



[2017] JMSC Civ 146

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2012 HCV 00578

IN THE MATTER of an Application by Christopher Alexander Getfield for an Administrative Order for Judicial Review

REGINA vs The Commissioner of Police Ex Parte Christopher Alexander Getfield

Christopher Alexander Getfield vs The Commissioner of Police Exparte Christopher Alexander Getfield

Application for Judicial Review – Certiorari - to quash decision of Commissioner of Police to dismiss and refusal of Re-enlistment in the Jamaica Constabulary Force – breach of right of fair hearing – Reg. 20, 45, 46, 47 Police Services Regulation, 1961. Section 5 of Jamaica Constabulary Force Act.

Miss Althea G.M. Grant for the Applicant

Miss Althea Jarrett for Respondent instructed by Director of State Proceedings

Heard: January 17, 2014 and October 13, 2017

Daye, J.

INTRODUCTION

- [1] The Applicant is a police officer who applied to the Commissioner of Police on 2nd June 2011 to be re-enlisted to the Jamaica Constabulary Force for a further tenure of five (5) years. His term of enlistment was due to expire on the 16th of September 2011. He was first enlisted as a constable on the 17th September 2001.
- [2] On the 19th of April 2012 he was granted leave by a Judge in Chambers to apply for Order of Certiorari to quash the decision of the Commissioner of Police to dismiss him from the force and to refuse his application for re-enlistment for a further (5) years. Leave was also granted to the applicant to apply for an order of Mandamus to compel the Commissioner to re-enlist him in the force.

DECISION

- [3] The decision of the Commissioner of Police that the Applicant complain about is contained in Jamaica Constabulary Force Orders dated 6th October 2011, No. 3557 which is exhibited in the hearing. The relevant part of this is as hereunder:

“5. Dismissal

The under mention has been dismissed from the Force with effect from its dates shown as not being permitted to re-enlist:-

*2011-10-06 Marine 9663 Cons. C. A. Getfield
(A19/61128)”*

- [4] Following on the grant of leave to apply for judicial review the applicant filed a Fix Date Claim Form on the 27th April 2012. It was supported by Affidavit evidence by the Applicant.

- [5] And the grounds for the Application is as follows:

1. The Force Orders published on the 5th October 2011 was unlawful and in breach of the Constabulary Force Act, the Police Service Regulations of 1961 and the Book of Rules for the guidance and general direction of the Jamaica Constabulary Force dated 7th September 1988 and/or breach of

the principles of natural justice, the Constitution of Jamaica and the rule of law and are unjust, capricious and arbitrary, null and void.

2. That the claimant was not afforded a genuine opportunity to be heard in respect of the allegations brought against him.
3. That the claimant was denied the legitimate expectation of being heard in respect of any of the allegations brought against him.
4. That the said decision and/or order of the Commissioner of Police are unreasonable, irrational and without foundation.
5. That the claimant was not nor has been in breach of any rules or provisions of the Jamaica Constabulary Force or any Laws of Jamaica.
6. That the allegations against the claimant cannot be substantiated and no evidence was put forward to warrant the penalty of dismissal.
7. The Commissioner of Police acted without and/or in excess of his jurisdiction, and in breach of the Police Service Regulations of 1961.
8. That no alternative form of redress remains for the claimant seeing that the claimant has exhausted all other remedies before making the application for Judicial Review.
9. The claimant has sufficient interest in the subject matter of this Application in that he is directly and substantially affected by the decision of the Commissioner of Police to dismiss him and not re-enlist him in the Jamaica Constabulary Force.
10. The Commissioner of Police has failed, refused or neglected to reinstate the claimant in the Jamaica Constabulary Force within a reasonable time or at all, is breach of the principles of Natural Justice.

- [6] On the 13th December 2012 the defendant filed an amended Fix Date Claim Form and deleted ground 5, 6, 7 and 10.

