



[2017]JMSC Civ. 94

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2016HCV01652

BETWEEN	RODRICK MUIR	1ST APPLICANT
AND	STACY-ANN CLARKE	2ND APPLICANT
AND	ERROL CRAIG	3RD APPLICANT
AND	PAULON MONTAQUE	4TH APPLICANT
AND	VINCENT ATHERTON	5TH APPLICANT
AND	FLETCHER GRAYSON	6TH APPLICANT
AND	KAREE FINEGAN	7TH APPLICANT
AND	LEONORA MILLS	8TH APPLICANT
AND	RORY RENALDO BURKE	9TH APPLICANT
AND	PETER CHRISTIE	10TH APPLICANT
AND	KIRD TORANTY	11TH APPLICANT
AND	CLIVE WRIGHT	12TH APPLICANT
AND	CARL TAFFE	13TH APPLICANT
AND	ENROY HANSON	14TH APPLICANT
AND	TANESHA SCHAAFFE	15TH APPLICANT
AND	KERRY-ANN HUDSON	16TH APPLICANT
AND	TAMICA TAYLOR	16TH APPLICANT

AND	SHAWN BARNETT	17TH APPLICANT
AND	DALE REID	18TH APPLICANT
AND	DEWAYNE JONAS	19TH APPLICANT
AND	THE COMMISSIONER OF POLICE	1ST RESPONDENT
AND	THE ATTORNEY GENERAL OF JAMAICA	2ND RESPONDENT

IN CHAMBERS

Miss Althea Grant for the Applicants

Miss Carla Thomas instructed by the Director of State Proceedings for the Respondents

HEARD: 6TH June 2017

PUSEY, J

JUDICIAL REVIEW – APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW – ORDER OF MANDAMUS – TEST TO BE APPLIED FOR LEAVE – WHETHER APPLICANTS SATISFY THE TEST FOR LEAVE TO BE GRANTED

THE BACKGROUND TO THE APPLICATION

- [1]** In April 2012, a Jamaica Constabulary Force Order dated 12th April 2012 with serial number 3384 introduced the “The Jamaica Constabulary High Potential Detective Training Programme” (HPDTP) and outlined its Terms, Conditions, Objectives, Recruitment and the Five Phased Selection Process for participation in the Programme. The Programme was open to members of the Jamaica Constabulary Force of the ranks of constable, corporals and sergeants with at least five (5) years service In the Criminal Investigation Branch (C.I.B).
- [2]** This Force Order stated that Candidates would be trained with a view of being promoted to the rank of Detective Inspector upon successful completion of the

Programme. Participants would also garner additional competences and experience to enhance their performance for progression to senior positions within the C.I.B. It further noted that at the end of the Programme, the intention was to promote twenty-five persons to the rank of Inspector.

- [3]** This Force Orders was amended by Force Order dated the 16th of August 2012 with Serial Number 3402 Sub. No. 6. which opened the Programme to officers who were not currently attached to the C.I.B. and those who were over 35 and had previously applied. The modification was as follows:

Force Orders Nos. 3384 ad 3387 Part I Sub. No 1 and 12 dated 2012-04-12 and 2012-05-03 respectively, treating on the application for High Potential Detective Training Programme (HPDTP) is republished with slight modification.

Applications are invited from suitable members of the Jamaica Constabulary Force who are thirty-five (35) years old or below with at least five (5) years service to participate in the selection process for the Programme.

Personnel who are below thirty-five (35) years old and previously sat the HPDTP examination and did not attain a score of 60% are invited to re-apply.

- [4]** Thirty-Two (32) Applicants were admitted to the HPDTP. The said Force Orders date 12th April 2012 outlined the Training Programme which included four phases and the duration of each. Phase one- Academic/Investigative Phase (Four Months), phase two- Advanced Investigative Training (Ten Weeks), Phase three- Professional Development (Ten Weeks) and Phase four- Attachment, Mentorship and Consolidation Phase (Eight Months and Two Weeks). For the final two weeks the participants were to present their findings of the research/case study phase for which a panel was to be set up to assess. The Programme was to last for eighteen (18) Months.

