[2024] JMSC Civ 82

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CIVIL DIVISION**

**CLAIM NO. SU2021CV04777**

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| **BETWEEN** | **TENROY DURRANT** | **CLAIMANT** |
| **AND** | **THE COMMISSIONER OF POLICE** | **1ST DEFENDANT** |
| **AND** | **ASSISTANT COMMISSIONER OF POLICE** | **2ND DEFENDANT** |

**Mr. Lemar Neale instructed by Nea Lex for the Claimant**

**Ms Lisa White instructed by the Director of State Proceedings for the Defendants**

**Heard: October 5, 2023 & July 19, 2024**

**Administrative Law – Judicial review - Whether delay bars grant of relief – Decision of Commissioner of Police not to confirm Constable on probation– Statutory Interpretation of The Police Service Regulations – Natural Justice – Meaning of show cause –Date of impugned decision is the date time begins to run– Deeming provision applies if Commissioner fails to act**

**Jamaica Constabulary Force Act, section 3(2)(a), The Police Service Regulations, 1961, Regulations 24(6)(a), (b), Civil Procedure Rules 56.6(7), (3)**

**WINT-BLAIR, J**

**[1]** The claimant filed a Fixed Date Claim Form seeking orders to move the decision of the Commissioner of Police ("CP") into the Supreme Court for judicial review for certiorari to have it quashed, and for a declaration that he was at all material times a confirmed member of the Jamaica Constabulary Force ("JCF".)

**[2]** The claimant was on probation in the JCF, the first defendant is the officer in the JCF upon whom the power of appointment, removal, and discipline in relation to members of the JCF has been conferred; and the second defendant is the Assistant Commissioner of Police ("ACP") in charge of Administration.

**The claimant's statement of case**

**[3]** The claimant commenced training on February 18, 2019 and was placed on two years' probation. On March 11, 2020, The claimant was posted to the St Mary Division.

**[4]** On November 10, 2020, the claimant received a warning notice from the Superintendent in charge of the St Mary Division. He was given seven days to respond in writing and three months over which to improve his conduct. The notice detailed matters from breaches of the curfew order under the Disaster Risk Management Act then in force on April 24, 2020; attending a gathering at a bar on June 27, 2020 in breach of the national curfew order; absence from lectures on October 23 and 30, 2020; wearing dirty shoes to a probationer's lecture, inappropriate attire; sporting a "mohawk" hairstyle; to removing car parts from a car in police custody, and funds from the strong pan held by the station guard. In addition, there was discomfort among members of the Castleton police station who worked with the claimant, in light of what was described as issues of trustworthiness. There was no written response from the claimant.

**[5]** Verbal responses were given by the claimant to his training officer who noted in a separate document that he had shown improvement in the issues regarding his

mode of dress and his hairstyle. There were charges related to absence from orientation between October 25 to 28, 2020 that were all withdrawn.

**[6]** On January 28, 2021, a notice of non-recommendation of confirmation set out certain allegations regarding the claimant's conduct and directed him to cease performing duties effective February 17, 2021, pending the resolution of the matter. This notice advised that his confirmation fell due on February 17, 2021, but that he would not be recommended to the CP. He was also required to respond within 14 days of receipt, to show cause why his dismissal from the JCF should not be pursued. This notice was served on the claimant on February 8, 2021.

**[7]** By letter dated February 21, 2021, the claimant's attorneys, wrote to the ACP in charge of Administration refuting the allegations and showed cause why he should not be dismissed. There was no response to this letter until after the claimant's attorneys again wrote to the first defendant on June 7, 2021.

**[8]** It was then that the claimant received a letter dated June 14, 2021 written on behalf of the first defendant which said that the matter had been referred to the second defendant and further communication would be in due course.

**[9]** By notice of discharge dated June 8, 2021, served on July 23, 2021, the claimant was notified that he was being dismissed from the JCF with effect from, February 18, 2021, pursuant to regulation 24(6)(a) of the Police Service Regulations, 1961[1]. The notice directed a response within 14 days of receipt, showing cause why he should not be discharged or to request a hearing with the first defendant.

**[10]** The claimant, through his attorneys, wrote a letter dated August 3, 2021, outlining the reasons he should not be dismissed from the JCF and requested an oral hearing with the CP and certain records within the possession of the ACP. There was no response to that letter nor was an invitation to a hearing with the CP extended.

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[1] Made under section 87 of the Jamaica (Constitution) Order in Council, 1959, preserved by section 2 of the Jamaica (Constitution) Order in Council, 1962

**[11]** The claimant submitted that based on his two-year probationary period his enlistment in the JCF became effective on February 18, 2021, pursuant to regulation 24(6)(b) of the Police Service Regulations, 1961 ("PSR") and as the claimant had carried out duties up to that date, he was enlisted by operation of law.

**[12]** Since being directed to cease performing duties pending the resolution of the matter, he has not received a salary with the result that he is experiencing serious financial hardship. The claimant argues that the notice of non-recommendation states that his dismissal is conditional upon him showing cause. Having done so he should not have been dismissed. Therefore, he reasonably expected a decision with reasons in relation to his letter of August 3, 2021, or an invitation to a hearing with the first defendant.

**[13]** The claimant contends that as he has not been dismissed from the JCF, he cannot engage in any other employment as it would be a conflict with his being a member.

**[14]** He challenges the decision not to recommend his confirmation to the CP as contained in the notice of non-recommendation dated January 28, 2021, as being unreasonable and irrational. The claimant argues that the decision was premised upon four orderly room charges which had been proven against him. These charges stemmed from his absence from duty between October 20, 2020, to October 23, 2020, without permission or lawful authority. The circumstances of his absence were due to no fault of his and he made efforts to communicate his absence to Superintendent Morgan.

**[15]** The said notice of non-recommendation of January 28, 2021, outlined other allegations such as his being seen at an illegal party, 'turning up dirty for lectures', sporting a 'mohawk' hairstyle and being seen on the streets in contravention of the Disaster Risk Management Orders. Notwithstanding these allegations, which he denies, there were no orderly room charges against him for these matters so that he could respond. The second defendant appears to have treated these allegations as proven and part of the reason for the decision not to recommend confirmation to the first defendant.

