

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2003/HCV 2362

BETWEEN REGINA ex parte LIVINGSTON OWAYNE SMALL CLAIMANT
AND THE COMMISSIONER OF POLICE 1ST DEFENDANT
AND THE ATTORNEY GENERAL 2ND DEFENDANT

Arthur Kitchen for the Claimant.

Curtis Cochrane, instructed by the Director of State Proceedings, for the Defendants.

Heard 27th July 2006 and 18th September 2006

**Judicial Review – Certiorari – Decision – Civil Procedure Rule 56.16(1)
Brutum fulmen – Alternative Remedy – Delay.
Wednesbury Resonableness**

Campbell J

(1) The applicant was a Student Constable of Police in training at the Twickenham Park Police Academy. He became a member on the 9th September 2002 and was due to graduate from the Academy on the 11th June 2003.

(2) A report was made to the Commandant of the Academy, that the applicant was seen engaged in sexual intercourse with a female student of that Academy. He was subsequently dismissed from the Academy on the 16th May, 2003. Between the time of his dismissal and the filing of the application for Court Orders on the 5th December 2003, he occupied himself in seeking the assistance of the Police

Federation and an attorney-at-law who wrote to the Commissioner in September 2003, seeking reinstatement.

(3) His application seeks an Order of Certiorari to quash the Commandant's decision and an order of mandamus directed to the Commandant or the Commissioner of Police to restore the applicant to his post of Student Constable.

(4) The Grounds on which the applicant relies are:

(1) The order or decision is unlawful and in breach of principles of natural justice and/or the Police Service Regulations, 1961 and/or the Constitution of Jamaica and is unjust, capricious, arbitrary, null and void, in that:

(a) The applicant was never given a fair hearing or any hearing at all prior to the decision.

(b) The said allegation of improper conduct by the Applicant was never established or proved beyond a reasonable doubt.

(c) The applicant was denied his legitimate expectation that he would be allowed to continue his training as a student constable of police, on condition that he admitted the truth of the said allegation.

(d) The said order or decision is unreasonable in view of all the circumstances, and is such that no person or body properly directed on the relevant law could have made the same.

(5) **Relevant Regulations, Rules and Orders.**

(a) **The Police Service Regulations 1961, Regulation 24 (6)
Probationary Service**

1. (a) On first appointment to the Force a constable shall – 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 service 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.

2. The above regulation has been brought to my attention and explained to me.

(b) **Special provisions relating to orders for judicial review**

56.16 (1) of the Civil Procedure Rule 2002 states;

Where the Claimant seeks an order or writ of certiorari to remove any proceedings for the purpose of quashing them, the claimant may not question the validity of any order, warrant, commitment, conviction or record unless-

(a) before the trial the claimant has lodged with the registry a copy of the order, etc., verified by affidavit, or

(b) can account for the failure to do so to the satisfaction of the court.

(c) **General Standing Orders – 2000**
Jamaica Police Academy

Out of Bounds Area

The quarters of officers and sub-officers as also the various operational departments and areas of the Police Academy are out of bounds to all students except duty or official authority is obtained to visit them. The Dormitories/Rooms are out of bounds to all male/female unless on duty or so authorized by senior members of staff. No male/female is allowed to entertain or accommodate any person of the opposite sex in his or her dormitory. Modesty Gardens is strictly out of bounds to all male students, except with the permission of a senior member of staff.

(6) The decision

The decision that is being impugned is that of the Commandant of the Twickenham Park Police Academy, "whereby it was ordered or decided on the 16th day of May 2003 that the applicant be dismissed from the said Academy.

This is supported by paragraph 3 of the affidavit of Livingstone Owayne Small.

"On or about the 16th day of May 2003, I was verbally dismissed from the said Academy and sent home by Senior Superintendent of Police, Mrs. Mary Royes-Henry, the Commandant of the said Police Academy, as a consequence of an allegation that I was seen having sexual intercourse with a female Student Constable of Police in an old building on the compound of the said Academy, and which said allegation I eventually admitted the truth thereof, and in writing, but only after I was told by the said Commandant that if I admitted the truth of the said allegation I would be allowed to continue my said training."

(7) However, the affidavit of Francis Forbes, Commissioner of Police, contradicts the claimant as to whose decision it was that dismissed him. The Commissioner's affidavit outlines the investigatory process, which started with a hearing of the charges against the applicant at which Small was present. Then continues at paragraphs 12 and 13

Para. (12) That on my review of the file herein and in particular the report of the applicant, I formed the view that the applicant is wanting in the qualities likely to render him a useful member of the Jamaica Constabulary Force.

(13) That under Regulation 24(6)(a) I had Notice of Dismissal dated 12th November 2003 served on the applicant on or about December

12, 2003. A copy of the said Notice is exhibited and marked "EF.7" for identification.

(8) Applicant's Case

Counsel for the applicant submitted that no criminal act was committed. There was no breach of the rules or standing orders of the Jamaica Constabulary Force. It was further submitted that the treatment of the matter was unenlightened and displays the social morals of the Victorian period.

