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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E. 106A OF 1985

BETWEEN	ACTING CORPORAL HUGH CAMPBELL	PLAINTIFF
A N D	SUPERINTENDENT OF POLICE i/c KINGSTON CENTRAL DIVISION	FIRST DEFENDANT
A N D	THE COMMISSIONER OF POLICE	SECOND DEFENDANT
A N D	THE HONOURABLE ATTORNEY GENERAL FOR JAMAICA	THIRD DEFENDANT

Mr. Garth Lyttle for the Plaintiff

Mr. Range Langrin, Q.C. and Mr. Douglas Leys for the Defendants.

HEARD: October 22nd and November 8, 1985

DOWNER J.

THE ISSUES

Does a Sub-Officer have the right to a fair hearing before the Commissioner of Police exercises his undoubted power to make him cease to be a member of the Constabulary Force after he has completed his first five (5) years of service? The course of the Common Law suggests that there is such a right and if this be so, the plaintiff is entitled to a declaration that the Commissioner's action on the 12th March, 1985 in refusing to approve his continuance in the Police Force was null and void. But even if the right to a fair hearing exists, the plaintiff has a further hurdle, in that Mr. Langrin for the Respondents contends in an alternative submission for the defendants, that the requirements for natural justice was complied with in these proceedings. We must examine the relevant facts, the common law and subsidiary legislation and the Acts of Parliament to determine whether this seemingly audacious claim has any merit in the eyes of the law. It important to emphasize at the outset that it is the supervisory jurisdiction of the Court which has been invoked by an Originating Summons, and this Court is only concerned as to whether the correct procedures were followed. As there can be no appeal from

the Commissioner's decision, the merits or demerits of his action cannot be questioned in these proceedings.

The plaintiff seeks a number of declarations, but the substance of these, is that he seeks a declaration that he is still a member of the Constabulary Force with an application for re-enlistment to be considered by the Commissioner in accordance with law, and a further declaration that he is entitled to his emoluments from the 12th of March, 1985. In opposing the plaintiff's prayer, Mr. Langrin contended that natural justice is applicable to cases of dismissal only and not a desire for re-enlistment as well as the alternative submission adverted to.

THE RELEVANT FACTS

The affidavits disclose that the plaintiff was sworn into the Constabulary Force on the 17th March, 1980 and since then has attained the rank of Acting Corporal. In January, 1985 he applied to be re-enlisted for a further five years. That application was considered at first by the first defendant Superintendent Cowan. In considering the matter, the Superintendent examined adverse entries in the record of the plaintiff and he noted them as follows:-

1. Failing to hand over service revolver and 12 rounds .38 cartridges on 19.5.81 on completion of his tour of duty. Deprived of two days'pay.
2. Failing to hand over S/R # 6820υ and 12 rounds .38 cartridges on the completion of duty on 25.11.84. Deprived of one day's pay.
3. Disrespectful to a Senior in rank in the Guard room at the Central Police Station on 27.12.84 at about 5:30 p.m. Deprived of two days' pay.

4. Conducted himself in a manner prejudicial to the Good Order and discipline of the force, whilst on duty at the Guard Room Central Police Station on Thursday 27th December, 1984 at about 5:30 p.m. by using insulting words to a Senior in rank who was dressed in uniform at the time. Deprived of two days' pay.

Court of Enquiry pending, for failing to comply with lawful order given by a Senior in rank.

In a report to the Assistant Commissioner of Police, the Superintendent while pointing out that the plaintiff's discipline and conduct were poor, stated that he was of average intelligence and performed his duties fairly well. More importantly, he observed that he had spoken to the plaintiff concerning his conduct and anticipated that he would turn over a new leaf and improve. Additionally, he recommended that the Sub-Officer be re-enlisted. This recommendation was dated 30th January, 1985 and on the 16th of February, the Superintendent sent a notice to the plaintiff under the caption - Re: Your discipline and conduct. In this notice, it was pointed out to the plaintiff that his discipline and conduct were regarded as unsatisfactory, that he was inclined to ignore instructions from seniors and resented corrections. Significantly, only items 1, 2 and 3 in the memorandum to the Assistant Commissioner was brought to the attention of the plaintiff. Moreover, he was warned that his application for re-enlistment might not be considered, and he was required to reply to the above within seven days. This document is of importance, because Mr. Langrin, argued with force that this notice was sufficient to satisfy the requirements that the plaintiff be given a fair hearing. But the first point to note is

