



[2022] JMSC Civ 58

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2016 HCV 03094

BETWEEN	EVERALD TOMLINSON	CLAIMANT
AND	THE COMMISSIONER OF POLICE	DEFENDANT
AND	ATTORNEY GENERAL OF JAMAICA	DEFENDANT

IN CHAMBERS

Mr. Chukwuemeka Cameron instructed by Carolyn Reid & Co. for Claimant

Ms. Kamau Ruddock instructed by the Director of State Proceedings for the 1st and 2nd Defendants

Heard: May 2, 2022

Administrative Law – Legitimate Expectation – Whether Police Officer Has a Legitimate Expectation to be Re-enlisted to the Jamaica Constabulary Force.

D. STAPLE, J (AG)

BACKGROUND

[1] Mr. Tomlinson is in a pickle. He found himself, as a former member of the Jamaica Constabulary Force, on the receiving end of a decision by the Assistant Commissioner of Police (Administration) that he will not be recommended to the

Commissioner of Police to be re-enlisted in the force after being a serving member since June 19, 1995.

- [2]** This decision for non-recommendation for re-enlistment was confirmed in a notice dated June 13, 2014. The Claimant accepted that he received this notice.
- [3]** The notice went into great detail concerning matters which the Assistant Commissioner felt affected the question of whether or not Mr. Tomlinson should be re-enlisted. It is accepted and I find that many of these complaints raise extremely serious issues. One in particular, which remains unventilated, is particularly egregious.
- [4]** The Claimant has denied and/or provided explanations or replies to each of the allegations laid out against him in the Notice.
- [5]** Dissatisfied with this decision of the Assistant Commissioner of Police, the Claimant has filed the present Fixed Date Claim Form requesting a declaration that he had a legitimate expectation to be re-enlisted to the force.
- [6]** The Defendants have filed an Affidavit in Response challenging the Claimant's claim and seeking to outline and bolster their position that Mr. Tomlinson is not fit to be re-enlisted to the Jamaica Constabulary Force.
- [7]** The question now comes for the Court to determine whether or not the Claimant has a legitimate expectation to be re-enlisted in the Jamaica Constabulary Force.
- [8]** The Court is very grateful to Counsel for their submissions and authorities. I have read the cases and considered the submissions carefully. If I did not refer to them specifically, it is not an indication that I did not consider them.

THE LAW ON POLICE RE-ENLISTMENT

[9] The **Constabulary Force Act** governs the enlistment of sub-officers and constables of the Jamaica Constabulary Force. It is not in dispute that Mr. Tomlinson was a Constable of Police at all material times.

[10] Section 5 of the **Constabulary Force Act** provides as follows:

*“5. Sub-Officers and Constables of the Force may be enlisted for a term of five years, and no Sub-Officer or Constable of the Force, so enlisted, shall be at liberty to withdraw himself from the Force until the expiration of that term; and no Sub-Officer or Constable of the Force who has not been enlisted for a term shall be at liberty to withdraw himself from the Force until the expiration of six months from the time he shall have given notice in writing of his intention so to do to the Officer under whose immediate orders he -shall be and if any Sub-Officer or Constable shall so resign or withdraw himself before the expiration of such term, without the permission of the Commissioner or without such previous notice, he shall for such offence, forfeit and pay a penalty not exceeding twenty dollars, on summary conviction; and it shall be lawful for the Court, in case such penalty shall not be paid to commit such person to an adult correctional centre with or without hard labour, for any period not exceeding **three calendar months.**”*

[11] After the initial period of enlistment, Constables and Sub-Officers are required to submit applications to the Commissioner for re-enlistment. If successful, the applicant should be re-enlisted for a further period of five years. This is made clear by Rule 1.10(b) of the **Book of Rules for the Guidance and General Direction of the Jamaica Constabulary Force.**

Procedure on Application to be Re-Enlisted

[12] There has been much litigation in this area over the years. The procedure to be followed on an application for re-enlistment is now fairly well settled. I adopt the summary of the procedure set down by Sykes J (as he then was) in the decision submitted as part of the Claimant’s case in *Berrington Gordon v Commissioner of*

*Police*¹. Summarising the position taken from the decision of the Court of Appeal of Jamaica in *Clarke v Commissioner of Police*², Sykes J (as he then was) outlined the following principles:

- (i) *No police officer who must apply for re-enlistment has an automatic right of re-enlistment;*
- (ii) *The police officer has to apply for re-enlistment in accordance with the relevant or extant rules and regulations;*
- (iii) *The power to decide whether the officer will be re-enlisted, according to the Act, lies solely with the Commissioner of Police;*
- (iv) *It is the Commissioner of Police who determines the standard of conduct expected of police officers. The Courts have no power to make this determination;*
- (v) *The Commissioner of Police can properly determine that a particular officer wont be allowed to re-enlist even before that officer makes an application for re-enlistment;*
- (vi) *If the Commissioner of Police decides that a particular officer wont be re-enlisted before he makes such an application, fairness does not require that such an officer be heard before the Commissioner of Police makes that decision.*
- (vii) *If the officer does not apply for re-enlistment, then his time in the police force comes to an end and no right has been breached even if, unknown to the officer, the Commissioner of Police had decided that he would not be permitted to re-enlist;*
- (viii) *However, if the Commissioner of Police has decided that the particular officer will not be allowed to re-enlist, whether before or after such an application, and such an application is in fact made, fairness demands the Commissioner of Police must notify the officer of **his** (emphasis mine) decision and the decision must be accompanied by reasons.*

