

IN THE SUPREME COURT OF BELIZE A.D. 2001

ACTION NO. 101

(WILFREDO GUERRERO PLAINIFF
(
BETWEEN (AND
(
(
(THE ATTORNEY GENERAL DEFENDANT

Ms. C. Pitts for the Plaintiff.

Ms. M. Haffiz for the Attorney General, defendant.

AWICH, J.

14.7.2004

JUDGMENT

1. Notes: *Contract: whether an agreement was a contract of service or a contract for services.*
Breach of contract; whether there was breach of a fundamental term.
Public Service; the power to appoint or discipline public officers is in the Public Service Commission, S: 106 of the Constitution.
2. More carefully thought out terms of the contract between the Government of Belize, the defendant, and Mr. Wilfredo Guerrero, the plaintiff, would have avoided the argument, the subject of this case. The case arose primarily out of the fact that the written “agreement” dated, 30.11.1999, by which Mr. Wilfredo Guerrero was engaged by the Government of Belize, did not

specify whether he was a public officer or an independent “consultant” contractor for services.

3. The contract included terms that are usually applicable to public officers, for examples, the term at paragraph 2, that there would be a “probationary period” of three months after which, “the performance of Mr. Guerrero would be assessed by the permanent secretary”, the term at paragraph 5 about vacation leave and the terms at paragraphs 8, 9 and 10 about ill health. On the other hand the “Terms of Reference for the Project” which included descriptions of the source of funds, the work to be done and the plaintiffs’ job descriptions all stated in the schedule of the agreement, were terms that were suited to independent contractor agreement.

4. ***The Object of the Agreement Dated 30.11.1999***

It became necessary to engage the plaintiff, a well qualified and experienced engineer, because the government had obtained funds from the Inter-American Development Bank (the IDB), and the Caribbean Development Bank (the CDB), for work known as, “Hurricane Rehabilitation and Disaster Preparedness Project”, which required engineers to oversee. The work activities to be undertaken included construction of public shelters, retrofitting certain public buildings, rehabilitation of piers, and constructing drainage. The plaintiff was engaged as “a consultant” whose job title was “Project Engineer”. He was to report to a Project Co-ordinator. Together with the agreement to engage the plaintiff, the document titled “Terms of Reference for the Project”, was given to him. The agreement was signed by Yvonne Hyde, Permanent Secretary then, for the Ministry for Economic

Development. The terms of reference stated the plaintiffs' job descriptions in great detail.

5. From the scanty evidence which was limited to a testimony of only one witness for each side, I was able to say that the uncertainty as to whether the plaintiff was appointed a public officer or an independent contractor led to Mr. Guerrero and the permanent secretary conducting their relationship in a mixed manner as and when it suited one or the other. On some occasions Mr. Guerrero would appear to function as a public officer under the overall supervision by the permanent secretary, and on other occasions he would appear to function as an independent consultant.

6. ***The Main Issue: (Was the plaintiff a public officer ?)***

The first and main issue for determination must be the question as to whether the plaintiff was employed as a public officer or as an independent contractor for services. If the plaintiff was employed as a public officer, then as a matter of law, the letter of Yvonne Hyde, permanent Secretary, dated 5.5.2000, informing the plaintiff that his "services [were] terminated with immediate effect," in accordance with the contract would be invalid.

The plaintiff would be entitled to relief. The letter would be invalid because the power to appoint, confirm, discipline, retire in public interest and dismiss, public officers rested and still rests with the Public Services Commission, except in respect to those officers whose appointments are specifically provided for otherwise in the Constitution. The power was conferred by *S: 106 of the Constitution of Belize* before it was amended in 2001. The section stated then as follows:

“106.-(1) The power to appoint persons to hold or act in offices in the public service (including the power to transfer or confirm appointments), and, subject to the provisions of section 111 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 Services Commission constituted for each case as prescribed in section 105(11) of this Constitution.”

