[2015]JMSC Civ.26

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CLAIM NO. 2014 HCV 03951

BETWEEN IN THE MATTER OF an application by Dewayne Thomas, for leave for an Order of Certiorari quashing the decisions of the Commissioner of Police to discharge his services by giving him a two year contract without notice and then discharging him for failing to reenlist and thereafter refusing to reenlist him as a Constable within the Jamaica Constabulary Force.

AND

IN THE MATTER OF an application by Dewayne Thomas for leave to apply for an extension of time for Judicial Review

BETWEEN	DEWAYNE THOMAS	APLLICANT
AND	COMMISSIONER OF POLICE	RESPONDENT

Mrs. Dionne Maylor and Mr. John Clarke for the Applicant.

Ms Marlene Chisholm from the Attorney General Chambers for the Respondent

Heard: 12th of February 2015 and 26th of February 2015.

Application for leave to apply for judicial review- four (4) year delay-whether application can be granted once good reasons are presented.

SHELLY WILLIAMS, J (AG)

[1] On the 15th of August 2014 Mr Dewayne Thomas filed two Notices namely a Notice of application for Court Orders to Extend Time for filing application for Judicial Review and an Application for Leave to apply for an Order for Judicial Review. There were two affidavits filed by Mr Dewayne Thomas in support of both applications.

[2] On the 12th of February 2015 the application was heard as to whether time should be extended to file application for Judicial Review. The matter was part heard to the 26th of February as the parties indicated that they wished to provide additional authorities in the matter.

BACKGROUND

[3] The Applicant in his affidavit stated that on the 4th of March 2014, he was discharged from the Jamaica Constabulary Force (the Force). He had enlisted in the Force in 9th of September 2002 and was assigned to the Parish of St James. In June 2007 he applied for re-enlistment in the Force for five years.

[4] The Applicant was re-enlisted but the period of time that he re-enlisted for is a matter that is not agreed by the parties. The Applicant claimed that he applied and was enlisted for five years while the Respondent maintained it was an enlistment for a period of two years. The two year period is supported by letters and notices indicative of the conditions of the Applicant's re-enlistment. The Respondent produced:-

a. A Notice dated the 26th of June 2007, signed by the Superintendent of Police that the Applicant's work, worth and conduct was below average and that he – the Applicant would be recommended to be re-enlisted for a period of two (2) years.

b. The Notice was followed by a letter dated the 27th of August 2007 signed by Superintendent of Police that the Applicant was approved to be re-enlisted for a period of two years.

[5] In May 2008 the applicant was transferred to Manchester and was assigned to the Mandeville Police Station. On the 3rd of February 2010 a Notice was served on the Applicant which was signed by the Superintendent of Police for Manchester which indicated that:-

a. The records showed that he had not re-enlisted in the Force as of September 8th 2009 and as such his two year period had expired. That his continuation in the Force would be dependent on evaluation of his work.

b. The applicant being aware that he had a Court of Enquiry pending against him in the Area One (1) Court of Enquiry Panel in which charges arose out of Breaches of the Corruption Prevention Act.

c. Based on these and other disregard for Rules and Regulations of the Force he- the Superintendent would be recommending that he be dismissed from the Force.

[6] After that Notice was issued on the 4th of February 2010 there was a letter sent from the Superintendent for Manchester to the Assistant Commissioner of Police where it was recommended that the Applicant not be re-enlisted into the Force.

[7] On the 12th of February 2010 there was a letter issued by the Superintendent of Police to the Assistant Commissioner of Police informing him of the allegations of corruption made against the Applicant and that the matter was handed over to the Anti-Corruption Branch.

[8] On the 4th of March 2010 the Assistant Commissioner of Police wrote to the Applicant informing him that he had been dismissed from the Force. The letter indicated that if the applicant wished to appear before the Commissioner either alone or accompanied by his attorney to show cause why he should not be dismissed he should do so. If he chose to do so, he should advise his Commanding Officer within seven (7) days of receipt of the letter.

[9] On the 16th of March 2010 the Applicant wrote, through his Commanding Officer, that he wished to appear before the Commissioner to show cause why he should not be

discharged. Subsequent to this letter there was a meeting of the Applicant and the Commissioner of Police. The Applicant indicated that he attended the meeting without his attorney, Ms Christine May Hudson, as the date for the meeting was changed by the Commissioner and Ms Hudson, was unable to attend. He attended the meeting and at the conclusion of the meeting he received a letter dated the said date 18th of May 2010 informing him he was discharged from the Force.