**[16]** Further, the decision to discharge him from the JCF to the extent that it is premised on the reasons outlined in the letter dated January 28, 2021, is arbitrary, unreasonable and irrational as the first defendant did not give him an opportunity to be heard nor were the reasons why he should not be discharged considered.

**[17]** In respect of procedure and delay, the claimant did not challenge the decision of the second defendant at the time as it was conditional upon showing cause or requesting a hearing. He understood that he was being provided with an avenue for redress and that if an alternate remedy was available, a court would be unlikely to entertain his application.

**[18]** The decision of the second defendant was overtaken by the decision to discharge him as contained in the notice of discharge dated June 8, 2021. Therefore, the claimant argued that he had 3 months from the date of the notice of discharge to challenge the decision to discharge him. The notice of discharge was served on him on July 23, 2021. The claimant exercised the option to show cause and request a hearing. To date, he has not received a response to his letter dated August 3, 2021, nor an invitation to a hearing with the 1st defendant.

**[19]** Having delivered the letter of August 3, 2021 to the second defendant, the claimant received communication that his response to the notice of non-recommendation had not been signed. By letter dated August 4, 2021, his attorneys-at-law pointed out that the original signed copy had been submitted and the unsigned copy was merely an enclosure for ease of reference. There was no reply from any of the defendants.

**[20]** By letter dated October 15, 2021, delivered on October 19, 2021, the claimant's attorneys-at-law wrote to the second defendant making a demand that a failure to respond within 14 days of receipt, would lead to the filing of an application for judicial review. To no avail.

**[21]** The claimant submitted that the delay in making the application for leave was not intentional as it was occasioned by his desire to exhaust the avenues afforded by

the second defendant in the notices of January 28, 2021 and June 8, 2021. He embarked on these avenues for redress in good faith at the invitation of the defendants, with a view to resolving this matter amicably and out of court.

**The defendants' statement of case**

**[22]** ACP Lewis deposed that the records kept by the JCF reflect that the claimant was enlisted on February 18, 2019 vide Force Order No. 3796 dated March 5, 2020. He was placed on probation for a period of 2 years in keeping with Regulation 24(6)(a) and Force Orders No. 3376 Sub No. 5 dated February 16, 2012. On "completion of his training" he was posted to the St. Mary Division with effect from March 11, 2020.

**[23]** It was deposed that the records show that the claimant had a history of conduct deemed unacceptable to the JCF. This resulted in complaints, with various levels of disciplinary action taken.

**[24]** On April 24, 2020, the claimant was observed to be untidy in his attire by his Divisional Training sub officer when he reported for a probationer's lecture. He was spoken to regarding his appearance

**[25]** On Friday, April 24, 2020, at about 10:30p.m., Sergeant E. Fletcher the Sub-officer in-charge of the Castleton Police and Constable W. Mcintosh, observed the claimant walking along the Castleton Main Road, in breach of Section 6(1) of the Disaster Risk Management Enforcement Measures (No.4) Order, 2020 which required him to remain indoors from 6:00pm, April 24, 2020 to 6:00am, April 25, 2020. The claimant was unable to provide a satisfactory answer when questioned and was instructed to "get off the street" by Sergeant Fletcher.

**[26]** On Saturday, April 27, 2020, around 10:15 p.m., Sergeant E. Fletcher and Constable S. Miller saw the claimant at a bar where an illegal party was in program, with about sixty persons in attendance, along the Castleton Main Road in the vicinity of the Orangefield Bridge. This was in breach of Section 6(1) of the Disaster Risk Management Enforcement Measures (No.4) Order, 2020. On the arrival of

his sub- officer, the claimant entered his motor car and drove off in the direction of the Castleton Police Station.

**[27]** On May 1, 2020, the claimant was observed to be in breach of Force Order no. 3737 dated 17, 2019 which treats with the dress code policy of the JCF by wearing a “mohawk” hairstyle.

**[28]** The ACP deposed that the records show that the claimant’s discipline was poor as evidenced by the four orderly room charges proven against him for being absent from duty without permission or lawful authority as follows:

i. October 20, 2020, 8:00a.m. to 6:00p.m. - fined 1 day’s pay

iï. October 21, 2020, 6:00p.m. to 12:00md - fined 1 day’s pay

iii. October 22, 2020, 12:00md to 8:00a.m. - reprimanded

iv. October 23, 2020, 8:00a.m. to 6:00p.m. – reprimanded

**[29]** The records show that the claimant had demonstrated through his conduct that he had no regard for the policies of the JCF and as such would be unable to command the respect of the members of the public.

**[30]** On November 13, 2020, the claimant was served with a Warning Notice regarding his work worth and conduct dated November 10, 2020. The claimant did not respond to it. Based on this history of conduct, which is unacceptable to the JCF, the claimant was deemed a liability, his attitude and conduct being contrary to the mission of the JCF. As a result, the decision was taken not to recommend his confirmation to the CP.

**[31]** The claimant was personally served with a copy of the notice of non-recommendation of confirmation on February 8, 2021. It was read and explained to him. He was given 14 days to show cause why his dismissal should not be pursued. He was also told to indicate within 14 days of receipt of the notice whether he wanted to appear before the CP for a hearing with or without an attorney. The

notice directed the claimant to cease performing all duties with effect from February 17, 2021, pending the resolution of the matter.

**[32]** The records show that at all material times the claimant was given the opportunity to be heard in relation to the charges and reports against him and as such the CP has complied with the Police Service Regulations and the rules of natural justice.

**[33]** It was deposed further that the claimant responded to the notice of non-recommendation by way of letter dated February 21, 2021. However, based on his response he was deemed to be dishonest; it was determined that he does not possess the attributes of honesty and integrity which are necessary to become an efficient Constable of police. In reliance on the history of his conduct, the claimant could have no legitimate expectation of re-enlistment and therefore the action taken by the defendants was reasonable and lawful in the circumstances.

**Submissions**

**The Claimant**

**[34]** Mr. Neale cited the cases of **Latoya Harriott v University of Technology[2], CCSU case[3]** and **Marlon Mullings v Commissioner of Police et al[4]** to submit that the decisions of the defendants are susceptible to judicial review. The decision not to recommend the claimant's confirmation personally and directly affected the claimant. The decision had the effect of separating him from his employment thereby depriving him of those emoluments and benefits attached to his office as a public servant.

