

IN THE HIGH COURT OF BELIZE, A.D. 2023

Claim No. 261 of 2023

BETWEEN

RAYMOND CLINTON MAGDALENO

APPLICANT

AND

**SECURITY SERVICES COMMISSION
COMMISSIONER OF POLICE
ATTORNEY GENERAL**

**1st RESPONDENT
2nd RESPONDENT
3rd RESPONDENT**

Before the Honourable Madam Justice Geneviève Chabot

Date of Hearing: July 3rd, 2023

Appearances

Darrell Bradley, for the Applicant

Agassi Finnegan and Stanley Grinage, for the Respondents

RULING ON URGENT APPLICATION FOR AN INJUNCTION

1. On May 9th, 2023, the Applicant filed an Application for Permission to Apply for the Judicial Review of the Respondents' decision to transfer him from Training Officer, Eastern (Police) Division, Belize City, Belize District, Belize, to Professional Standards Branch, Belmopan City, Cayo District, Belize, with effect from March 1st, 2022 (the "Application"). The Applicant also sought an injunction staying the decision pending the outcome of the judicial review.
2. At a Directions hearing held on May 29th, 2023, I directed that the Application would be heard on July 28th, 2023, to allow time for the Respondents to respond to the Application and for both parties to file submissions. The Applicant's counsel requested that I issue an interim injunction pending the hearing of the Application. I was not in a position to do so as this relief was sought as part of the Application to be heard on July 28th.

3. On June 9th, 2023, the Applicant filed an Urgent Application for an Interim Injunction restraining the Respondents from transferring the Applicant until the determination of the judicial review (the “Injunction”). I received the filed Injunction on June 20th, 2023 and scheduled a hearing for June 26th, 2023. On June 26th, 2023, the Respondents informed me that they had only just been served with the Injunction and requested time to seek instructions and respond to the Injunction. The hearing of the Injunction was adjourned until July 3rd, 2023.
4. Having heard the submissions of both counsel and considered the matter, I have decided to grant the Injunction.

Legal Framework

5. Section 27 of the *Supreme Court of Judicature Act* and Part 17 of the *Supreme Court (Civil Procedure) Rules* 2005 empower this Court to grant interim remedies, including an interim injunction, at any time. The leading case of *American Cyanamid Co. v Ethicon Ltd.*¹ establishes guidelines for the exercise of the court’s discretion to grant or refuse an interim injunction. Under these guidelines, courts should consider whether there is a serious issue to be tried; whether the applicant would be adequately compensated by damages; whether the defendant would be adequately protected by the applicant’s undertaking in damages; and, the balance of convenience.
6. In *The Chief of Fire Officer and Public Service Commission v Elizabeth Felix-Phillip and 37 others*,² the Court of Appeal of Trinidad and Tobago confirmed that these guidelines apply to public law cases, but with modifications appropriate to the public law element of the case. The parties to this Injunction accept that I must consider whether there is a serious issue to be tried, and the balance of convenience. They, however, differ on the question of damages. The Applicant interprets *Chief of Fire Officer* as holding that damages are never a relevant consideration in an application for an interim injunction in a public law case, except where commercial interests are engaged. The Respondents say that damages are always a relevant consideration, although the weight to be given to this consideration may be lesser than in private law cases.
7. In its decision in *Chief of Fire Officer*, the Court of Appeal of Trinidad and Tobago relied heavily on the House of Lords’ decision in *R v Secretary of State for Transport, Ex parte Factortame Ltd and another (No. 2)*³. I find it helpful to refer directly to this seminal decision to better understand the issue arising in this Injunction. In *Factortame*, Lord Goff of Chieveley considered the sequence in the *American Cyanamid* guidelines and noted that an applicant must first establish that there is a serious issue to be tried. Once that threshold

¹ [1975] AC 396 (“*American Cyanamid*”).

² Civil Appeal No. S 49 of 2013 (“*Chief of Fire Officer*”).

³ [1991] 1 AC 603 (“*Factortame*”).

is crossed, the court must consider whether it is just or convenient to grant an injunction. Lord Goff of Chieveley further noted that the approach in *American Cyanamid* was to divide the “just and convenient” analysis into two stages. The first stage is for the court to consider whether an adequate remedy in damages is available to the parties. It is only if there is doubt as to the adequacy of a remedy in damages that the court will proceed to the second stage, which is a consideration of the balance of convenience.

