



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2012 HCV 00080

BETWEEN	TAMEKA WATSON	CLAIMANT
AND	THE COMMISSIONER OF POLICE	1ST DEFENDANT
AND	ATTORNEY GENERAL OF JAMAICA	2ND DEFENDANT

Annaliesa Lindsay instructed by John. G Graham & Co. for Claimant

Hazel Edwards instructed by the Director of State Proceedings for 1st and 2nd Defendants.

9th October 2012 & 2nd November, 2012

Judicial Review – Police Service Regulations – Whether Constable Disciplined twice – whether alternative remedy exhausted.

CORAM: JUSTICE DAVID BATTS

[1] This fixed date claim form was filed on the 6th day of January, 2012 pursuant to permission to file fixed date claim form granted by the Honourable Miss Justice Kay Beckford on the 20th day of December, 2011.

[2] The relief claimed is as follows:

- a) An Order of Certiorari to quash the decision of the Commissioner of Police made on the 13th day of April 2011 whereby the Claimant Woman Constable No. 133346 was dismissed from the Jamaica Constabulary Force.
- b) Such further or other order as this Honourable Court deems fit.

[3] At the commencement of the matter I enquired of counsel whether there was to be cross examination given that both sides had filed affidavits. It was common ground that this was unnecessary as the facts were for the most part uncontested.

[4] Counsel for the Attorney General expressed a desire to argue a point in limine, that is, that the Claimant failed to exercise all available remedies and ought not to have been granted permission. I invited counsel to argue this as part of her substantive submissions because:

- a). There may be some overlap of issues particularly as to the suitability of the alternate remedy.
- b). The order granting permission to apply for judicial review was made after an inter partes hearing and therefore as I am not a Court of appeal from Justice Kay Beckford's order, I would rather deal with such a submission after a full hearing on the merits.

[5] In the result each counsel made fulsome and comprehensive submissions on the law and with reference to the evidence. No disrespect is intended if I do not repeat the same or refer to all the authorities cited. Suffice it to say that the court is indeed grateful to both counsel for their depth of research and the relative clarity of their submissions. It has made my task so much easier.

[6] The relevant facts as gleaned from the evidence and so far as is necessary, as I find them to be, are as follows:

- a). *The Claimant Constable was in training at the Jamaica Police Academy.*
- b). *Her roommate Constable Anderson was also in training.*
- c). *Cons. Anderson discovered that the Claimant had transferred credit from "her" cellular phone to the Claimant's without her permission. This had been done over a period of time.*
- d). *Cons. Anderson made a written report of the matter to SSP Pastor Gary Welsh the Commandant of the Jamaica Police Academy (hereafter referred to as SSP Welsh)*

- e). *SSP Welsh gave the report to Woman Inspector McKain and gave her instructions in particular, he told her to convene a meeting with the parties.*
- f). *W/Inspector McKain interviewed Cons. Anderson and the Claimant separately. (See W/Inspector McKain's detailed report at Exhibit TW10 to the Affidavit of Tameka Watson dated 6th January 2012).*
- g). *Thereafter a meeting was convened between SSP Welsh, W/Inspector McKain, the Claimant and Miss Anderson.*
- h). *In that meeting SSP Welsh after speaking to both the Claimant and Constable Anderson, reprimanded the Claimant, directed restitution of the amount of phone credit taken and also instructed that the Claimant, attend counseling sessions. The Claimant, was also required to do a research paper on the right to Privacy and the respect of Peoples Property. [Again See Inspector McKain's report exhibit TW10].*
- i). *Subsequently, Cons. Anderson's boyfriend (described as a "fiancée" in some statements) and who was the true owner of the phone from which the credit was removed made contact with SSP Welsh. He expressed dissatisfaction with the way the matter was handled and demanded that the Claimant be asked to make a public apology.*
- j). *SSP Welsh did not accede to those demands and told the fiancée he would stand by the course of action he had taken in the matter as Commandant. [See Witness Statement of Gary Welsh TW14 to the Affidavit of Tameka Watson dated 6th January 2012].*
- k). *The fiancée was not satisfied with this and wrote a letter to SSP Welsh's superiors protesting his handling of the matter [See exhibit TW8 to the Affidavit of Tameka Watson dated 6th January, 2012].*
- l). *In consequence Assistant Commissioner Heath instructed SSP Welsh to "retard" the complainant pending investigations.*
- m). *This "retardation" be it noted was on the instruction of ACP Heath and was a step with which SSP Welsh disagreed expressly. [See Exhibits TW14, and TW 22 at p age 81 of Judges Bundle].*

- n). *The investigation which occurred was done by the Anti-Corruption Branch. The investigator came to the conclusion that the Claimant had committed acts of larceny and that SSP Welsh had dealt with the matter in an “unprofessional manner.” They expressed the view that SSP Welsh should have used his office to exemplify a “zero tolerance” approach to unethical behaviour and criminality.*

The following recommendations were made,

“It is based on these foregoings that I recommend that strong departmental and criminal charges be preferred against Woman Constable Tameka Watson for her actions and at the least she be dismissed from the organization.