7. I appreciate that the work area that the plaintiff was engaged in was for public purposes, and I also appreciate that the terms of the contract about probation, annual leave and ill health are identical to those stated in the Public Service Commission Regulations, however, the question as to whether the plaintiff was appointed a public officer must be answered according to S:106 of the Constitution. The definition of a “public officer”, “public office” or “public service” given in the Regulations cannot displace the requirement of S: 106 of the Constitution. Compare *Martha Perch and others v Attorney General of Trinidad, Privy Council Appeal No. 5 of 2001*, a case in which employees transferred to the Postal Corporation of Trinidad and Tobago continued doing their work which was for public purposes. The relevant Minister of Government retained the power to issue instruction to the board of the corporation, so the government determined the overall policy of the corporation, but the day to day management and operations became the responsibility of the board. The Privy Council held that the employers were “not public servants employed in the service of the

government in a civil capacity”.

8. In my view, in order to meet the requirement of S: 106 of the Constitution there must be a letter of appointment to a post in the public service, which letter must come from the Public Services Commission, the Judicial and Legal Services Commission or the Security Services Commission or on their behalf, not from a permanent Secretary (now Chief Executive Officer) to the intended employee. Similarly, in the event of dismissal or other disciplinary action, as in this case, the letter must come from the Public Services Commission or the other two Commissions. The only exception I can think about is an instrument of appointment under the hand of the Governor General for appointment of certain officers under the Constitution. That however, is academic because a letter from the Public Service Commission usually follows after the instrument has issued. In disciplinary matters all that a chief executive officer can do is to investigate and gather the reasons, the grounds, for the disciplinary action and recommend the appropriate action to the Commission. The Commission may investigate further, but must offer opportunity to the public officer “to exculpate himself”, before the Commission decides the disciplinary question. From the cases that have come to court in the past, it may be said that most chief executive officers understood the limitation to their disciplinary powers. There have been a few odd cases in which the chief executive officers have taken rather inflated view of their disciplinary powers.

9. An appointment in the public service, which is properly made would be to an established post in the Service. That means that the post would have been authorised by Parliament in the annual expenditure budget passed for that financial year under the *Finance and Audit Act, Cap 15 Laws of Belize*. I think however, that a mistaken appointment to a non-existent post, provided done by the relevant Commission, will create duties and rights as between the government and the employee. Of course, once established most posts will reappear in the annual budget unless abolished, that is, not included in the annual budget for the financial year. It is not in issue here whether the post of Consultant Project Engineer to which the plaintiff was appointed was an established post. It is not necessary to know for the purposes of this case although proof that the position of Project Engineer was not an established post would be proof tending to show that there was no such post in the public service to which the plaintiff could have been appointed.
10. It was, however, an important fact that the plaintiff never claimed that apart from the agreement of 30.11.1999, he received a letter of appointment from the Public Services Commission. He said in Court that he considered that he was a public officer because he believed that a person who had worked for more than three months would become a public officer. That does not change the law in S:106 of the Constitution. I have to conclude that the plaintiff was never appointed a public officer and therefore was not subject to the disciplinary process under the Public Service Commission Regulations. Termination of his services was never required to be under the Public Service Commission Regulations.

11. ***Breach of Contract.***

So, the relationship between the plaintiff and the defendant was that of an employer engaging an independent contractor for services. Their duties and obligations were those stated in the agreement dated 30.11.1999, without any gloss to be supplied by the Public Service Commission Regulations.

Under the contract, both the plaintiff and the defendant could terminate their agreement without giving reason, by giving one month notice to the other, under paragraph 12 of the schedule, otherwise the agreement and the relationship would terminate after 24 months from 8.11.1999, according to paragraph 1. Note that a contract for a specified period, but terminable by notice of a shorter time, is not a contract for a fixed term - see ***Ioanou v BBC [1974] 1CR 414.***

12. Outside the above two contemplated lawful ways of terminating the agreement and thus the duties and obligations thereunder, breach may occur.

The defendant has claimed that breach has occurred, the plaintiff regarded his duty not seriously and in particular failed to submit certain reports and that was despite warning and having been given deadline which was extended. As the result, the defendant contended, the plaintiff was rightfully dismissed by the defendant for breach of terms of the agreement.

