

IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
TERRITORY OF MONTSERRAT
(CIVIL)
AD

CLAIM NO. MNIHCV 2003/0004

BETWEEN:

GERALDINE CABEY

Claimant

AND

THE GOVERNOR

First Defendant

THE ATTORNEY GENERAL

Second Defendant

THE COMMISSIONER OF POLICE

Third Defendant

APPEARANCES:

Mr. Jean Kelsick for the Claimant

Mrs. Esco Henry Greer for the Defendants

Date: May 4th 2004
21st October, 2004

JUDGMENT

- [1] **GEORGE-CREQUE, J.:** This action arises out of the suspension of the Claimant from performing the duties of Accountant General of Montserrat by the First Defendant by letter dated 2nd January, 2002 (sic 2003) and the seizing of a computer and files belonging to the Claimant following a search in December, 2002 by the police of the Claimant's home in connection with a criminal investigation into certain actions of the Claimant.

The Background

[2] The reliefs sought by the Claimant arises against the following factual background which is not in dispute:

- (a) The Claimant, an accountant by profession was appointed Accountant General of Montserrat on 1st November, 1995. She held and actively served in that post until 2nd January, 2003 when she was suspended from that post by letter signed by the Permanent Secretary, ("The PS' Letter") who stated that she was so directed by the First Defendant. In this letter the Permanent Secretary also advised the Claimant that officers suspended from duty may not leave the island without the permission of the Governor.
- (b) Prior to this the Claimant had been placed on leave as from 28th March, 2002, in connection with certain audit queries relating to the Emergency Department Fuel operations and monies collected in respect thereof by the Treasury Department.
- (c) On 16th December, 2002 the Claimant's home was searched by the police under a lawfully issued search warrant. They seized the Claimant's computer along with other items of related software and personal files and subsequently on 23rd December, the Claimant was arrested and charged with certain criminal offences.
- (d) By letter dated 3rd February, 2003, the Claimant, through her solicitors, wrote to the Second Defendant stating that a request had been made at the time of the arrest of the Claimant in December, 2002, and again reiterating the request that the Claimant be permitted to download her files from the computer seized so as to enable her to use same on another computer for work purposes and alluding to the fact that their failure to comply with this request was causing the Claimant financial loss. He gave a deadline of 15th February, 2003 for the return of her documents.

- (e) The Second Defendant wrote to the 3rd named Defendant, on 7th February, 2003 requesting the 3rd named Defendant provide the Claimant with copies of the files on her computer's hard drive.
- (f) Neither the request made by the Claimant or the 2nd named Defendant was complied with by the 3rd named Defendant. This prompted an Application for leave to apply for judicial review and to seek relief under the Constitution and for certain interim reliefs, inter alia, liberty of the Claimant to leave Montserrat as well as for the furnishing by the 3rd named Respondent to the Applicant a copy of her computer records on a disc.
- (g) Edwards J, on hearing the Application on 25th March, 2003, granted leave to the Claimant to apply for judicial review and also gave permission to the Claimant to travel abroad once she informed the police of her departure and return dates. It was also ordered that copies of the Claimant's computer documents be made available to her, on a disc (*emphasis added*) by the 3rd named Defendant by 18th April, 2003 with a further direction for the inclusion of a penal notice directed to the 3rd named Defendant ("Edward J's Order"). As will be seen later, as to what was meant by a "disc" in Edward J's Order took on significance during subsequent events and during the proceedings.
- (h) On 17th April, 2003, Inspector Ezekiel Woodley, in purported compliance by the 3rd named Defendant with the order of 25th March, 2003 went to the Claimant's home and attempted to deliver to her a computer hard drive also referred to as a hard disc which was stated as being a duplicate copy of the Claimant's hard drive of her seized computer. She refused to accept delivery thereof.
- (i) Claimant's computer was not returned to her until 14th August, 2003 when same was returned to her solicitors. The computer was immediately taken to the offices of Jimmy Lee a computer technician for inspection, testing and advice on the

condition thereof. It was also inspected by one Sylvia White Gabriel who has some knowledge of computers and Mr. Denzil West, Director of Government Information Systems with expertise in computer science and programming.

