[2017] **JMSC Civ. 201**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2013 HCV 05426

IN THE MATTER of the Constitution of Jamaica and the Regulations made there under.

AND

IN THE MATTER of the Jamaica Constabulary Force Act and the Regulations made there under

AND

IN THE MATTER of the interdiction of Constable Barrington Dixon

AND

IN THE MATTER of an Application for permission to apply for Judicial Review

BETWEEN	**BARRINGTON DIXON**	**CLAIMANT**
AND	**THE COMMISSIONER OF POLICE**	**1ST DEFENDANT**
AND	**THE ATTORNEY GENERAL**	**2ND DEFENDANT**

Mrs. Leith Palmer instructed by Kinghorn and Kinghorn for the Claimant

Miss Lisa White instructed by the Director of State Proceedings for the 1st and 2nd Defendant

Heard: February 5 and 27, 2014 and November 3, 2017

Leave for Judicial Review – Certiorari - Civil Procedure Code 56 – Sec. 5, 26, 35, 37 of the Jamaica Constabulary Force Act and Reg. 46 and 47 of the Police Services Regulations 1961 Interdiction – Notice of Non recommendation of Re-enlistment – Poly graph testing

Daye, J.

[1] On the 4th October 2013 the claimant, a police constable, filed a Notice of Application for these Court Orders:

i. That he be granted permission to apply for Judicial Review of the decision of the Commissioner of Police of the 14th August 2013 not to recommend his Application for re-enlistment in the Jamaica Constabulary Force; and

ii. Any other relief the court deem just.

iii. That the commissioner be compelled to re-enlisting him for 5 years or such other appropriate period.

iv. An Interim Order that he receive his salary until determination of this matter.

[2] This notice was sent to the Commissioner of Police and the Attorney General of Jamaica.

[3] The claimant enumerated four grounds on which he based this application.

[4] The substance of these grounds are that he was not given a fair hearing before the decision was taken not to recommend his re-enlistment. In addition the claimant contended the refusal to recommend his re-enlistment was based on grounds that were unreasonable, unlawful and unconstitutional.

[5] The Commissioner's letter of the 14th August 2013 to the claimant captioned "*Notice of non-recommendation of re-enlistment*" inform the claimant among other things, that:

> ***"However, the Police Service Commission has directed that the proceedings pursuant to your recommended retirement be discontinued and that your application for re-enlistment be denied."***

[6] Seventeen (17) sub-paragraphs contain the reasons for this decision. The reasons recounted the history that the police constable was charged for breaches of the Corruption (Prevention) Act on the 11th November 2009 arising from a Road Traffic incident with a motorist. That he was dismissed of the charge i.e. the Magistrate's Court for the parish of St. Catherine on the 25th August 2011 because of the complainant's death. Then the reasons stated more specifically:

> ***"14. That the allegations for which you were before the Court, even though not properly ventilated because of the complainant's death are quite serious.***
>
> ***15. That the matter cannot be suitable addressed in a disciplinary hearing because of the complainant's death and difficulty will be experienced in securing the attendance of witness Peter Calloo o/c 'Indian'.***
>
> ***16. That there is reasonable cause to infer that you have no interest in cooperating with the organization in establishing the integrity of your character because you have not made yourself available for polygraph testing on four (4) separate occasion as requested by the Assistant Commissioner of Police, Anti-Corruption Branch.***
>
> ***17. That subsequent to the request being made for polygraph testing you have not submitted yourself, done anything to date concerning the request for polygraph testing to be done.***
>
> ***18. Under the circumstances the High Command of the Jamaica Constabulary Force has lost confidence in your ability to discharge your function as a police officer to serve and protect. Further the High Command is of the view that***

your usefulness to the Jamaica Constabulary Force has been considerably impaired."

[7] The reference in this Notice disclose that there is some background to the Commissioner of Police refusal to re-enlist the police constable.

[8] The Commissioner in his evidence on Affidavit dated 21st February 2014 explained that he made the decision that the police constable's application for re-enlistment was not approved. He exhibited a copy of this decision of the 20th November 2013 that was addressed to the police constable. This letter in effect ratified the letter containing the notice of non-re-enlistment dated August 14, 2013.

