."YEAR OF STAYING RESOLUTELY ON COURSE"

REF. NO. ACY: 1/11 1988/06/30

Dear Cde Permanent Secretary/Head of Department,

Please see the attached case of Gordon Yaw – Appellant and V.J. Correia – Respondent, which has been forwarded to me for circulation to Permanent Secretaries, Heads of Departments and Regional Executive officers.

Yours Co-operatively,

…….
J.E. Sinclair
Permanent Secretary
Public Service Ministry.

IN THE COURT OF APPEAL OF THE SUPREME COURT OF JUDICATURE.
CIVIL APPEAL NO.12 OF 1973.

In the matter of an application for a writ of certiorari by
Gorgon Yaw,

Appellant
(Applicant),

-And-
V, J. CORREIA,

Respondent
(Defendant).

BEFORE

The Hon. Mr. E. V. Luckhoo - Chancellor.

The Hon. Mr. H. B. S. Bollers - Chief Justice.

The Hon. Mr. P. A. Cummings - Justice of Appeal.

1973: December 12,13,19.
1974: January 22, 23, 24.
1975: January 9.

Doodnauth Singh for appellant.

Dr. M. Shahabuddeen, S. C., Mrs. C. P. Agard, with him, for respondent.

JUDGEMENT

CUMMINGS, J.A.;

During the hearing of this case, the point that worried me was that it appeared to me that the constitution sufficiently defined a "Public Officer', but after listening to the arguments of the learned Attorney General, and having another look at art. 125 of the constitution, I observe that the word 'office' is nowhere specifically defined. So that although " Public Officer'is defined, nowhere do we find the meaning of "office".

In Craies on statute law, 5th Ed., at p. 480, the following passage appears:

" The general rules adopted for construing a written constitution embodied in a statute are the same as for construing any other statue. In D' Emden V. Peddar, (1904), I Australia C. & R. 91, 111-117, it was laid down by the High Court of Australia that where the constitution act contained provisions

> undistinguishable in substance, though varying in form, from provisions in the constitutions of the United States, which had received Judicial interpretation by the supreme court of the United States, it was proper to consult and to treat as a welcome aid, but not as an infallible guide, the relevant decisions of the court."

Consequently, I am persuaded to agree that one has got to revert to the position at common law as set out in the cases cited by the learnt Attorney General to ascertain the meaning of the word "office", and when that is done it becomes evident that the post held by the appellant in this case was not an office within the meaning of the common law as set out therein . / see also Crofit V. Dunphy, (1933) A.C. 156, per Lord Mc Millan, at P. 165./
The other submission begin in my view also untenable, I concur with the conclusion reached and the other proposed by the learned Chancellor.

Percival A. Cummings,
Justice of Appeal.

Dated this 9th day of January,1975.

SOLICITORS:
H. B Fraser for appellant

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Dr. M. Shahabuddeen, S. C., Mrs. C. P. Agard, State Counsel, for the respondent.

JUDGEMENT

CHANCELLOR:

The judgment, which I am about to deliver, has the full concurrence of the learnt chief Justice, and I speak for both of us.
This appeal affords an admirable opportunity for examining the question of who is a 'Public Officer' under the constitution of Guyana – a question which was specifically raised and fully argued.

The appellant was dismissed by the Permanent Secretary of the Ministry of Housing and Reconstruction (hereinafter referred to as 'the Ministry ') whilst in the service of the government of Guyana. If, in law, his status was that of 'Public Officer', only the Public Service Commission or its delegated agent, and no one else, could have legally secured his dismissal, as the competent authority vested with this power under the constitution of Guyana The matter arose in this way: The appellant was employed by the Ministry on 2nd July, 1965, as a watchman; he was suspended on the 4th October, 1970, for gross inefficiency and negligence in the performance of his duties on the night of 3rd October, 1970, when he failed to observe the escape of oil and tar from the machines under his care. No formal charge was laid against him in connection with the said incident, but the decision was taken to dismiss him after an investigation was carried out by the Permanent Secretary; this dismissal was subsequently confirmed by the Minister on 2nd February, 1971, after representation had been made to him by counsel proceeded to make further representations to the Public Service Commission, with the result that on the 2nd June, 1971, the commission informed Counsel by letter that it was satisfied that the Ministry did not observe the normal disciplinary

procedure when the appellant was dismissed from his occupation as a watchman with the ministry. That letter went on to say that a request was being made of the Permanent secretary to conduct a 'proper inquiry' and to report his findings to the secretary of the commission; but the Permanent Secretary was unwilling to adopt any such course; he considered that the jurisdiction to deal with the appellant belonged to him and not the commission; he was satisfied with his investigations and consequently ignored the request; whereupon, the appellant moved the high court for an order of certiorari to remove the inquiry into that court, for the purpose of quashing the order of dismissal, on the ground of lack or excess of jurisdiction. It was there contended that the Permanent Secretary had no authority in law to make the said decision to dismiss, having regard to art. 96 of the constitution of Guyana; alternatively, that he exceeded his jurisdiction in his decision to dismiss, and that there was non-compliance with the rules of natural justice in that, inter alias, he was entitled to know the charges made against him, to make representation and be heard in connection therewith .The trial judge dismissed the order nisi and ruled that the appellant was not a Public Officer but a government employee dismissible at pleasure. It is from this Ruling that this appeal arises.

