:

'(1) Subject to the provisions of paragraph (2) of this Order a transfer not involving a change in emoluments of an officer, or the grading of his post, may, where the transfer –

© is between Ministries or between Departments of different Ministries, be made by the Permanent Secretary, Administration.

(2) Where an officer is, or is to be transferred under any of the foregoing provisions of this Order, a Permanent Secretary, a Head of Department or the officer concerned (through his Head of Department or Permanent Secretary) may lodge a written objection with the Permanent Secretary Administration; and if an objection is lodged it shall be transmitted to the Governor for determination.

[35] Mr Christian Q.C. does not dispute that the Governor in his discretion is responsible for the appointment of any person to public office. It is disputed that it is in the remit of the Governor to make transfers. Mr Christian Q.C. contends that (i) neither section 16 (1) nor 16 (2) of the Montserrat Constitution Order includes any reference to transfers; (ii) transfers are governed by section 219 and 220 of the General Orders for the Public Service. Section 220 © provides that transfers between Ministries or between Departments of different Ministries are made by the Permanent Secretary Administration. There is not even a requirement that the Governor be consulted. After making reference to section 68 (7) of the Constitution, Mr Christian Q.C. submitted that (1) General Order 220 © operates to exclude a transfer between Ministries as a provision "otherwise provided"; alternatively, the use of the transfer as a punitive measure puts it into a context which requires it to be considered other than an appointment.

[36] The cases of **Marie Dyer v Eluid Williams, Permanent Secretary Agriculture, Public Service Commission, the Attorney General** (Suit No. 4 of 1991) and **Smith and Others v Attorney General** 1985 LRC (Constitution) page 1128, are instructive in relation to the matters raised by Mr Christian. At pages 8 and 9 of the judgment of Adams J in **Marie Dyer** the following appears:

"I refer to the case ... from Belize of **Smith and Others v Attorney General** 1985 LRC (Constitution) page 1128. In that case the plaintiff's held posts as lecturers at the Belize Teachers College. By letter sent to each of them by the Chief Education Officer they were informed that they would be posted to other educational institutions. The reason given was that the Teachers College was undergoing some form of re-structuring. Under the Belize Constitution Order, Section 108 vested the Public Service Commission with the power to appoint and

discipline civil servants and in section 123 made the position with respect to transfer very clear, ...

'Any reference in this Constitution to power to make appointments to any public office shall be construed as including a reference to power to make appointments on promotion and transfers to that office.'

Since in Belize it was made abundantly clear by the Constitution Order that transfers were a matter for the Public Service Commission Moe C.J. as he then was, had little difficulty in deciding that the transfers effected by the Acting Chief Education Officer were null, void and of no effect. There the Constitution Order of Belize had clearly spelt out the position with respect to the power to transfer."

[37] Likewise the Constitution of Montserrat makes it clear that transfers were a matter for the Governor. From a conjoint reading of sections 16 (1) (a) and 68 (7) of the Constitution it is clear that the constitutional power to transfer public servants vests in the Governor. The General Orders are subordinate to the Constitution.

[38] Mr Christian also urged upon the court that Mr Gerald's transfer was punitive and was a direct result of the charge of misconduct laid against him. Further the Governor allowed the political arm of Government to dictate the treatment to be meted out to Mr Gerald.

WAS THE TRANSFER PUNITIVE?

[39] In paragraph 21 of his skeleton argument Mr Christian Q.C. stated:

"Lawful penalties in respect of disciplinary charges are listed in section 46 (1) of the Public Service Commission Regulations 1980 ... A transfer is not a lawful penalty in respect of a disciplinary charge which has been established and therefore the Public Service Commission acted ultra vires in recommending it and the Governor acted ultra vires in imposing it. A purported transfer effected under such circumstances is punitive and unlawful."

[40] In paragraph 22 it is stated:

"To impose such a sanction on the plaintiff without affording him the opportunity of a right to be heard about the lack of judgment being ascribed to him generally is clearly ultra vires and in breach of natural justice."