**[35]** Counsel submitted that the claimant exercised the options available to him at the material time. The true reason for his discharge was never communicated. There was no indication that his letter was considered and deemed dishonest until the leave stage. The claimant indicated to the defendant that he wanted a hearing, at

[2] [2022] JMCA Civ 2
[3] Council of Civil Service Unions and others v Minister for the Civil Service [1985] AC 374
[4] [2018] JMSC Civ. 126

which he would be represented by counsel. No response was forthcoming. The notice of discharge was conditional upon showing cause. The claimant did so with no response.

**[36]** The claimant had received a warning notice yet no disciplinary action was taken. According to an internal memorandum, he had improved. However, the allegations in the warning notice were taken out and used in the notice of non-confirmation against him. When reprimanded by his supervising officer that fact was used to form the basis of his dismissal. A reprimand was a sanction imposed and so it would not be fair to use that sanction as a basis to not recommend him.

**[37]** The explanation provided by the claimant for the delay of five months and eleven days in making the application is the fact that he was seeking to exhaust the avenues afforded by the second defendant in his letters dated January 28, 2021 and June 8, 2021. Through his attorneys-at-law, the claimant made enquiries of the defendants regarding the status of his matter. Having sought to avail himself of the alternative form of redress and without a response from either defendant, the claimant was left with no alternative but to approach the court, as judicial review was the most adequate, efficient and suitable form of redress available to him. The claimant was summarily dismissed whilst he was in the process of seeking statutory relief.

**[38]** In assessing delay, Mr. Neale relied on the case of **Constable Pedro Burton v The Commissioner of Police**[5] to submit that the court should consider that a claimant seeking judicial review must first exhaust all alternative forms of redress available to him. If the claimant had applied to the court for leave to apply for judicial review within the three (3) months prescribed, without first having pursued the alternative remedy available, the application would ordinarily have been refused.

[5] [2014] JMSC Civ. 187

**[39]** Further, even if the claimant has given a good reason for the delay, that is not the end of the matter. He relied on **Constable Pedro Burton, ex parte Greenpeace** and **Marlon Mullings** to highlight that the court also has to consider whether good reasons exist to extend the time. It is not discernible what hardship or prejudice could be caused to third parties if the court were to extend the time. In fact, it is the claimant who is experiencing hardship and prejudice by the decisions of the defendants. The claimant's evidence is that since he was directed to cease performing duties pending the resolution of the matter, he has not received a salary and is now experiencing serious financial hardship.

**[40]** Public interest dictates that the application should proceed since the defendants acted unreasonably, arbitrarily and capriciously. The defendants cannot be heard to argue delay because they always knew that the claimant challenged their decisions.

**[41]** It was contended that the claimant has shown arguable grounds for judicial review. as the powers of the defendants, pursuant to regulation 24(6)(a), were not exercised by or before February 17, 2021, (the end of the claimant's probationary period) and as such, the deeming provision in regulation 24(6)(b) would apply. The deeming provision is automatic unless the claimant's service was dispensed with or his probationary period was extended. The letter dated June 8, 2021, is critical as it states that the claimant is discharged with effect from February 18, 2021, by which time the claimant would have been deemed to be duly confirmed as a member of the JCF.

**[42]** If the claimant was confirmed as enlisted, then regulation 24(6) could not apply. to terminate him, Regulation 47 would have to be engaged. Counsel relied on the case of **Marlon Dwayne Mullings v Commissioner of Police et al** to further argue that in addition to the decision to discharge being quashed, the notice of non-recommendation must also be quashed as recommendations are also susceptible to judicial review.

**[43]** Furthermore, the defendants breached the principles of natural justice and procedural fairness concerning the claimant, which makes the decision void. Mr. Neale relied on the text, De Smith Judicial Review of Administrative Action 3rd edition and **R v Secretary of State for the Home Secretary, ex parte Doody**[6] in that regard as also **Tameka Watson v Commissioner of Police**[7] and **Wayne DeMercado v Firearm Licensing Authority et al**[8].

**[44]** Moreover, the defendant acted arbitrarily, irrationally and Wednesbury unreasonably when they found the claimant guilty of being absent, notwithstanding that his absence was outside his control and was as a result of government regulations which came into effect as a result of the advent of Covid-19. The claimant presented the defendants with justifiable reasons and evidence for his absence and they were not given the consideration that ought to have been given.

**[45]** In relying on **Constable Pedro Burton v The Commissioner of Police**[9] , counsel submitted that litigants who have exhausted alternative forms of redress received the favourable exercise of discretion from the courts. He argued that the claimant was provided other avenues to challenge the decisions and embarked on those avenues but received no response.

**[46]** In any event, the availability of other forms of redress is not a bar to applying to the court for a judicial review. The failure of the defendants to abide by the alternative process that they have created to bring finality to the matter demonstrated that judicial review is the more adequate, effective, suitable and expedient mechanism for the claimant to obtain redress.

**[47]** In reply to opposing counsel's submissions, it was argued that it is the affidavit of Andrew Lewis that says the claimant is enlisted. There is nothing to say he is discharged. In relying on **R v Commissioner of Police**[10], counsel submitted that

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[6] [1994] 1 AC 531
[7] [2012] JMSC Civ. 156
[8] [2023] JMSC Civ 4
[9] [2014] JMSC Civ. 187
[10] unrep delivered December 3, 1993

the process can only be interrupted under two circumstances, the Commissioner of Police must act before the end of the probationary period or extend it. The evidence in this case shows that the probationary period expired on the 17th of February, that is the day before the discharge. The Commissioner of Police does not have to make a decision for the probationer to move forward, by operation of the law the claimant is deemed enlisted once his period of probation ends.

**The Defendant**

**[48]** Ms Lisa White submitted that delay is a discretionary bar to obtaining relief by way of judicial review. In reliance on Rule 56.6 (1) and 56.6(3) of the CPR, Ms White submitted that the claimant failed to comply with the rules as his application is far out of time and his actions in applying for judicial review are seven months after the impugned decision. Any challenge to the decision to discharge the claimant constitutes undue and inexcusable delay which this court ought not to countenance as it is well known that applications for judicial review must be prompt.

