IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2015 HCV 05005

BETWEEN	**ODEAN GRANT**	**APPLICANT**
AND	**THE COMMISSIONER OF POLICE**	**1ST DEFENDANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**2ND DEFENDANT**

Application for extension of time to apply for leave for Judicial Review – Delay – Whether good reason shown

Ms. Zaieta E. Skyers for the Applicant.

Mrs. Taniesha Rowe Coke instructed by the Director of State Proceedings for the Defendants.

Heard: 04th May, 2017

IN CHAMBERS

COR: V. HARRIS, J

[1] By way of a Notice of Application for Court Orders filed on October 26, 2015 the applicant, Mr. Odean Grant, is seeking the following orders:

i) That the Applicant be re-enlisted in the Jamaica Constabulary Force;

ii) That the Applicant be granted an extension of time to apply for Judicial Review.

[2] The grounds for the application are:

i) The Applicant was acquitted of charges in the Half Way Tree Resident Magistrate's Court on the 13th day of January, 2011;

ii) The Applicant was unable to file his application within the required period as he was unable to retrieve his file from his former attorney as he was out of pocket and could not settle his outstanding legal fees.

[3] On May 04, 2017 I refused the application. I promised to put my reasons in writing. I do so now.

Background

[4] On January 03, 2006 the applicant was enlisted in the Jamaica Constabulary Force (JCF). He was due for re-enlistment on December 31, 2010. On August 20, 2009 he was arrested for allegedly breaching the Anti-Corruption Act. He was acquitted of the charge on January 11, 2011. His attorney in those proceedings was Mr. Everton Dewar.

[5] Following his acquittal, the applicant on September 10, 2010 wrote to the 1st defendant, the Commissioner of Police, and applied to be re-enlisted. This was denied on January 05, 2011.

[6] The applicant deposed in his first affidavit dated October 22, 2015 that he was informed by the 1st defendant that the only way that he would be re-enlisted in the JCF was if he took and passed a polygraph test.

[7] On or around June 2011, although he protested, the applicant underwent polygraph testing. It would appear from the evidence that this process was aborted by the examiner and he was told that another test would not be done.

[8] Sometime in July 2011 the applicant was informed by the 1st defendant that his decision not to re-enlist him was final.

Evidence in support of the application

[9] The applicant indicated that he had made several attempts to retrieve his file from his attorney Mr. Dewar so that he could commence the judicial review process. However, he was unable to do so because he had not settled his outstanding legal fees. He finally obtained his files on May 02, 2014.

[10] The applicant stated that he had been without a steady income since August 2009 and as result, not only had he been unable to provide for his family, but he also had difficulty securing legal representation.

[11] It is to be noted that although this application was filed on October 26, 2015 it was not served on the defendants until April 05, 2017. In his second affidavit filed on May 03, 2017 (which was short served) the applicant provided the reason for this.

[12] He stated that the attorney who initially had conduct of the matter was Mr. Barrington Frankson who became seriously ill in May 2015. His office was closed in April 2016. The applicant said that he was told that his file had been sent to another attorney, but when he contacted that attorney's office his file could not be located. He eventually spoke with his current attorney and gave her certain instructions. His file was eventually located in November 2016.

[13] The applicant averred that his file (for the current application) was "in abeyance" from October 2015 to November 2016 as a result of Mr. Frankson's illness. Additionally, his present attorney did not receive a date for the hearing of this application until late March 2017. It was those circumstances that caused the delay of the service of the application on the defendants.

The applicant's submission

[14] Learned counsel for the applicant Ms. Zaieta Skyers submitted that the court is empowered to extend the time to apply for leave for judicial review by virtue of rules 56.6 (2) of the Civil Procedure Rules (CPR).

[15] She directed the court's attention to the threshold that must be met for the application to succeed, that is, the applicant must show the court that there is good reason for doing so. In considering whether to refuse leave or grant relief because of delay the court must determine whether this would be likely to cause substantial hardship to or substantially prejudice the rights of any person or be detrimental to good administration (see rule 56.6 (5) of the CPR).

[16] The applicant, Ms. Skyers posited, has met the criterion to be granted relief. He has shown good reason for doing so. The delay on his part, she said, was caused by:

i) his decision to take the polygraph test;

ii) his inability to obtain his files and instruct counsel due to impecuniosity; and

iii) the further delay of the matter due to Mr. Frankson's illness.