- (j) When the computer was seized the Claimant says that the computer was in good working order but on its return by the police was found not to be in working order. This is disputed by the 3rd Defendant. There is some conflict of opinions between the various computer experts as to the proper functioning of the computer upon its release to the Claimant by the 3rd Defendant.

The reliefs claimed

[3] The Claimant asks for the following reliefs:

- (1) A Declaration that the First Defendant's refusal to grant the Claimant permission to leave the Territory pursuant to section 41(4) of the Public Service Commission Regulations, 1980, ("the PSC Regulations") is, at common law, unreasonable, irrational, disproportionate and an abuse of 1st Defendant's discretion.
- (2) Further or alternatively, a Declaration that 1st Defendant's refusal to grant the Claimant permission to leave the Territory is in breach of her constitutional right under section 63 of the Constitution to protection from discrimination.
- (3) Further or alternatively, a Declaration that 1st Defendant's refusal to grant Claimant permission to leave the Territory is in breach of her constitutional right under section 62 of the Constitution to protection of freedom of movement.
- (4) Further or alternatively, a Declaration that 1st Defendant's refusal to grant Claimant permission to leave the Territory is in breach of the doctrine of separation of powers
- (5) Compensation for loss of income resulting from the loss of use occasioned by the seizure of the computer files.

[4] Leave was also granted to the Claimant on 14th November to add the following reliefs:

- (6) A Declaration that the seizure of Claimant's computer data was in breach of her constitutional right under section 64 of the Constitution to protection from the unlawful deprivation of property.
- (7) Compensation for loss of Claimant's computer, and
- (8) A Declaration that Regulation 41(4) of the PSC Regulations is ultra vires the Montserrat Constitution.

[5] At the time when this matter came on for hearing, Regulation 41(4) of the Public Service Commission Regulations was "deleted" by virtue of SR&O No. 72 of 2003 published on 22nd December, 2003. This renders a decision in respect of the relief set out at subparagraph (8) above unnecessary. Mr. Kelsick on behalf of the Claimant however contends that his prayer set out at subparagraph (1) above is alive in so far as it affected the Claimant as between the date of her suspension (2 January, 2003) to 25th March, 2003, the date of the court order granting her permission for leave to leave the Territory.

Permission to leave the Territory

[6] I propose to deal with the reliefs set out at subparagraphs 1 to 4 above inclusive together as the common thread running through these prayers is the refusal of the 1st Defendant to grant permission to the Claimant to leave the Territory. The Attorney General contends that Claimant has failed to establish that 1st Defendant at any time denied Claimant permission to leave the Territory. Indeed it is not asserted by the Claimant that any such request was made and refused by any of the Defendants. Further, she says it has not been shown that the PS' Letter in which she referred to Regulation 41(4) of the PSC Regulations was done on the instructions of either of the Defendants.

[7] Counsel for the Claimant's contention however, is that if Regulation 41(4) of the PSC Regulation was unconstitutional, as is to be concluded by its repeal, the very reference in the PS' Letter to Regulation 41(4), which could only mean that the Claimant was not free to leave the Territory without permission of the 1st Defendant, constituted a breach of her fundamental right under section 56 of the Constitution which protects against deprivation of

personal liberty. It is to be noted that the Claimant's case is being put on a somewhat different basis to the reliefs set out in the Motion. Counsel in his skeletal submissions however has urged upon the court that the letter was tantamount to a curtailment of her liberty in that she was not free to leave the Territory and was also a contravention of her right to freedom of movement as protected under section 62 of the Constitution.

[8] I am not persuaded that the PS' Letter amounted to an infringement of the Claimant's personal liberty as guaranteed under section 56 of the Constitution. There is no assertion that Claimant was unlawfully arrested and or detained by virtue of Regulation 41(4) or the PS' Letter. The Claimant, in paragraph 19 of her Affidavit of April 10th 2003, speaks of being arrested by the police on 23rd December, 2002 and later that evening being granted bail by the police. This however, was in connection with criminal investigations and charges, being laid against the Claimant by the police and thus a different set of circumstances not directly relevant to this case. No authority has been cited in support of this contention and I have found none where circumstances such as this was challenged as being in breach of personal liberty. On the contrary, the challenge invariably seems to arise against the backdrop of an arrest or detention of the person as was the case in **Attorney General of St. Christopher & Nevis –v- Reynolds**¹. Some guidance may also be derived from the marginal note to section 56, which states "*protection from arbitrary arrest or detention*". I accordingly hold that there was no breach of section 56 of the Constitution in relation to the Claimant.