Under the constitution of Guyana, 1966/art. 125 (1)/:

'Public Officers' means an office of emolument in the public service;
'Public Officer' means the holder of any public officer and includes any person appointed to act in any such office; and

'The Public Service' means, subject to certain exceptions, service with the government of Guyana in a civil capacity.'

These meanings are not dissimilar from those in previous constitution, which were looked at by Sir Clyde Archer in cumberbatch V. Weber, (1965) L.R.B.G. 408. That judge said (at p. 417):

' The terms 'Public Officer', 'Public Office' and 'Public Service' were Defined for the purpose of the 1953 constitution. The meaning given to 'Public Officer' was the holder of an office of emolument in the service Of the crown in respect of the Government of the colony. In the 1961 constitution the meaning of 'public officer' is the holder of an office of emolument in the service of the crown in a civil capacity in respect of the Government of British Guiana.

These definition are in accord with what was said in a number of cases in which the Question as to what constitute a public officer was considered. In Henley V. Lyma (1928) 5 Bing. 91,Best, C.J. said at p. 107;

'Then what constitutes a public officer? In my opinion everyone who is appointed to discharge a public duty, and receives a compensation in whatever shape, whether from the crown or otherwise, is constituted a public officer.'

He then gave you examples of public officers and continued:'

' It seems to me that all these cases establish the principle that if a man takes a reward, whatever be the nature of the reward-whatever it be in money from the crown, whether it be in land from

the crown, whether it be in lands or money from any individual- for the discharge of a public duty, that instant he becomes a public officer;'

'In R.V. Whitaker, (1914) 3.K.B. 1283 (which was the case of a common law conspiracy to bribe a colonel of a regiment), Lawrence J. in delivering the judgment of the court of criminal appeal, said at p.1296:

> Then it was argued that the appellant was no 'a public and ministerial officer'. A public officer is an officer who discharges any duty in the discharge of which the public are interested, more clearly so if he is paid out of a fund provided by the public. If taxes go to supply his payment and the public have an interest in the duties he discharges, he is a public officer. The addition of the words ' and ministerial' does not affect the matter. In our view he is also a ministerial officer. The Attorney General was write in his contention that the word " ministerial" is here used in contrast with "judicial"; every officer who is not a judicial is a ministerial officer."

Sir Clyde's excursion clearly crystallized the concept of 'public officer' which judge- made law establish for the criminal law in England, but with what justification could that be injected into the area of constitutional law in this country? In England, for that class of cases all that was required was to compound the existence of a public duty with the receipt of emoluments, so that when a man takes a reward for the discharge of a public duty, that instant he became a 'public officer'. This ready made formula persaud, J.A. was prepared to endorse in Evelyn v. chichester, (1970) 15 W.I.R. 410, when he said (at p. 427):

> "When regard is had to the definition of 'public officer' and 'public office' in the constitution and to the dictum of best, C.J. in Henley V. Lyme corpn. And that of Lawrence, J. in R. V. Whitaker, one inclines to the view, unpalatable though it may be to some, an unsuitable thought the expression may appear to be in these circumstances, that the respondent, a deck-hand on one of the Government's ships, is a public officer".

> This notion also appealed to crane, J. A. (in the same case).

He referred to the case of R. V Burnell, (1698) Carth., at -. 479, " in which the criterion for determining a 'public officer' was firmly established as follows;

> 'Every man is a public officer who hath any duty concerning the public, and he is not less a public officer wh4ere his authority is confined to narrow limits, and the nature of that duty, which makes him a public officer and not the extent of his authority "

With great respect to the opinions of Sir Clyde Archer, Persaud, J. A., the test adopted does not, in our humble view, go far enough; even if in same way it captures the idea of 'public service'and'payment', for it omits to take into consideration two vital factors, namely, the prerequisite of the existence of an ' 'offline', and an appointment by the competent authority to that 'office', who would become the 'holder' of that 'office'.