She also submitted that he acted sensibly and reasonably when he decided to take the polygraph test since he was of the belief that he would have been re-enlisted once he passed. On the issue of impecuniosity she relied on the authorities of ***Alcron Development Ltd v Port Authority of Jamaica*** [2014] JMCA App 4 and ***Leymon Strachan v The Gleaner Company and Dudley* Stokes** (Motion No 12/1999 – judgment delivered 6 December 1999).

[17] Ms. Skyers advanced that granting the relief would not cause any substantial hardship or prejudice to the rights of the respondent. However, withholding it would substantially prejudice the rights of the applicant. She also stated that granting the relief was not detrimental to good administration. She relied on the

case of ***R v Commissioner for Local Administration ex parte Croydon London Borough Council*** [1989] 1 All ER 1033.

[18] Ms. Skyers also put forward that the matters that were raised in the application are of great importance and should be resolved. The applicant, she said, has been acquitted of the criminal charge and yet he is unable to continue in his job. He ought not now to be barred from getting the redress that he deserves because of the "technicality" of delay. She cited the case of **R v Secretary of State for the Home Department ex parte Ruddock** [1987] 1 WLR 1482 in support of her submission.

The submissions on behalf of the Defendants

[19] Learned counsel for the defendant's Mrs. Taniesha Rowe Coke commenced her submissions by directing the court to rule 56.6 (1) of the CPR. She submitted that an application for leave to apply for judicial review must be made promptly and within three months from the date when the grounds for the application first arise. She cited the case of ***Miguel Pine v Commissioner of Police*** [2015] JMSC Civ. 182 which she said demonstrated how this rule was to be interpreted and applied.

[20] She submitted further that the date on which the grounds first arose in this matter would have been on January 05, 2011, as that was the date the applicant was denied re-enlistment in the JCF. The application for leave for judicial review was filed on October 26, 2015 over four (4) years and ten (10) months later. Consequently, the application for leave was not made promptly and in accordance with rule 56.6 (1).

[21] However, Mrs. Rowe Coke continued, the court is empowered to grant an extension of time, if good reason for doing so is shown. She relied on the decision of ***Leroy Thompson v The Commissioner of Police and The Attorney General of Jamaica*** [2012] JMSC Civ. 166.

[22] It was advanced by learned counsel for the defendants that on a perusal of the affidavit of the applicant in support of the application, the evidence does not disclose any "sufficiently reasonable explanation" for the substantial delay in making the application. In addition, the applicant's impecuniosity, without more, was not enough to move the court to exercise its discretion. She placed reliance on the case of ***Dewayne Thomas v Commissioner of Police*** [2015] JMSC Civ. 26 for this point.

[23] Mrs. Rowe Coke advanced that in light of his impecuniosity, as well as, the urgency and importance of the matter, the applicant has not provided any evidence that he attempted to seek legal aid, and has failed to give an explanation for not doing so.

[24] In closing her submissions she asserted that on the totality of the evidence before the court, the application for extension of time ought to be refused because the applicant has not shown any good reason why the court should extend the time.

Analysis

[25] Rule 56.6 of the CPR sets out certain requirements for applications for judicial review. That rule provides:

> 56.6 (1) An application for leave to apply for judicial review must be made promptly and in any event within three months from the date when the grounds for the application first arose.
>
> (2) However the court may extend time if good reason for doing so is shown.
>
> (3) Where leave is sought to apply for an order of certiorari in respect of any judgment, order, conviction or other proceeding, the date on which grounds for the application first arose shall be taken to be the date of that judgment, order, conviction or proceedings.

(4) Paragraphs (1) to (3) are without prejudice to any time limit imposed by any enactment.

(5) When considering whether to refuse leave or grant relief because of delay the judge must consider whether the granting of leave or relief would be likely to:

(a) cause substantial hardship to or substantially prejudice the rights of any person; or

(b) be detrimental to good administration.

[26] It is unambiguous that the filing of an application for leave for judicial review must be made promptly (note the mandatory language of the rule) and in any event within three months from the date when the grounds for the application first arose.