[9] As to the infringement of the Claimant's right to protection of freedom of movement, under section 62 of the Constitution, it is useful to set out section 62(1) and (2) of the Constitution.

Protection of freedom of movement.

62.—(1) Except with his consent, no person shall be hindered in the enjoyment of his freedom of movement, that is to say, the right to move freely throughout Montserrat, the right to reside in any part thereof, the right to enter Montserrat and immunity from expulsion therefrom.

¹ (1979) 43 WIR 108.

(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—

(a) for the imposition of restrictions on the movement or residence within Montserrat or on the right to leave Montserrat of persons generally or any class of persons that are reasonably required—

(i) in the interests of defence, public safety, public order, public morality or public health, or

(ii) for the purpose of protecting the rights and freedoms of other persons, 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;

(b).....

(c) for the imposition of restrictions on the movement or residence within Montserrat or the right to leave Montserrat of public officers that are reasonably required for the purpose of ensuring the proper performance of their functions;

(d)

(e)

(f)..... or

(g) for the imposition of restrictions on the right of any person to leave Montserrat that are reasonably required in order to secure the fulfillment of any obligation imposed by law, except so far as the 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.

[10] The PS' Letter, in the second and last paragraphs thereof, state:

"His Excellency the Governor, on the advice of the Public Service Commission, has directed that you be suspended from public office with immediate effect in accordance with Section 41(1) of the Public Service Commission Regulations,..... .

You are also advised that officers suspended from duty may not leave the island without the permission of the Governor."

From this it is proper to conclude that the PS's letter was written at the direction of the Governor. Further, it is reasonable to infer that the Claimant, having received the PS' Letter, must have understood it to mean that she, as an officer who had been suspended

from her duty, was not permitted to leave the Territory without the permission of the Governor.

[11] In *de Freitas-v- Permanent Secretary of Ministry of Agriculture and others*² the challenge to constitutionality was in respect of section 10(2)(a) of the Civil Service Act of Antigua and Barbuda which created a restraint on freedom of political expression as being contrary to sections 12 and 13 of the Constitution of Antigua and Barbuda which sections protected the freedoms of expression and assembly. The Privy Council held that “ *By virtue of their special position in a democratic society, civil servants enjoyed special advantages and protections and correspondingly, had to submit to certain restrictions. Their unique status did not however, justify a substantial invasion of their basic rights and freedoms and the constitution permitted limitations upon their freedom,only where such restrictions were reasonably required for the proper performance of their civil functions . Moreover, the restraint also had to satisfy the requirement of being ‘reasonably justifiable in a democratic society, the quality of the reasonableness of a limitation being determined according to the importance of the legislative objective and the restriction and limitation of the means used to impair the right to no more than was necessary to accomplish the objective’.*”

[12] Applying the principles enunciated in *de Freitas’* case to the one at bar, it becomes apparent that where a civil servant, is suspended from the performance of their functions it can hardly be advanced that restraining them from leaving the Territory is ‘ reasonably required for the purpose of ensuring the proper performance of their functions’ that person having been suspended or barred timely from the performance of their functions.. Similarly as in the *de Freitas* case Regulation 41(4) is all embracing and would catch in its net even the most junior civil servant. Accordingly, such a restraint was excessive and could not therefore be said to be reasonably required for the proper performance of the their functions or reasonably justifiable in a democratic society. The Governor no doubt saw the wisdom of deleting this offending provision from the PSC Regulations and did so on 22nd December, 2003 by virtue of SR&O No. 72 of 2003. It is reasonable to conclude and I hold that the Claimant was restricted in her liberty to leave Montserrat in any event as

from 2nd January, to 25th March, 2003 when this restriction was effectively lifted by court order. This restriction is in contravention of the Claimant's right guaranteed by section 62 of the Constitution.