PROCEDURE PREDATING FORCE ORDER DECISION

- [7] Two actions were taken by or for the Commissioner in response to the applicants request for re-enlistment.
- [8] The first is that the Assistant Commissioner of Police for Administration on the 10th August 2011 served the Applicant with a Notice of Non-recommendation of re-enlistment. There are the terms:

You were transferred to the Marine Division on May 19, 2011 where for the two-month period your present commanding officer assess your discipline to be good and your performance as satisfactory. However, during your tenure at the Traffic Division for the period June 2008 to May 2011, your general conduct and discipline were assessed to be of average standard. You reportedly displayed a lackadaisical and nonchalant attitude towards your duties and had to be spoken to on a number of occasions. Your demeanour and attitude are described by your previous commanding officer as “one who sees no evil, hears no evil and speak no evil” you reportedly also failed to assert yourself.

You are one of three policemen whose image appeared on a social network (Facebook) displaying a firearm and making questionable suggestion of a firearm being discharged whilst holding aloft a bottle seemingly with alcoholic beverage. It is also noted that members of the public also formed a part of your group which took place in a setting that give cause for concern. The image depicted is disturbing and reflects that you have a poor sense of responsibility and lack good judgment. The image of the Jamaica Constabulary Force has also been negatively impacted by your action. Having regard to your poor performance and lackadaisical attitude over a sustained period coupled with your poor

sense of responsibility and lack of good judgment, the Jamaica Constabulary Force has lost confidence in your ability to serve the citizen of Jamaica with diligence and integrity hence the non-recommendation of your re-enlistment to the Commissioner of Police.

APPLICANT'S REPLY

The Applicant responded to these allegations by letter on August 22, 2011 which was sent to the Assistant Commissioner of Police for administration. He denied he did not perform his duties professionally or any way for any period in the force. He drew attention to the fact that he was never cited or charge for any misconduct or failing his duties by his commanding officer at the Traffic Division. Further he pointed out that there was no criticism of his work when his previous application for re-enlistment was submitted and was approved. Also he said his previous commanding officer at the Traffic Division had as recently as March 23, 2011 gave him a favourable written recommendation of his conduct and work. Then he denied that he was one of the persons in the photographs on Facebook. He requested that the photograph in possession of the commissioner be sent to him, so he could show he was not one of the persons in the photographs. He received no response to this letter.

ORAL HEARING

[9] The question of whether it was an image of the applicant in the photograph came up only later when he was summoned to a meeting by the Commissioner on the 6th October 2011 presumably for an oral hearing of his application for re-enlistment. There he answered the commissioner that his image was not in a photograph shown to him. He listed the names of the other policemen in the photograph and Dennis Getfield. This was the second and last action taken by the Commissioner before he orally informed the applicant that he was no longer a member of the Police Force.

ISSUES

In light of these series of events the issues then that arise are:

- (i) Is the applicant entitled to a fair hearing by the commissioner before a decision was taken to recommend that he should not be re-enlisted in the Force; and
- (ii) If he was entitled to a fair hearing was he afforded a fair hearing by the commissioner in all circumstances.

JUDICIAL REVIEW

[10] The basis and objective of judicial review was stated in a passage in the judgment of Lord Clyde in Hutchinson Reid v Secretary of State for Scotland [1999] 2 WLR 28; [1999] 2. AC 512. He states:

“Judicial review involves a challenge to the legal validity of the decision. It does not allow the court of review to determine the evidence with a view to forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from the procedure which either by statute or common law as matters of fairness it ought to have observed. As regard the decision itself it may be found to be perverse, or irrational or gross disproportional to what was required or its decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or a sufficient evidence to support it, or through account being taken of irrelevant matters, or through a failure for any reason to take account of relevant matters, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. But while the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies it is perfectly clear in a case of review, as distinct from on ordinary appeal the Court may not set about forming its own preferred view of the evidence.” (c/f Anisminic Ltd V Foreign

Compensation Commission [1969] 2 AC 147 at 171, B-D [1968] UKHL 6, [1969] 1 All ER 208, [1969] 2 WLR 163.