[41] Regulation 46 (1) of the Public Service Commission regulations states the penalties which may be imposed on an officer against whom a disciplinary charge has been established. The penalties include severe reprimand and reprimand. The penalty imposed upon Mr Gerald was severe reprimand, a penalty which was well within the law and which could have been imposed were the charge a valid one.

[42] General Order 219 states that officers are liable for transfer to any post of equivalent grade in the territory. This alone should dispense with any notion that a transfer is a penalty. This is quite apart from the fact that transfer is not included in the list of penalties provided for by the Public Service Commission regulations.

[43] In **Marie Dyer**, Adams J granted a declaration that the decision of the Permanent Secretary to transfer and the transfer of Marie Dyer was unlawful void and of no effect. Mr Justice Adams further declared that the proper authority for the transfer was the Public Service Commission. It is to be noted that the Permanent Secretary did not have the power to transfer Marie Dyer.

[44] In his judgment Adams J referred to a letter written to Marie Dyer by the Permanent Secretary. The letter concluded as follows:

‘This type of behaviour represents a blatant attempt on your part to bring the office of Permanent Secretary into disrepute. As a consequence you are being transferred to the Forestry and Environment Division with effect from Monday September 10, 1990...’

In the words of Adams J; no amount of sophistry could confer on those words of the letter any meaning other than the one they naturally bear, and that is that because the plaintiff had behaved in what was considered by the defendant to be an unbecoming way she was being sent to another division within the very Ministry of Agriculture to which she was attached. (See page 5 of the judgment) Adams J expressed the view that:

“The defendant by the very language in his letter to the plaintiff castigating her was seeking to impose some form of punishment by the purported transfer.” (See page 10 of the judgment)

[45] In the instant case the position is not the same. In paragraph 5 of his affidavit sworn to on 13 December 2002 and filed on 17 December 2002 Anthony J. Abbott the Governor of Montserrat at the material time, stated:

“Furthermore, although the applicant presented an apology which was accepted by the Public Service Commission, I had to consider the long term effects of this event on the working relationships with the new Minister and others within the government who were affected by the event. When Minister Brunel Meade wrote to me on 11 January 2000, informing me that he had lost confidence in the ability of the Director of Agriculture to advise objectively and had betrayed his trust, I realized that in spite of the apology to the Public Service Commission – the Ministry of Agriculture would soon become a dysfunctional organization if the situation was not resolved quickly. Given the breakdown in trust between the Minister and Director ... I considered it essential in the interests of the Ministry of Agriculture and the wider Montserratian community that action should be taken.”

[46] In paragraph 9 Mr Abbott stated:

“I do not accept or agree that my decision to transfer the applicant was vindictive or punitive. The decision was not to punish him. The decision was based on the needs and best interests of the Ministry of Agriculture after the aforesaid event.”

[47] It is indubitable that the transfer of Mr Gerald to the Ministry of Finance was rooted in the speech he delivered on December 15th, 1999. I am not however persuaded to the view that the transfer was punitive. In my view paragraph 8 of the affidavit of Anthony J. Abbott clearly explains the position. It is also the case that Mr Gerald could be transferred whether or not a charge had been brought against him. I agree with Ms Weekes, Q.C. that the real issue for the court in respect of the transfer is whether the decision itself is “Wednesbury unreasonable.” Ms Weekes, Q.C. submitted that: (1) There is no evidence of procedural unfairness. I agree. (2) There is no requirement within the Statute or the Constitution that the Governor should have consulted with Mr Gerald before the transfer. I agree. (3) There is no practice within the civil service of Montserrat that civil servants are consulted on transfer issues, neither can Mr Gerald demonstrate with evidence that he had a legitimate expectation that he would be consulted. I also agree.

[48] In the premises I hold that the act of transferring Mr Gerald out of the Ministry of Agriculture was effected in due course of law and was not arbitrary or without justification. Accordingly the declaration sought in paragraph (c) of the summons is refused. The declarations that the Governor has no power to transfer Mr Gerald out of the Ministry of

Agriculture without his consent and that the Governor and/or the Public Service Commission failed to show any or any sufficient cause for transferring Mr Gerald against his will from the Ministry of Agriculture to the Ministry of Finance are also refused. I also refuse an order directing the Governor to transfer Mr Gerald back to the Ministry of Agriculture as Director of Agriculture.