- [5] The formal graduation date for the HPDTP was scheduled for the 19th of September 2014. However, on the 13th of September 2014, a meeting was held with the participants informing them that the HPDTP was to be extended for a further six months and that they would be assigned to different areas. This extension was seen as Phase Five.
- [6] Phase Five began in October 2014 and was to end in April 2015. After the completion of Phase Five of the HPDTP in April 2015, upon enquiry, the participants received an email from Detective Inspector Salmon Director of Criminal Investigation Training on the 23rd of April 2015. This email instructed the participants to remain at their current postings while the reports from The Divisions to which they were attached were being compiled and reviewed, and until further instructions were given.
- [7] On the 6th of October 2015, after the participants of the HPDTP received no further instructions, a letter was written to The Assistant Commissioner of Police in charge of The Criminal Investigation Branch outlining what had transpired since September 2014. They also posed questions relating to the conclusion of the HPDTP, any considerations to relocate person who have been displaced from their families and the promotion of participants to the rank of inspector.
- [8] As there was no response to the said letter dated the 6th of October 2015, the participants of the HPDTP involved the Office of the Public Defender. A letter dated the 23rd of November 2015 from Mr Lloyd Williams, The Information and Complaints Officer at the Public Defender's Office, was written to The Commissioner of Police seeking information on behalf of the participants of the HPDTP highlighting that the situation was untenable as participants were displaced from their families, faced uncertainty, were unable to make meaningful plans to the jeopardy of their welfare and their families.
- [9] In response to the letter written by Mr Lloyd Williams, the then Commissioner of Police wrote a letter dated 17th of December 2015 confirming receipt of the letter

of Mr Williams on behalf of the participants of the HPDTP and stating that the concerns therein would be enquired into and the requisite action taken.

[10] Following this, a meeting was held with the participants of the HPDTP on the 5th of January 2016 where they were informed that “Exit Interviews” would be conducted. These Exit Interviews were conducted between the 26th to the 29th of January 2016.

[11] On the 29th of March 2016 a letter to the Commissioner of Police was written by Ms Althea Grant, the participants’ Attorney-at- Law, on the participants’ behalf as no further communication was made to the participants following the Exit Interviews. The said letter was delivered to the Commissioner’s office on the 31st of March 2016 and informed him that there was no conclusion of the HPDTP. She requested a hearing with the Commissioner of Police be set within five working days of the receipt of the letter so that the issues relating to the conclusion of the HPDTP could be ventilated. She further stated that if no communication was received within the stipulated time period, Judicial Review Proceedings would be instituted in the Supreme Court. No such further communication was received.

[12] To date there has been no formal conclusion of the HPDTP and none of the participants have been recommended by the Commissioner of Police for promotion to the rank of Inspector.

THE APPLICATION

[13] The Applicants sought leave to apply for Declarations, Orders of Mandamus and Damages.

[14] The Applicants sought, “an Order of Mandamus to compel The Commissioner of Police to prepare the necessary paperwork in a fair and equitable manner or to cause the necessary paperwork to be prepared in a fair and equitable manner for presentation to The Police Service Commission so that the Applicants can be promoted to the rank of Inspector.”

THE PROCEDURAL ISSUE

[15] Counsel for the Respondents submitted that for Leave to be granted, the test outlined in *Sharma v Browne Antoine & Ors* [2006] UKPC 57, that there must be an arguable ground for judicial review having a reasonable prospect of success, must also be satisfied in relation to the Administrative Orders being sought.

[16] Counsel further submitted, relying on the case of *Office of Utilities Regulation v Contractor General* [2016] JMSC Civ. 27, that leave of the court is not required for Declarations. Therefore, the only administrative remedy to be considered was that of the order of mandamus being sought.

[17] In the Civil Procedure Rules parts 56.1(1), 56.1(3) and 56.9(1) illustrates that the remedy of a declaration is listed as a separate administrative order from judicial review. The relevant Parts are cited below:

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 my 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 body, including a duty, to make a decision or determination or to hear and determine any case.

