



[2018] JMSC Civ. 64

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2014 HCV 02992

IN THE MATTER of an application by
Constable Petro Burton for Judicial
Review

AND

IN THE MATTER of the decision of
the Commissioner of Police on
November 17, 2011 and March 17,
2014.

BETWEEN	PETRO BURTON	CLAIMANT
AND	THE COMMISSIONER OF POLICE	DEFENDANT

OPEN COURT

Zavia Mayne instructed by Zavia Mayne & Co for the Claimant

Tamara M. Dickens instructed by Director of State Proceedings for the Defendant

Heard: 18th September, 2017 Delivered: 23rd April, 2018

Judicial Review—Principles applicable- Reviewing decision of the Commissioner of Police- Wednesbury Unreasonableness –Principles of Natural Justice – Decision not to re-enlist Police officer

BERTRAM LINTON, J

BACKGROUND

6. *The delay in preferring disciplinary charges against the Claimant of 4 (four) years and 6 (six) months (September 2006 – March 2011) is unreasonable and unfair, as during this period he acted under the presumption that the matter was summarily dispensed with by his Commanding Officer.*
7. *The Claimant has a legitimate expectation that having been ordered to apologize that he would not be subjected to any further disciplinary proceedings.*
8. *The Claimant has always maintained that he has not breached any rules or provisions of the Jamaica Constabulary Force or any Laws of Jamaica.*
9. *The said decision of the Defendant is so unreasonable and/or irrational that the same ought to be quashed forthwith.*

[4] The Claimant says that on the 7th September 2006 at approximately 11:00pm he was on patrol with Corporal Horace Reid when upon reaching the Texaco Petrol Station at Naggo's Head, Saint Catherine, Mr Burton observed a suspicious Nissan Motor Car. Corporal Reid used the service vehicle to block the path of the Nissan car and Mr Burton alighted from the service truck and approached the Nissan. He says he noticed that the driver of the car had a gun in his lap. As result, he pointed the M16 firearm he had in his possession at the car and ordered the driver to come out. The driver, Sergeant Patrick Walker identified himself as a Police officer and had a conversation with Mr Burton and Corporal Reid. Sergeant Walker was later joined by Constable Brenan Cohen after which Sergeant Walker and Constable Cohen left the scene.

[5] The matter was reported to Mr Burton's supervisor Superintendent Bent. He was asked to apologize to Sergeant Walker and as far as he knew the matter was at an end. In November 2010, some four years later, Mr Burton was instructed to submit a report in relation to the 2006 incident and he did so on November 22, 2010. On March 8, 2011 Mr Burton was served with notice that disciplinary charges were laid against him pursuant to Regulation 47 of the Police Service Regulations, 1961. The disciplinary charges being:

Charge 1: Being a member of the Jamaica Constabulary Force, conducted yourself contrary to the discipline, good order and guidance of the Force in that you behaved unprofessionally when you pointed your firearm at the vehicle that Detective Sergeant Patrick Walker and Constable Cohen was sitting in and shouted to them saying, "Pussy come out now," on Thursday the 7th of September, 2006 about 11:10pm at Naggo's Head, Portmore, St. Catherine.

- [9] It was submitted that there was an inexplicable period of four years where no action was taken against the Claimant; this was between September 2006 and November 2010. The fact that the matter was recorded in the station diary of the "Hundred man Police Station" there would be no reason for not taking action sooner than November 2010. In addition, there was no communication between the Claimant and the Defendant between the period of delay, as such no delay could have been attributable to the Claimant. Further, Counsel pointed to the fact that another four months had passed before actual charges were brought against the Claimant on March 8, 2011. On November 17, 2011 Mr Burton was informed of the Commissioner's decision to dismiss him from the JCF. It was also highlighted that a further three years elapsed, from the filing of his appeal, before Mr Burton was advised that it had been refused. In consideration of the length of time involved, Counsel says that the delay was inordinate, unreasonable and unacceptable.
- [10] Counsel argued that the prejudice caused to the Claimant by the delay is that he was not afforded the opportunity to seek out and call witnesses in his defence. It was submitted that prospective witnesses would have moved away or even if found may have difficulty in recalling the circumstances of the altercation. This prejudice hindered the Claimant in mounting a proper defence on the day of his hearing. It was also noted that the prospective witnesses would have made the inconsistencies of the prosecution's case even more unbelievable and would have inured to the Claimant's benefit.
- [11] Counsel propounded an alternative argument. He said that there was an abuse of process because the Defendant failed to comply with Regulation 32 of the Police Services Regulations. It was contended that Regulation 32 requires that a report of misconduct made to the Commissioner of Police to be dealt with as soon as possible. Based on his revision of the case law, Counsel came to the conclusion that the delay in this case was inordinate and unreasonable.