[10] The Respondent argued in his chronology that he thought he had re-enlisted for five years. He based on the fact that:

a. The Applicant was certified/recertified in the use of a Glock 9MM Pistol.

b. He received a letter dated 21st of January 2010 from the Force to the National Commercial Bank indicating he was a serving member of the Force.

c. He received another letter dated the 26th of November 2009 to the British High Commission indicating that he was a serving member of the Force.

d. He was given a letter dated the 20th of October 2009 approving 14 days vacation leave.

[11] Subsequent to receiving the letter of dismissal and having the meeting with the Commissioner of Police the Applicant indicated that he made attempts to secure an attorney and to pursue legal action. These efforts included:

a. Contacting his attorney-at-law Ms Christine May Hudson advising her of the decision of the Commissioner of Police. Ms Hudson advised him that he would have to make an application for Judicial Review. She quoted him a sum to undertake this and he was unable to afford it.

b. He went to the Public Defender's office in September 2010. A statement was taken from him by personnel at that office and he was informed they would contact him. He did not hear from them and contacted them in 2012. He was told then that due to the Tivoli Incursion he would have to wait for a period of one year before he could receive assistance. He checked with the office

constantly up to September 2012 when he was informed that the Force would not reverse their decision.

c. In October 2012 the Jamaica Police Federation (the Federation) contacted him and informed him they had retained an Attorney for him ie Nunes Scholefield Deleon & Company. Mr Patrick Foster QC, an Attorney with the said law firm, wrote to the Public Defender for information about his case but that information was not forthcoming.

d. On the 21st of January 2013 he was referred to Nigel Jones & Company and on the 4th of February 2013 he was provided with a legal opinion. There was a request of the sum of $100,000 for the application for Judicial Review. He was unable to afford this fee.

e. He contacted the Legal Aid Clinic for assistance and on the 15th of August 2014 the Notice of Application for Extension of Time and the Application for Leave to file judicial review was filed.

[12] The applicant indicated that he has four children one of which is ill. He was unable to afford an attorney based on his impecunious position.

GROUNDS FOR THE APPLICATION

The Applicant filed two grounds on which he rested his application, namely:

a. The Applicant's delay in filing the application for Leave to apply for an Order for Judicial Review was not intentional.

b. The Defendant will not be prejudiced by the extension of time.

EVIDENCE

[13] At the hearing of this matter the Applicant relied on the evidence contained in the affidavit of Mr Dewayne Thomas while the Respondent relied on the Affidavit of the Assistant Commissioner of Police Mr. Gervis Taylor. Neither affiant was cross-examined.

[14] The affidavit of Mr Dewayne Thomas consisted of thirteen paragraphs (13) with two exhibits attached along with the affidavit of Sergeant Raymond Wilson the Chairman of the Federation. In his affidavit, Mr Thomas details the reasons he was unable to file his application before the expiration of four years. The reasons are as listed above, however the Applicant additionally denies being served with any documents in relation being re-enlisted for only two years. These reasons included the attempt to utilise the services of three different lawyers/law firms and the Public Defender. After those attempts he finally received assistance from the Kingston Legal Aid Clinic. Mr Thomas indicated in his affidavit the fact that he is impecunious and the reasons for this position included the fact that he has a sick child.

[15] Assistant Commissioner Mr. Gervis Thomas produced an affidavit which consisted of 19 paragraphs. The Affidavit chronicled the details of the Applicant's service ie from the time the applicant joined the Force on the 9th of September 2002 to when he was discharged 18th of May 2010. The affiant also commented on a letter that had been received from the Public Defender. The affidavit of Assistant Commissioner of Police Thomas had a number of exhibits attached to it including all the Notices and letter served on the Applicant during his period of enlistment.

SUBMISSIONS

[16] Mrs Maylor and Mr. John Clarke who appeared on behalf of the Applicant, after chronologically laying out the sequence of events that led to the termination of the Applicant submitted that leave should be granted to extend time to apply for Judicial Review.

[17] Mr. Clarke indicated that he rested his submission in relation to the extension of the time to apply for Judicial Review on Rule 56.6(2) of the Civil Procedure Rule 2002 (the Rules) which states *that "... the court may extend the time if good reason for doing so is shown."*

[18] He combined this submission with rule 56.6 (5) which states

"When considering whether to refuse leave or to 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 substantial prejudice the rights of any person; or

b. be detrimental to good administration."

[19] Mr Clarke submitted that one of the main reasons for the delay was that the Applicant was impecunious. The Applicant has four children one of whom is sick. To support his position he argued the case of **Alcron Development Limited v Port Authority of Jamaica** a decision of the Court of Appeal delivered on17th of February 2014. In the case at paragraph 69 Lawrence-Beswick JA (Ag) (dissenting) stated "Impecuniosity is, to my mind, a compelling reason for one's ability to access legal services which do sometimes come at a relatively high price."