**[49]** Ms White relied on the case of **City of Kingston Co-operative Credit Union Limited v The Registrar of Cooperatives Societies and Friendly Societies and Yvette Reid**[11], to highlight that time began to run from the date of the impugned decision. In the instant case, this was the decision not to recommend confirmation on January 28, 2021. Accordingly, the claimant should have applied for judicial review of the impugned decision not to recommend confirmation by the latest April 28, 2021. He ought to have challenged that decision by way of judicial review of the decision to discharge by September 8, 2021.

**[50]** In relying on the case of **George Anthony Levy v The General Legal Council,**[12] counsel submitted that the claimant has failed to provide good reasons for the court to grant an extension of time and the court ought not to exercise its discretion to grant an extension of time.

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[11] Claim No 2010 HCV 0204
[12] 2013 JMSC Civ 1

**[51]** Counsel cited **George Anthony Levy v The General Legal Council**[13] and **R v Stratton-on Avon DC, ex p Jackson**[14] to submit that as the claimant was far out of time the relief sought should not be granted as it will bring about prejudice to the to the JCF. She relied on the case of **O' Reilly v Mackman**[15] to submit that good administration requires that public bodies be able to make decisions and not be kept in limbo while they are questioned. They ought to be able to make decisions with some finality and not be subject to uncertainty as to when or whether they will be set aside by a court.

**[52]** Further, the instant claimant violated the JCF code of discipline by failing to report for duties without a satisfactory explanation, among other infractions. Granting him relief will send an indirect message to the other members of the Force that indiscipline is acceptable.

**[53]** Ms White argued that the wording of Regulation 24(6) makes it clear that the Commissioner has discretion in the confirmation of a probationer and his decision was in keeping with the said regulation when he dispensed with the claimant's services. The conduct of the defendants was in keeping with the dicta in **R v Commissioner of Police, ex parte Keith A. Pickering**[16] which highlighted the key principles of natural justice and a fair hearing.

**[54]** The claimant was heard and convicted in orderly room proceedings; served with a copy of a warning notice to which he failed to respond and supporting reports indicated that his conduct was poor. He was given the opportunity to respond, therefore there was no breach of natural justice.

**[55]** Certiorari is a discretionary remedy and is not available as of right. Counsel relied on the cases of **R v Criminal Injuries Compensation Board, ex p Lain**[17] and **Ex**

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[13] [2013] JMSC Civil 1
[14] [1983] 3 All ER 769, 744
[15] (1983) 2AC 237
[16] (1995) 32 JLR 123
[17] [1967] 2 All ER 770

**p Schaper**[18] to explain the scope of certiorari. In order to benefit from this remedy, the claimant would have to prove that that the inferior tribunal or authority failed to exercise its power according to the law and that there was an unlawful exercise of the power.

**[56]** Counsel submitted that a lawful and reasonable decision was made in respect of the claimant's non recommendation of confirmation pursuant to regulation 24(6)(a) and the CP was empowered by law to discharge the claimant in circumstances where he had committed various infractions and was found wanting in the qualities that would render him a useful member of the force. It could not be said that there was the unlawful exercise of the discretion in not recommending the claimant for confirmation.

**[57]** The common practice is that members of the force enjoy a period of enlistment for five years generally. There is no evidence to ground the assertion that he would have been enlisted or to assume that it would be for five years. Work, worth and conduct are reserved for enlistment and length of enlistment. Even if it is agreed that the deeming provision took effect, there is no evidence of years of enlistment given the difficulties with his work, worth and conduct. The claimant assumed that the period of enlistment had begun without any documentation, to support this assumption. There is nothing before the court to show that the documents from the Commissioner to the claimant indicated that a decision had been taken regarding his enlistment. Before the period of probation had ceased, the notice of non-recommendation was served. The claimant could not have formed the view that enlistment had taken place.

**[58]** If the period of probation was not continuous, then the deeming provision would apply. There were no actions by the CP to suggest that there should be a transition from probationer to member. The period could have been extended beyond two

[18] BZ 1995 SC2

years but was not. Neither party treated the status of the claimant as moving from probationer to member.

**[59]** Counsel argued that the claimant also did not consider himself a member but a probationer seeking transition with accusations over his head. This he contended, prevented his transition to membership. He is saying two things at the same time, firstly he was not afforded a hearing and secondly, he ought to be deemed a member. If he was a member, there was no need for a hearing, while he also said that a hearing is required and he did not receive one.

**[60]** Ms White cited **R v Commissioner of Police**, to submit that the Commissioner of Police has the power to interrupt the probationary period and once he does then the deeming provision does not apply. It is the same in the instant case, the deeming provision does not apply. Therefore, the court ought not to grant order number two in the Fixed Date Claim Form as there is no evidence upon which to base such an order in the circumstances.

**[61]** The claimant was aware of the non-recommendation and responded in February. His attorney wrote in June and this was out of time. The claimant has separated the correspondence of January and June. Counting from June, the application for leave was made in November. By June, the claimant had counsel yet the application still had not been made.

**[62]** According to the claimant, there was no hearing and the process was unfair as it involved matters previously resolved. Both notices issued to the claimant gave him an opportunity to be heard. The claimant took advantage of that but argues his responses were not considered.

**[63]** Between the notices, there is nothing which said the responses of the claimant were not considered. A notice of non-confirmation was supplied to the claimant in January and it was clear that the entire period was under consideration. Even though the claimant improved in terms of presentation, other issues remained unresolved. Regarding dishonesty, the comments on dishonesty are not in the

notices but speak to the assertions charged. There is nothing to show a finding of dishonesty and it ought to be treated as a comment.

**[64]** A hearing that is not in person does not render the proceedings invalid or unfair. There were materials provided by the claimant which were relevant at hearing. The non-recommendation is not punishment for infractions previously sanctioned and withdrawn. Work, worth and conduct must be of a standard for suitability of the candidate. It is a two year process and the decision of the CP is based on the record of the claimant over the period. The CP looks at the overall period to decide suitability. A decision has to be made for the probation period to end, to be extended or for enlistment.