[27] In **Miguel Pine** (supra) Campbell J at paragraph 48 of the judgment puts it this way:

> *"The issue of delay is an important consideration in determining whether or not the court ought to grant leave to apply for judicial review. An application for leave for judicial review must be made promptly or within three (3) months after the grounds to make the claim first arose. There have been cases that have been brought within three (3) months and have failed the promptitude test. The court must be satisfied that the application was made promptly."*

[28] As it concerns the issue when time begins the run, Campbell J at paragraph 49 in **Miguel Pine** relied on and applied the principles in ***R v Secretary of State for Transport ex p. Presvac Engineering Ltd*** (1991) 4 Admin L. Rep 121, 133-134:

> *"...the court noted that the time limit begins to run from the date when the grounds for the claim first arose. The time does not run from the date when the claimant first learnt of the decision or action under challenge nor from the date when the claimant considers that he has adequate*

> *information to bring the claim, such matters may be relevant to the separate question of whether an extension of time should be granted."*

[29] Therefore in the case at bar, the grounds for the application (for leave to apply for judicial review) arose on January 05, 2011 because that was the date when Mr. Grant's application for re-enlistment was denied. However, even if it could be said that he acted reasonably and sensibly (and I am not saying that he did) to do the polygraph test in June 2011, he would have been informed by the 1st defendant in July 2011 that the decision not to re-enlist him in the JCF was final.

[30] The significance of this is that when he filed the present application on October 26, 2015 there had been a delay of well over four (4) years. This delay, I find, is inordinate. It is therefore undisputed that the application was not made promptly and within three (3) months from the date when the grounds arose in accordance with rule 56.6 (1) of the CPR. However, the matter does not end there.

[31] Rule 56.6 (2) of the CPR allows the court to extend the time "**if good reason for doing so is shown**." I am also to consider whether the grant of relief or the refusal of leave would be likely to cause substantial hardship to or substantially prejudice the rights of any person or be detrimental to good administration.

[32] On the feature of good administration, Lord Diplock in ***O'Reilly v Mackman*** (1983) 2 AC 237 noted:

> *"The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision."*

[33] Guidance was provided by Sharma J on the approach to take concerning prejudice in the case of ***Jones and Another v Solomon*** (1989) 41 WIR 299:

> *"I reject the submission of the attorney for the respondent that proof by the appellants, of substantial prejudice is a condition precedent to the refusal of relief. This is an untenable proposition, since it would throw the burden upon the commission of proving that the grant of relief would cause substantial hardship or substantial prejudice to the commission,*

> *irrespective of the length of time which has elapsed since its decision. The primary concern of rule 4 is with respect to delay in applying for relief, as the heading itself indicates.*

[34] It would seem to me that the fundamental factor which underpins rule 56.6 of the CPR is delay. The applicant must satisfy the court, by presenting compelling evidence, that although there was delay on his part, there are good reasons for extending the time for leave to apply for judicial review.

[35] I will therefore examine carefully the applicant's evidence in support of the application to determine if I should exercise my discretion in his favour. As I embark upon this exercise, I will be guided by my learned brother Anderson J in ***Leroy Thompson*** (supra). At paragraph 11 of the judgment the learned judge stated:

> *"It cannot be over-emphasized that where a Court is to be called upon to exercise discretion in favour of a party, that party cannot be and never is entitled to the exercise of the Court's discretion in his favour, as a matter of right. Evidence of a sufficiently compelling nature must be placed before this court by a party, as could properly serve to justify the Court's discretion being exercised in that party's favour. This Court cannot and ought not to be expected to exercise its discretion on a whim, or in other words, on emotions. This Court must act on that which it determines, based on well-hallowed principles of law, to be proven facts."*

[36] The reason given by the applicant for the delay in making the application is financial hardship. This prevented him from obtaining his files from his former attorney and instructing counsel. It is clear from his evidence that he made no attempts to seek legal aid between 2011 and 2014.

[37] I am convinced that if he had done so, the attorneys could have obtained the certificate of his acquittal from the Magistrate's Court, as well as, the decision of the 1st defendant which he is seeking to impugn, in quite short order. Therefore, this application could have been made in a timelier manner.

[38] While the applicant said that he had retrieved his file from Mr. Dewar in May 2014, there is no evidence about what attempts, if any, he made to obtain legal representation or legal aid between May 2014 and May 2015, that is, up to the

time he retained Mr. Frankson. This was a further delay of a year and there is no explanation for this in his evidence.

