

IN THE SUPREME COURT OF BELIZE, A.D. 2012

CLAIM NO. 842 OF 2010

ANDREA LORD

CLAIMANT

BETWEEN

AND

BELIZE ADVISORY COUNCIL

DEFENDANT

Before the Honourable Madam Justice Michelle Arana

Mr. Godfrey Smith, S.C., for the Claimant

Ms. Magalie Perdomo for the Defendant

J U D G M E N T

1. This is an application for judicial review brought pursuant to an order granting leave to seek judicial review granted by Hon. Justice Awich on March 8th, 2011. The substantive application was heard by me on November 30th, 2011.

2. The Claimant Ms. Andrea Lord is seeking judicial review of the decision of the Belize Advisory Council made on August 10th, 2010 confirming a decision of the Public Services Commission of July 16th, 2009 transferring Ms. Lord from the Customs Department to the Income Tax Department. Ms. Lord by way of a Fixed Date Claim Form sought the following relief, namely:

- (a) A declaration that the decision of the Belize Advisory Council made on August 10th, 2010 confirming the Public Service's decision of July 16th, 2009 to transfer the Claimant to the Income Tax Department was made in breach of the Claimant's right to natural justice, was unreasonable, perverse, unlawful, null and void.
- (b) An order of certiorari to quash the decision of the Belize Advisory Council made on the 10th day of August, 2010 purporting to confirm the decision of the Public Services Commission made on 16th July, 2010.
- (c) An Order that the Claimant be immediately and fully reinstated to the post she held as Customs Examiner Grade II prior to her purported transfer on full pay with all the privileges and benefits she enjoyed prior to her purported unlawful transfer.

(d) Any other order which the Court thinks just in the circumstances of the case, including an order that the Defendant pay the costs of this Claim.

The Facts

3. For ease of reference, I reproduce (with a few variations) the Chronology of events as set out in the Skeleton Arguments of the Claimant.

On August 7th, 2008 Ms. Tasha Young makes a complaint against Ms. Lord, alleging that Ms. Lord sought a bribe from her of \$100 (euphemistically referred to as “one cent”) in exchange for processing her package through Customs. On the following day, August 8th, 2008, Collector Colin Griffith wrote the Claimant asking her to respond to the allegations and on August 11th, 2008 Ms. Lord responds in writing to Mr. Griffith. On October 7th, 2008 the Public Services Commission (PSC) advises Ms. Lord of disciplinary action taken against her. On July 16th, 2009 the PSC advises MS. Lord of the decision to transfer her. Ms Lord’s attorney then files a Notice of Appeal to the Belize Advisory Council (BAC), and on January 12th, 2010 the BAC advises that Ms. Lord’s case file is

closed. On January 19th, 2010 the Claimant's Attorney requests the BAC to reopen the case file. On April 7th, 2010 the BAC advises the Claimant that her appeal will be accepted and will be heard.

On April 16th, 2010 Ms. Lord's new attorney files Notice of Appeal and Submissions and on May 26th, 2010 the Solicitor General submits comments on the Appeal. On June 21st, 2010 the Comptroller of Customs submits comments on the Appeal and on June 25th, 2010 the Claimant's attorney replies to comments. On August 10th, 2010 BAC confirms the decision of the PSC. On November 25th, 2010 the Claimant Ms. Lord files her application for permission for judicial review and on March 22nd, 2010 Awich CJ (Acting) grants permission for judicial review.

4. The Grounds for Judicial Review sought by the Claimant are as follows:

1) The decision of the Belize Advisory Council of 10th August, 2010 confirming the decision of the Public Services Commission of July 16th, 2009 that the Claimant be transferred from the Customs

Department to the Income Tax Department was arbitrary, irrational and unreasonable in that the Solicitor General as counsel for the Public Services Commission, had advised the Belize Advisory Council in writing that the Public Services Commission had in fact unlawfully transferred the Claimant.

- 2) The decision of the BAC of 10th August 2010 confirming the decision of the Public Services Commission of July 16th, 2009 that the claimant be transferred from the Customs Department to the Income Tax Department was tainted with illegality in that the BAC considered fresh evidence that was not before the Public Services Commission without allowing the Claimant the right to test that new evidence through cross examination.
- 3) The decision of the BAC of 10th August, 2010 confirming the decision of the PSC of July 16th, 2009 that the Claimant be transferred from the Customs Department to the income Tax Department was arbitrary and unreasonable in that there were no findings by the Public Services Commission that the Claimant

breached any of the regulations and therefore there was no decision to confirm.

- 4) The decision of the BAC was unreasonable and irrational in that the decision of the PSC was based on the testimony of one witness who was demonstrably unreliable.

