

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Public Law Division
2018/PUB/Con/0006

IN THE MATTER of an Application for Originating Summons by **CULBERT BUSTER EVANS** (Retired Corrections Officer) pursuant to the Rules of the Supreme Court Order 8, Rule 1.

IN THE MATTER of the Constitution of The Commonwealth of The Bahamas

IN THE MATTER of the Decision of Her Excellency the Governor General of The Commonwealth of The Bahamas communicated to the Applicant by a letter from the Permanent Secretary of the Department of Public Service dated 21st December, 2016 and received by the Applicant whereby the Governor General in accordance with the advice of the Public Service Commission has approved the Applicant's retirement from the Public Service on 3rd January 2014 in accordance with the **Pensions Act**.

BETWEEN:

CULBERT BUSTER EVANS
(Retired Corrections Officer)

Applicant

AND

THE PUBLIC SERVICE COMMISSION

1st Respondent

AND

THE MINISTRY OF PUBLIC SERVICE

2nd Respondent

Before Hon. Mr. Justice Ian R. Winder

Appearances: Ms. Maria Daxon for the Plaintiff

Mr. Audirio Sears for the 1st and 2nd Respondents

27 January 2020

JUDGMENT

WINDER, J.

This is the Applicant's (Evans) application for the payment of a gratuity following upon the completion of his service with the Bahamas Department of Corrections ("BDOC"). Other matters raised by Evans in his claim have otherwise been resolved.

1. Evans commenced employment with BDOC (then Her Majesty's Prison) on the 3 January, 1989. Following satisfactory completion of the six-months probationary period, Evans continued to be engaged on successive contracts as a Prison Officer (now Corrections Officer) with the BDOC until he retired with effect from 3 January, 2014. Evans was awarded a pension of \$14,575 per annum with effect from 4 January 2014.
2. Evans continued to be engaged in the Corrections Service until he attained the mandatory retirement age of 60 on 30 November 2016. Evans had been seconded/assigned to the Road Traffic Department at the time he attained the retirement age of 60.
3. Evans sought in the action, brought by Originating Summons on 2 February 2018, resolution of the following questions
 - (1) Whether upon the true construction of The Constitution of the Commonwealth of The Bahamas that the Applicant was constitutionally appointed to the public office?
 - (2) Whether on the true construction of the Prison Act, Pensions Act, The Public Services Act, General Orders, the Public Service Commission Regulations and the Constitution of the Bahamas that the Applicant is a Public Servant/Officer?
 - (3) Whether upon the true construction of The Constitution of the Commonwealth of The Bahamas that the Applicant is entitled to a gratuity, upon retirement from public office?

Evans seeks a declaration that he is entitled to a gratuity.

4. Evans relies on a letter dated 26 December 2016 from the Ministry of Public Service which indicated that he had been awarded a pension by reason of his

retirement from the Public Service in accordance with the Pensions Act. He says that he is entitled to a Declaration that he was at all times a public servant/ officer and by virtue of him carrying such a designation he is entitled to a gratuity in addition to the Pension that he is currently receiving. The Applicant further avers that such entitlements should be awarded to him as a Public Servant even if his classification as a Subordinate Officer did not qualify him for this benefit.

5. The Respondents contend that Evans is not entitled to a gratuity as he was classified at all times as a Corrections Officer and as such he was a Subordinate Officer. They say that Evans was not a public officer.

6. I accept the submission that Evans is not a public officer.

7. Articles 108 and 110 of the Constitution of The Bahamas prescribe the mode by which a person is appointed to a public office within the Government Service of the Commonwealth of The Bahamas (also known as and called 'the Public Service'); thus establishing such person as a public officer entitled to all benefits under the laws of The Bahamas, relative to persons engaged as such within the Public Service. Articles 108 and 110 provide:

108. Subject to the provisions of this Constitution power to make appointments to public offices and to remove and to exercise disciplinary control over persons holding or acting in such offices is hereby vested in the Governor-General, acting in accordance with the advice of the Public Service Commission.

...

110. The Governor-General acting in accordance with the advice of the Public Service Commission, may by directions given by instrument under the Public Seal delegate, to such extent and subject to such conditions as may be specified in those directions, the powers vested in him by Article 108 of this Constitution (other than powers to make appointments to the offices referred to in Article 109 of this Constitution and to remove or exercise disciplinary control over persons holding or acting in such offices) to such public officers as may be so specified.

8. Article 137 of the Constitution of The Bahamas further provides as follows:

137. (1) In this Constitution, unless it is otherwise provided or required by the context —

“public office” means, subject to the provisions of paragraph (6) of this Article and Article 127 of this Constitution, any office of emolument in the public service;

“public officer” means the holder of any public office and includes any person appointed to act in any such office;”

(6) For the purposes of this Constitution, a person shall not be considered to hold a public office by reason only that he is in receipt of a pension or other like allowance in respect of public service.”