[20] Mr Clarke also argued the case of **R v Commissioner for Local Administration, ex parte Croydon London Borough Council** and another reported at [1989] 1 All E R 1033. He referred to the decision of Woolf LJ at page 14 that deals with delays. At the last paragraph of the decision he quoted from the judgement ie *"As long as no prejudice is caused, which is my view of the position here, the courts will not rely on those provisions to deprive a litigant who has behaved sensibly and reasonably of relief to which he is otherwise entitled."*

[21] Mr Clarke argued that seeking advice from first Ms Hudson, then to the Public Defender, to Nunes Scolefield and then to Nigel Jones and Company and last to the Legal Aid Clinic showed that the Applicant had acted sensibly and reasonably.

[22] Mr Clarke then argued the test that is to be applied in the application for extension of time which was laid out in the case **of R v Secretary of State for Trade and Industry, ex parte Greenpeace Ltd** reported at All England official Transcript (1997-2008. Mr Clarke argued that Ord. 53 r 4 (1) and s.31 (6) was similar to Rule 56.6(2) of the CPR.

[23] In the case of that there are three issues that must be addressed when applying for extension of time to apply for Judicial Review which are-

a. *"Is there a reasonable objective excuse for applying late?"*

b. *"What, if any, is the damage, in terms of hardship or prejudice to third party rights and detriment to good administration, which would be occasioned if permission were not granted?"*

c. *"In any event, does the public interest require that the application be permitted to proceed?"*

[24] Ms Chisholm who represented the Respondent in response indicated that the Rules indicate that these applications are to be made promptly. Counsel referred to Rule 56.6 (1) which states

"An application for leave to apply for Judicial Review must be made promptly and in any event within three months from the date when grounds for the application first arose."

[25] Ms Chisholm argued that the Applicant has shown no good reason(s) for extending time and that this Honourable Court ought not to exercise its discretion to extend the time for the Applicant to apply for leave to apply for Judicial Review.

DELAY

[26] The delay in relation to filing the application for Judicial Review is four years. The Applicant:-

1. On the 4th of March 2010 was informed of the decision that the Commissioner of Police had dispensed with his services and had declined to re-enlist him in the Force.

2. This was followed by a Notice dated the 4th of March 2010 in which the Applicant was informed that he was discharged from the Force from September 7th 2009.

3. On the 18th of May 2010 he met with the Commissioner of Police and after the meeting was notified that said day that he was discharged from the Force.

[27] The application for leave to apply for judicial review was filed on the 15th of August 2014 and amended on the 7th of January 2015.

The reasons advanced for the delay are as follows:-

1. The applicant is impecunious.

2. The Applicant was awaiting legal assistance from either different lawyers or from the Public Defender.

[28] When it comes to the issue of delay counsel for the Applicant was allowed to submit additional authorities in relation to his application. The authorities advanced were the case of **R v Secretary of State for Foreign and Commonwealth Affairs ex parte** Ross-Clunis reported at the Law Reports 1991 Volume 2 439. This is a House of Lords and Privy Council decision. That decision concerned the review of two decisions from the Secretary of State handed down either eight years or less than one year prior to the application for Judicial Review.

[29] The Applicant also relied on the case of **In re Sampson** [1987] WLR 194. That case concerned a decision about whether the applicant could be ordered to pay a sum to The Legal Aid Department towards his defence. The court held in that case that he had no right of appeal. In that case the order for the payment was made on the 7th of May 1981. On the 18th of April 1985 time was extended for leave to appeal.

[30] The final authority relied upon was an extract from the Judicial Review Handbook sixth edition by Michael Fordham QC at page 26 that has a paragraph dealing with delays. The paragraph deals with "Delays not being fatal" and gave some examples.

[31] In relation to delay Ms Chisholm argued that the delays in this case were unacceptable. In support of her arguments she relied on the cases of **Tulloch Estates Limited v Industrial Disputes Tribunal** a decision of Campbell J heard on 18th of December 2001 and 19th December 2001. The Respondent's counsel also relied on the

case of **City of Kingston Co-Operative Credit Union Limited v Registrar of Co-Operative Societies and Friendly Societies and Friendly Societies and Yvette Reid** a decision of Sykes J decided on September 24 and October 8, 2010.

ANALYSIS

[32] In relation to delays the starting point is laid out in the case of **O'Reilly v Mackman** (1983) 2 AC 237 where Lord Diplock said:

> *"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 of the authority has reached in purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the persons affected by the decision."*

This case also emphasises that even in instances where the delay is less than three months the court may still rule that there was undue delay.

[33] Rule 56.6 of the CPR lays down the rule that the court is to take into consideration when considering delays in applying for Judicial Review. Rule 56.6 (1) indicates that in

> "an application for leave to apply for judicial review must be made promptly and in any event within three months from the date when grounds for the application first arose.