I also recommend that the action of Bishop Gary Welsh, Senior Superintendent of Police and Commandant of the Jamaica Police Academy be examined to determine at the very least if his action depicts sound judgment and the ability to shape members of society as professional men and women.

I further recommend that this file be sent to the Director of Public Prosecutions for her advice/ruling and a copy be sent to the Commissioner of Police for his immediate attentions.” [Exhibit B1 to Affidavit of Baldwin Burey dated 5th October, 2012].

- n). *The file was submitted to the Director of Public Prosecutions who by letter dated 22nd April 2010 advised that no criminal charges be preferred but that “strong departmental action be taken.” [Exhibit BB2 to Affidavit of Baldwin Burey dated 5th October, 2012].*
- o). *Prompted by this advice the Office of the Commissioner of Police by letters dated 16th June 2010 and 22nd June 2010 preferred disciplinary charges against the Claimant pursuant to Regulation 47 of the Police Service Regulations 1961. [Exhibit BB3 and BB4 to Affidavit of Baldwin Burey dated 5th October, 2012].*
- p). *A disciplinary hearing was convened (referred to in the correspondence as a Court of Enquiry) presided over by Mr. A. R. Martin (President). After hearings at which evidence was taken and submissions made the*

Court of Enquiry recommended dismissal of the Claimant. [Exhibit BB6 to Affidavit of Baldwin Burey dated 5th October, 2012].

- q). *It is important to note that before the court of enquiry the representative of the Claimant strongly urged that the Claimant, had already been punished and should not be punished again for the same offence.*
- r). *In treating with that allegation the Court of Enquiry stated,
“The matter of Double Jeopardy was raised in this matter by the defence as they thought that the matter was dealt with and settled by the Commandant but the court found that the Commandant merely ordered an investigation and took action which was in his view appropriate.” [Exhibit BB6 to Affidavit of Baldwin Burey dated 5th October, 2012].*
- s). *The decision of the Commissioner of Police consequent on the report of the Court of Enquiry was as follows:-
“Findings confirmed. Dismissed from the JCF. She should not have been allowed to graduate. Must be removed from the Recruiting Centre immediately.” [Exhibit B1 to Affidavit of Baldwin Burey dated 5th October, 2012].*
- t). *By letter dated the 15th April 2011 the Office of the Commissioner of Police wrote advising the Claimant of her dismissal and that dismissal would take effect on the date she was served with that notice. Interestingly a second letter of dismissal dated 25th December, 2011 was issued after she had applied for Judicial review.*
- u). *This second letter of dismissal referred to the earlier one and described it as “relevant.” Counsel for the Attorney General quite properly conceded that this second letter of dismissal was redundant and that nothing turned on it in the instant matter.*

[7]. The Claimant's case is based on a single proposition. This is that the acts of SSP Welsh constituted lawful disciplinary proceedings and it was contrary to law for the Claimant to again be subjected to disciplinary proceedings in the form of the Court of Enquiry. In other words the proceedings before the Court of Enquiry

were ultra vires the Police Service Regulations and rules and ought therefore to be set aside.

8. The Defendant responded in several ways as follows:-

(and I hope I do her well formulated submissions no great disservice in my endeavour to state them concisely)

- a) *SSP Welsh did not conduct a disciplinary proceeding or a "summary trial" within the meaning of the relevant rules, regulations and statements.*
- b) *If SSP Welsh did deal with the matter "informally" it did not preclude the exercise by the Commissioner of his power under section 47 to discipline members of the force.*
- c) *Even if the Claimant is correct and she has been wronged, this Court of Judicial review should exercise its discretion and refuse any relief because of the nature of the offence and the need to have an honest police force. In this regard she relied particularly on the Affidavit of Commissioner Owen Ellington dated 8th October, 2012 and paragraph 14 thereof.*
- d) *The Claimant failed to exercise her statutory right of appeal to the Governor General's Privy Council or the offer of an appeal to the Commissioner of Police and therefore this application for Judicial Review should be dismissed.*

[9]. The first and paramount question for this court to resolve therefore is what were the nature of the acts done by SSP Welsh in this matter. It is the view of this court that an investigation followed by action, particularly action which involves compensatory directives and instruction to one party ought to be categorized as disciplinary. Indeed it is fair to say that SSP Welsh dealt with the issue "summarily" in the way he thought best.