I will now examine each of these grounds in turn.

5. In support of this first ground, Learned Counsel for the Applicant Mr. Smith argued that the failure of the BAC to accept the advice of the Solicitor General led the BAC to come to an unlawful decision which was arbitrary, irrational and unreasonable. The letter from the Solicitor General's office dated May 26th, 2010 advised the BAC that:

“It is the considered view of this office that the Public Services Commission failed to give proper notice to the Appellant of its findings, the penalty imposed on her, her right and time to appeal its determination of the disciplinary proceedings.”

6. The letter from the PSC which is the subject of the advice tendered by the Learned Solicitor General is the following letter which informed Ms. Lord of her transfer:

“July 16th, 2008

Ms. Andrea Lord

Customs Examiner 2

Thru’ Financial Secretary

Ministry of Finance

BELMOPAN

Dear Ms.Lord,

Please be informed that the Public Services Commission has approved that you be transferred on appointment to the post of Second Class Clerk with effect from July 20, 2009. You will be posted to the Income Tax Department, Belize City, with effect from July 20, 2009.

The post of Second Class Clerk is on payscale 4 of \$10, 104 x 624- \$21, 960 per annum and you will continue to receive your existing salary of \$15, 096 per annum.

Your incremental date of October 1 remains unchanged.

All other conditions of service remain the same.

Sincerely,

AF Cruz

For Secretary

Public Services Commission

C: Comptroller of Customs

Commissioner of Income Tax

Accountant General

Auditor General

Coordinator- HRMIS"

7. I must state that at this juncture that this Court is not interested in delving into the merits of the appeal heard by the BAC. That is not the purpose of judicial review. The Court is constrained to examine the letter issued by the PSC to the Applicant in order to determine firstly, whether that letter contained a decision of the PSC which was capable (in law) of being ratified and confirmed by the BAC and secondly, whether the BAC in ratifying this decision acted in a manner that was fair and reasonable and not arbitrary.

8. In response to this first ground of judicial review, Ms. Perdomo for the Defendant BAC submits that the comments from the Solicitor General were merely sought as required by Rule 5(2) of the Belize Advisory Council (Procedure) Rules and that the Solicitor General was not acting as the Legal Advisor to the BAC. Section 5 of the Belize Constitution (Belize Advisory Council) Act Chapter 4 of the Laws of Belize states:

“5(1) The Secretary shall within seven days of the receipt of the material referred to in Rule 4 above, send a copy thereof to the Solicitor General as well as to the Head of the department to which the appellant belongs or belonged.

(2) The Solicitor General and the Head of Department concerned shall within one month of the receipt of the material aforesaid furnish the Secretary with their view and comments on the merits of the appeal.”

The material referred to in this section is the Notice of Appeal and Grounds of Appeal as described in Section 4 of the Belize Advisory

Council (Procedure) Rules sent by the Appellant to the Secretary of the Belize Advisory Council.

9. Ms. Perdomo further argues that ground 1 cannot succeed because the comments and advice of the Solicitor General do not bind the Belize Advisory Council. In support of this contention, she cites Section 54(8) of the Constitution which declares that:

“In the exercise of its functions the Belize Advisory Council shall not be subject to the direction or control of any other person and authority.”

In further support of this argument, Ms. Perdomo cites the case of ***Melanie Gladden v. the Attorney General et al Claim No. 692 of 2010.***

10. I agree with Counsel for the Defendant on this matter and I reiterate the position taken by Legall J when His Lordship stated in the **Melanie Gladden** case:

“It was also said that the Council’s decision was unreasonable having regard to the advice given by the Solicitor General. The comments and views of the Solicitor General are not binding on the Council because Rule 8 (3) states that any matters of law or procedure arising during the hearing of an appeal shall be determined by the chairman who may consult any legally qualified member of the Council in that behalf. I therefore do not find any merit in these submissions.”

While I appreciate the point ably argued by Mr. Smith that if the BAC is going to reject the advice tendered by the Solicitor General they should give clear reasons why they are doing so, that is different from saying that the BAC should have taken the advice of the Solicitor General therefore their failure to do so, coupled with their failure to give reasons, rendered their decision arbitrary, unreasonable and illegal. I strongly agree that it is surely commendable practice for the BAC to give reasons why they are refusing to follow the advice of the Learned Solicitor General, even when that advice is sound legal advice. However, the argument that the BAC’s failure to follow the advice of the Solicitor General made

the BAC's decision arbitrary and unreasonable cannot stand, since the effect of that would be to bind the BAC to adhering to whatever advice the Solicitor General gives. That is a result that was clearly never intended by the legislature. For these reasons, I find that the first Ground cannot succeed.