- (9) An application for an administrative order must be made by a fixed date claim form in form 2 identifying whether the application is for –
- (a) judicial review
 - (b) relief under the Constitution
 - (c) a declaration; or
 - (d) some other administrative order (naming it), and must identify the nature of any relief sought.

[18] Part 56 of the CPR shows that both judicial review and declarations are separate and independent administrative orders. Judicial review includes the remedies of certiorari, mandamus and prohibition for which leave must be sought. Thus, as a declaration is a separate administrative remedy, the authorities suggest that no leave is required.

[19] Fraser J in coming to his conclusion relied on the case of **Audrey Bernard Kilbourne v The Board of Management of Maldon Primary School** 2015 JMSC Civ 170, where in paragraphs 20 and 21 of the judgment stated:

*It is noteworthy however that the attention of the Court of Appeal in **The Chairman, Penwood High School's Board of Management and the AG v Loana Carty** was not adverted to CPR 56.1 (1) (c) as this court's attention has been. It does appear to this court that the Rules Committee of the Supreme Court in Jamaica though clearly away of the decision in **O'Reilly v Mackman** has chosen a liberal approach. Our CPR therefore provides that a declaration against a public body can be obtained under the CPR r. 56.1 1 (c) in the absence of an application for judicial review. This "public law" declaration is in contrast to the declaratory judgment obtainable under CPR r. 8.6...*

*My conclusion is supported by what transpired in the unreported case of Claim No. 2009 HCV 00660 **Legal Officers Staff Association (L.O.S.A) v. AG and Minister of Finance**. In the paper **Judicial Review – Holding the State Accountable** presented at the Jamaican Bar Association Continuing Legal Education Seminar February 18, 2012, at paragraph 31 Mangatal J. in outlining what happened in the case stated that:*

An application for a declaration pursuant to Part 56 is separate from an application for judicial review and no leave is required in order to apply for a declaration. In this case, King J. had granted the applicants leave to apply for judicial review but his decision is on appeal. I accepted the

submission made on behalf of L.O.S.A that as they separate matters, a hearing for the Declarations could be set down notwithstanding that the issue of the grant of leave was on appeal. On appeal from my procedural decision, Norma McIntosh J.A. agreed with the proposition that they were indeed separate and that at a Case management conference the court may direct that parts of a claim be dealt with separately...

- [20] This Court is of the view that no leave is necessary for the application for declarations. Leave is required for the application for orders of mandamus which have been sought. The principle therefore is that the determination of whether leave is to granted, would depend on whether there was a realistic prospect of success in relation to the order of mandamus being sought.

Order of Mandamus

- [21] McDonald-Bishop J,(as she then was),in ***Milton Llewellyn Baker v Bogle and Ross***[2013] JMSC Civ 137 conveniently set out the requirements for a grant of an order for mandamus, quoting from Halsbury's laws.

- (1) A legal right must exist in the person seeking the remedy. The person seeking mandamus must show that there resides in him a legal right to the performance of a legal duty by the party against whom the mandamus is sought. In order, therefore that a mandamus may issue for something to be done under a statute it must be shown that the statute imposes a legal duty. It is only in respect of a legal right that mandamus will lie. The Court will not enforce an equitable right.
- (2) The duties of the person to be compelled must be a public duty as the order is only granted to compel the performance of duties of a public nature.
- (3) The legal right to enforce the performance of a duty must reside in the applicant himself. The Court will only enforce the performance of the statutory duties by public bodies on the application of a person who can show that he has himself a legal right to insist on such performance. The mere fact that a person is interested in the performance of a duty as member of a class of persons, all of whom may be regarded as equally interested, but

he having no particular ground for claiming performance, will not be sufficient ground for claiming performance.