[11] Now the grounds of judicial review of the applicant can be subsumed under these headings:

1. Is the police officer entitled to a fair hearing before the decision to refuse his Application to re-enlist?
2. Did the Commissioner acted in excess of his powers to dismiss the Applicant?
3. Did he act unreasonable in the Wednesbury sense (Associated Provincial Pictures House Ltd v Wednesbury Corporation [1948] K. B. 223
4. Did the Commissioner misconstrue the statutory provisions that confer authority on his office?

[12] In **Act. Cpl. Hugh Campbell v Supt. Of Police i/c Kingston Central, The Commissioner of Police and the Attorney General**, Suit E. 106 of 1985, del. Nov. 8, 1985, **Downer J.** (as he then was) dealt directly with the issue of the right of a police officer to receive a fair hearing before his application for re-enlistment is refused. After examining a number of cases at common law. **Weinberger v Ingles, Schmidt v Secretary of state for home Affairs** [1969] 2 W.L.R. 337, **R v. Board of Visitors of Hull Prison, Ex Parte St. Germaine** (No. 2) 1969 1 WLR 1041 he concluded that an officer had a legitimate expectation to be heard before his application is refused. He then formulated the rule in his decision thus:

“... that wherever a public authority or a tribunal – whether statutory or non-statutory or domestic, is empowered to make a concession or grant a privilege, then an applicant who legitimately expect such concession or privilege, is entitled to the procedural protection of a fair hearing before a decision is made against him. Any such

decision which ignores this procedural protection will be quashed or declared null and void.”

[13] The learned Judge went on to say that both of common law and statute the police constable as a public officer had a legitimate expectation of the Application of the principles of natural justice before a dismissal or refusal to renew which is in substance a dismissal. He decline to base his decision in the case that paragraph 46(1) of the Police Services Regulation 1961 dealing with dismissal apply to refusal to approve continuance of the police officer service. The facts of this case are that the police officer applied for re-enlistment to the Force in January 1985 as his first term of 5 years expired. The Supt. of Police sent a report of adverse entries in the record of the Plaintiff to the Assist Commissioner of Police. It contains separate entries about his conduct between 1981-1984. But he nonetheless recommended the officer for re-enlistment explaining that he counselled him and he showed improvements. In February 1985 he sent a notice to the plaintiff outlining 3 of the adverse entries but not the fourth. Counsel for the Plaintiff sent a letter in March 1985 to the Superintendent that his client was entitled to a fair hearing. The plaintiff's application with all four adverse entries to the Commissioner. The Assist Commissioner had sent the plaintiff's application with all four adverse entries to the Commissioner, then the Commissioner reviewed the plaintiff's filed and refused his Application. The Judge found that the plaintiff was not given a fair hearing and was not given an opportunity to comment on the fourth adverse entry in the report. He was denied a fair hearing. Downer J. did not accept, the submission of Mr. Langrin who appeared for the Attorney General, that the reply contained in the letter of counsel for the plaintiff to the officer was an opportunity to be heard and amounted to a fair hearing. He said the notice had not bring home to the attention of the plaintiff that these allegations were to be relied on in his application for re-enlistment.

The judge then made two declarations:

- i. The officer's application be reconsidered in accordance with a fair hearing as the original decision was null and void.
- ii. That the officer was entitled to emolument from the date when the commissioner purported to reject his application to be re-enlisted. (c/f for Downer JA in **Owen Vhandel v The Board of Management Guys Hill High School** SCCA 72/2000, delivered June 7, 2001 at p.29, para 3 p50.)

[14] Morrison J.A. (as to then was) in **the Police Service Commission, the Commissioner of Police, The Services Commission v Donovan O'Connor** (2014) JMCA 35 found that the respondent a police inspector who it was recommended to the Governor General to be retired in the public interest, pursuant to Reg. 26 of the Police Service Commission was not given a fair hearing because he was not given a fair opportunity to meet the charges presented against him. On the recommendation of the Commissioner of Police, the Police Inspector was served a notice of the grounds on which his retirement was recommended in the public interest. The notice contained a specific set of allegations about the police inspection's conduct. Then it referred to 33 unspecified complaints against him. His lawyers in a letter provided answers to the specific complaints and then noted that it was not right to expect his client to answer the 33 unspecified complaint.