that, the fourth item in the adverse report was taken into account by the Commissioner and it was never forwarded to the plaintiff so that he could comment on it and accept or deny his involvement on that charge. This is similar to the situation in Kanda v. Government of Malay (1962) A.C. 322 - 388 as in that case a finding of the Board of Enquiry was forwarded to the Adjudicating Officer but never forwarded to the plaintiff, and the Privy Council held such an action amounted to a denial of natural justice. But there is a more fundamental observation to be made about the notice, nowhere in the document was it brought home to the plaintiff that if he desired an oral hearing it might have been granted, nor does it bring home to the plaintiff that his re-enlistment would have depended on any oral or written submissions that he may have made. The caption is misleading since it merely mentions discipline and conduct, when the subject matter was the plaintiff's application for re-enlistment. It is not surprising that in replying on the 4th of March, the Sub-Officer merely acknowledged the three convictions brought to his attention, pointed out that this was the first time he was spoken to about his conduct and stressed that he was now a different person and that his Seniors had made observations to that effect also. Additionally, he stated that he was now a force for good to enlighten his juniors so that they could maintain good discipline. In this regard the case of Bonaker, Clerk v. Evans 16 (1854) Q.B. 162 at 173 is instructive. It reads thus:-

> " But then it is contended that prior to the issuing (of) the sequestration, the incumbent had the sufficient opportunity which the law requires, as the letter of the defendant, the Bishop's secretary, sent to the plaintiff prior to the issuing of the sequestration, ought to be considered as affording him an ample opportunity of making his defence.
>
> We do not mean to say that the Bishop was bound to proceed to hear the charge with the same formalities as are adopted in proceedings

> before Courts. No greater degree of form can be requisite than is sufficient to justify a superior in removing an inferior officer for delinquency, a rector, for instance, before he removes a parish clerk. But it is essential that the charge should be intimated to the supposed delinquent, and that he should have a fair opportunity of refuting it. Does then the letter in question answer this description? We think not. It does not purport to call upon him to deny or excuse his wilful absence, or the disobedience of the monition, before or to the Bishop, or else a sequestration would issue; but it is written alio intuitu, to threaten him with with a sequestration unless he should reside. We do not think that this amounts to that hearing of the party accused which the law requires."

The Superintendent obviously impressed by the A/Cpl. and after having a personal interview, stated that the Sub-Officer had shown a marked improvement in discipline and conduct and that after having a conversation with him, declared that he had discovered certain aspects which could have resulted in his past behaviour. Further, he stated that the plaintiff was turning over a new leaf, had shown improvement and re-iterated that he recommended his re-enlistment. It would have been helpful if the Superintendent had told us in what areas there were improvements, if he had made a note of the conversation and if he had explained the aspects which resulted in the past behaviour. If that was done, it would have ensured that apart from his recommendation, the Commissioner would have had a more accurate portrait of the plaintiff before he refused to approve his re-enlistment. On March 28, 1985 the Superintendent was sent a letter by the plaintiff's Counsel pointing out his entitlement to a fair hearing, but prior to that, on 6th March, the Commissioner of Police had received and reviewed the plaintiff's application for re-enlistment. He considered all four convictions in the adverse report and noted that despite the favourable recommendations of the Superintendent, he had decided that the Acting Corporal would not be an asset to the Jamaica Constabulary Force. Nowhere does the Commissioner

indicates that he even took into account the plaintiff's letter of the 4th March in so important a matter. It is against this background that we must now examine the legal issues.

THE LAW APPLICABLE

The authorities on this aspect of administrative law are now so well developed that it is possible to formulate the general principle and illustrate the rule by the decided cases. The rule is that whenever a public authority or tribunal - whether statutory, non-statutory or domestic is empowered to make a concession or grant a privilege, then an applicant who legitimately expects such concession or privilege, is entitled to the procedural protection of a fair hearing before a decision is made against him. Any such decision which ignores this procedural protection will be quashed or declared null and void.

Legitimate expectation although not labelled as such, was always well known in private law. It was the principle of the decision to award substantial damages, in Chaplin v. Hicks (1911) 2 K.B. 786 where it was decided that such damages could be awarded where the plaintiff was wrongfully prevented from belonging to a limited class - which gave rise to the legitimate expectations and therefore she was denied of the opportunity of obtaining a prize.