- (4) The application must be made in good faith. Not only must it appear that the applicant is himself a person having a real interest in the performance of the duty sought to be enforced, but also makes the application in good faith and not for an indirect purpose. If it appears that the application for mandamus is really on behalf of a third party, the order will be refused.
- (5) The demand for performance must precede the application. As a general rule, the order will not be granted unless the party complained of has known what it was he was required to do, so that he has the means of considering whether or not he should comply. So it must be shown by evidence that there was a distinct demand of what the party seeking mandamus desires to enforce and that that demand was met with a refusal. This requirement that before the remedy will be granted there must be a demand to perform the act sought to be enforced and a refusal to perform it cannot be applicable in all possible cases. The rule does not apply where a person had, by inadvertence, omitted to do the act complained of which he was under a duty to do and the time for performance had passed.
- (6) It is said too, that although a mere withholding of compliance with the demand is not sufficient ground for a mandamus, yet it is necessary that there should have been a refusal in as many words. All that is necessary is in order that a mandamus may issue is to satisfy the court that the party complained of has distinctly determined not to do what is demanded.
- (7) For mandamus to issue there must be possibility of effective enforcement. This is to say that the court will not order something that is impossible of performance because the doing of the act would involve a contravention of the law or because the party against whom the mandamus is prayed does not for some reason, possess the power to obey. A mandamus will not be

granted if the party complained of has powers which would enable him to make the order inoperative.

- (8) There must be no other legal remedy. As a general rule, the Court in the exercise of its discretion may refuse an order of mandamus when there is an alternative specific remedy at law which is not less convenient, beneficial and effective. Alternative remedies that exclude the remedy are proceedings against the Crown which are substituted by the Crown Proceedings Act.
- (9) Where a statute creates an obligation and enforces its performance in a specified manner, the performance cannot be enforced in any other manner. So the remedy will not be available when a specific remedy is given by the Act imposing the duty that is sought to impose.

Whether there was a legal right

- [22]** Miss Grant for the Applicants submitted that the Force Orders dated 12th April 2012 with serial no. 3384 which outlined information as to the operations and management of the Programme, created a legitimate expectation that on successful completion of the HPDTP, the Applicants would be promoted to the rank of Inspector. Consequently, as she argued that all Applicants successfully completed the Programme, they had a right to be recommended for promotion to the rank of Inspector by the Commissioner of Police.
- [23]** Miss Thomas for the Respondents refuted this argument submitting that the participants of the HPDTP had no legal right to a promotion to the rank of Inspector. Further, Counsel submitted that there was no such legal duty imposed on the Commissioner of Police. She argued that the Force Orders could not purport to confer a right not provided for in the governing statutory provisions. Additionally, the criteria for advancement are outlined in regulations 15 and 16 of the Police Service Regulations and unless the criteria set out therein is satisfied, the participants could not be promoted.

- [24] The court must therefore decide whether the Applicants in fact had a legitimate expectation. Lord Fraser of Tullybelton in ***Council of Civil Service Unions and others v Minister for the Civil Service*** [1985] AC 375 at page 401B stated that, *‘Legitimate...expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue.’* Hence the question that arises in this case is whether there was a promise to the Applicants on behalf of the Commissioner of Police or whether there existed a regular practice that after the completion of the HPDTP, participants were promoted.
- [25] The Applicants would not be able to establish a regular practice as this was the first time the HPDTP was being introduced and they were the first to participate in the Programme. The issue thus turns on whether there was a clear and unambiguous promise to the Applicants on behalf of the Commissioner of Police that they would be promoted to the rank of Inspector upon successful completion of the Programme.
- [26] The participants of the HPDTP rely on the Force Order dated 12th April 2012 with serial no. 3384 which outlined information as to the operations and management of the Programme. Miss Grant argues that as this Force Order stated that the Programme was being done with the view of promoting participants to the rank of inspector on successful completion of the Programme. It must be noted that the Force Order stated that the Programme was being done “with the view of” promoting persons and did not say the participants will be promoted on completion of the Programme. The term “with the view of” could not and did not create a clear and unequivocal promise. Additionally, the terms and conditions clearly stated that that, “upon completion, Participants would garner additional competences and experiences to enhance their performance for progression to senior positions within the CIB.” This statement clearly states that what will be gained are skills that will improve their chances for a promotion. There was no promise of a promotion. Finally, the Force Orders distinctively stated that there was only an intended to promote a maximum of twenty-five persons.

Consequently, the Participants could not have expected that if all thirty-two of them successfully completed the Programme, all would be promoted.