8. The view espoused by Lord Goff of Chieveley is not as categorical as that of the Applicant. *Factortame* does not suggest that the first stage be completely bypassed in matters of public law; the adequacy of damages must still be considered. However, the learned Lord expressed the view that given the nature and interests at play in matters of public law, damages normally cannot protect either party and the analysis would therefore proceed to the second stage:

I take the first stage. This may be affected in a number of ways. For example, where the Crown is seeking to enforce the law, it may not be thought right to impose upon the Crown the usual undertaking in damages as a condition of the grant of an injunction: see *F. Hoffmann-La Roche & Co. A.G. v. Secretary of State for Trade and Industry* [1975] A.C. 295. Again, in this country there is no general right to indemnity by reason of damage suffered through invalid administrative action; in particular, on the law as it now stands, there would be no remedy in damages available to the applicants in the present case for loss suffered by them by reason of the enforcement of the Act of 1988 against them, if the relevant part of the Act should prove to be incompatible with European law: see *Bourgoin S.A. v. Ministry of Agriculture, Fisheries and Food* [1986] Q.B. 716. Conversely, an authority acting in the public interest cannot normally be protected by a remedy in damages because it will itself have suffered none. It follows that, as a general rule, in cases of this kind involving the public interest, the problem cannot be solved at the first stage, and it will be necessary for the court to proceed to the second stage, concerned with the balance of convenience [emphasis added].⁴

9. I note that in *Chief of Fire Officer*, the Court of Appeal briefly addressed the issue of adequacy of damages, but having found damages to be inadequate, proceeded to the balance of convenience question. I will therefore address the issue of adequacy of damages in this ruling.

⁴ *Factortame*, *supra* at 672-673.

Analysis

Serious issue to be tried

10. I am satisfied that there is a serious issue to be tried. At this stage, I am not required to opine on the strength of either party's case, but I must satisfy myself that the case is not frivolous or vexatious.⁵ It is not.
11. The Applicant received a "Notice of Intention to Transfer/Reposting" on February 22nd, 2022. The Notice indicated that the transfer was to take effect on March 1st, 2022, some 7 days later. The Applicant requested a reconsideration of the decision to transfer him given the short timeframe, but that request was denied. March 1st, 2022 came and went without the Applicant being notified of a formal decision to transfer him. The Applicant subsequently received notification of the approval of his transfer in a letter from the Security Services Commission dated January 30th, 2023. The letter advised the Applicant that the transfer had been approved on January 10th, 2023 and was effective from March 1st, 2022, some 10 months earlier.
12. The Applicant's counsel forcefully argued that the decision to transfer the Applicant retroactively, outside the normal time period for transfers between stations, and without any consideration of the Applicant's age and preferences breached several provisions of the *Public Service Regulations, 2014* (the "PSR") and the Belize Police Department's *Departmental Orders No. 16 of 2013* (the "DO").
13. The Respondents' counsel agreed that on the surface, there appears to be an issue to be tried. She also conceded that the threshold is low. However, counsel invited the Court to look at the circumstances of the transfer and find that if there is a question to be tried, that question is not serious. The Applicant knew since February 2022 that he would be transferred, but delayed making an Application for Permission to Apply for Judicial Review. He also waited one month after the filing of the Application to file this Injunction. The circumstances are such that if there had been a serious issue to be tried, the Applicant would not have delayed applying to the Court for a remedy.
14. I cannot agree that the Applicant delayed in making his Application to such an extent that it would put into question the seriousness of the issues raised. The issue of delay is raised by the Respondents in response to the Application, and will be fully addressed in due course. For now, I will simply note that in their response to the Application, the Respondents do not argue that the Applicant should have applied for judicial review as soon as he received the "Notice of Intention to Transfer/Reposting"; they argue that the Applicant should have applied within 3 months of the decision being challenged, which was made on January 10th,

⁵ *American Cyanamid, supra* at 407.

2023.⁶ To argue, for the purpose of this Injunction, that the Applicant should actually have come to this Court as soon as he received the “Notice of Intention to Transfer/Reposting” in February 2022 is contradictory and wrong in law. I agree with Applicant’s counsel that a notice of intention is not a decision. Until January 10th, 2023 there was no decision for the Applicant to challenge, and it would have been premature for him to apply for judicial review.