These additional elements must then be considered and in so doing the warning of Chief Justice Marshall in U.S. V. Maurice, 2 Brock 96, should be heeded, that- "Although an office is an employment, it does not follow that every employment is an office'. As also that which appears in Bacon's abridgement, under officer and officers', which reads as follows: "There is a difference between an offline and an employment, every officer being an employment; but there

are employments which do not come within the denomination of officers." One is then able all the more to appreciate Lord Goddard's dictum in Beeston V. Stepleford U.D.C.V. Smith, (1949) 118 L.J.R. 984, that-" to the words 'public officer' different meaning can be given according to the statute in which they occur."

And so it could, with truth, be said that whilst every public officer may be a public servant, not every public servant is necessarily a public officer. In the same way, although every public officer may be in the public service, not everyone in the public service is the holder of a public office.

The vital question then must be not what the meaning of 'public office' is for the criminal law or for some other non- constitutional purpose, but what it is under art.96 (1) of the constitution. The former has already been set out; the latter is as follows:

> "Subject to the provision of this constitution, the power to make appointments to public officers and to remove and exercise disciplinary control over persons holding or acting in such offices shall vest in the Public Service Commission."

The impression one gets from 'office' in this context is that if someone is to be 'appointed' to it, that office must exist; it must be capable of subsisting on it's own; it must have some duration of tenure, and be quite apart from the holder. This was the idea pronounced in Great western Ry. Co. v. Bater,(1922) 2 A.C.1, H.L., and which has found favour in many case since. Lord Atkinson there concurred in the opinion happily expressed by Rowlatt, J. as being 'a subsisting, permanent, substantive position which has an existence independent of the person who filled it, which went on and was filled in succession by successive holders, and that if a man was engaged to do any duties which might be assigned to him, whatever the terms on which he was engaged, his employments to do those duties did not create an office to which those duties were attached;……" Lord Summer, in that case was of the opinion that a clerk was not the holder of a public office. His Lordship observe:

> "…At present he is in the divisional superintendent's office at Swindon, whatever that involves, and he is called a member of the 'permanent' staff, and enjoys such permanency, I suppose, as a month's notice allows. My Lords, to say that Mr. Hall holds an 'office' seems to be to be an abuse of language… he merely sits in one."

The judgment in Bater's case was later endorsed in Macmillan V. Guest, (1942) A.C.561,at p.564, where Lord Atkin said;

> "…It is necessary to consider whether the appellant (1) held an office;(2) held an public office… there is no statutory definition of 'office'. Without adopting the sentence as complete definition one may treat the following expression of Rowlatt, J. in Great western Railway Co. V. Bater, adopted by Lord Atkinson, as a generally sufficient statement of the meaning of the word: 'an office or employment which was a subsisting, permanent, substantive position which had an existence independent of the person

> who filled it, which went on and was filled in succession by successive holders."

And Lord wright:

> "…The word 'office' is of indefinite content. Its various meanings cover four columns of the New English Directory, but I take as the most relevant for purpose of this case the following: 'A position or place to which certain duties are attached, especially one of a more or less public character. This I think roughly corresponds with such approaches to a definition as have been attempted in the authorities, in particular, Great western railway Co.v. Bater, where the legal construction of these words, which had been in schedule E since 1803… was discussed."

Blackstone in his commentaries, Vol. 2, p. 36, described an office as a " a right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging. "Offices were, he said, in his time incorporeal hereditaments, "For a man may have a estate in them, either to him and his heirs, or for life, or for a term of years or during pleasure only…" In Ashenheim V. Income Tax Commissioners,(1972) 3 W.R.L.455, at p.463, Sir victor Windeyer was of the view that: " this concept of an office has lingered in language and in law; so that a man is ordinarily said to be appointed, or called, to an office- under the crown or a corporation- as distinct from a man simply engaged for a task." [see also Bassu's Commentary on the constitution of India, 5th Ed.,Vol. V, pp 196, 197, and state of Assam V. kanak, (1967) Sc. 884 (886).]

We entertained but little doubt that under our constitution 'office' should be construed as a post created and designated, and intended to be, of a subsisting, permanent and continuing nature. With this in mind, we would proceed to the next question: When does a person "hold" office under the constitution? It goes without saying that a person cannot be regarded as the "holder" of an office if there was no office to which an appointment could be made, nor could he be the "holder" if his appointment was not in accordance with the law of the constitution.

Crane J.A. was inclined to think in Evelyn V. Chichester that "whether any departmental employee…is to be considered a public or non public officer and so outside the public service, would seem to be entirely a question of fact," but this could hardly be tenable. For the proper construction of the constitution is a matter of law, and that construction would have to be applied to the facts of the case, so that the conclusion is inescapable that it must be a mixed question of law and fact. In other words, the facts which purport to support the existence or non-existence of an office will have to be considered before determining whether in law an office is constituted. In like manner, whether a person is the "holder" under art. 96(1) of such an office will depend not only on the fact of such an appointment, but whether it was made within the legal meaning of the said article of the constitution.[see the dictum of Lord Wrenbury in Great western Railway Co. V. Bater (supra) at p. 33, and Lord Wright in Macmillan V. Guest, at p.567.]