So far as a right to a fair hearing before a domestic tribunal was concerned, the concept was recognized in the case of Weinberger v. Inglis (1919) A.C. 606. This was a case where the plaintiff had sought to be re-elected a member of the Stock Exchange. Although his application was rejected on the basis that he was born in Germany and of enemy birth, in a striking passage at page 616 Lord Birkenhead had this to say:-

> " Had the enquiry been pursued, I should have thought it necessary to consider whether the member had not in addition contracted with the

> Committee to purchase, the expectation that he would in due course be re-elected, unless the Committee concluded in good faith and after considering the matter properly that he was not eligible for re-election."

After observing that the sole question which was considered was that the appellant was of enemy birth, Lord Birkenhead, L.C. said:-

> " I may add, that if I took the view that the appellant was condemned upon grounds never brought to his notice, I should not assent to the legality of this course, unless compelled by authority. "

Lord Wrenbury at page 644 in the same case illustrates the underlying principle thus:-

> " Thus on the other hand he enjoys an [illegible] anticipation - and I have no doubt a very well-founded anticipation - that the Committee (who by authority given by the proprietors are appointed by his own class - by the members) will not only in fair treatment of himself, but in the interest also of the business of the proprietors and of the profitable occupation and user of their premises give all reasonable effect to the consideration that he has paid a substantial sum for a membership which is the basis of his business existence, and that while he has no legal claim he has a business claim to re-election in the absence of good reasons to the contrary. He has a tenure based upon no legal right of continuance, but resting upon sound business considerations which must be taken to have considered satisfactory when he paid his entrance fee. "

It is against the background of this neglected case of high authority that we must examine the concept in administrative law. It was first used by Lord Denning, M.R. in Schmidt v. Secretary of State for Home Affairs (1969) 2 W.L.R. 337 and applied in Attorney General of Hong Kong v. Ng Yuen Shiu (1983) 2 W.L.R. 735. Here the Privy Council decided that a legitimate expectation arose where the Hong Kong Government expressly promised that illegal immigrants would be interviewed and given an opportunity to make representation why they should not be removed before a

deportation order was made. Both the Hong Kong Courts and the Privy Council ruled that this expectation was sufficient to establish a right to a fair hearing. Further, in Council of Civil Unions v. Minister for the Civil Service (1984) 3 W.L.R.1174, the House of Lords decided that where it was the general practice to consult Civil Servants before there was any alterations in their status, then there was a legitimate expectation that this practice would continue and before any discontinuance, public servants would have a right to be heard even though they could be dismissed at pleasure, and although their expectations were not rights which could be protected in private law, in this instance however, the House of Lords ruled that the claims of national security had precedence over natural justice.

The Court of Appeal in England also has made judicial pronouncements as to the right to a fair hearing in instances where the application is for the renewal of a licence which is analogous to the instant case of an application for re-enlistment. In Schmidt & anor v. Secretary of State for Home Affairs (1969) 2 W.L.R. 337 - 353, WIDGERY, L.J. in explaining how the concept would be applied in these circumstances, made the following remarks:-

> " It is true, as he (Mr. Hogg) pointed out in his reply, that in some of the licensing cases there is an indication that a renewal of a licence raises different considerations from the first grant of licence, and I fully accept that that may be so in cases where renewal is something which can reasonably be accepted by the possessor of the licence and where the facts are such that a refusal of renewal is tantamount to the withdrawal of a right which the applicant legitimately expected to hold. "

The principle of legitimate expectation is also applicable to a prisoner who challenged the decision by a Prison Board of Visitors awarding him a loss of remission of sentence although there was no legal right to remission, but a legitimate expectation of

receiving it - See Reg. v. Board of Visitors of Hull Prison Ex Parte St. Germain (No.2) (1969) 1 W.L.R. 1041. These cases demonstrate that even though there is no right or interest enforceable in private law, the Courts will on an application for judicial review, declare administrative action invalid if a fair hearing was not part of the procedure whereby the decision was made.

The issue in this case is whether on the true construction of paragraph 575 of the Jamaica Constabulary Force Rules and Regulations (1939), (Jamaica Gazette July 39, 1939) a Constable who has enlisted five years has a legitimate expectation that the Commissioner will give approval to extend his service if he so desires and that in coming to the decision if the Commissioner is minded to disapprove, he is entitled to a fair hearing although he has no enforceable right in private law. The relevant paragraph reads as follows:-

> 575. " A Constable is enlisted for a term of five years, and during that time he cannot leave the Force except for physical disability. At the end of this term if he so desires and if the Inspector General (Commissioner) approves, he will be allowed to extend his service."