[9] Prior to this Notice of non-recommendation to re-enlist the police constable was served a notice of interdiction on the 8th July, 2011 on the grounds that steps "were being taken to effect his retirement from the Jamaica Constabulary Force in the Public's interest". The Attorney on behalf of the police constable questioned the basis of the steps to retire his client in the public interest in a letter of the 15th September 2011. The response from the Police High Command was to issue letters to the police constable to attend at their office for an interview and to take a polygraph test.

[10] Constable Barrington Dixon was first enlisted in the Force on the 18th August 2003. It is reasonable to infer that he re-enlisted in 2008. He applied again for re-enlistment, the present application in issue, on the 2nd May, 2013.

[11] On the 11th November 2009 he was arrested and charged on the 18th November for breach of the Corruption (Prevention) Act. He was suspended pending the trial of the matter without pay.

[12] On 29th August 2010 the charges against him were dismissed in the St. Catherine Resident Magistrate's Court. From that time through his Attorney-at-Law he repeatedly requested that the Commissioner re-instate him to his duty. The correspondence between his attorney exhibited to his affidavit and the

Commissioner of Police reveal that steps was taken to retire him in the public interest. He protested in writing about this action as being unfair as the reasons for this course was based on the criminal charge for which he was dismissed.

[13] The issue is whether the police constable in all the circumstances was entitled to be granted leave i.e. permission for judicial review of the Commissioner's decision not to recommend his re-enlistment in the force.

TEST

[14] Lord Bingham of Cornhill and Lord Walker of Gestingthorpe in the Privy Council decision **Sharma v Brown-Antoine and Ors**. (2006) 69 WIR 379 formulated the test for leave for judicial review as follows, para. 14:

> ***"(4) The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy: R v Legal Aid Board, Ex p Hughes (1992) 5 Admin LR 623, 628; Fordham, Judicial Review Handbook, 4th ed (2004), p 426. But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application. As the English Court of Appeal recently said with reference to the civil standard of proof in R(N) v Mental Health Review Tribunal (Northern Region) [2005] EWCA Civ 1605, [2006] QB 468, para 62, in a passage applicable mutatis mutandis to arguability:***
>
> ***"… the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities."***

> ***It is not enough that a case is potentially arguable: an applicant cannot plead potential arguability to "justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory processes of the court may strengthen": Matalulu v Director of Public Prosecutions [2003] 4 LRC 712, 733.***

DISCRETIONARY BAR

[15] Delay in commencing its Application for leave may result in refusal of the application. Also if leave will not produce a practical result the court may also refuse the application at this stage. So too the availability of an alternative remedy is likely to cause the judge to exercise his/her discretion to refuse the application.

[16] **Campbell J in Regina ex parte Livingston Dwayne Small v Comm. of Police and the Attorney General** CL 2003/HCV 2362 del. Sept. 2006 applied these bar to the facts of an application before him. He refused leave for the applicants to commence proceedings for judicial review (p.11-14. A student constable of police in training at the police academy was dismissed for misconduct)

ALTERNATIVE REMEDY

[17] The learned judge examined the basis for the discretion bar of alternative remedy. He said at para 15 adapting the words of Lord Oliver in **Leach v Deputy Governor of Pankhurst Prison** (1988) AC 533 of 580c

> ***"An alternative remedy … may be a factor, and a very weighty factor, in the assessment of whether the discretion ... to grant or refuse judicial review should be exercise, (R v Chief Constable of Maryside Police ex parte Coverly (1986) 1 All ER 257."***

Straw J. referred to and accepted Campbell J's reasoning of the basis for an alternative remedy for judicial review in Malica Reid v INDECOM, the Attorney General, DPP, Isiah Simms and Eric Daley, Cl. 2011 HCV 00981 del March 18, 2011 at para 19-20:

> ***"The adequacy of the alternative remedy to deal with the question that is raised in the given case is a vital consideration. If the alternative remedy is not suitable or effective, then there will be no bar to the Applicant seeking relief by way of judicial review ..."***

[18] The learned Judge went on to apply the following test used by Beatson J in **Reginal (on an Application by J D Whetherspoon plc) v Guilford Borough Council** 2006 EWHC 815 admin para 905