11. The second ground advanced by Counsel for the Claimant is that the decision of the Belize Advisory Council (BAC) confirming the decision of the Public Services Commission (PSC) was tainted with illegality in that the BAC considered fresh evidence that was not before the PSC without allowing the Claimant the right to test that new evidence through cross examination. This ground refers to a statement made by Colin Griffith, Customs Collector, dated June 16th, 2010 in which he alleges that Ms. Lord admitted to him on the day of the incident that she had asked Ms. Young for the money.

12. In response to this ground, Ms. Perdomo for the Defendant BAC argues that there is no evidence that the Council acted on any additional material provided by the Comptroller of Customs and a copy of all the material was sent to the Claimant, so there was no illegality. I disagree.

13. While it is true that the BAC is not a court of law and therefore it is not bound by the strict rules of evidence, the BAC is an administrative tribunal and as such, is bound by the rules of natural justice and fairness. Fairness must govern its procedure at all times. How else can the public servant be assured that when his fate is being determined that the tribunal has arrived at its determination in an unbiased manner? That alleged confession is a piece of evidence which was highly prejudicial to Ms. Lord and as such the BAC acted unfairly in not allowing the attorneys for the Claimant to cross examine Mr. Griffith on his statement. In addition, it is not enough for Counsel for the Defendant Ms. Perdomo to say there is no evidence that the BAC relied on that statement in reaching its

decision. If indeed that is the case, then the BAC was obligated to state in clear and unambiguous terms that their decision was not in any way influenced by the evidence of Mr. Griffith, given the highly prejudicial nature of his statement, especially in light of the fact that that statement was never considered by the Public Services Commission. This was clearly a breach of the Claimant's right to natural justice. On this basis, I find that this second Ground of judicial review succeeds.

14. The third ground of Judicial Review is that the decision of the BAC was arbitrary and unreasonable in that there were no findings by the Public Services Commission that the Claimant breached any of the regulations and therefore there was no decision for the BAC to confirm.

15. Ms. Perdomo submits in response to this ground that the Appellant is seeking to rehash the Appeal which has already been heard and determined by the BAC. She relies on the Affidavit of Kenrick Ysaguirre dated 30th day of May, 2011 as a member of the BAC who stated in paragraph 14(iii) that:

“The Public Services Commission had the benefit of hearing the witnesses in person and watching their demeanor. This was mostly a case of ‘oath against oath’ and that having heard the evidence the PSC decided to believe the evidence of the Complainant Tasha Young as against that of the Appellant.”

Ms. Perdomo also relied on the Minutes of the Hearing contained in a letter dated May 6th, 2010 from A.P. Cruz, Secretary of the PSC, sent to Secretary of the BAC, Amelia Poornananda who stated that:

“The Commission conducted a disciplinary hearing on May 15, 2009. On June 25th, 2009 the Commission concluded the case and found that Ms. Lord’s actions to be in contravention of PSR 19 (c) (d) and (e) of the Public Service Regulation and Section 26 of the Services Commissions Regulation.

The Commission approved that Ms Andrea Lord be severely reprimanded and transferred out of the Department with immediate effect.

The Commission then approved transfer on appointment of Ms. Lord to the post of Second Class Clerk with effect from July 20, 2009 and posted to the Income Tax Department, Belize City.”

Ms. Perdomo argues that this third ground must fail because the BAC has already considered these points in the Appeal and that the Court cannot now challenge the finding of the BAC and revisit the appeal through the guise of judicial review.

16. In my view, this is the strongest ground of judicial review advanced by the Claimant. I have perused the letter sent by the PSC to the Applicant repeatedly and I have not found a scintilla of evidence indicating the decision reached by the PSC. I have also scoured the transcript of the proceedings before the PSC and again, nowhere on any of those 19 pages have I been able to decipher what was the

decision of the PSC and on what basis they arrived at that decision (if any). The final words on the transcript are as follows:

“The hearings have basically concluded so it is left for us to make a decision. I want to thank everybody for being here - Mr. Sylvester, Ms. Lord for making a couple statement and so we stand adjourned.”