Morrison J.A. held (at para 36) that

“... the requirements of fairness demand that the notice of the complaints supplied to the member must be sufficiently particularised and, depending on the nature of the complaints, accompanied by a summary or some other indication of the evidence in support of it, so as to enable the member to respond meaningfully to them. In my view, the notice served on the respondent in this case, relating to 33 complaints that had been lodged with “various agencies” against him over

a nearly 15 year period (5 May 1988 - 24 January 2003), was palpably insufficient for this purpose..”

[15] It can be deduced from the authorities the following propositions:

- (a) The service of notice of grounds of dismissal or refusal to re-enlist or other disciplinary charge by an authority or its officers on a public officer fulfils only one, if not the first requirement by the public authority to act with fairness to the officer;
- (b) Another element is that the notice must particularised sufficiently the complaints against the officer to enable he or she to be given a fair opportunity to respond before any decision adverse is taken against the officer, even suspension.
- (c) The authority must fully and fairly consider the public officers answer, response or defence. (See **R v The Commissioner of Police Ex. Parte Courtney Ellis**) para 54, 62.65 This does not have to be an oral hearing or a court like trial.

[16] In my view a fair hearing may involve that:

- (i) A notice that contain multiple charges/complaints or counts, each charge should be particularized and the charges must not lead to prejudice by their joiner.
- (ii) Where a public officer answer or respond to the charges or complaint if each of them raise an issue that require specialized, technical or scientific material to assess the answer or response then a decision by a decision maker that does not allow consideration of such material is deficient and will occurred with a fair hearing.

(iii) Consideration of such material aforesaid, taken into account, with the legislative scheme, may be warranted from the earlier stage of proceedings rather than the later stage to give real and true effort to the principle that the officer must have a fair hearing. **Rees and others v Crane** [1994] 1 AllER 833, 844 para 845 para a-f

DISCUSSION AND ANALYSIS

- [17] In the present case the applicant like the Inspector in **Donovan O'Connor**, the Constable in **Hugh Campbell** was faced with multiple charges. Some were specific and other un-particularised. The officer was not given a chance to make firstly any comment on the un-particularised charges. The officer gave answers to the specific changes but no separate treatment was given to these answers.
- [18] In relation to the allegations about the photographs on the social media, Facebook the applicant disputed that it was his image in the photograph. He offered an explanation from the time he got the notice of the complaint. His answer raised the issue of identification. It was an issue that required more investigation which could be perused. It was not a matter of pour credibility. Nor was it simple to say as was submitted by Miss Althea Jarret for the Attorney General, why it is the applicant did not given answer at the Oral Hearing that disclose who the person was. Time and opportunity was required by the demands of justice to be given to him and the decision maker to resolve this issue before a final decision was taken.
- [19] It would be correct that the decision to refuse the applicant's re-enlistment was taken without sufficient evidence. This would not be a fair hearing. A decision taken without adequate evidence would be unreasonable in the **Wednesbury** sense. One has to bear in mind that it was a decision that would affect the applicant's livelihood and reputation and the procedure chosen was a summary one where there was no later stage to undo and what may be incorrect. It is also

correct too that the Commissioner acted in excess of jurisdiction. It meant he would have misused or abused his powers.

[20] This is connected to the submission that the Commissioner misconstrued the statutory provision that gave him the power and authority to act. The Force Order describe the decision to refuse re-enlistment as dismissal. It does not appear, where the procedure for dismissal under sec. 46(1) are carefully laid out, that it would be lawful and proper to treat this particular application for re-enlistment in a summary way.