> ***"The test whether a claimant should be required to pursue an alternative remedy in preference to judicial review is the "adequacy" 'effectiveness' and suitability of that alternative remedy ... it was said that the test can be boiled down to whether the real issue to be determined can sensible be determined by the alternative procedure and in R v Nowham LBC ex parte R 1995 ELR 156 at 16B, that is whether the alternative statutory remedy will resolve the question at issue fully and directly"***

ISSUE

[19] The issue is whether the applicant Constable Barrington Dixon has an arguable ground for judicial review with a reasonable prospect of success and to which there is no discretionary bar.

SUBMISSION

[20] Counsel Miss Lisa Whyte submitted in terms of respondent written skeleton argument filed 5th February 2014 that the application for leave for judicial review should be refused. She structured her submission under ten headings:

a) The notice of application for court order is not properly constituted.

b) The application is premature

c) The applicant has not placed the discussion before the court

d) There is no arguable grounds

e) The premise in which apply to for leave is not yet crystallised

f) The heading of the matter is not connect

g) The court does not engage in academic exercise

h) The Attorney General is not a proper party

i) No provision of the constitution court bear identifying that is breached

j) Procedural errors.

[21] A recurring theme that runs through the respondent's submission is that the letter with notice of non-recommendation to re-enlist the applicant is not a decision. The commissioner of police did not make any decision not to re-enlist the applicant at the time he applied for judicial review. In each paragraphs 24-40 under the heading there is no arguable case counsel relied or the claim that only the commissioner of police has the sole authority to make an administrative decision not to re-enlist. She contented the recommendation of the Police Service Commission and or an Assistant Commissioner was not any such decision. Consistently will this submission she point out that no decision was exhibited.

[22] These submissions were foreshadowed at the first hearing. It is for these reasons that the court ordered that the decision not to re-enlist the applicant must be exhibited. This was exhibited in the Commissioner of Police Affidavit of February 2014. Furthermore the court granted amendment to the applicant's Notice of Application of Court Order to include the specific relief for judicial review. It means that the foundation of Miss Lisa Whyte's submission that rest on the claim there is no decision for review would fall away and all related submissions thereto.

[23] As to one (1) of her submissions she submitted that the applicant did not expressly identify the relief he is claiming or the order requested and thereby is in fatal breach of R 56 3(b) of CPR 2002 as amended.

[24] Under R. 56.1 (2) and (3) of the CPR 2002 a judicial review application falls under application for Administrative Orders. Judicial review includes the remedies for certiorari, prohibition and mandamus. Further any persons who had a right to be heard under any relevant law or the Constitution may apply for judicial review. The applicant would qualify under his present notice of application for a court order**.**

[25] The common law imply a legitimate expectation to a fair hearing in the Constabulary Force Act dealing with re-enlistment (per Downer J.

[26] Acting Cpl**.** Hugh Campbell v. Supt of Police i/c Kingston Central, The Commissioner of Police and The Attorney General Suit E 106 of 1985, delivered November 8, 1985.

[27] The constitution provides for judicial review of administrative action under section 9 per downer J.) The right to a fair hearing is protected right under section 20 of The Charter of Rights (per Morrison J.A. **The Police Services Commission and Ors. V. Donovan O'Connor** [2014] JMCA 35. Again the applicant would be entitled to file his application as he did on the basis of these provisions. This would dispose of both heading (i) and (g) of the respondent's submission.

[28] Beyond this rules gives the court the discretion to permit an amendment to the application (56 4(6)) to grant leave on such conditions or terms as appear just (56 4(8)) and give direction at any stage that the claim proceed by way of an application for an administrative order.

[29] The learned author Albert Fiadjoe, opined in **Commonwealth Caribbean Public Law (3rd Ed)** that judicial review is wider than the old prerogative order. He reasoned that a person having the relevant interest could apply for judicial review for the most suitable remedy and that could be a declaration, though certiorari may not be granted or is inappropriate.