words 'perverse'. No reasons were given by the tribunal as to the factual findings upon which it was determined that the Claimant was guilty as charged. As such, it was submitted that the tribunal's decision was unfair and irrational and ought to be quashed.

[14] It was argued that the punishment meted out to the Claimant was disproportionate to the alleged misconduct and therefore should be considered 'Wednesbury Unreasonable'. The Claimant's service record, character, nature of the alleged infraction and possibility of rehabilitation were not considered by the Court of Enquiry so the decision arrived at should be deemed as disproportionate, unjustified and 'Wednesbury Unreasonable'.

[15] Lastly, Counsel maintained that the Claimant was not given a fair trial. Reliance was placed on the case of *Ridge v Baldwin and others* [1963] 2 All ER 66 which outlined the principles of fairness and duty to act fairly. It was argued that the delay in initiating disciplinary proceeding put the Claimant at significant risk at not having a fair trial. Further, the Claimant was not given the opportunity to test the evidence as it relates to the station diary entry as he was prohibited from doing so. This he maintained would have also tested the credibility of the complainant's account. Also, the Claimant's request to call Sergeants Allison and Richie to testify to his character was denied. When combined, it was submitted that the Claimant was not given a fair hearing. In light of all the submissions, the Court was asked to quash the decision of the Commissioner and re-instate Mr Burton to his previous position.

THE DEFENDANT'S CASE

[16] The Defendant's case is that when Mr Burton and Corporal Reid used their service vehicle to block the path of the Nissan, the Claimant alighted from the truck and approached the Nissan pointing his M16 weapon on Sergeant Walker. After Sergeant Walker identified himself and stated his rank, he said that Mr Burton's response was insubordinate and abusive, he further went on to say 'me

- [20] As it relates to section 47 of the Regulations, Counsel relied on the Affidavit evidence of Dr Carl Williams which outlined that Mr Burton was notified that disciplinary charges were being brought against him. Dr Williams' evidence also exhibited a receipt with Mr Burton's signature showing that he was served with the charges, statements of Detective Sergeant Walker and Constable Cohen and a copy of the station diary entry from the Portmore Police Station. Counsel pointed to the fact that Mr Burton's own evidence showed that he was represented at both the Court of Enquiry level and Privy Council of the Constabulary Force level when he appealed. Since all the requirements of section 47 of the Regulations were met, Counsel argued that the Commissioner's actions were not ultra vires.
- [21] It was submitted that Mr Burton's dismissal was done pursuant to section 47 of the Regulations. Therefore, section 46(2)(3) do not apply. In any event, it was argued that the offences for which Mr Burton was charged are not minor offences and so the Commissioner was acting within his powers.
- [22] As it relates to the claim that Burton had a legitimate expectation of being heard, Counsel contended that Mr Burton was heard at the hearing of the Court of Enquiry held on June 29, 2011 and October 5, 2011. It was argued that the principle of legitimate expectation does not apply. Counsel relied on the case of **Council of Civil Service Unions v Minister of the Civil Service** [1985] AC 374. The case outlined that legitimate expectation arises if (1) Mr Burton was permitted to enjoy an advantage by the decision maker but this was withdrawn or (2) having been assured that an advantage was not be withdrawn, it was withdrawn without reasons for the withdrawal.
- [23] In any event Counsel pointed to the fact that natural justice principles were adhered to in keeping with the law. She noted the findings of Sykes J (as he then was) in the case of **Berrington Gordon v The Commissioner of Police** [2012] JMSC Civ. 46. In the case at bar, Mr Burton was advised of the complaints made against him, he was given an opportunity to respond to the complaints, he was

come to an end. Firstly, she adopted the arguments used in her previous submissions as it relates to the delay in proceedings. Secondly, she highlighted the fact that SSP Bent's evidence is that he did not speak to Mr Burton or Sergeant Walker in relation to the events of 7th September 2006. Lastly, she made the point that an apology is not a stipulated penalty under the Regulations therefore bolstering her argument that the matter was not summarily dealt with before the Court of Enquiry was convened. As such, Mr Burton could not reasonably have a legitimate expectation that no further actions would be taken against him.