(9) Counsel proposed that the test to be applied in determining whether a constable is "wanting in any such quality" is an objective one which accords to both reason and common sense. The compromising position the claimant found himself in is insufficient to ground a decision that he is bereft of such qualities as are likely to render him a useful member of the Force. Counsel contended that no reasonable Commandant would come to such a decision. There was no rule in the Standing Order that student officers cannot engage in sexual intercourse. Counsel relied on the case of **Associated Provincial Picture Houses, Ltd. v Wednesbury Corporation (1947) 2 All E.R.**

(10) The decision of the Commandant being verbal was not exhibited, but was accounted for in accordance with Rule 56.16 (1) (b). The Commandant's decision, even if quashed, would not alter the relationship of the claimant with the Police Academy, for the simple reason, the Commandant's order did not constitute a dismissal. The Commissioner's order did. The mere quashing of the order would

leave the parties status indeterminate. In any event, the class of which the claimant was a member had long graduated when this matter came before the Court.

(11) Mr. Kitchen did not choose to rebut the defendant's argument that the Commissioner's notice of December 2003, some six (6) months after the applicant had been "sent home" was the decision that had dismissed the applicant. Instead, he posited that the application can be amended at any time to grant whatever relief the Court found, although not "specifically asked for by a claimant.

(12) The Court is reluctant to grant pointless relief. The class the applicant was a member of at the time the application was heard has long since graduated. What would then become of the applicant, would he be required to forego the remaining instructions and be deemed "graduated" or should be allowed to start a new programme afresh?

(13) The problem arose in the case of **R v Comptroller-General of Patents Designs & Trade Marks, ex p Gist-Brocades(1986) 1WIR 51**, the Court had to consider whether the defendants were correct in declining to grant the applicant's licence, the term not having expired. They found that the defendants had erred in not granting the licence, and made a declaratory order to that effect. However, by the time the matter was heard, the licence had expired. The Court held; "certiorari would have been *brutum fulmen* ... the passage of time has by now made any prerogative remedy of no practical use" (per Lord Diplock at 66 g & h). **See also**

R v Ashton University Senate, ex p Roffey (1969) 2 QB 538, I refuse the application on this ground.

(14) Additionally, the application for Court orders refers to two factors that are impediments in the exercise of the Court's discretion in favour of the applicant. The application states that, "An alternative form of redress exists by way of a claim for wrongful dismissal, but Judicial Review appears to be the most appropriate and expedient action, given all the circumstances of the case as aforesaid. The time limited by Rule 56.6 (1) of the Civil Procedure Rules, 2002 for making this Application has been exceeded, and the Applicant is personally and directly affected by the said order or decision.

(15) In respect of the first of these factors, the availability to an alternative remedy is a bar to the grant of judicial review. It is settled that judicial review is a remedy of "last resort." It is a collateral challenge and not an appeal. In **Leech v Deputy Governor of Parkhurst Prison (1988) AC 533** per Lord Oliver 580c;

"An alternative remedy for abuse of process, whether effective or not, may be a factor, and a very weighty factor, in the assessment of whether the discretion which the court undoubtedly has to grant or refuse judicial review should be exercised." See also **R v Chief Constable of Merseyside Police ex parte Caverly (1986) 1 All ER 257**.

(16) The adequacy of the alternative remedy to deal with the question that is raised in the given case is a vital consideration. If the alternate is not suitable or

effective, then there will be no bar to the applicant seeking relief by way of judicial review. **R (on the application of Taylor) Maidstone Borough Council 204 EWHC 254 (Admin)**. See also **Dionne Holness vs Coroner of Kingston and St. Andrew and the Attorney General of Jamaica, HCV OO999/2005**. **Supreme Court (unreported) delivered 18th September 2006**

(17) In respect of the delay, the decision that the applicant challenges was dated May 16th 2003, the application was filed on the 5th December 2003, more than six months later. This period is more than twice the period limited for the filing of an application for leave by Rule 56. 6 (1) of the Civil Procedure Rules 2002. When an application for leave to apply is not made promptly and any event within three months, the court may refuse leave on the ground of delay. **See Tulloch Estate Ltd. v Industrial Dispute Tribunal M130/2001** delivered in Supreme Court on 19th December 2001.

(18) Despite the fact that leave was granted, the question of delay may still result in a refusal to exercise the Courts discretion in favour of the applicant at the substantive hearing. As in **R v Dairy Produce Quota Tribunal, ex p. Caswell (1990) 2 A.C 738**. The application was filed on the same date that he was notified of his dismissal by the Commissioner. The delay incurred by the applicant in pursuing this application is another ground on which I would refuse his application.

(19) My findings outlined above have disposed of this application, I am however constrained to say, I disagree with Counsel for the applicant's submission, that the decision to dismiss the constable was unreasonable in the sense of the Wednesbury principles. It certainly cannot be that it is only a breach of the criminal or civil law or some expressed rule at the Academy, that could objectively ground a finding that a student constable 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. Such a contention can easily be met by a consideration of what must be one essential in a police officer's character, that is creditworthiness. If the officer's words cannot be relied on, his usefulness as a police officer is seriously impaired. A falsehood by itself breaches none of the guidelines stated by Counsel. The applicant admitted in his statement that he had lied to a Senior Superintendent when confronted about the matter. He was prepared to contradict with a falsehood, the statement of the two "eyewitnesses" to his actions. The witnesses were his colleagues. There is nothing irrational about a decision-maker who, having that fact before him, concludes that the applicant is unlikely to become a useful member of the Force.

The application for certiorari and mandamus is refused. No order as to costs.