In the instant case the evidence is clear and unchallenged. The appellant was not employed in any office of 'watchman' established or created by the legislature as such. He was merely hired

by the Ministry to serve as a watchman and paid from an open or block vote. The permanent secretary in his evidence explained the matter in this way:

> "Block votes are for certain works of the services and can be sent at discretion of Permanent Secretary for the works and services. It is spent by Permanent Secretary to Provide goods and services- services being people taken on to work. I take on people to work on the block vote. The Permanent Secretary terminates employment of block vote. Appointments to block vote are not made by the Public Service Commission. Permanent Secretary exercise power to terminate these appointments.

In actuality the appellant's employment was not secured by an appointment by the commission, but emanated from the Ministry. This was clearly illustrated from an examination of the employment slip, which merely directed the accountant to enter the bearer, that is, the appellant, on the payroll, with the necessary particulars supplied.

In utilizing the block vote, there were more than 20 watchman employed by the Permanent Secretary, all paid weekly at a certain rate per an hour. The Permanent Secretary said further in his evidence:

> "…I make decision to increase or decrease complement of watchmen and for any other employees payable from open vote. This is common practice among all P.S's. I carry decision into effect. I have been Permanent Secretary, Ministry of Housing, from 1969…Yaw would be paid from Head- Wages Govt. Housing Estates in Estimates."

Mr. Harewood, Secretary to the Commission, also gave evidence, and explained that it was a Senior Clerk, one Duncan, who had signed the letter of the 2nd June,1971, requesting the Permanent Secretary to conduct "a proper inquiry"; he would not have signed such a letter. As a matter of fact, in his affidavit he said categorically, that, that letter does not truly reflect the position, as he knew it (and he had spent 32 years at the secretariat of the Public Service Commission). He support Mr. Correia that "the usual method of creation of public offices is to request Public Service Ministry; if case is accepted, Public service Ministry would approach cabinet for authority for its creation; this may be done by submission of Annual Estimates to Cabinet for Cabinet approval; Cabinet having approved, Estimates are submitted to Parliament which approves or disapproves; post is always specifically described in Estimates.

In order to determine, therefore, whether a "public office" has been constituted under articles 125(1) and 96(1), a useful method of ascertainment might be to examine the question in this way: (1) Is there an 'office' established in the sense afore described with a sufficient degree of permanence and continuity, and which exist apart from the holder? If so, (2) Has an appointment been made to that office in accordance with art. 96(1)? If so, (3) Is it an office of emolument? If so, (4) is it an office, which involves service with the Government of Guyana in a civil capacity?

When each of these four questions can be answered in the affirmative, then the person who holds the said 'office' could be counted a public officer. In other

words, there must be an office (a) held by a person appointed by or on behalf of the Public Service Commission, (b) to serve the state, (c) for an emolument; all of which must be duly satisfied before the person serving could be regarded as a public officer.

A Permanent Secretary cannot create an office except specifically authorized by parliament so to do. Nor can a judge declare an employment to be an office if the legislature has not in sufficient terms recognized that employment as an office. Were it otherwise, as submitted by the Solicitor General, it would lie within the competence of a Permanent Secretary by a simple administrative decision to create public offices from a block vote under his control and to abolish them at will. And thereby from day to day extend or curtail the operational range of Public Service Commission over a multiplicity of occupations transient or substantive in nature, and remote from the actual conduct of the business of the Government.

Therefore, before the appellant as a watchman can claim to be a public officer, it must be shown that: (1) an 'office' was created by parliament to accommodate this category of employment; (2) 'emoluments' were attached to it; (3) the Public Service Commission or its delegated authority did so appoint him; (4) He was to serve the Government of Guyana.

I would here like, for the purpose of the record, to interpose a personal note to make it clear that in Evelyn V. Chichester I did not concur in the view that the deck-hand/ respondent was a public officer. I did make two assumptions but only for the purpose of answering certain arguments put forward by the solicitor general. The first assumption appears at p. 413 G when I said:

> " I propose to test the validity of the dismissal from two standpoints. Firstly, was it effective having due regard to what was procedurally described under the law? And, secondly, could there have been a dismissal at pleasure by the appellant, assuming the respondent was a public officer who was subject to the right of the crown to be dismissed at will?"

And at p. 421 I:

> "I shall assume for the purpose of deciding whether it is competent for a court to inquire into the validity of the General Manager's order of dismissal, that the power or the Public Service Commission was legally delegated to him under the constitution, and that his decision would be afforded the same protection as art. 119(6) provides for a Commission."

We would now like to draw attention to art. 96(2). This recognises