¹ [2012] JMSC Civ 46

² (1996) 52 WIR 306

- (ix) *The officer must (not may) be allowed to make representations to the Commissioner of Police;*
- (x) *The right to be heard can only arise if and only if*
 - a. *The officer applies for re-enlistment;*
 - b. *The Commissioner of Police informs him that he will not be permitted to re-enlist; and*
 - c. *He has been given the reasons for the decision.*
- (xi) *It is for the Commissioner of Police to decide what form the hearing should take and whether there will be written as well as oral submissions. But whatever form the hearing takes, it must be fair.*
- (xii) *The hearing before the Commissioner of Police is a review where the onus is then placed on the officer to make his case for re-enlistment.*
- (xiii) *The decision not to permit re-enlistment is not a dismissal;*
- (xiv) *In considering whether to permit the officer to re-enlist, the Commissioner of Police can take into account the past conduct of the officer.*

[13] It is important to highlight, as Sykes J (as he then was) did, that in the case of *Clarke*, Gordon JA indicated, in the form of a general principle, that a constable with a history of misbehaviour cannot claim that he has a legitimate expectation to re-enlist³.

[14] Forte JA (as he then was) said in *Clarke*, “There was no dispute that the appellant in the particular circumstances had a legitimate expectation that he would be re-enlisted, and consequently was entitled to the opportunity for a fair hearing.⁴” In my view Forte JA was not intending to lay down a general statement of principle that all officers have a legitimate expectation to be re-enlisted. It was a statement

³ n 2 at p. 314

⁴ n 2 at p. 313

specific to the matter before the Court in that case. Gordon JA's statement, on the other hand, is, in my view, intended to be a general principle.

- [15] I am buttressed in this view in the fact that Carey JA, in reading the unanimous decision of the Court of Appeal in *Clarke*, stated clearly that there is no automatic right of re-enlistment. In other words, there is no legitimate expectation created to be re-enlisted in every case where a Constable's re-enlistment arises to be determined.
- [16] All that he has a legitimate expectation to, is the right to fairness and due process in the process of being re-enlisted.
- [17] So the question that arises is whether or not Mr. Tomlinson had a legitimate expectation to be re-enlisted in light of all the facts surrounding his history in the JCF.

THE FINDINGS OF FACT

- [18] It is not disputed that Constable Tomlinson was enlisted in the Constabulary Force on the 19th June 1995. He was re-enlisted for 3 five year periods up to June 18, 2010. He was due for re-enlistment on June 18, 2014.
- [19] Mr. Tomlinson himself has not given any evidence as to when exactly he applied for re-enlistment. It can only be inferred that he did based on the Notice of Non-Recommendation for Re-Enlistment dated June 14, 2014 which stated at paragraph 2,

“You are hereby notified that your application has not been recommended to the Commissioner of Police on the following grounds...”

- [20] This portion was not challenged by the Defendants. So I accept as a fact that he had applied for re-enlistment.

[21] It cannot be seriously disputed that Mr. Tomlinson has had a tumultuous tenure as a member of the Constabulary Force. There were, I find, instances of disciplinary breaches and complaints against him that were substantiated.

Established Unsavoury Complaints

[22] In the Affidavit of ACP Richard Stewart, there were 5 of eight disciplinary charges proven against Mr. Tomlinson relating to his absence from muster parades on two occasions, abandoning his post on one occasion and two instances of failing to report for and perform duties. Whilst these allegations were denied by the Claimant in his Affidavit in Support, there is no evidence from the Claimant that he made any formal challenge to those findings at the time they were found proven (emphasis mine) against him. Therefore, they would have been established and unchallenged findings and I so find.

[23] There was also a formal high form of disciplinary proceeding against Mr. Tomlinson in the form of a Court of Enquiry. A Court of Enquiry is a procedure set out in Regulation 47 of the Police Service Regulations 1961 to determine whether or not an officer is guilty of an offence that warrants dismissal. It is a proper trial before a disciplinary tribunal.

[24] One such Court of Enquiry was conducted in relation to Mr. Tomlinson in relation to two charges brought against him. These charges were outlined in the Notice served on him dated June 13, 2014 at paragraph (iii). They were as follows:

(a) *Being a member of the Jamaica Constabulary Force conducted yourself contrary to the discipline, good order and guidance of the Force, in that you grossly misconducted yourself by saying to Ms. Rhojel Henry; "The reason why oono gal a behave suh is because unno a sleep inna di same bed wid unno mada and fada and a teck di same cock" on Tuesday the 24th of February 2009 about 8:15 am at the bus park which adjoins the Morgan's Bridge Police Station in the parish of Westmoreland.*

(b) *Being a member of the Jamaica Constabulary Force conducted yourself contrary to the discipline, good order and guidance of the Force in that you boxed Ms. Rhojel Henry in her face without justification or excuse for so doing on the 24th of February 2009*

about 8:15 am at the bus park which adjoins the Morgan's Bridge Police Station in the parish of Westmoreland.