**[65]** The claimant's reference to orderly room charges is unreasonable as they are not before the court. However, having disciplinary charges during a probationary period is not an unreasonable consideration for the Commissioner.

**[66]** In closing, it was submitted that there was no breach of natural justice in the instant claim. It was not unreasonable to make the decision to discharge. The Commissioner is the decision maker and the second defendant acts on behalf of the Commissioner. Whether the Assistant Commissioner of Police recommended the claimant to the Commissioner of Police, the final decision rested with the Commissioner of Police.

**Discussion**

**Delay**

**[67]** The parties have raised this issue again at this, the substantive stage. The claimant argues that he availed himself of the opportunities to show cause afforded to him in order that he not run afoul of any alternate remedies, this led to the delay in the filing of the application for leave. The defendants argue that delay remains a factor as it is a discretionary bar to obtaining relief by way of judicial review.

**[68]** Rules 56.6(1) and 56.6(3) of the CPR state:

*56.1 (1) This Part deals with applications-*

*(a) For judicial review;*

*(b) by way of originating motion or otherwise for relief under the Constitution;*

*(c) for a declaration or an interim declaration in which a party is the State, a court, a tribunal or any other public body; and*

*(d) where the court has power by virtue of any enactment to quash any order, scheme, certificate or plan, any amendment or approval of any plan, any decision of a minister or government department or any action on the part of a minister or government department.*

*…*

*(3) "Judicial Review" includes the remedies (whether by way or writ or order) of –*

*(a)certiorari, for quashing unlawful acts;*

*(b)prohibition, for prohibiting unlawful acts; and*

*(c)mandamus, for requiring performance of a public duty, including a duty to make a decision or determination or to hear and determine any case.*

**[69]** In the case of **City of Kingston Co-operative Credit Union Limited v The Registrar of Cooperatives Societies and Friendly Societies and Yvette Reid**, Sykes J (as he then was) addressed the issue of extension of time and when time begins to run when making an application. He stated that:

*".. all the cases of which I am aware all point in one direction, namely, that the date of the decision (and not the date the claimant acquires subjective or actual knowledge of the decision) is the date from which time begins to run against the claimant."*

**[70]** Sykes J then went on to quote Hayton A.J in the case of **Securities Commission of the Bahamas ex parte Petroleum Products Limited**[19] which said:

> *"I respectfully concur that the date when time begins to run cannot be the date that the claimant acquires knowledge which could be two months, two years or twenty years after the impugned event which he now claims to affect him. The date must be objective, not subjective.*
>
> *…*
>
> *The "essential requirement" then becomes that the claimants must here show that they acted promptly."*

**[71]** I adopt the language of Dunbar-Green, J (as she then was) with regard to the relevant date: "*On a proper construction of rule 56.6(1), the date of the impugned decision is the date when grounds for the application first arose."*[20]

**[72]** The grounds for the application for leave arose from the decision not to recommend confirmation dated January 28, 2021. The claimant was personally served with that notice on February 8, 2021 at the Castleton police station in St. Mary. The deadline for the application to have been filed was April 28, 2021. It was filed on November 19, 2021, which by my reckoning is just shy of seven months after the deadline.

**[73]** The notice gave him fourteen days from the date of receipt to show cause why he should not be dismissed. The deadline for that response was February 22, 2021. The claimant was also to indicate within fourteen days from the date of receipt whether he wanted a hearing before the CP at which he could attend alone or with an attorney or representative if non-confirmation was ordered. The effective date for the cessation of duties was February 17, 2021.

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[19] BS 2000 5C 24 (delivered July 4, 2000) (Suit No. 1440 of 1999)
[20] R v Commissioner of Police ex parte Pedro Burton [2014] JMSC Civ. 187

**[74]** The claimant responded in writing in a letter dated February 21, 2021. The case of **R v Commissioner of Police** deals with the issue of the exhaustion of alternate remedies in this way:

> *"Conduct in relation to the exhaustion of remedies can therefore be advanced in favour of extending time for leave to apply for judicial review but it is not a basis on which to determine when time began to run against the defendant."*[21]

**[75]** It is therefore a factor to be considered, but not the only factor. There must be evidence in support of the pursuit of any alternate remedies not just the mere assertion. The claimant exhibited to his affidavit, the letters he wrote to ACP Lewis in response to the notice of non- recommendation to demonstrate the sincerity of the submission.

**[76]** The court must satisfy itself that the application was made promptly. The exhibits before the court show that the notice of non- recommendation dated January 28, 2021 and served on February 8, 2021 was responded to on February 21, 2021. A letter from the attorneys for the claimant to the CP dated June 7, 2021, set out his response to that notice and requested information in the event of a hearing. The letter from counsel enclosed he claimant's earlier letter of February 21, 2021 for ease of reference.

**[77]** The claimant was discharged from the JCF by notice of discharge dated June 8, 2021. This notice gave him fourteen days to respond through the Superintendent in charge of the St Mary Division or to request a hearing with the CP, with or without a representative. The notice of discharge was served personally on the claimant on July 23, 2021.

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[21] para 15

**[78]** The claimant received a response dated June 14, 2021 from the office of the CP to his letter of June 7, 2021. It stated that the matter had been referred to the ACP Administration.

**[79]** The attorneys for the claimant again wrote to the CP on August 3, 2021, indicating the several letters that the claimant had received and their content. An oral hearing was requested on the basis that the claimant did not know what accounted for the change in circumstances having not received no response to the letter of February 21, 2021, while at the same time, a notice of discharge had been served on him. The request for information was repeated.

**[80]** Some review of the claimant's correspondence seemed to have been carried out by the defendants, as in another letter dated August 4, 2021, attorneys for the claimant wrote to the CP saying that their client had communicated to them that the office of the CP had indicated to their client that his response to the notice of non-recommendation[22] was unsigned. The claimant's attorneys made it clear that the original signed copy had been submitted to the CP and the unsigned copy was merely an enclosure in a later letter. The CP did not respond in writing to the attorneys despite the clear evidence that the claimant was represented; the reasonable inference is that contact was made directly with the claimant.

**[81]** On October 15, 2021, attorneys for the claimant wrote again to the CP setting out a demand. "We are instructed to inform you that should we not hear from you within 14 days of your receipt of this letter, our client intends to apply to the Supreme Court for judicial review of the decision to discharge him from the JCF."