[21] It is useful to examine the Commissioner of Police reason for his decision. The Commissioner deposed in his affidavit of the 16th April 2013 at para 6-18 as follows:

“6. Sometime in September 2010, photographs of the Applicant were posted on the facebook site of Constable Titus Hammond of the Flying Squad. One of the photographs showed the Applicant displaying a firearm in his left hand and sitting with the said Constable Titus Hammond, Constable Joshua Hammond of the May Pen Police and a civilian man. In the photograph, Constable Joshua Hammond is sitting beside the Applicant and is holding in his right hand, what appears to be a bottle of alcoholic beverage. I exhibit hereto marked “OE1” for identification, a copy of that photograph.

7. The 2nd photograph shows only the Applicant and Constables Titus and Joshua Hammond. In this photograph, the Applicant is seen holding a bottle of Hennessy alcoholic beverage and using his right hand to mimic pointing a firearm while Constable Joshua Titus is pointing a firearm in the direction of the camera. I exhibit hereto marked “OE2” for identification, a copy of that photograph.

8. When the aforesaid photographs first came to the attention of the police high command, the identities of the police officers were not readily apparent. Investigations were however carried out and all 3 Constables, including the Applicant were definitively identified.

9. When this information came to my attention, I ascertained when the Constables’ terms of enlistment would come to an end and took the decision that I would

not approve their applications for re-enlistment should any such application be made as I considered such conduct inimical to the standards of professionalism and integrity required of members of the JCF who are guardians and preservers of the peace. I determined however, that I would review my decision in light of any submissions made to me by the officers on their application for re-enlistment, should any such application be made.

10. *On June 2, 2011, the Applicant applied for re-enlistment for a second 5 year term. His re-enlistment was not recommended to me by the Assistant Commissioner of Police for Administration for the reasons stated in the Notice Re Non-Recommendation for Enlistment dated August 11, 2011. A copy of that notice is exhibited to the Affidavit of the Applicant and marked “CAG2” for identification.*

11. *The Applicant was given 7 days to respond to the Notice Re Non-Recommendation for Enlistment. His response is exhibited to his Affidavit and marked “CAG4”*

12. *The Applicant was invited to be heard by me as Commissioner of Police. That hearing was initially to have taken place on September 28, 2011, but was subsequently rescheduled to October 6, 2011. Prior to that hearing, I had read the Notice Re Non Recommendation for Enlistment and the Applicant’s response. I also had the aforesaid photographs in my possession as well as the results of the investigation identifying the Constables whose images appear in the photographs.*

13. *At the hearing on October 6, 2011, I gave the Applicant every opportunity to address the photographs. I asked him if he knew the persons in the photographs and he identified the man holding the fireman in exhibit “OE1” as a person by the name of “Dennis” whom he said is a member of his community and is not a policeman or a licensed firearm holder.*

14. *I was surprised by the Applicant’s response, because on meeting with him, I immediately recognized him as one and the same person displaying the fireman in the photograph in exhibit “OE1”. I also recognized him as the person holding the bottle of Hennessy alcoholic beverage in the photograph at exhibit “OE2”.*

15. *When given the opportunity to respond, the Applicant despite the clear and unequivocal image of himself in the two photographs, denied that he was one of the persons captured in the photographs. The Applicant*

was only prepared to say that he knew the person to be someone from his community. It is therefore not true as alleged by the Applicant in his Affidavit that I did not listen or that I refused to listen to anything he had to say regarding the photographs.

16. I consider the Applicant posing with a firearm (in the case of the 1st photograph) and, holding a bottle of Hennessy alcoholic beverage while sitting beside another Constable who is himself holding and pointing a firearm (in the case of 2nd photograph), in what appears to be a social setting to be a grave lapse in judgement for a police Constable. That lapse was compounded in my view by the fact that when presented by me with the photographs, the Applicant looked at them and denied that he appeared in them when it was clear to me and confirmed by an investigation, that the Applicant was the person in question.

17. As a result of the Applicant's grave lapse in judgment, coupled with his denial in face of the evidence, I lost confidence in his ability to perform the duties of the office of Constable with sound judgement, professionalism and integrity. As a consequence, I decided not to approve the Applicant's application for re-enlistment. The Applicant was informed of my decision and the reasons for same."