[34] This rule highlights that time periods should be strictly adhered to as even if an application is filed within a three month period the application may still be deemed to be delayed. In the case of **City of Kingston Co-Operative Credit Union Ltd v Registrar of Co-Operative Societies and Friendly Societies and Yvette Reid**, Sykes J after detailing the decisions in a number of cases namely Securities Commission of the Bahamas ex parte Petroleum Products Ltd B.S. 2000 SC 24 (delivered on 4 July 2000)

(Suit No. 144 of 1999) went on to analysis how and when time is to be run in applications for Judicial Review.

[35] The significance of these cases is that in all of them it was held that time starts to run when the decision is made, not when the Defendant would have acquired knowledge of it. In this case the decision of the Commissioner of Police was made on the 4th of March 2010 which is the date of the letter of dismissal.

[36] Rule 56.6 (2) allows the court to extend time to apply for Judicial review. Rule 56.6(2) states that, "*However the court may extend the time if good reason for doing so is shown.*" This rule to extend the time for Judicial Review has been reviewed in a number of cases.

[37] In the case of **R v Diary Produce Quota Tribunal, ex parte Caswell** (1990) 2AC 738, Lord Goffe examined the question of delay and said:

> *" When an application for leave to apply is not made promptly and in any event within three months, the court may refuse leave on the ground of delay unless it considers there is good reason for extending the period: but if it considers that there is such good reason, it may still refuse leave or (where leave has been granted) substantive relief, if in its opinion the granting of the relief sought would be likely to cause hardship or prejudice (as Specified in Section 31(6), or would be detrimental to good administration. I imagine that, on an ex parte application for leave to apply before a single judge, the question most likely to be considered by him, if there has been such delay, is whether there is a good reason for extending the period under rule 4(1). Questions of hardship or prejudice, or detriment under section 31 (6) are, I imagine, unlikely to arise on an ex parte application when the necessary material would, in all probability, not be available to the judge."*

[38] In the case of **Jones and Another v Solomon** 41 WIR 299 Sharma J dealt with the issue of delay in applying for Judicial Review. In his analysis Sharma J compared

the English rules that deal with delays and in particular dealt with how the court should deal with delay from the more restrictive approach previously taken by the courts and the new rules as to how it should be approached. Sharma J said at page 316 of his decision dealt first with the issue as to how the court should approach the issue of delays. He stated that:

> "Provisions is made in rule 4 as to how delayed applications should be dealt with by the court. The rule reads as follows:
>
> *"(i) Subject to the provisions of this rule, where in any case the court considers that there had been undue delay in making an application for judicial review or, in a case to which paragraph (2) applies, the application for leave under rule 3 is made after the relevant period had expired, the court may refuse to grant – (a) leave for the making f the application, or (b) any relief sought on the application, if, in the opinion of the court the grant of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of any person or would be detrimental to good administration."*

Sharma J in his decision then dealt with how the court should approach the issue of prejudice. He stated:

> *"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."*

Sharma J then went on to discuss the issue of not having resources for legal proceedings. Sharma J stated that:

> *"The only apparent attempt the respondent in this case made 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 the 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."*

In the case of Jones the application was dismissed on the ground of undue delay.

[39] The Applicant advances a number of reasons for his delay in applying for Judicial Review which are outlined above.

[40] There is no explanation as why legal aid was not pursued prior to 2014, four years after the dismissal of the Applicant. In following the case of **Jones and another** it is made clear that although the issue of impecuniosity can be considered, it must be coupled with the need to act expeditiously in pursuing an application. This was also noted in the decision of **Alcron** where Lawrence -Beswick JA (Ag) dissenting stated that:

> *"Impecuniosity is, to my mind, a compelling reason for one's inability to access legal services which do sometimes come at a relatively high price. However, the court is mindful of the fact that the absence of funds may be unjustifiably proffered as a reason for delay in undeserving instances."*

[41] In applying the test laid down in **R v Secretary of State and industry ex parte Greenpeace** I do not find that the applicant has placed before the court a reasonable objective excuse for the delay.

[42] I reject the submission that the Applicant acted in sensible and reasonable manner in his approach to this application. There were two legal opinions given to the Applicant concerning this application for Judicial Review. The Applicant filed the application for extension of time a year and a half after the final opinion.

CONCLUSION

[43] Having taken into consideration all the reasons placed before the court in relation to this application I am constrained to reject the application to extend the time to apply for Judicial Review. The Applicant has not advanced a reasonable explanation for the four year period before making the application for leave to apply for Judicial Review. The court does have the discretion to extend the time for such an application however the Applicant has not satisfied the court and the application is denied.