- [27] The Claimant's insistence that he is innocent is not for the Court to determine at this point because the Court's role in judicial review proceedings is to assess/review the process and not a determination of the merits of the matter. Counsel once again stressed that the Court's role is not appellate in nature and it would not be concerned in any respects with Mr Burton's guilt or innocence.
- [28] She said that the decision of the Commissioner should not be quashed on the basis of it being unreasonable and irrational. Mr Burton was dismissed after his charges were adjudicated by the Court of Enquiry in keeping with the Regulations. Further, the Court of Enquiry found that the charges against him were proved. As such, Mr Burton cannot now say that the decision of the Commissioner is 'Wednesbury Unreasonable' as this test has not been satisfied.
- [29] She pointed to the delay of the Claimant in applying for judicial review and has asked the Court not to grant the orders sought because of this delay. In addition, the Police Services Privy Council's decision to uphold the Commissioner's dismissal of Mr Burton was made on February 10, 2014 while the application for leave for Judicial Review was filed June 19, 2014. With this, she submitted that the application for Judicial Review is significantly out of time.
- [30] Counsel pointed out that the Court has no jurisdiction to grant an order of mandamus re-instating the Claimant to the JCF. It was submitted that Mr Burton's five year term as an officer had come to an end when he sought re-

- i. Was Mr Burton given full notice of the charges laid against him; and
 - ii. Was he given an opportunity to be heard?
2. Whether the Commissioner of Police acted ultra vires in dismissing Mr Burton meaning;
 - a. Was the decision of the Commissioner irrational meaning;
 - i. Were summary proceedings conducted prior to the decision of the Court of Enquiry; and
 - ii. Is the decision of the Commissioner so unreasonable that no other tribunal could come to the same decision?
 - b. Was the decision of the Commissioner illegal?
3. Whether or not the Claimant had a right to re-enlistment at the end of his tenure bearing in mind the fact of his dismissal.

LAW AND ANALYSIS

- [33] It is essential for me to outline the Court's role and purpose in these proceedings as it will frame the way in which this matter is dealt with. In this regard the White Book, paragraph 54 1.1, Volume 1, is particularly instructive. It was noted that the Court's function in judicial review proceedings is supervisory and not appellate in nature.
- [34] In the case of **Associated Provincial Picture Houses Limited v Wednesbury Corporation** [1948] 1 KB 228, the principle was framed in this way;

"What then is the power of the Courts? They can only interfere with an act of executive authority if it is shown that the authority has contravened the law. It is for those who assert that the local authority has contravened the law to establish that proposition. On the face of it, a condition of the kind imposed in this case is perfectly lawful. It is not to be assumed prima facie that responsible bodies like

observed in carrying out his functions as the Commissioner of the Jamaica Constabulary Force.

(a) *Were the Regulations followed?*

[38] Regulation 47 of the Police Services Regulations, 1961 stipulates that:

47.(1) *Subject to the provisions of these Regulations a member may be dismissed only in accordance with the procedure prescribed by this Regulation.*

(2) *The following procedure shall apply to an investigation with a view to the dismissal of a member-*

(a) *the Commission or, in relation to a member below the rank of Inspector, the Commissioner (after consultation with the Attorney-General if necessary) shall cause the member concerned to be notified in writing of the charges and to be called upon to state in writing before a specified day (which day shall allow a reasonable interval for the purpose) any grounds upon which he relies to exculpate himself;*

(b) *if the member (being of or over the rank of Inspector) does not furnish such a statement within the time so specified or he fails to exculpate himself the Governor-General shall on the recommendation of the Commission appoint a Court of Enquiry consisting of one or more persons (who may include the Commissioner, or other Officer) to enquire into the matter; the members of the Court shall be selected with due regard to the rank of the member concerned, and to the nature of the charges made against him;*

(c) *if a member below the rank of Inspector does not duly furnish such a statement as aforesaid or if he fails to exculpate himself the Commissioner shall appoint a Court of Enquiry (constituted as under sub-paragraph (b)) to enquire into the matter;*