Implicit in the phrase 'if he so desires' is the necessity for the Constable to speak with or write to the Commissioner who is empowered to decide. A necessary implication of the power to approve is that there must be a fair hearing by the Commissioner before an adverse decision is taken. As for legitimate expectation, Lord Birkenhead in Weinberger said that the plaintiff had purchased an expectation that he would be re-elected and Lord Wrenbury was equally emphatic that the plaintiff enjoyed a very well founded anticipation to be re-elected. The instant case is even stronger, for the legitimate expectation concerns a public office where both by statute and by the common law

principles of natural justice apply to a dismissal or refusal to renew which in substance is a dismissal. See Ridge v. Baldwin (1963) 2 W.L.R. 933 for dismissal and Weinberger for renewal. What was the basis of his legitimate expectations? During the period of five years he could not have withdrawn himself from the force, save under special conditions. He has risen from the rank of a Constable to that of an Acting Corporal and he was not in breach of Section 6 of the Constabulary Force Act whereby his post was held to be automatically vacant because he was absent for over forty-eight hours without a satisfactory explanation. His commanding officer whose position is recognized by Section 14 of the Act had reported that he was in good health and had twice recommended that he be re-enlisted. None of these features gave him a legal right or interest to continue in the police force, but it was the basis of a legitimate expectation that his service would be extended. Moreover, on the basis of the cases referred to, once he has expressed the desire to re-enlist and there were doubts on the Commissioner's mind as to whether approval would be given, then the common law ordains that he be given a fair hearing so that he can present his case to attempt to pursuade the Commissioner to re-enlist him.

Because of Mr. Langrin's submissions, I should emphasise that this Court in exercising its supervisory jurisdiction is not attempting to substitute its decision for that of the Commissioner. What is being stressed is, the manner or procedure by which the decision is arrived at, and if there be not a fair hearing in these circumstances, the decision will be held to be null and void and the Commissioner must start all over again to consider the matter by going through the correct procedures. In so doing, no one doubts the Commissioner's integrity and impartiality to arraive at

a just decision, nor should the Commissioner be embarrassed at all because he made an error in law. It is a matter on which even High Court Judges have erred, see Mahon v. Air New Zealand Ltd. (1984) 3 W.L.R. 884 as well as the Archbishop of Canterbury, see the Queen v. Archbishop of Canterbury 1 Ellis v. Ellis (1858-1859) 545.

It is clear from the Commissioner's own affidavit that the applicant was never accorded a fair hearing. But Mr. Langrin strenuously contended in the alternative that the Constable's reply to the notice on discipline and conduct fulfilled the requirements for natural justice. My ruling was that, the notice was inadequate. A further reason was that as Mr. Lyttle suggests, the penalties which were imposed were those described as minor offences dealt with summarily by the Commissioner, and that the proceedings for dismissal stipulated in 46(1) of the Regulation could not have been invoked. (See the Police Service Regulations Proclamations Rules and Regulations [1961]). At this point, I think I should make it clear as Mr. Lyttle may wish to re-iterate his submission on appeal that he contended, that paragraph 46(1) applied to the circumstances of this case on the basis that a refusal to approve a continuance of the plaintiff's service was in substance a dismissal. I rejected that contention, and prefer to decide the case on the application of the common laaw principles that before a refusal to re-enlist him, since he had legitimate expectations to be re-enlisted, he should have been accorded a fair hearing.

CONCLUSION

Counsel informed me that this case was in the nature of a test case. There are twelve other cases filed in the Supreme Court with similar circumstances which are awaiting the outcome of these proceedings, so I thought it appropriate because of the

importance of the subject matter to deliver this judgment in open court. The declarations sought against the Superintendent i/c of Kingston are odd and I have refused them. The declarations I am prepared to grant are:-

1. That Acting Corporal Campbell's application for re-enlistment should be reconsidered by the Commissioner and that he be accorded a fair hearing, as the original decision of the Commissioner was null and void.
2. That Acting Corporal Campbell is entitled to his emoluments from the date when the Commissioner purported to reject his application to be re-enlisted.

The plaintiff must have his costs which are to be agreed or taxed.