- [13] I do not consider however, that this infringement of the Claimant's right to freedom of movement by virtue of the unconstitutionality of Regulation 41(4) as stated in the PS' Letter, ought in this case, to attract any monetary compensation. No permission to leave the Territory had in fact been sought of the 1st Defendant and no refusal made by him. As he stated in paragraph 3 of his Affidavit filed on 14th May, 2003, "*I have never received any request from Mrs. Cabey for permission to travel abroad. If I had received such a request, I can see no reason why I would have refused*".

Deprivation of Property – computer and computer data

- [14] I deal firstly with the Claimant's computer data. The words, "documents", "files" and "records" all seem, to my mind, to have been used interchangeably throughout various correspondence and during the proceedings to refer to the same subject matter namely computer data on Claimant's computer which was seized during the search. It is not disputed that Claimant was seeking this data, she said, for working purposes, which she had undertaken privately.
- [15] The Attorney General concedes that if Edward J's Order was not complied with by 18th April, 2003, then the detention of the records or documents which was lawfully taken, would then become an unlawful detention. Counsel for the Claimant contends that the unlawful detention occurred much earlier - i.e. a few days after 16th September, 2002 as it was possible that the files or documents, in the right environment with the right facilities, could have been copied in one day. This is according to the evidence of the computer expert Mr. Denzil West. No advice was sought from Mr. West nor from any experts on Montserrat as to whether this could have been effected.

²(1998) 53 WIR 563

- [16] I am satisfied however, that the operative date for determining the lawfulness of the detention of the computer data is 18th April, 2003, as specified in Edward J's Order. The question which the court must then decide, is whether the delivery of a 'hard disc' or 'hard drive' by the 3rd Defendant was in compliance with the Order. In essence what was the word 'disc' intended to mean in the context of the Order?
- [17] Mr. West swore affidavits and gave evidence on behalf of the Defendants. In his evidence he stated that:-
- (a) it is not common practice that a casual user would transfer their data to a hard drive;
 - (b) casual users would normally not know how to install a hard drive into a computer;
 - (c) it was preferable that a computer technician install a hard drive rather than a casual user.
- [18] Mr. Colin Fergus who also gave evidence on behalf the Defendants expressed similar opinions as expressed by Mr. West as set out above. He went on further to say that:-
- (a) if someone was given data on a hard drive, in order to use that data, they must have the use of a CPU;
 - (b) in order to install the hard drive one has to go inside the unit;
 - (c) if one didn't know what they were doing one can damage the system.
 - (d) if data was stored on a CD Rom all one has to do is put the CD in a working computer in order to have access to the data.
 - (e) It is a much simpler process to give someone their data on a CD rather than giving someone a hard drive.
 - (f) if the quantity of data is 8.9 mega bytes the most practical method is a CD Rom and not a hard drive.
- [19] Sylvia White Gabriel who swore to an affidavit on behalf of the Claimant was of the opinion as Mr. West and Mr. Fergus and more emphatically stated the impracticability of delivering to someone a hard drive for accessing one's data. She stated in effect that:-

- (a) an average computer user could hardly be expected to install a hard drive into a computer as this would require specific knowledge of computer hardware and relevant software to render it usable;
- (b) a second hard drive is the cheapest high capacity storage medium for backing up large volumes of electronic data and other files. However, simply possessing an internal back-up hard drive without it being installed properly into a computer is virtually useless, particularly if one does not possess a computer.

[20] The statement of Jimmy Lee exhibited to the Claimant's affidavit of February 2003 was in similar terms as the other affiants in respect of a computer hard drive. He said that, "a hard drive is a storage device for computer files **but without a computer system to run it, is completely useless**" (emphasis added). Further he says that, "whenever a new hard drive is placed in an existing computer system, it has to be physically installed, configured and set up in order for that computer system to accept the same hard drive. It requires a computer expert to execute all of the above, since computer users generally, do not possess the knowledge to perform this function"

[21] No evidence was led establishing that the Claimant owned or had another computer into which she could have installed the hard drive which was being delivered to her. Further, she says, which I accept, that she informed the inspector that the hard drive which was being delivered by him was of no practical use to her without the availability of a CPU in which that hard drive could have been installed and that she did not have the competence to install a hard drive into a CPU, thus she did not accept the hard drive being delivered. She also said she was not an expert in the field of computing and she would access her data either from a CD or from a diskette. In my view then, the Claimant would be considered as what has been referred to as a casual user.