[22] On the Commissioner's account he came to a decision not to re-enlist the applicant from September 2010. This decision was based on the two photographs exhibited. He acknowledged that there was an issue about the applicant's identity on the photograph. He indicated that investigations were carried out on this issue and the Applicant's identity was established. He stated he reviewed the file with all these materials. Although he made a decision not to re-enlist the applicant he was open to the applicant addressing him to change his decision. He says he did in fact give the applicant an opportunity to do so at the meeting of the 6th October 2011.

[23] At no time did the Commissioner give the applicant the opportunity to address the result of the investigation about his identity. It is not reasonable and fair to rely on the grounds that information about the investigation would cause danger to the informer or endanger the public. The Commissioner ought to supply the applicant with some information about the material on the central issue of

identity. He should have done this to the applicant's written request and also at the oral hearing. The failure to do this denied the applicant of a fair hearing.

- [24] The Commissioner of Police's Affidavit in response cannot be fully addressed without reference to **R v Commissioner of Police Ex Parte Glenroy Clarke** (1974) 31 JLR 520. Miss Althea Jannell for the Attorney General relied on this authority in her submission. This was a case where the police officer application for re-enlistment was refused. He applied for judicial review to the full court who upheld the Commissioner's decision. He appeal from the Full Court's decision and the Court of Appeal upheld the Full Court's decision that a police officer did not have an automatic right to re-enlistment. It accepted that a Commissioner could come to a decision not to re-enlist an officer before that officer made his application. But the Commissioner must be open to change his decision upon representation by the officer. In **Glenroy Clarke's** case the Court of Appeal found the Commissioner who took his decision not to re-enlist the applicant, did give him an opportunity to make representation why he should not be dismissed.
- [25] In the present applicant's case even though he was given an oral hearing he was not given adequate opportunity to meet the case against him having regard to the issue of identity that was at stake. The applicant requested disclosure of the photograph. None was provided to him before the hearing. It was the duty of the Commissioner to disclose the photograph upon the applicant's written request and supply such discrete information of investigation of his identity thereon at the oral hearing. There was thus a breach of fair hearing.
- [26] This breach would result in a breach of section 5 of the **Constabulary Force Act**. No procedure is laid down in this statutory provision as to steps for applying for re-enlistment. But it is now accepted as good law that where a statute confer on any person or body the power to make decision that affects a person's right then the procedure laid down in the statute is to be followed. Further the common law will imply such additional procedure as will ensure the attainment of

fairness. (per Lord Bridge, **Lloyd v McMahon** [1987] 1 All ER 1118 at 1161 and Downer JA **Vhandel's** case (supra).

- [27] If there is a breach of a fair hearing there is also a breach of the constitution. Downer J. took the view that sec 1(9) of chapter 1 of the Constitution enshrine judicial review of administrative action (**Vhandel's case** (supra) p.18 para 2). Morrison JA in **Donovan O'Connor** agreed with Counsel for the Appellant that a citizen has an entitlement to fair hearing which is a constitutionally protected right under section 20(2) of the Constitution as amended by the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2010.
- [28] Another factor that vitiates the Commissioner's decision is that the Force Order containing the decision is ambivalent as to whether the decision was a refusal to re-enlist or a dismissal. In **Glenroy Clarke** the Full Court held the decision by the Commissioner not to re-enlist an officer is an administrative decision and the decision to dismiss for disciplinary conduct was a quasi-judicial decision warranting a court of enquiry under Reg. 46(1) of the Police Service Regulation (1961). Downer, J decline to base his decision on judicial review in **Hugh Campbell** (supra) on sec. 46(1) leaving counsel Mr. Garth Little to deal with it on appeal if necessary.
- [29] In the present applicant's case the Commissioner's decision in the Force Order which was headed 'dismissal' invariably brought into play the provisions of sec. 46(1). It is pertinent to refer to relevant parts of Reg. 45, 46(2)(a) and (b), 47 (2)(k) and (l).