13. The plaintiff denied breach. He said he did his best to meet the deadline, but it was impossible in the circumstances. He argued that it was unreasonable for the Project Co-ordinator, the person to whom the plaintiff was to report,

and the Permanent Secretary, to insist on the deadline.

14. The defendant's witness testified that the plaintiff generally did not take his work seriously. However, the witness made it clear that the plaintiff's engagement was terminated because he failed to prepare reports, in particular the "Initial Report" to be submitted to the IDB as a condition precedent to disbursement of funds. The plaintiff was made aware, the witness said, of the purpose of the report and that after repeated urging to have the report completed, the plaintiff suggested a deadline which he failed to meet. As the result of the failure by the plaintiff, the report was submitted to the IDB late, and there were consequences.
15. The plaintiff in his testimony gave several explanations. He said that the report he was asked to prepare should have been prepared by his boss, the project coordinator. The insinuation there was that it was not his job, but the boss', the plaintiff was called upon because he was more knowledgeable. He also said he could not meet the deadline because it was about Easter week, he could not get the personnel at the offices from which he was to collect data for the report.
16. Contrary to the explanation that the preparation of the initial report was not the duty of the plaintiff, the engagement agreement makes it clear in the last two paragraphs headed, "Reporting and Co-ordinating", that it was the plaintiffs' duty. Moreover, paragraph 6 of the schedule also makes it the plaintiff's duty to prepare other reports. The two paragraphs I mentioned state as follows:

‘Reporting and Co-ordination’

Within three weeks of commencement of the services, the Project Engineer shall present, for the approval of the GOB and the Bank, an initial report setting out his planned schedule of activities to accomplish the project execution tasks necessary over the six months of the project’s life.

He shall also submit semestral reports(at the same time as the submission of the project semestral reports) on his activities and accomplishments as they relate to the execution performance of the project and shall reflect any administrative issues that may not be properly covered in the project progress reports.”

Paragraph 6 to which I referred states;

“The consultant shall...

6. Prepare inputs to the semestral and quarterly reports to be submitted to the GOB, the IDB and the CDB respectively and participate in scheduled formal review meetings; review consultants’ periodic and specific reports, provide necessary feedback to the consultant and submit appropriate written comments and recommendations to the PCU on a timely basis.”

17. The evidence as a whole gives the impression that the plaintiff was deliberately lackadaisical in his work, possibly because he resented having

to report to the project co-ordinator. He, in fact, had resigned only three months from the commencement of his engagement, but withdrew the resignation a month later. He knew that a report he was to prepare was required urgently, and despite that he asked to go on leave. He was told that he could go on leave on condition he submitted the report. If there was any doubt that the plaintiff was made aware about the urgency of the report, that dispelled it. I find as a fact that the plaintiff breached his contract of engagement generally, and in particular when he failed to prepare the “Initial Report” to be submitted to the IDB.

18. It is not all breaches that give the other party a right to terminate the contract. The breach must be of a fundamental term of the contract; a term that parties must be taken to have realised was a very important one because it goes to the root of the contract, or a term the breach of is likely to result in serious consequences. Having regard to the source of funds for the project and the consequences to the project, of delay in disbursement of funds, and to the terms of the contract read as a whole, it is my conclusion that failure to submit the report was a fundamental breach that entitled the defendant to terminate the contract dated 30.11.1999, by which the plaintiff was engaged.

19. ***The Order Made.***

The claim of Mr. Alfredo Guerrero against the Attorney General is dismissed. Mr. Guerrero will pay the costs of suit.

20. This case could also be dismissed on the ground that the parties were never at *ad idem*. The government thought it was engaging Mr. Guerrero as an

independent consultant for services, but Mr. Guerrero thought he was being appointed as a public officer.

21. Pronounced this Wednesday the 14th day of July 2004.

At the Supreme Court

Belize City

Sam Lungole Awich

Judge

Supreme Court