[22] Based upon the evidence of the Mr. West, Mr. Fergus, Ms. White Gabriel and the Claimant I find that the delivery of a hard disc or hard drive was not in compliance with the tenor and spirit of Edward J's Order as the impracticality of this medium ought to have been, and in my view, fully appreciated by the 3rd Defendant particularly having regard to the fact that

3rd Defendant was aware that Claimant's CPU was also being detained. Further, it is clear from all the circumstances leading up to the making of the Application for furnishing copies of the computer documents for work purposes that what was intended was for the Claimant to obtain her working data by a medium readily and easily usable and accessible by her as a casual computer user such as a CD Rom or floppy disks. It was obviously not intended that the Order be construed in a manner, which defeated its very purpose to the detriment of the Claimant. This method of compliance with the Order by the 3rd Respondent was at best, disingenuous. The Claimant understandably, refused to accept delivery in the circumstances. I accordingly hold that the Claimant's computer data was unlawfully detained as from 18th April, 2003 and this unlawful detention continued until August, 14th 2003, when Claimant's computer was returned to Claimant's solicitors.

[23] I now turn to the computer unit itself or the CPU as it is commonly called. According to the evidence of Steve Foster, Superintendent of Operations of the Royal Police Force of Montserrat, the CPU was taken by the authority of the police to the offices of WCCIT in Miami Florida by one Rob Wishart a detective Inspector from the UK, also attached to Montserrat. This was so as to effect an imaging process of all files and information on the hard drive of the computer. After the computer was returned in August 2003 the Claimant took the computer to Jim Lee of Jim Lee Computer Services Inc. for inspection as to its operable condition and there it was discovered, according to the Claimant, that the CPU could not be booted up without the intervention of a computer technician and was not working properly.

[24] Mr. Denzil West, testified that he examined the computer whilst at the premises of Jim Lee and opined that it was working properly as far as he could tell. He conceded however, that he may have spent just about fifteen minutes on examining and testing same and that Ms. White Gabriel had spent considerably more time in examining and testing the same.

[25] Mrs. White Gabriel's finding as to the condition of the returned computer, which I accept, is contained in paragraph 6 of her Affidavit filed on 27th November, 2003. She said that the computer 'froze' nine out of 12 times she booted it up making it impossible to complete the

particular task or to shut it down normally. I accordingly find that the Claimant's CPU was not in an operable condition when same was returned to her by 3rd Defendant in August and has remained in an inoperable and useless state. The CPU or its data was never entered into evidence in any proceedings.

[26] The Claimant contends that the detention of her computer data and detention and return of her computer in an inoperable condition is in breach of her constitutional right to protection from deprivation of property protected by section 64 of the Constitution. The Attorney General contends that there was compliance with Edward J's Order in that the Application spoke of records and thus it was necessary to provide this by producing, in essence, a mirror hard disc as the sure way of ensuring compliance with the Order. This I do not accept. Based upon the evidence of Mr. Fergus this could have been accomplished on 20 CDs. From Ms. White Gabriel 's affidavit it can reasonably be concluded that, the used portion of the hard drive could in fact take up no more than approximately 7 CDs.

[27] The Attorney General cited **Thakur Persuad Jaroo –v- The Attorney General**³ in drawing the Court's attention to the powers of the police in relation to seizure and detention of property. In this case the appellant challenged the detention of a motor vehicle, which he had purchased in good faith by the police as being in breach of his right under the Constitution of Trinidad and Tobago to the enjoyment of property and not to be deprived thereof without due process of law. Lord Hope in delivering the Judgment of the Board of the Judicial Committee of the Privy Council at paragraph 25 stated thus:

“ The police have extensive powers in relation to the seizure and detention of property. But enshrined in the requirement of due process is a declaration of the fundamental guarantee afforded under the Constitution to each and every individual that the powers of the police must be exercised lawfully and not arbitrarily. They exist to protect the interests of society, but their exercise must respect the rights of the individual. When these interests come into conflict the question is ultimately one of balance to be determined according to the common law.... .”