"45. A member against whom any disciplinary proceedings are taken is entitled to know the whole case against him and to have an adequate opportunity of preparing the defence.

46. (2) *Where*

(a) it is represented that a member below the rank of Inspector has been guilty of misconduct; and

(b) *the authorized officer is of the opinion that the misconduct alleged is not so serious as to warrant proceedings under regulation 47 with a view to dismissal,*

the authorized officer may make or cause to be made an investigation into the matter in such manner as he may think proper; and if after such investigation the authorized officer thinks that the charge ought not to be proceeded with he may in his discretion dismiss the charge, but if he thinks that the charge ought to be proceeded with he shall report the member to the Commissioner or in the case of any minor offence specified in Part I of the Second Schedule may deal with the case summarily, and may impose a penalty on the member in accordance with these Regulations.

47. (2)(k) *if the Commissioner is of opinion that the member deserves some punishment other than dismissal, he shall recommend to the Governor-General what other penalty should be imposed;*

(l) *if the Commission is of opinion that the member does not deserve to be dismissed by reason of the charges alleged, but that the proceedings disclose other grounds for removing him from the Force in the public interest, he may recommend to the Governor-General that an order be made accordingly, without recourse to the procedure prescribed by regulation 26.*

47. (3) *In relation to a member below the rank of Inspector references to the Commission in sub-paragraphs (g), (h) and (i) of paragraph (2) shall be construed as references in sub-paragraphs (j), (k) and (l) of that paragraph to recommendations which may or are to be made by the Commission to the Governor-General shall be construed as references to decision which may or are to be made by Commissioner."*

[30] These provisions confer on the Commissioner of Police or the Commission the powers to:-

- (1) Investigate a complaint of misconduct against a police officer or officers above the rank of Inspector;
- (2) To determine if the complaint warrant dismissal or not

- (3) If the complaint warrant dismissal then he must follow the detail procedure of Reg. 47 to:
- (a) Notify officer in writing of charges against him/her
 - (b) Notify him/her of the date that charges will be heard and that he/she state in writing his defence before a specific date
 - (c) Appoint a Court of Enquiry if the officer does not provide a written statement of defence or if he/she fails to exculpate himself.
 - (d) Set a date for the hearing of the court of enquiry into the charges and inform the officer that will be permitted to attend the hearing to defend himself.

Then they are other provisions for the calling of witnesses, questioning witnesses and making findings. The Commissioner may recommend that the officer be dismissed in the public interest if the charges are not made but for dismissal but disclosed other grounds for removing him from the Force. Where the Commissioner decide that after investigation the member is to be charged for misconduct not warranting dismissal he may proceed to a hearing following the procedure under Reg 47. There the Commissioner is empowered to deal summarily with an officer who is charged for any minor offence in Part 1 of the Second Schedule and imposed a penalty in accordance with the schedules. The rules expressly provides that the statutory procedure for dismissal under Reg. 47 are not apply for a summary hearing.

- [31]** There are some twenty-nine (29) minor offences listed in Part 1 of this second schedule they relate to its conduct and performance of its duty of any officer on duty and off duty. Dismissal is not a penalty for breach of any of its minor offences tried summarily. Dismissal is a penalty for offence not tried summary under Reg. 47.