9. Regulation 15(1)(a) and 24 of the Public Service Commission Regulations prescribes the functions of the Public Service Commission with regard to the appointment, inter alia, of public officers and provides:

15 (1) The Commission shall make recommendations to the Governor-General on the following —

- (a) appointments, (not being appointments delegated by the Governor-General under Article 110 of the Constitution), promotions and transfers of public officers in respect of whom powers of appointment are vested by Article 108 of the Constitution in the Governor-General acting in accordance with the recommendation of the Commission;

24. The appointment (not being an appointment delegated by the Governor-General under Article 110 of the Constitution), promotion and transfer of public officers shall be made by the Governor-General acting in accordance with the recommendation of the Commission and, subject to the provisions of regulation 23 of these Regulations, the following procedure shall be followed —

- (a) as soon as it is known that a vacancy will occur in the post of “Head of Department” the holder of that post shall without delay report the matter to the Permanent Secretary and make recommendations. If for any reason the Head of Department is unable to report the vacancy, the officer acting for such Head of Department or the next senior officer in the department shall make the required report and recommendations;
- (b) upon receipt of a report referred to in paragraph (a) of this regulation the Permanent Secretary shall forward the report together with his observations thereon to the Director of Public Personnel, who shall communicate to the Chairman in writing his recommendations regarding the filling of the vacancy;
- (c) the Head of Department shall report to the Permanent Secretary without delay the creation of any new post or any impending vacancy

in an existing post in his department. The report shall include a recommendation as to how the post should be filled and whether or not the post should be advertised. If it is recommended that the post should be advertised the Head of Department shall forward a draft advertisement with the report;

- (d) upon receipt of a report referred to in paragraph (c) of this regulation, the Permanent Secretary shall forward it to the Director of Public Personnel, who shall verify that there is no Establishment or financial objection to the filling of the post and that the terms of the advertisement, if any, are correct, and shall forward the report to the Chairman, together with his own recommendation in the matter;
- (e) in the case of vacancies among miscellaneous officers to which this regulation applies, the necessary report shall be made to the Chairman by the Director of Public Personnel;
- (f) if the Commission decides that a post should be advertised, the Commission shall arrange the publication of the advertisement and shall receive the replies to the advertisement;
- (g) the Commission may interview the candidates for any post or it may appoint a Selection Board for this purpose and the Selection Board shall report to the Commission in such manner as the Commission directs. The Commission shall take into consideration the recommendations by the Head of Department and the Permanent Secretary on the candidates;
- (h) if the Commission is unable to recommend any candidate for appointment to the post, the Commission may propose such arrangements as may be necessary for recruitment to the post from outside The Bahamas.

10. The Court of Appeal decisions in ***The Attorney General v John Haughton***, **SCCApp & CAIS No. 188 of 2011** and ***BTVI v Essel Deleveaux-Spruill***, **IndTribApp & CAIS No.197 of 2017** and instructive in demonstrating the application of this legislative framework in determining who is a public officer.

11. The application of the above legislative framework and the authorities demonstrates conclusively that Evans is not a public officer for the purposes of the constitution as he was not appointed to a public office by the Governor General or under delegated powers, in accordance with Constitutional and statutory provisions. No evidence has been led by Evans, upon whom the burden rests, to support the contention that he was appointed as a public officer. His attestation papers bear out that he was engaged and re-engaged from time to time on contractual terms in the Bahamas Prison Service under the provisions of the Prisons Act. The letter of 26 December 2016, relied upon by Evans, indicating that

he had been awarded a pension by reason of his retirement from the Public Service in accordance with the Pensions Act cannot assist him in the face of the legislative framework and the authorities.

12. Section 14(1) of The Public Service Act (relevant to Evans) provides for contract officers to be entitled to a gratuity as follows:

14. (1) Subject to the provisions of this section, every contract officer who is employed for a continuous period of not less than two years in any public office shall upon satisfactory completion of his contract service be entitled to receive and he shall be paid out of the Consolidated Fund a gratuity equal in amount to fifteen per centum of the total salary which he shall have received in respect of such contract.

Section 13(3) and (4) of the Public Service Act of the Statute Law of the Bahamas 1987 (relevant to Evans' case) however excludes subordinate officers from receiving any gratuity in the following manner:

13. (3) Subject to the provisions of Article 121 of the Constitution, the grant of any pension under the provisions of this section shall be in lieu of any pension or gratuity payable under any other Act.

(4) Notwithstanding anything in this Act, no subordinate officer shall be entitled to gratuity under section 14 of this Act.

13. It cannot seriously be disputed that as a Corrections (Prison) Officer Evans is a subordinate officer. In Section 11 of The Public Service Act Chapter 31 of the Statute Law of the Bahamas 1987 (relevant to Evans' case) a subordinate officer is defined as follows:

“subordinate officer” means any officer of the Prison's Department holding an office specified in Part A of the Third Schedule

The Third Schedule to the Act includes the following offices:

Sergeant.
Corporal.
Prison Officer.

In the circumstances therefore, as a subordinate officer Evans is unable to obtain a gratuity pursuant to section 14 of the Act.

14. Further, and in any event, Evans, having received a pension, cannot receive a gratuity as Section 13(3) of the Public Service Act provides that the receipt of a pension would be in lieu of any pension or gratuity payable.

15. In all the circumstances therefore Evans' claim is dismissed with costs to be taxed if not agreed

Postscript

16. The Judgment of the Court will not take effect until Tuesday, 28 April 2020.

Dated the 7th day of April 2020

Ian R. Winder

Justice