(d) *the Court shall inform the member charged that on a day specified the Court will enquire into the charges and that he will be permitted to appear before the Court and defend himself;*

(e) *if witnesses are examined by the Court the member shall be given an opportunity of being present and of putting questions to the witnesses on his own behalf, and no documentary evidence shall be used against him unless he has previously been supplied with a copy thereof or given access thereto;*

(f) *the Court may in its discretion permit the member charged or the person or authority preferring the charges to be represented by another member or by a member of the public service or by a solicitor or Counsel and may at any time, subject to such adjournment as in the circumstances may be necessary, withdraw such permission; so, however, that where the Court permits the person or authority preferring the charges to be represented the member charged shall be given the like permission;*

taken against him. To this end, he was to be further notified of the charges, if any, for which he should be called upon to answer.

[41] By way of letter dated 24th February, 2011, from the Commissioner's office, Mr Burton was informed that disciplinary charges were laid in accordance with Regulation 47 and he had the option to make a statement to exculpate himself no later than March 15, 2011. Attached to this letter, were the charges which were laid, statements from Sergeant Walker and Constable Cohen and a copy of the Portmore Station Diary. On the 15th March, 2011, Mr Burton acknowledged service of the charges, statements and a copy of the Station Diary. He also chose to reserve his defence until the hearing.

[42] The Court of Enquiry proceedings began on the 29th June, 2011 and ended on 5th October, 2011. Notes of the Proceedings indicate that Mr Burton was present on all occasions and was represented by a member of the Police Federation at each hearing. This representative was allowed to cross examine witnesses and at the end of the trial, Mr Burton and his legal representative chose to rest his case on the No Case Submission made on his behalf.

[43] Therefore, I find that all the requirements of Regulation 47 have been met.

(b) *Were natural justice principles observed?*

[44] In **Lloyd v McMahon** [1987] AC 625 (pp702-3) it was said that

"My Lords, the so called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when anybody, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depend on the character of decision making body, the kind of decision it has to make and the statutory or other framework in which it operates. In particular, it is well established that when a statute has conferred on anybody the power to make decisions affecting individuals, the Court will not require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional safeguards as will ensure the attainment of fairness."

delay between September 2006 when the altercation took place and January 2011 when Mr Burton was first informed that disciplinary action would be taken against him. I have considered that the delay was largely administrative and to some extent involved internal investigation done by the JCF themselves before charges were laid. In particular, Dr. Williams noted that Corporal Reid would not comply with the investigation and this accounted for some of the delay as well as the backlog in cases to be investigated. The question is whether this Court, having considered the reasons submitted, would agree that the delay is unreasonable.

[49] I have considered that Corporal Reid was charged as well and understandably reluctant to cooperate. Also, the JCF is a large organisation and based on Dr. Williams' evidence of reduced human resources, the investigation process was not as efficient as it should be. As such, I do not find that the explanation for the delay, based on the evidence, is unreasonable having regard to the circumstances presented before me.

[50] Is there prejudice as a result of this delay? I have not accepted the Claimant's arguments on this point as being legitimate in terms of the delay affecting the availability of witnesses since it not reasonable to presume that he had other witnesses and he has not indicated otherwise. In any event, I am not sure what prejudice would have arisen as the case would still depend on the credibility of witnesses and he himself did not give evidence. I will not delve into the specifics of the hearing itself but as I see it, Mr Burton did not raise any issues of witnesses being in or around the area at the time of the incident nor did Sergeant Walker and Constable Cohen. As such, I find that there was no prejudice to the Claimant as a result of the delay in the disciplinary proceedings.

(ii) Was the Claimant given an opportunity to be heard

[51] Mr Burton contended that he was not allowed to call evidence of his good character at the hearing from Sergeants Richie and Allison. As such, the Court of

[54] In determining whether the Commissioner of Police acted ultra vires, it is necessary for the Court to examine whether he acted irrationally and/or illegally in the circumstances.

(a) *Irrationality*

[55] Lord Diplock, in the case of **Council of Civil Service Unions v Minister for the Civil Services** [1985] AC 374, said

"By "irrationality" i mean what can now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standard that no sensible person who had applied his mind to the question to be decided could have arrived at it."