**[82]** The Notice of Application for Leave to apply for Judicial Review was filed on November 19, 2021. Between August 4 and November 19, 2021, another two months and fifteen days passed. In all the circumstances, given the failure of the Commissioner to respond to the letters sent to him by counsel, I cannot say that the claimant failed to act promptly nor can it be said that the reasons for the delay

[22] February 21, 2021

are not good ones. In my view, the claimant had a reasonable expectation of responses to the letters sent to the CP by his attorneys. It is also unclear why the notice of discharge dated June 8,2021 was not served until July 23, 2021.

**[83]** Good administration and procedural fairness go hand in hand, there is a public interest in the CP making sound decisions regarding the complement of the police force. This requires efficiency and certainty in decision making. Decisiveness and finality are also required, there was no indication that the claimant prevented any of this from happening or has prejudiced the defendants in any way. In all the circumstances, delay in making the application does not arise as a bar to the grant of discretionary relief in this claim.

**Judicial Review**

**[84]** The heads of judicial review as set in the **Council of Civil Service Unions and others v Minister for the Civil Service**[23], which needs no introduction are as follows:

> *The process of judicial review is the basis on which courts exercise supervisory jurisdiction in relation to inferior bodies or tribunals exercising judicial or quasi-judicial functions or making administrative decisions affecting the public. It is trite that judicial review is concerned only with the decision making process of a tribunal and not with the decision itself. Lord Hailsham of St. Marylebone L.C. expressed in Chief Constable of the North Wales Police v Evans [1982] 1 WLR 1155 at page 1161a that the purpose is to ensure that the individual receives fair treatment and not to ensure that the authority which is authorised by law to decide for itself reaches a conclusion which is correct in the eyes of the court. Lord Diplock in Council of Civil Service Unions v Minister for the Civil Services [1985] AC 374 at page 410 F-H, discussed the principle of judicial review in relation to*

[23] [1985] AC 374

*decision making powers and spoke to three heads -- illegality, irrationality and procedural impropriety:*

> *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.*
>
> *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 standards that no sensible person who has applied his mind to the question to be decided could have arrived at it...*
>
> *I have described the third head as —procedural impropriety rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.*

*The balancing and weighing of relevant considerations is primarily a matter for the public authority, not the courts (per Lord Green MR in Wednesbury, at page 231; and per Lord Hailsham in Chief Constable of the North Wales Police at page 1160 H). However, if there has been an improper exercise of power, it will be viewed as unreasonable, irrational or an abuse."*

**[85]** In **Chief Constable of The North Wales Police v Evans**[24] at page 1160 paragraphs F-G, Lord Hailsham of St. Marylebone L.C opined as follows:

> *"But it is important to remember in every case that the purpose of the remedies is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question. The function of the court is to see that lawful authority is not abused by unfair treatment and not to attempt itself the task entrusted to that authority by the law."*

**[86]** In addition, our Court of Appeal has now added the grounds of unconstitutionality and proportionality as heads of judicial review. (See **Latoya Harriott v University of Technology**) [25] These additional grounds were not argued in this claim.

**[87]** The approach of the court in determining this claim is in the exercise of its supervisory jurisdiction. The role of the court is to review the decision-making process and not to decide whether the decision is correct or not. It is not for this court to substitute its own views on the merits of the decision made or to make a decision on the merits of the claim.

**The commencement of the probationary period**

**[88]** In his response to the notice of non-recommendation, the claimant disputes the date he was enlisted, giving the date as **February 16, 2019**. In the notice of non-recommendation, the date of enlistment was stated as February 19, 2019 and that the claimant was on probation for a period of two years.

**[89]** In the affidavit of ACP Lewis he states that the records in the personnel file reflect that the claimant was enlisted on **February 18, 2019** vide Force Order No. 3796 dated March 5, 2020. The claimant was placed on probation in keeping with

[24] [1982] 1 WLR 1155
[25] [2022] JMCA Civ 2 at para [47]

regulation 24(6)(a) of the PSR and Force Orders No. 3376 Sub No. 5 dated February 16, 2012.[26]

**[90]** The reason this date is being disputed by the claimant in his response to the notice is unclear to this court, as it is his affidavit which says he was enlisted on February 18, 2019.[27] Given that both affidavits which contain the sworn evidence of each witness give the date of enlistment as February 18, 2019, that date is accepted as accurate as it constitutes the date of the commencement of training.

**[91]** No mention has been made by the claimant of the Force Orders referred to by ACP Lewis and its applicability to this matter. The Court views this as an acceptance of the content of that document both in this application and on this point. This view is supported by the submission that the claimant considers himself an enlisted member of the JCF. It is reasonable therefore to infer that the claimant would be au fait with the content of the said Force Orders which I will not reproduce here.

**[92]** The affidavit of ACP Lewis states: "On completion of his training", the claimant was posted to the St. Mary Division effective March 11, 2020. This was less than two years after the date of enlistment. That statement gives rise to the interpretation that the claimant remained on probation as the two years had not yet expired in keeping with the Force Orders.

**Illegality**

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[26]Regulations 24 (6) of the Police Service Regulation provides as follows: -

"(6) On first appointment to the Force a Constable shall –

(a) during the period of his training be deemed to be on probation, and if during that period he is in the opinion of the Commissioner found wanting in any such qualities as are likely to render him a useful member of the Force, his services may forthwith be dispensed with by the Commissioner; and

(b) at the end of the period aforesaid, if his services have not been dispensed with, be deemed to have been duly confirmed as respects his enlistment."

The Force Orders state inter alia: "In accordance with the Regulations, the period of training during which, a Constable on first appointment to the Force shall be deemed to be on probation, shall be two years."

[27] Filed on August 8, 2022 at paragraph 4

**[93]** Pursuant to section 3(2)(a) of the Jamaica Constabulary Force Act, the Commissioner has the sole operational command and superintendence of the Force. The discretion given to the CP is to be exercised fairly and reasonably.