15. I also disagree that the Applicant delayed in applying for an injunction. The Applicant applied for an injunction in the Application and raised the issue at the Directions hearing held on May 29th, 2023. The Applicant filed the Injunction some 10 days after the Directions hearing, where I had indicated that I would not be in a position to grant an interim injunction until the hearing of the Application scheduled for July 28th, 2023.
16. The Respondents made no submissions in respect of the alleged breaches of the *PSR* and the *DO* highlighted by the Applicant. I find that breaches in the nature of those alleged by the Applicant are serious issues to be tried. The *PSR* and the *DO* govern many employees in the Belize Police Department who may be subject to transfers in any given year. Transfers between stations in particular are subject to rules which are designed to ensure that an employee’s career and family life are disrupted as little as possible. There is a public interest in making sure that those rules are complied with. There is nothing in the record as presently constituted that would allow me to conclude that the Applicant’s case is frivolous or vexatious. The first element of the *American Cyanamid* guidelines is met.

Damages

17. Damages would not be an adequate remedy in this case. Damages suffered by the Respondents as a result of the granting of this Injunction, if any, would not be quantifiable in monetary terms. The Applicant is not seeking to be taken off work, but to continue working from Belize City until the determination of this matter. The Respondents would continue to benefit from his services. If there is any loss caused to the Respondents, that loss would be operational in nature, not financial.
18. I also find that the Applicant would not be adequately compensated by damages should he be successful in judicial review. I agree with the Respondents that the Applicant could be compensated for the expenses of commuting daily from Belize City to Belmopan, a 79km journey. The Applicant could be compensated for the cost of gas, the use of his personal vehicle, time, and inconvenience. His family life would not be unduly disrupted. As I indicated at the hearing, however, my concern is in relation to the disciplinary matter the Applicant faces upon his return to work. On June 15th, 2023, the Applicant was issued a show cause letter from the Ministry of Home Affairs & New Growth Industries (the

⁶ First Affidavit of Rolando Zetina dated June 9th, 2023 at para. 41.

“Ministry”) in which it is noted that the Applicant has failed to report for duty at his station in Belmopan since March 1st, 2023. The letter indicates that the Ministry intends to take disciplinary action against the Applicant for Abandonment of Post under the *PSR*. The Applicant is asked to respond in writing as to why disciplinary action should not be taken against him. Should he be found to have abandoned his post, the Applicant could be deemed to have left the public service under section 218 of the *PSR*. Applicant’s counsel submitted that this would result in the Applicant losing his job and pension benefits after almost 30 years of service, and less than two years before retirement. This was not contested by the Respondents. These losses would not be adequately remedied by damages.

Balance of Convenience

19. The balance of convenience tips in favour of the Applicant. As noted by the Privy Council in *National Commercial Bank Jamaica Ltd v Olint Corp Ltd.*, “the purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result. [...] the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other”.⁷
20. In my view, refusing the Injunction would carry a greater risk of injustice than granting it. The Respondents submitted no evidence that would allow me to discern any prejudice to them. In his First Affidavit, Rolando Zetina indicates that “whilst the Applicant remains out of office, his post remains vacant, negatively affecting the due operation of the office”. I note however that the Applicant was promoted to the post of Inspector on February 8th, 2022, with retroactive effect from October 15th, 2021.⁸ Until he went on sick leave in the spring of 2023, the Applicant continued to perform his work as Training Officer, Eastern (Police) Division in Belize City despite his promotion. The Respondents have not explained why granting the Injunction would affect the due operation of an office that has been functioning since October 15th, 2021 despite the vacancy which the Applicant was appointed to fill.
21. I am mindful of the Respondents’ argument that granting this Injunction would amount to validating the Applicant’s decision to disobey an order from his superior. As noted by the Respondents, the Belize Police Department is a disciplined organization, and the Applicant swore an oath to follow orders given to him. The Respondents’ counsel relied on *Ian Haylock v Prime Minister of Belize et al*⁹ in support of her contention that an order is considered lawful unless declared otherwise by the Court. That is not my understanding of

⁷ [2009] 1 WLR 1405 at para. 16.

⁸ First Affidavit of Rolando Zetina dated June 9th, 2023 at para. 7.

⁹ Claim No. 43 of 2021 (“*Haylock*”).