[39] While impecuniosity is an issue that can be taken into account when considering an application of this nature, it "must be coupled with the need to act expeditiously in pursuing an application." (Per Shelly-Williams J (Ag) (as she then was) in ***Dewayne Thomas*** (supra) at paragraph 40).

[40] In **Dewayne Thomas** the applicant also relied on impecuniosity as the main reason for the delay in making his application for leave for judicial review. There was no evidence (like in the present case) that he had attempted to seek legal aid and his explanation was that he was awaiting legal assistance from different attorneys, as well as, the Public Defender. He also told the court that he had four (4) children and one of them was ill. His application for judicial review was also filed four (4) years after the grounds for the application first arose.

[41] In refusing the application Shelly-Williams J (Ag) stated that the applicant had not provided an explanation as to why legal aid was not pursued by him prior to 2014, which was four (4) years after his dismissal. She also rejected that he had acted reasonably and sensibly. She found as instructive the dicta of Sharma J in **Jones v Solomon** (supra) as to the approach to take where an applicant did not have the financial resources to instruct counsel in proceedings of this nature:

> *"[38] The only apparent attempt by the respondent in this case to explain the delay in applying for leave is contained in paragraph 19 of his affidavit in support of his application, where he deposes that he applied for legal aid on or about 25th July 1983, as he had no money to continue legal proceedings. This was more than one year after the commission had declined to alter its decision. This was not sufficient excuse for the delay since he could have applied for legal aid soon after the commission's decision if his pecuniary circumstances prohibited him from making the application."*

[42] Learned counsel Ms. Skyers relying on the **Croydon London Borough Council** case (supra) stated that I should, "scrutinize with care any delay in making an

application and a litigant that does delay in making an application is always at risk [but] as long as no prejudice is caused, the courts will not rely on those provisions to deprive a litigant who has behaved sensibly and reasonably."

[43] However, the facts in that case are distinguishable. In **Croydon**, although the application for judicial review was made almost two and a half years after the grounds arose, there were at least two appeals of the Council's decision during this period. Therefore, the court felt that although there was a delay by the Council in making the application, they had acted reasonably and sensibly by awaiting the outcome of the appeals before doing so.

[44] This was certainly not the situation in the present case. While the view might be taken that he acted reasonably and sensibly to wait until June 2011 to take the polygraph test, I cannot say that this was the case after he was told in July 2011 that the decision not to re-enlist him was final.

[45] Similarly, the case of **Ex parte Ruddock** (supra) is unhelpful to the applicant as the facts are also distinguishable. That case concerned the tapping of Mr. Ruddock's telephone because he was a member of the Communist Party Additionally, although his phone had been bugged in 1983 he only learnt about it in March 1985. The application for judicial review was made in July 1985. The further delay (between March and July) was caused by the unavailability of a witness to give affidavit evidence. Even though the court found that the delay was not satisfactorily explained, it did not reject the application on that ground because the judge was of the view that the matters raised by the application was of general importance.

[46] The cases of **Alcron Development Ltd** and **Leymon Strachan** dealt with the issue of impecuniosity which has already been addressed at paragraphs 39 to 41 above.

Disposal

[47] I have found that the applicant has failed to satisfy the promptitude test that is provided for in rule 56.6 (1). The delay of over four (4) years in making the application is substantial and inordinate. The explanation that he has given for the delay is unsatisfactory and unacceptable.

[48] Having carefully scrutinized the evidence he has presented and applying the principles that I have gleaned from the authorities above, I have concluded that he has failed to show good reasons why I should exercise my discretion to grant him the relief that he is seeking. Impecuniosity, without more, is not a satisfactory excuse for the delay. The applicant had the option of pursuing legal aid, in light of the urgency and importance of the matter. This he failed to do. He has provided no explanation for this failure. I reject his submission that he acted sensibly and reasonably in the way that he has approached this application.

[49] The evidence presented by the applicant is also woefully inadequate as regards whether the refusal or grant of leave would cause substantial hardship or prejudice to his or the defendants' rights or not, as well as, whether it would be detrimental to good administration or not.

[50] While the court appreciates the reason given for the delay in having the application served (the misplacement of the file due to Mr. Frankson's illness and the subsequent closure of his office), the applicant's evidence is unhappily sparse in relation to the major issues that ought to have been addressed in this matter.

[51] The application for extension of time to apply for leave for judicial review is therefore refused and there will be no order as to costs.