[56] There are two issues of fact which will aid the Court in making a determination under this head. Firstly, can it be said that the matter was brought to a conclusion by ASP Bent before the Commissioner of Police was involved and secondly, was the decision of the Commissioner so unreasonable that no other tribunal could have reached the same decision based on the circumstances that presented themselves.

(i) Were summary proceedings conducted prior to the decision of the Court of Enquiry

[57] The Claimant says that he was informed that Sergeant Walker and Constable Cohen made a report to Superintendent Terrence Bent (as he then was). He says he was asked to apologise to Sergeant Walker and did so. As a result, he believed that the matter was closed. However, Superintendent Bent denies that he spoke to Sergeant Walker and Constable Cohen in relation to the matter. He further denies that he was involved in the matter as based on the report made to him by Mr Burton; the allegations did not meet the threshold for him to get involved.

minor. With respect to the offences levied against Mr Burton however, it can be said that by their very nature, they are not considered minor offences. The charges outlined are by no means captured within the context of the Regulation. I cannot agree with Mr Burton that the charges would fit into Regulation 46 at all.

[62] Secondly and perhaps notably, the Commissioner made it clear from his letter to Mr Burton dated the 24th February, 2011 that the proceedings against him were being conducted in accordance with Regulation 47. What the Court is to consider is whether the decision is one that is proportionate to the powers granted to the Commissioner in Regulation 47. Based on this Regulation itself, I find that it indeed does.

(b) *Illegality*

[63] In the case of **Council of Civil Service Unions v Minister for the Civil Services** [1985] AC 374, Lord Diplock said:

"By illegality as a ground for judicial review, I mean that the decision-maker must understand correctly the law that regulates his decision making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable."

[64] The head of illegality in the context of Judicial Review proceedings takes into account 1) whether the Commissioner considered irrelevant factors in coming to his decision, 2) whether the Commissioner failed to consider relevant factors in coming to his decision, and 3) whether the Commissioner acted in bad faith and used his powers for an illicit purpose.

[65] Having concluded above that the Commissioner has the power to dismiss Mr Burton in accordance with Regulation 47, I will now look at the factors which were considered. I will just say from the outset that item 3 was never proposed as an issue before the Court and there is no evidence before the Court to support its applicability. For this reason, I cannot say whether the Commissioner acted in bad faith or used his powers for an illicit purpose. Similarly, there is no evidence

[68] I will address the request for an order of mandamus as a matter of completeness. Based on the fact that I find that there is no procedural impropriety, irrationality or illegality in the decision making process which led to the dismissal of Mr Burton, it would mean that he is not entitled to any of the orders sought, particularly, an order of mandamus. According to **Halsbury's Laws of England: Judicial Review** (Volume 61 (2010)) : 5. Judicial Remedies:

"A mandatory order is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or it to do some particular thing specified in the order which appertains to his or its office and is in the nature of a public duty. Whereas the older authorities were concerned with restoration, admission and election to offices and delivery up and production and inspection of documents, in modern times the purpose of a mandatory order is to compel the performance of a public duty, whether of an inferior court or tribunal to exercise its jurisdiction, or that of an administrative body to fulfil its public law obligations. It is a discretionary remedy.

An applicant for judicial review may seek all or any of the prerogative orders either in the alternative or cumulatively with each other, as well as with any other remedies available on an application for judicial review. It is common practice to apply for a quashing order and a mandatory order together."

[69] In a case at bar, the effect of an order of mandamus is such that it gives effect to Mr. Burton's reinstatement which would serve to usurp the Commissioner's decision not to re-enlist him as a member of the JCF. The issue would then be, is there an automatic right to re-enlistment? The answer is no. The reason for this was succinctly outlined in the case of **Glenroy Clarke v Commissioner of Police and Another** (1996) 33 JLR 50 by Carey JA who said:

"There is no such right as an automatic right to re-enlistment. Approval should be and doubtless is granted where the conduct of the member is satisfactory. The level of conduct or performance is to be determined by the Commissioner and the Court has no power to set the standard or acceptable conduct in the force."

[70] Even if I had found that Mr Burton was given an unfair hearing, the Court would still not be able to grant an order of mandamus for the very reason that the Court has no jurisdiction to determine the standard of members of the JCF. This was an important point underpinning the findings outlined in the case of **R v the Commissioner of Police ex parte Courtney Ellis** [2014] JMCS Civ. 97.