- [25]** The result of the Court of Enquiry was an initial finding of guilty on both counts. However, when reviewed by the Commissioner of Police, count one was determined by him as unproven whilst count 2 remained proven and a strong reprimand was recommended as punishment. There was no challenge to this result despite the notice of the result (exhibit "ELT 2") stating that the officer could appeal the decision.

Serious Allegations that Were Unchallenged

- [26]** There was also a formal warning in 2006. Mr. Tomlinson was given a written Warning Notice dated July 18, 2006 which highlighted that his work, worth and conduct were of an unacceptable standard and threatened him with certain consequences including a warning that if he did not improve, he would be recommended to the Commissioner of Police for termination. This was from no less a person than the Superintendent in Charge of the Westmoreland Division at the time.
- [27]** Mr. Tomlinson denied being served with this 2006 report. But there is clear evidence of service on the notice dated the 26th July 2006 at 4:00 pm by a Sergeant with regulation number 8879. I accept this as proof that he was indeed served with this notice in 2006. I see no reason for this Sergeant of Police to have lied that he delivered the Warning Notice to Mr. Tomlinson.
- [28]** There was no evidence of any formal challenge to the allegations made in this notice from Mr. Tomlinson at the time the notice was served upon him. One can only infer from this lack of formal challenge to these serious findings from his supervising officer, that he displayed a cavalier attitude towards such a serious finding and was not interested in challenging them.

[29] There were other findings of an unsavoury nature made in the recommendation for non-re-enlistment notice dated the 13th June 2014. These were the recommendation for counselling mentioned at paragraph (iii)(b) and the recommendation for a warning in paragraph (iii)(c) following alleged incidents of violence. Again, there is no evidence of any sort that Mr. Tomlinson sought to challenge these allegations before the Commissioner of Police after being served with the Notice dated June 13, 2014 which he was perfectly entitled to do.

Very Serious Allegation that remains outstanding

[30] Finally, we come to the most serious allegation that remains outstanding. It was not disputed that the Claimant was suspended from duty as a result of being charged for a very serious sexual offence of having sexual intercourse with a person under 16. The charge followed a recommendation from the Office of the Director of Public Prosecutions. The result of the case was a “No Order” which means that whilst the case was dismissed, it remains a live case that can be brought back before the Court and does not represent an exoneration of Mr. Tomlinson.

ANALYSIS

[31] In light of all of the above, Mr. Tomlinson cannot say he has a sterling history in the force. In fact, he has, what I find to be, a sordid history of serious complaints and at least one finding before the Court of Enquiry into a serious matter of assaulting a citizen of Jamaica for an unjustified reason.

[32] Such a member of the force, in my view, cannot have any legitimate expectation to be re-enlisted as per the dicta of Gordon JA in the *Clarke* case.

- [33] I am buttressed in this view as he would have had a prior warning about his conduct from 2006 from the Superintendent in Charge of the Westmoreland Division. Which warning I find he received and did not challenge.
- [34] Subsequent to receiving this strong warning, Mr. Tomlinson would have been found guilty of an offence before the Court of Enquiry of an offence he committed in 2009, 3 years after receiving the warning about his conduct in 2006.
- [35] Thereafter he was suspended for two years regarding the matter of the complaint of sexual misconduct with a minor. Which complaint remains in a state of abeyance as there was only a “No Order” made. This means the complaint can be prosecuted again.
- [36] In my view, this particular officer, Mr. Tomlinson, could not have and did not have any legitimate expectation to be re-enlisted in the force.

CONCLUSION

- [37] I find that the poor conduct of Mr. Tomlinson in his career as a member of the Jamaica Constabulary Force was such that it could not and did not give rise to any legitimate expectation in him that he would be re-enlisted to the Jamaica Constabulary Force.
- [38] In the circumstances therefore, the application for the declaration is refused.
- [39] Though it is usual in administrative claims to allow the parties to bear their own costs, I am minded to allow the Defendants to recover their costs in this case. I found that in the circumstances, Mr. Tomlinson’s application had little hope of success. The authorities are quite clear that there is no automatic right to re-enlistment and that an officer with a poor record has no legitimate expectation to be re-enlisted. This claim ought never to have been proceeded with. It is only fair that the Defendants be able to recoup their costs for the time and effort spent to defend this matter.

[40] After hearing submissions from both attorneys-at-law, they agreed costs in the sum of \$90,000.00 to be awarded to the 2nd Defendant.

ORDERS

[41] I hereby make the following orders:

- 1 The orders sought in paragraphs 1 and 2 of the Fixed Date Claim Form dated the 27th June 2016 are refused.
- 2 Costs to the 2nd Defendant in the sum of \$90,000.00 as agreed.

.....
Dale Staple
Puisne Judge (Ag)