**[94]** Regulation 24(6) does not by its language, confer an absolute discretion on the Commissioner. It directs him to consider whether the member is "found wanting in any such qualities as are likely to render him a useful member of the Force" before dispensing with his services. The discretion is wide, but it is not unlimited. There has to be a directing of his mind towards the criteria set down in the regulation as a basic principle of natural justice in the exercise of this statutory discretion.

**[95]** That being said, in the application of Regulation 24(6)(a) the Commissioner of Police has the power, during the probationary period of a newly enlisted recruit, to dispense with his or her service, if he or she is found wanting. If the service of the recruit is not dispensed with during the training period, (which the same as the probationary period), then at the end of that period of training/probation, enlistment in the JCF is confirmed. Regulation 24(6)(b) makes it clear that a constable who has not been dismissed during the probationary period would be "deemed to have been duly confirmed as respects his enlistment"

**[96]** Should the CP fail to act before the end of the period of training, then the deeming provision would apply and the constable would be confirmed as enlisted. There is no evidence in the present case that the training period was extended.

**[97]** The regulations under review gives the CP power to take action if during the period of training, he is of the opinion that the constable is lacking in any of the qualities required to make him a useful member of the Force. The CP should however obey all the elementary rules of fairness before he finds that the claimant is unsuitable or before he takes action to dismiss him. What is fairness in those circumstances? This was the way it was said by Carey, JA in **Corporal Glenroy Clarke v The**

**Commissioner of Police and the Attorney General for Jamaica**[31] a case concerning the re-enlistment of a member of the JCF:

> *"Where the Commissioner has taken a decision not to approve re-enlistment, then, upon any application of the member for re-enlistment the Commissioner is obliged, in fairness, to supply the reasons for his decision allow the officer affected, an opportunity to be heard in relation to that material if the officer requests it… Any right which the appellant had to be heard, could only arise after the appellant had been advised of the decision not to approve and the reasons therefor. The opportunity afforded to the appellant to be heard allowed the Commissioner to review his decision in light of any submissions made to him by the officer or his attorney. The reasons having been supplied, must then be answered by the attorney. Consequently, the exercise is akin rather to an appeal process than to a trial process. The onus is thus on the officer to show cause why he should be allowed to re-enlist."*

**[98]** To show cause means*: to produce a satisfactory explanation or excuse.*[32] As Carey, JA said, the process is not akin to a trial, it is a review exercise. Therefore, there is no right to appear in person before a tribunal as the accused to answer to charges as if there was to be a trial. If there is such a right, then no authority has been cited to this court in support of it. The CP was entitled to engage in a review of all the reports and recommendations of the divisional and training officers under his command in order to form the opinion that the applicant was suitable for enlistment.

**[99]** On the authority of **Corporal Glenroy Clarke** above, the CP may also consider intelligence and confidential reports without providing copies to the claimant. It is also in this review of the material that a decision had to be made about whether the explanation given by the claimant was in fact satisfactory. To show cause is

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[31] SCCA No. 84/94; delivered March 11, 1996
[32] Black's Law Dictionary, 10th ed.

the action taken by the probationer. To decide whether cause has in fact been satisfactorily shown is the action taken by the CP and this is based on a review of the record and submissions from counsel for the claimant before him.

**[100]** In the case of **Inland Revenue Commissioners v Hambrook**[33] it was held that "the particular and peculiar position of a police constable [and his] duties and authority remove him from the ordinary category of Crown servant." At page 811 the court said:

> "It is settled beyond controversy that the Sovereign can terminate at pleasure the employment of any person in the public service unless in special cases where it is otherwise provided by law."

**[101]** The decision of the Commissioner is based on the record of the claimant over the entire period of probation. He is entitled to review the record created over the continuous period of training to decide. A balance must be struck between the interests of the individual member and the national interest in having a disciplined, responsive, respected and respectful police force.

**[102]** The law is that there is no automatic re-enlistment for enlisted members. An enlisted member has to show cause why he should be allowed to re-enlist. An enlisted constable with a history of aberrant behaviour cannot claim a legitimate expectation to re-enlist. This statement of the law applies with even greater force to a constable on probation.

**[103]** Having not become a confirmed member of the JCF, the onus is on the claimant to show cause why in the face of documentary evidence of alleged aberrant behaviour, which nevertheless formed part of the two-year history of his performance, he should be allowed to enter into the ranks of the JCF. The claimant indicated his position in a bid to show cause in various documents to which reference has already been made.

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[33] [1956] 1 All ER 807 at 809, 811

**[104]** In my view, it further cannot be said that the CP did not take action during the probationary period. Had the claimant's period of probation not been interrupted by the notice of non-recommendation, then the deeming provision would have been engaged. However, there were no actions by the defendants to suggest that there should be a transition from probationer to member. There were no documents before this court to show that a decision had been taken to enlist the claimant. The probationary period was not extended beyond two years. Neither Commissioner nor claimant treated the status of the claimant as moving from probationer to confirmed member on any of the documents before the court. There was no evidence from the claimant to refute the fact that the notice of non-recommendation was made during the period of probation. This was while the claimant was still being trained. It was during his period of training that the qualities of the claimant were under review.

**[105]** Ultimately, the CP had to make a decision for the probation period to end, to be extended or for enlistment. The decision was made to end the probationary period of the claimant as set out in the notice of non-recommendation and ultimately the notice of discharge. The court is not to set the standard of acceptable conduct in the JCF, that is the function of the CP. There is no evidence that the CP acted ultra vires.

**Fairness/Procedural Impropriety**

**[106]** In **Keith Pickering v Jamaica Constabulary Force**, the Full Court set out the ingredients of a fair hearing dividing them into three categories:

1) Advance notice of charges or accusations;
2) Right to see factual evidence in the possession of the decision maker;
3) Right to make representations.

**[107]** The court said that which of the three selected depends on the particular circumstances of each case. "*A formal hearing may well be unnecessary but an enquiry on the facts should be carried out and common prudence should dictate*

*that the report or at least its substance should be shown to the applicants and an opportunity afforded them to comment on it before the final decision was taken by the respondent."*

**[108]** The claimant's position is that he requested a hearing. It is trite that a hearing can be on paper. Fairness depends on the particular circumstances of the case, and the court should employ a flexible approach.