[27] As reiterated by the Privy Council, in the case **HMB Holdings Ltd v Cabinet of Antigua and Barbuda** [2007] UKPC 37 at paragraph [31], a legitimate expectation claim fails, 'if the public body has done nothing or said nothing which can legitimately have generated the expectation that is contended for.' As there was no clear and unambiguous promise to the Applicants of a promotion, nothing was done or said by the Commissioner of Police or on his behalf to have generated the expectation of such promotion. The HPDTP merely created an opportunity for a promotion.

[28] The Court finds that there was no legal right conferred by these Force Orders. There is no authority to suggest that the Constabulary Force Orders is endowed, whether by statute or subsidiary legislation, with legal authority thus having legal effect. Consequently, it cannot impose on the Commissioner of Police any legal duties or grant legal rights. The court also finds that these Force Orders did not intend to confer any legal right for the reasons discussed above. It merely intended to create an opportunity for promotion, not a right to promotion.

[29] Therefore, the Applicants have failed to establish that they had a legal right to the promotion and they have failed to establish that the Commissioner of Police had a legal duty to recommend them for promotion.

Whether there was a demand and refusal

[30] Counsel for the Respondents submitted that there was no demand by the participants of the HPDTP. The evidence does not show that the Applicants made a distinct demand to the Commissioner of Police for the necessary paperwork to be prepared so that they could be promoted.

[31] In the letter dated the 6th of October 2015 addressed to the Assistant Commissioner of Police in charge of The Criminal Investigation Branch, as stated in paragraph 56 of the participants' Affidavit filed on 14th November 2016, they

merely outlined to him what had transpired since September 2014. Furthermore, the letter requested information rather than making any demands. The end of the letter posed the following questions:

- What if any considerations are being given for the relocation/exchange transfer for members of the group who have been displaced from their homes and families and are currently facing great financial difficulties?
- Having successfully completed the course will the members of the Programme be promoted to the rank of Inspector in light of our legitimate expectation?
- Are there any plans for a graduation or closing ceremony?
- What if any certification will be given to members of the group?
- Will there be any promulgation in the Force Orders for the course participants?

[32] Certainly these questions cannot be said to have amounted to a demand for the necessary paperwork to be completed so that the participants of the HPDTP could be promoted to the rank of Inspector. In addition to this, the letter was not addressed to the Commissioner of Police but to the Assistant Commissioner of Police.

[33] Further, the letter from the Office of the Public Defender on behalf of the Participants of the HPDTP to the Commissioner of Police dated the 23rd of November 2015, the letter only sought information on behalf of the participants of the HPDTP and highlighted that the situation was untenable as participants were displaced from their families, faced uncertainty, were unable to make meaningful plans to the jeopardy of their welfare and their families. This again, cannot constitute as a demand.

[34] Finally, the letter dated the 29th of March 2016 written to the Commissioner of Police by Althea Grant on behalf of the Applicants, only entailed details of the participants' plight and not a demand to be recommended for promotion. She requested that a hearing be held within 5 working days upon receipt of the letter

to discuss the concerns relating to the conclusion of the HPDTP. Further, she stated that if no communication was received, judicial review proceedings would be instituted in the Supreme Court of Jamaica.

[35] Therefore, none of the communications on behalf of the Participants to the Commissioner of Police can amount to a demand as to satisfy the pre-conditions outlined by McDonald-Bishop J. Therefore, there was no demand for which the Commissioner of Police could have refused.

[36] The pre-conditions are therefore not satisfied and as such, there is no realistic prospect of success of the order of mandamus being sought.

DISPOSITION

[37] The application for Leave to apply for Judicial Review is refused. The Court does not believe the Applicants have a realistic prospect of success for the following reasons:

The Applicants have no legal right to or a legitimate expectation of a promotion to the rank of Inspector.

There is no legal duty on Commissioner of Police to recommend the Applicants for promotion to the rank of Inspector.

There was no demand from the Applicants to the Commissioner of Police to prepare the necessary paperwork so that they could be promoted.

As there was no demand, there could be no refusal by the Commissioner of Police.