Haylock. The issue before James J. was whether an injunction should be granted to prevent a person from assuming the office of Comptroller of Customs where their appointment to that office was challenged. The Applicant argued, *inter alia*, that granting an injunction would be in the public interest because a successful outcome on their challenge would render all decisions of the Comptroller of Customs void. It is in that context that James J. wrote that “decisions made by an office holder are valid unless declared void by the Court”.¹⁰ Here, the Applicant does not challenge the authority of those who made the decision to transfer him. The Applicant challenges the decision itself as having been made in breach of the *PSC* and the *DO*. Refusing the Injunction on the basis that the order is presumed lawful, where the lawfulness of the order is the very issue in contention, would negate the very reason the Injunction is being sought.

22. I am also mindful of James J.’s dictum in *Haylock* that “interim relief is granted when the court considers that it has a duty, where appropriate, to ensure that any order made on the eventual hearing of the matter would be rendered nugatory”.¹¹ The Applicant is 53 years old, and less than two years away from retirement. As noted by the Applicant’s counsel, legal proceedings sometimes take years before being brought to completion. If the Injunction is not granted, the Applicant will have to immediately assume his station in Belmopan. The prejudice the Applicant is seeking to avoid by challenging the decision to transfer him will materialize, thereby rendering the substantive matter nugatory. In addition, the Applicant risks being doubly penalized by the fact that he is facing disciplinary proceedings for his failure to report for duty in Belmopan. The risk is real, as the Applicant has been issued a show cause letter on June 15th, 2023. The Applicant failed to report to Belmopan because he challenges the lawfulness of the transfer. In addition to rendering the substantive matter nugatory, refusing to grant the Injunction would threaten the Applicant’s very livelihood.
23. I do not wish for this Ruling to be interpreted as a license for public officers, and members of disciplined organizations in particular, to disregard orders they disagree with. In the normal course, a public officer would be expected to comply with orders from their superior even where they are being challenged. However, this matter presents unique circumstances which deserve special consideration. This is the Applicant’s last posting as he is less than two years away from retirement. The *DO* include provisions which are specifically designed to assist police officers in their transition towards retirement. Section 12 of the *DO* specifically states that “it is BPD Policy that whenever possible the final posting prior to an officer’s retirement will be a home posting”. This is one of the provisions the Applicant alleges have been breached. Denying the Injunction would render

¹⁰ *Haylock, supra* at para. 54.

¹¹ *Haylock, supra* at para. 42.

the benefit provided by this provision meaningless to the Applicant because a determination of this matter may not come until he proceeds to retirement.

24. In light of the circumstances, I find that refusing to grant this Injunction would prevent this Court from being able to do justice after a determination of the merits of the judicial review. Factoring in all of the circumstances, it is appropriate to grant the Injunction until the determination of this matter.
25. I also find that it is appropriate to restrain the Respondents from instituting disciplinary proceedings against the Applicant for Abandonment of Post until the determination of this matter. In his Urgent Application for an Interim Injunction, the Applicant asks this Court to grant such further or other relief as it deems fit. I deem it fit in the interest of both parties to make this further order, because without it the Applicant may be reluctant or fail to go back to work pending the outcome of the judicial review. The Applicant is seeking to maintain the *status quo* as it existed immediately prior to the filing of the Application. The Applicant was then employed as an Inspector in the Eastern (Police) Division, Belize City and that is where he is expected to report as a result of the present Ruling. However, without a specific order restraining the Respondents from instituting disciplinary proceedings against him, the Applicant may choose not to report to work at all, thus depriving the Respondents of his services. It is in the interest of both parties to create the necessary conditions to ensure that the Applicant continues to contribute to the Belize Police Department pending the outcome of the judicial review proceedings.

IT IS HEREBY ORDERED THAT

- (1) The Respondents, whether by themselves, their agents, servants or anyone whatsoever, are restrained from transferring the Applicant from Training Officer, Eastern (Police) Division, Belize City, Belize District, Belize, to Professional Standards Branch, Belmopan City, Cayo District, Belize, with effect from March 1st, 2022 until determination of this matter.
- (2) The Respondents, whether by themselves, their agents, servants or anyone whatsoever, are restrained from instituting disciplinary proceedings against the Applicant for Abandonment of Post until determination of this matter.
- (3) Costs in the cause.

Dated July 5th, 2023

Geneviève Chabot
Justice of the High Court