CONSTRUCTIVE DISMISSAL

[49] Ms Weekes, Q.C. submitted that Mr Gerald's claim for constructive dismissal fails because he has not established that he would have a claim of constructive dismissal in contract/employment law. Ms Weekes, Q.C. referred to Unfair Dismissal, Employment Law Handbook, August 1998, where the following appears at page 15:

"In **Western Excavating (ECC) Ltd. v Sharp** 1978 1CR 221 the Court of Appeal ruled that the employer's conduct which gives rise to a constructive dismissal must involve a repudiatory breach of contract. As Lord Demming put it: 'If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed.'

[50] In my judgment Mr Gerald has not made out a case of constructive dismissal. In fact the claimant is still gainfully employed in the Ministry of Finance, more than three years after being transferred there. In the circumstances Mr Gerald is not entitled to a declaration that he is constructively dismissed or to damages or compensation. The declaration sought is accordingly refused.

HAS THE APPLICANT FAILED TO EXHAUST ALL AVAILABLE REMEDIES?

[51] Ms Weekes, Q.C. stated that it is a general principle of Judicial Review that save in exceptional cases an applicant for relief must first exhaust all available remedies before seeking relief by way of Judicial Review. [See **R v Epping & Harlow General Commissioners Ex P. Goldstraw** (1983) 3 ALL ER 257.] Ms Weekes contended that sections 1001, 1002 and 1003 of the Montserrat General Orders of Public Service give Mr Gerald the right to make representations and to petition or seek an interview with the

Governor, Ms Weekes, Q.C. submitted that all three of these sections provided alternative remedies to the complaints now before this court and in the circumstances the applicant ought to be denied the right to judicial review.

[52] General Order 1001 (1) states in part:

“An officer who wishes to make representation relating to his conditions of service or any other matter of a public nature must first address his head of Department or Permanent Secretary.”

[53] General Order 1002 states in part:

“A petition is a formal reference to ultimate authority for special consideration of a matter affecting a public officer personally...

(iii) a petition will not be entertained if it –

(b) deals with a matter in which legal remedies are still open;”

[54] Mr Christian, Q.C. submitted that General Orders 1001 and 1002 do not apply for the following reasons:

(a) The plaintiff’s objection is in reality related to the method of his transfer from the Ministry of Agriculture to the Ministry of Finance rather than to his conditions of service in the Ministry of Finance.

(b) A petition will not be entertained if it deals with a matter in which legal remedies are still open (Section 1002 (iii) (b)).

I agree with the submissions of Mr. Christian, Q.C. and for the reasons stated I hold that General Orders 1001 and 1002 do not apply to this case.

[55] General Order 1003 states:

“Requests for interviews with the Governor should clearly state the reason for the request and must be submitted through the officer’s Head of Department or Permanent Secretary, who should record his views on the matter.”

From the wording of that General Order I am not of the conviction that it provides a remedy. A request for an interview with the Governor (which may or may not be granted) cannot, without more, be transformed into a remedy so as to bar an applicant judicial review on the ground that he has not exhausted all available remedies.

[56] In the circumstances of the case I hold that alternative remedies were not available to Mr Gerald under General Orders 1001, 1002 and 1003 and as such he was free to seek relief by way of judicial review.

DECLARATIONS AND ORDERS

[57] In conclusion the following declarations are made:

1. It is declared that General Order 311 (iv) of the Montserrat General Orders is unconstitutional.
2. The charge of general misconduct contrary to General Order 311 (iv) made against Mr Gerald was an invalid charge as it amounted to an hindrance of his right of freedom of expression guaranteed under section 60 of the Constitution of Montserrat 1989 and is an improper and invalid restriction upon him as a public officer.
3. It is also ordered that Mr Gerald is awarded costs in the sum of \$25,000.00 to be paid by the Attorney General.

Davidson Kelvin Baptiste
High Court Judge