[10]. This court may agree with the Commissioner of Police and the Investigative Report that SSP Welsh was too lenient, or that there were sanctions which he ought to have implemented which he did not. However a court of Judicial

Review is not to substitute its view of the merits for that of the tribunal being reviewed. In like manner provided that SSP Welsh had lawful jurisdiction to take the decision he did and treat with the situation as he did then, unless there is express statutory power so to do, the Commissioner of Police ought not to substitute his view on the merits for that of SSP Welsh.

[11]. When reviewing the jurisdiction of the Court of Enquiry I similarly make no comment on their findings or of whether I agree or disagree with the sentiments expressed. My decision as to whether or not the decision to embark on a Section 47 hearing was within jurisdiction, must depend on whether as a matter of law there was jurisdiction to deal with the issue.

[12] If SSP Welsh acted within his jurisdiction the question arises as to whether the Commissioner of Police had statutory authority to further discipline the Claimant by, convening a Court of Enquiry.

[13]. I have come to the conclusion based upon a review of the clear statutory provisions and rules that SSP Welsh did have lawful authority to deal with the matter in the way he did. The relevant statutory Rules and Regulations are as follows:

Regulations, made under Section 87 of the Jamaica (Constitution) Order in Council 1959, preserved by Section 2 of the Jamaica (Constitution) Order in Council 1962 and entitled "The Police Service Regulations 1961 (made by the Governor General after consultation with the Police Service Commission on the 1st day of June 1961),

"Authorized officer"

means the Commissioner or any other Officer not below the rank of Assistant Commissioner of police or except in relation to a member of or above the rank of inspector a Commanding Officer.

"Commanding Officer",

In relation to any member below the rank of Inspector, means the Officer in charge of the Division or other command to which the member is for the time being

attached, or, in the absence or inability to act of that Officer, the Officer in charge of the branch or area to which that Division or Command belongs, or an Officer deputed by him;

“Functions” -

Includes powers and duties

“Member”

Except in Part II, means member of the Force

“Officer”

Means any member holding any rank above that of Inspector

“Perform”

In relation to functions includes exercise

[Part V of these regulations is entitled “Discipline” and Part A of Part V is headed General].

Regulation 31 (3) states,

“Disciplinary proceedings against members below the rank of Inspector shall be instituted by or by direction of the Commissioner in the light of reports made to him, or otherwise.

31(4)

Subject to paragraph (5) the Commissioner where he is of the opinion that disciplinary proceedings ought to be instituted against a member below the rank of Inspector, may institute such proceedings or cause them to be instituted.

31(5)

Where an Offence against an enactment appears to have been committed by a member the Commission, or as the case may be the authorized officer, before proceeding under this regulation shall obtain the advice of the Attorney General or, as the case may be, of the Clerk of Courts for the parish, as to whether criminal proceedings ought to be instituted against the member concerned; and if the Attorney General or Clerk of Courts advises that criminal proceedings ought to be so instituted, disciplinary proceedings shall not be initiated before the determination of the criminal proceedings so instituted.”

Part B of Part V is entitled Proceedings.

Regulation 46 (2) provides,

“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, think 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 if he is not the Commissioner, 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.

Section 46(3)

“Where as a result of such investigation it is decided to charge the member with misconduct not warranting dismissal, the procedure to be followed shall be similar to that prescribed by regulation 47:

Provided that this paragraph shall not apply where any offence specified in Part I of the Second Schedule is dealt with summarily.

Sections 47 to 59 details the proceedings for dismissal.

- [14]. It is apparent that when treating with members below that of Inspector and with minor offences as defined in Part I, of the Second Schedule a fairly wide discretion is left to the authorised Officer. The Regulations allow authorized officers to deal with minor offences and to determine the most appropriate way to treat with them. There is no duty to first inform the Commissioner. In effect the Regulations delegate the handling of minor offences, not warranting dismissal, to the authorized officer.