Therein lies the difficulty and the arbitrary and unreasonable nature of the BAC’s decision to confirm the PSC’s decision. I was constrained to ask Ms. Perdomo to point out where in the letter of transfer which was sent to the Claimant by the PSC, or in the transcript of the PSC hearing, was there any indication as to the decision or findings reached by the PSC. She was unable to do so because there was no decision and no reasons for decision given. The letter sent to Ms. Lord dated July 16th, 2008 (which I have reproduced in its entirety in paragraph 6 of this judgment) reads like an ordinary letter of transfer. There was no mention of the disciplinary proceedings that had been held by the PSC. There was no mention of whether the PSC had found Ms. Lord to have breached any of the Public Services

Regulations and if so, which ones specifically had been breached by her. There was no mention of what were the PSC's findings, if any. So I do not know what the BAC confirmed because there was no decision of the PSC evident either in the letter sent to the Appellant or in the transcript of the PSC hearing. And the cover letter dated May 6th, 2010 sent to the BAC by the PSC does not save the situation because that letter was sent to the BAC, not to the Appellant. That detailed letter contrasts sharply with the perfunctory note written to the Claimant by the PSC briefly informing her of her transfer from the Customs Department to the Income Tax Department.

Mr. Ysaguirre as a member of the BAC made a statement in his affidavit as to what the PSC considered; but, with the greatest of respect to Mr. Ysaguirre, he was not a member of the PSC and the minutes of the PSC hearing reveal that he was not present when the PSC was deliberating. Clearly, Mr. Ysaguirre is not in a position to state what the PSC considered or decided. I find that the failure of the PSC to duly inform Ms. Lord of its findings, and to state clearly which of the regulations (if any) they found she had breached, unfairly deprived the Claimant of knowing what was the case she had

to answer, and put her at a distinct disadvantage in properly and promptly preparing her appeal. In addition, the primary purpose of a tribunal is to reach a determination and on the face of the letter and of the transcript there was no decision reached by the PSC, nor were there any reasons given for the transfer. This is not a situation which allows for inferences to be drawn. In this context, I cite with approval the dictum of Legall J in the **Melanie Gladden** case:

“A public authority is not required to give its reasons in a form similar to a judgment of a court. In giving its reasons for a decision, a brief statement of the facts, and a concise statement of the way in which it arrived at its decision are enough: see Ex parte Cunningham above. The point to be borne in mind is to give the claimant, and resulting possibly along the process, to the court, a brief idea of the thinking of the authority in arriving at its decision in the matter before it. The giving of reasons for decisions by public authorities affecting the right to work of officials is not only fair and just, but goes to some extent to prevent notions of arbitrary and discriminatory or abusive or a biased exercise of power by the

authority concerned, which in turn engenders public confidence in the system of administrative justice. In my view, the failure by the Council to give reasons for its decision breached the Claimant's right to be heard."

The PSC was under a duty to declare its findings, and the reasons for its findings, in clear and unambiguous terms to Ms. Lord so that she could comprehend the outcome of the disciplinary hearing taken against her and take legal action to appeal, if necessary. The letter of transfer appears to have been written in a vacuum as there is no discernible nexus between that letter and the disciplinary hearing of the PSC. The Appellant should never be in a position where she has to wonder and speculate as to what the decision of the tribunal was. So I agree with the submission of Counsel for the Claimant and I find that this ground of judicial reviews also succeeds.

17. The final ground of judicial review is that the decision of the BAC is unreasonable and irrational because it was based on the testimony of one witness who was demonstrably biased and unreasonable.

In response to this ground Ms. Perdomo argues that this is an attempt to have the court rehear the appeal and therefore should not be allowed. I agree. The Court cannot countenance this ground without delving into the substance of the appeal as to what was said by the different witnesses and that is not the purpose of judicial review. Therefore this ground will not succeed.

18. I have determined that Ground 2 and Ground 3 of the application succeed. I bear in mind that the relief sought under judicial review is discretionary. I agree with the submission of Mr. Smith that the transfer to the Income Tax Department resulted in a diminution of self esteem and loss of opportunity for promotion within the Customs Department for Ms. Lord who had distinguished herself in passing at the top of her class in her qualifying examinations to be a Customs Officer.

19. I therefore grant the relief sought by Ms. Andrea Lord as follows:

- (a) The declaration sought that the decision of the Belize Advisory Council made on August 10th, 2010 confirming the Public Service's decision of July 16th, 2009 to transfer the Claimant to the Income Tax Department was made in breach of the Claimant's right to natural justice and was unreasonable, perverse, unlawful, null and void is hereby granted.
- (b) The order of certiorari sought to quash the decision of the Belize Advisory Council made on the 10th day of August, 2010 purporting to confirm the decision of the Public Services Commission made on 16th July, 2010 is hereby granted.
- (c) The Order sought that the Claimant be immediately and fully re-instated to the post she held as Customs Examiner Grade II prior to her purported transfer on full pay with all the privileges and benefits she enjoyed prior to her purported unlawful transfer is hereby granted.

20. Costs awarded to the Claimant to be agreed or assessed.

MICHELLE ARANA

SUPREME COURT JUDGE

Dated this 16th day of March, 2012