[30] This view is soundly based and way followed by Straw J. in **Malica Reid** (supra) Counsel's submission on the points are formalistic. This approach does not

offend the restriction that judicial review should not be based on potential arguability. The other submission, on arguability as shown, are premised on the absence of a decision by Commission of Police and this falls away (heading (2)(3)(4)(5).

[31] The other submissions that the heading of the application describe the application as 'interdiction' is in errors (6) and (8) that the Attorney General is not a proper party can be corrected by a direction by a court to that the Fixed Date Form be amended.

[32] I do not find the remedy claimed is academic. There are real issue of arguability open to the applicant. Counsel Mr. Staple, an attorney then will the law firm representing the applicant submitted in correspondence exhibited to the applicant's affidavit pertinent points of law. He submitted that Reg. 35 and 37 of the Police Service Regulations as also Reg. 26 cannot be applied to ground a decision to refuse re-enlistment of the Applicant. He also submitted that the commission was attempting to retry the applicant. This is what he argued was unreasonable and is why the applicant did not get a fair hearing. No new ground was advanced in his notice of .....recommendation to re-enlist.

[33] One other ground was alluded to and that was the applicant's refusal to submit to an interview and to co-operate with the police to do a poly graph. The issue of the poly graph raised a real arguable point for the applicant as well as the Commissioner of Police.

[34] After the Police Services Commission decided that it was not appropriate to have a hearing to dismiss the applicant in the public interest because the complainant against him was deceased it referred and recommend that the matter be dealt with by the Commission on the basis of a refusal to re-enlist the applicant (See Reg. 47(2)(1)).

[35] The grounds for refusal to re-enlist are wider than dismissal for disciplinary reason. But it could be similar to dismissal in the public interest. Campbell J.

contemplated this in Ex parte **Livingston Dwayne Small** (supra). H said in response to Counsel's submission that his client did not commit any criminal offence.

> ***'It certainly cannot be that it is only a breach of the criminal or civil law or some expressed rule at the acade....., that would objectively ground a finding that a student constable is, in the opinion of the Commission found wanting in any such qualities as are likely to render him a useful member of the Force. In a consideration what must be one essential in a police officer's character, that is credit worthiness."***

[36] It seems that the issues of the credit worthiness of the applicant was at stake when he was dismissed of the criminal charges and when the hearing of the Commission was terminated and referred to the Commissioner. The Commissioner approach to this issue was to request a polygraph test which the applicant on legal ground refused. Something more was required to ground the refusal of applicant's application for re-enlistment. The applicant was still entitled to a fair hearing even in relation to the wider grounds that could be considered by the Commissioner. Should the Commissioner be ..... in his effort to obtain evidence to take a decision on the applicant's application? This is an issue that arises and provides an arguable ground for judicial review for the applicant. A balance has to be struck. Carey JA in ***Cpl. Glenroy Clarke v Commissioner of Police and the Attorney General*** (1996) 33 JLR 50 at p.54 para 7-9 put it this way:

> ***"Secondly a balance has to be struck between the interest of the individuals concerned and the national interest. The divulging of such confidential information may dry up the commissioner sources of information, his intelligence reports and, in the present environment in Jamaica might well lead to the elimination of these sources. The rules of natural justice which are flexible must be applied to all the circumstances of the case."***

[37] The present circumstance is that the applicant was dismissed of a criminal charge of corruption as the complainant is deceased and the witness not called. He is also dismissed of a disciplinary hearing to retire him in the public interest

on similar basis. Now he is requested to take a polygraph test to establish his credit worthiness to support his application for re-enlistment. The Commissioner has a duty to afford him a fair hearing. The Commissioner in the public interest must put forward reasons and evidence for the accused to answer. But the accused stand or his rights to refuse this polygraph test and or to submit to any other investigative process and his application to re-enlist is refused. It is open to him to argue that the rules of natural justice is and so inflexible to entitle him to a fair hearing.

[38] Based on the foregoing these are the Orders:

(a) Leave granted for Judicial Review

(b) Interim Order that the applicant be granted his salary from the date of his application for Judicial Review until the matter is determined.

(c) No order as to costs.

P.S. See Admissibility of poly graph evidence and dismissing on the reliability of Fry Test. Reference Manual scientific evidence 2d ed (2000) p.11, 1