- [32] The notice of non-re-enlistment served as the applicant contained complaints about the conduct and performance of the applicant's attitude. These were unparticularized but would amount to no more than minor offences. These could be tried summarily but if found proved would not be punished by dismissal.
- [33] The applicant challenged in written the complaint about his conduct. He got no response from the commissioner or his officer. At the oral hearing which was summary no mention was made of these complaints and no material to support them was produced, yet at the oral hearing he was dismissed. The Commissioner sought to invoke the summary power the statute imposed on him for both the application for non-re-enlistment and for an offence warranting the penalty of dismissal. Dismissal would be disproportionate for specified minor offences charged against the Applicant (**R v Barnsley Council, ex parte Hooke** [1976] 1 WLR 1052. This is another ground for judicial review. The sole figure of the applicant summoned by his senior officer to appear before the august person and the office of the Commissioner of Police on the 6th of October 2011 for a meeting in circumstance when he did not obtain a response to his answer or request and where he denied that his image was on photographs taken from Facebook in questionable conditions, where he was hastily questioned about the photographs and which he again denied his image was on these and where the commission then ruled that he did not believe the officer and lost confidence in him and thereby inform him that he was no longer in the force, against the Commissioner previous decision not to be re-enlist him, and the publishing in the Force Order dated the 6th October 2011, the dismissal and non-re-enlistment of the officer bear all the appearance of an **a fait accompli**, i.e. foregone conclusion, and this would be an unfair hearing.

RELIEF

- [34] The decision of the Commissioner of Police is therefore null and void. Certiorari is ordered and the decision quashed. The applicant also withdraw the request for an Order of Mandamus that is to compel the Commission to re-enlist him. Miss

Althea Jarrett submitted that the court does not have the power to Order Mandamus to compel the re-enlistment of an officer whose dismissal was quashed as null and void. She relied on three cases. **R v Commissioner of Police Ex Parte Ira Raffington** where Brooks J refuse to Order Mandamus to re-instate the applicant on the basis that such an order would usurp the authority of the Commissioner. Also she said in **The Industrial Dispute Tribunal v University of Technology Jamaica and the University and Allied Workers Union** Civil Appeals Nos. 71 & 72 of 2010, Brooks JA point out different powers a judge exercise on judicial review and on appeal. Then again she submitted that **Reid v Secretary of State for Scotland** (1992) 2 All ER 512 at 541-542 supported the submission.

[35] In **Hugh Campbell** the judge granted a Declaration on an application for Mandamus, for the officer whose refusal for non-enlistment was quashed. The judge said he was entitled to his emolument from the date when the application for re-enlistment was rejected.

[36] In **Vhandel**, Downer JA found where Certiorari was issued to quash a decision against the teacher's dismissal the result is that the teacher may re-instated from the date of the dismissal letter. The teacher would be entitled to salary and emoluments from that date. In order words the judge was content to make a declaration that the teacher was entitled to be re-instated. He said it was not necessary to issue a Mandamus to compel the School Board to do its duty in accordance with law/regulation, thus reinstatement of a successful applicant was declared by the court. He granted an order for liberty to apply to the court in the event that the school Board did not act upon the declaration. (cf per Sinclair-Haynes, J., In **R v Commissioner of Police Ex Parte Courtney Ellis**, Claim 2010 HCVO 01286 para 76 and 77 where the judge refusal to order mandamus.)

CONCLUSION

- (1) A police officer who applies for re-enlistment is entitled under the Jamaica Constabulary Force Act, the Police Services

Regulations, and in the Constitution to a fair hearing of his application before a decision is taken to refuse his application.

- (2) The applicant was not given adequate opportunity to meet the complaints of the refusal of his application for re-enlistment.
- (3) The Commissioner acted unreasonable in refusing the applicants application of re-enlistment.
- (4) The Commissioner acted in excess of his power when he refused the applicant's application for re-enlistment.
- (5) The Commissioner acted disproportionately when he imposed a penalty of dismissal against the officer.
- (6) The Commissioner misconstrued his statutory powers under the Police Service Regulations when dismissed the applicant.

[37] The Following Orders are granted:

- (a) Certiorari granted to quash the decision in the Force Order dated 6th October 2011 that the applicant's application for re-enlistment was refused and he was dismissed. The decision was null and void.
- (b) Declaration that the applicant is entitled to be re-instated as of the date of the 6th October 2011.
- (c) Declaration that the applicant be entitled to his salary and emoluments from 6th October 2011.

(d) Declaration that the Commission has a duty to commence hearing **De Novo** in accordance with the principles of fair hearing to determine issue of identity arising on the application for re-enlistment in the Force.

(e) Liberty to apply.

(f) No order as to cost.