Under section 64 of the Constitution of Montserrat, one of the limitations on the lawfulness to deprive an individual of their property under section 64(2) (a) (ix) thereof, is that the

³ [2002] 5 LRC258

taking of possession or acquisition of any property must be “ for so long only as may be necessary for the purposes of any examination, investigation, trial or inquiry... .”

[28] In Thakur’s case, Lord Hope cited from the judgment of Lord Denning MR in Ghani –v- Jones⁴ at page 1705 where he set out several propositions which, explains where the balance is to be struck. Among these propositions the following is stated as the fourth proposition in balancing the interests when no person has been arrested or charged.

“ the police must not keep the article, nor prevent its removal, for any longer than is reasonably necessary to complete their investigations or preserve it for evidence. If a copy will suffice it should be made and the original returned. As soon as the case is over, or it is decided not to go on with it, the article should be returned.”

Notwithstanding that the Claimant in this case was charged by the police, I consider the above principle to be applicable in light of the limitation imposed by section 64. What the Claimant sought was a copy of her working data so as to enable her to continue earning her livelihood as she was doing prior to the search and seizure. The court also ordered that she be furnished with a copy. The provision of a copy of this data could in no way have impeded the police in their investigations and discovery of any information relevant to the crimes charged.

[29] Based upon the foregoing, I accordingly find that the continued detention, and the refusal of the 3rd Defendant to furnish the Claimant with her computer data after 18th April, 2003 and the return of the computer unit itself in an inoperable condition on 14th August, 2003 was an abuse by the police of their powers of detention as their actions went beyond what was reasonably necessary for the purposes of their investigations. There was thus an unlawful deprivation of the Claimant to the use and enjoyment of her property by the 3rd Defendant herein in breach of section 64 of the Constitution.

Compensation

[30] The Claimant seeks compensation for the lost income resulting from the loss of the use of her computer data and also in respect of the value of her CPU. She asserted in her

⁴ [1969] 3 All ER 1700

affidavit, filed in support of the Motion that she earned professional income of \$500.00 per week from the use of her computer documents. In her Supplementary Affidavit filed on November 5th 2003 she stated at paragraph 7 thereof that, the depreciated value of the computer at the time of seizure was \$3,300.00 having bought it in December 2000 applying a 20% depreciation rate per annum. No documentary proof of these amounts were put forward. However, they were also not challenged by the Defendants.

[31] I have been referred to Part 56.8 (2) of CPR 2000 on the Court's power to award damages on a claim for judicial review or constitutional relief which in essence says that an award for damages may be made if the facts set out in the Claimant's affidavit justify the granting of such remedy and the court is satisfied that at the time when application was made the claimant could have issued a claim for such remedy. In addition the Court's wide powers, under section 66 of the Constitution are also being relied upon by the Claimant. The learned Attorney General referred the Court to **Blackstone's Civil Practice 2004** para. 74.53. which more or less echoes Part 56.8(2) of CPR 2000 and also submitted that the loss or damage suffered must be particularized and strictly proved.

[32] I am satisfied that the Claimant's loss has been sufficiently particularized in her affidavits which, evidence has been unchallenged. Accordingly I would award damages to the Claimant for:-

- (a) loss of income at the rate of \$500.00 per week as from 18th April, 2003 to 14th August, 2003, and
- (b) the value of Claimant's computer in the sum of \$3,300.00

Conclusion

[33] In the premises I make the following Declarations and Orders:

- (a) It is declared that the restraint imposed on the freedom of the Claimant to leave the Territory without the permission of the First Defendant pursuant to Regulation 41(4) of the Public Service Commission Regulations was in breach of the

constitutional right of the Claimant protected under section 62 of the Constitution
the said Regulation being ultra vires the Constitution.

- (b) It is Declared that the detention of Claimant's computer data after 18th April, 2003 and loss of her computer consequent upon its inoperable condition on its return on 14th August, 2003 is in breach of her constitutional right protected under section 64 of the Constitution from the unlawful deprivation of property.
- (c) Damages in the sum of \$8,500.00 be paid by the 3rd Defendant to the Claimant for loss of income and \$3,300.00 being the value of Claimant's computer.

[34] I make no order as to costs.

.....
Janice M. George-Creque
High Court Judge