**[109]** The well-known case of **Chief Constable of the North Wales Police and Evans**[34] a decision of the House of Lords is instructive. The case concerns the claimant who was sworn into the office of constable as a probationary member of the North Wales police force. He was treated unfairly and with that sentiment all the law Lords agreed. They applied the third class enumerated by Lord Reid in **Ridge v Baldwin**[35] which is that "*there is an unbroken line of authority to the effect that an officer cannot lawfully be dismissed without first telling him what is alleged against him and hearing his defence or explanation."*

**[110]** In the case at bar, there was a conflict on the evidence in the written responses submitted by the claimant at trial. I agree with the submissions of Ms White on this point as based on the inconsistencies in the positions taken by the claimant, he did not consider himself a member of the JCF, but a probationer seeking transition. The claimant contended in his written responses and in his submissions to this court, that there were unproven accusations over his head and these were used by the ACP to deny his transition to membership.

**[111]** In my view, the claimant advanced two simultaneous propositions, the first was that he was a probationer who had not been afforded a hearing based on certain allegations made against him. This hearing was required in order to determine the issue of the non-recommendation for enlistment but he did not receive one.

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[34] [1982] 1 WLR 1155
[35] [1964] AC 40

**[112]** The second, was that he, an enlisted member, of the JCF as deemed by the regulations, had not been dismissed. The claimant bases the contention that he is an enlisted member on the notice of discharge dated June 8, 2021, which states that the claimant was discharged with effect from February 18, 2021. It is the submission of the claimant that by that date, he would have been deemed to have been duly confirmed.

**[113]** Further, in his written response to the notice of non-recommendation the claimant stated that his training period ended and as his services were not dispensed with, he is therefore to be deemed an enlisted member of the JCF. In short, the contention is that the claimant was enlisted on February 18, 2019, and he was deemed enlisted on February 18, 2021.

**[114]** These are inconsistent positions. Either the claimant is enlisted or he was on probation and discharged. If the claimant is deemed a member of the JCF, there was no need for a hearing into a non-recommendation for confirmation as by operation of law he is a confirmed and enlisted member.

**[115]** There can be no serious submission that the period of probation was continuous The first such clear, written indication that the services of the claimant would be dispensed with was a warning notice dated November 10, 2020 which gave him three months to make improvements. Next was the notice of non-recommendation of January 28, 2021 in which he was directed to cease work on February 17, 2021. The effective date of the notice of discharge is really not what constitutes non-confirmation given the factual matrix, in fact it has the opposite effect. Time began to run on the day after his training began, that was February 19, 2019, and two years would expire on February 18, 2021 at midnight.[36] There is no evidence to support the deeming provision taking effect.

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[36] Interpretation Act

**[116]** It also cannot be said that there was no hearing granted to the claimant as he was heard on paper. The CP has therefore lawfully given the claimant a notice of non-recommendation and afforded the claimant a fair opportunity of responding to it.

**[117]** The claimant complains of not having an oral hearing with his attorney. There was no authority cited for the proposition that the CP was required to hold an in person hearing with a probationer even if one had been requested after written submissions had been made and considered. There was consideration of the submissions of the claimant as it is his position that the defendants indicated to him that the response was unsigned. The court is concerned with the decision making process and not the decision itself.

**[118]** The claimant has demonstrated no arguable ground with a reasonable prospect of success in relation to a breach of procedural fairness. He was given the opportunity to provide a satisfactory explanation. He provided his explanation, there was no breach of natural justice. The claimant was given an opportunity to be heard, being heard does not necessarily require a formal oral hearing but may take the form of a written explanation which the claimant was permitted to provide.

**Irrationality**

**[119]** The claimant alleges that irrelevant considerations were taken into account in that many of the allegations in the notice of non-recommendation were already the subject of a warning notice which is a sanction, even though he was not afforded a hearing on the warning notice. Further, he was labelled dishonest by the ACP and had no opportunity to refute this characterisation. Additionally, the orderly room charges were only laid so that the second defendant could have a basis to prepare the notice of non-recommendation seven days later.

**[120]** The difficulty with the claimant's various positions is that the warning notice served on him on November 13, 2020, gave him seven days within which to respond in writing. The claimant failed to do so, and he gave no explanation to this court for that omission. It means he bypassed the opportunity to be heard. Further, the

submission that the warning notice constituted a sanction is without any authority to support it.

**[121]** The allegation of dishonesty is the view of the ACP which he was free to hold, as much as the claimant was free to be offended. That does not constitute a removal of the opportunity to respond to any of the notices served on him.

**[122]** The orderly room charges were properly dealt with by the authorized officer as provided in regulation 46(2) and (3) entitled "Minor Offences which may be dealt with summarily" specified in part I of the Second Schedule of the PSR. These convictions constituted part of the record of the claimant and the CP was not prevented from considering the overall record of performance and character of the probationer over the probationary period as I have stated.

**[123]** The assertion was made that the true reason for discharging the claimant was never communicated to him. There was no evidence before this court that this was so. The notice of discharge states that the reasons for his discharge were those provided in the notice of non-recommendation of confirmation, to which he had responded.

**[124]** Mr Neale has conflated the examination of the record with irrationality and irrelevant considerations. The CP was obliged to take a decision grounded in the regulations and Force Orders on an objective assessment of the specific facts of the case before him. There is no merit to the issue of irrationality on the material presented to the court.

**Remedy**

**[125]** The House of Lords in **Evans**, though the chief constable had failed in the performance of his duty to act fairly in dealing with a probationary constable, granted only a limited declaration.

**[126]** This was not a case in which the claimant could claim a legitimate expectation to remain in the JCF, a fact with which he agreed in his affidavit. In order for the court

to grant an order for certiorari, the claimant would have had to prove that that the inferior tribunal or authority failed to exercise its power according to the law and that there was an unlawful exercise of the power, there was no evidence upon which to make such a finding.

**[127]** In the present case, in all the circumstances, the court declines to grant the orders sought in the Fixed Date Claim Form filed on August 8, 2022. The following orders are made as a consequence:

**[128]** **Orders**:

1. The orders sought in the Fixed Date Claim Form filed on August 8, 2022 are refused.

2. Judgment for the defendants.

3. No order as to costs.

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Wint-Blair, J