[15] This becomes clear when one has regard to Jamaica Constabulary Force Orders dated 21st June, 1990 Serial No. 2246 Sub Nom.

Paragraph 4 is entitled Disciplinary Authority and Proceedings which states,

Attached to these orders as Appendix D is an addendum to Chapter VIII of the Jamaica Police Manual Volume .

[16]. Appendix D to Police Orders 2246 dated 21st June 1990, 'Disciplinary Authority and Procedures provides:

The Constabulary Force Act provides for a chain of command, whereby members are supervised through the seniority of ranks, except in circumstances where there are instructions to the contrary.

The Police Service Commission has responsibility for discipline of Officers and Inspectors while this function is delegated to the Commissioner in respect of other ranks. However, the Police Service Regulations empower Divisional Officers acting in the capacity of authorized officers to assemble and conduct Summary trials (Orderly Room) for specified minor offences in respect of members below the rank of Inspector.

Courts of Enquiry in respect of members below the rank of Inspector are dealt with by Presidents appointed by the Commissioner of Police.

Divisional Officers shall be responsible for the performance, discipline and welfare of all personnel under their command.

Divisional Inspectors shall perform staff functions on behalf of Divisional Officers in matters relating to discipline.

Additionally, the Divisional Inspectors shall be responsible to prepare cases for Orderly Room and Courts of Enquiry serve process in connection with these cases when necessary and also warn witnesses and accused in accordance with the regulations.

At Station Level, the Sub-Officer in charge shall be responsible for the discipline of the personnel attached to the station.

He shall be responsible to report in writing all disciplinary matters where trial is being contemplated, to the Divisional Officer and in the case of a Zoned Area, through the Zone Officer to the Divisional Officer.

Sub-Officers who are assigned specific areas of responsibility within the station shall report all disciplinary matters to the Sub-Officer in charge for transmission to the Zone or Divisional Officer.

Officers and Sub-Officers in command at the various levels may act without reference to higher authority and may at their discretion determine whether a minor breach will be submitted for disciplinary action or whether, warning, counseling or other action will adequately suffice.

When a breach of discipline necessitates suspension or interdiction, it shall be the responsibility of the Divisional Officer to submit a written report to the Commissioner, through the Area Officer, outlining the circumstances of the case along with his recommendation.

In extreme circumstances, the Divisional Officer shall make a verbal request to be followed by the written report.

Records and Procedures

Summary Trials (Orderly Room)

The procedures to be followed in a summary trial shall closely resemble those for Courts of Enquiry as laid down in the Police Service Regulations.

The accused shall be called upon to admit or deny the charge and if admitted the Commanding Officer need not hear the evidence.

If denied, witnesses shall be called to prove the allegations.

The accused shall be allowed all the privileges prescribed for Courts of Enquiry. The evidence shall be taken on oath and recorded in writing. At the end of the trial the Commanding Officer shall inform the member of the findings and punishment.

When a member is convicted at Orderly Room it shall be the duty of the Divisional Officer to record his findings in the Divisional Defaulter Register. [There follows detailed instructions as to how convictions are to be recorded and published].

[17]. Part I of the Second Schedule which is referred to in Regulation 46 (2) (3) is entitled, "Minor Offences which may be dealt with summarily" and lists 29 offences or categories of offences. These include the following:

- #6 Fighting or creating a disturbance
- #8 disrespect to Seniors in rank
- #12 Soliciting or receiving a gratuity
- #19 Drawing a revolver or bayonet for use without authority except in self-defence.

- #25 Prevarication before any Court or any enquiry
- #29 Any act, conduct or neglect to the prejudice of good order or discipline, other than those which are required to be reported to the Commissioner of Police, whether or not such act, conduct or neglect has been in the execution of duty.

Part II of the Second Schedule is entitled "Penalties which may be imposed on members below the rank of Inspector in respect of Minor Offences dealt with summarily"

- #1 By the Commissioner -
 - (a) Deprivation of pay for a period not exceeding four days.
 - (b) Confinement to barracks for a period not exceeding five days
 - (c) Severe reprimand
 - (d) Reprimand
 - (e) Caution
- #2 By any other Officer (being in charge of a Division or holding any other Command)
 - a) Deprivation
 - b) Confinement to barracks for a period not exceeding 3 days.
 - c) Severe reprimand
 - d) Reprimand
 - e) Caution

[18]. There was an attempt by the Defendant to deny that SSP Welsh was a Commanding Officer. However, he is described as that at several places in the evidence. See Statement of D. Anderson p. 21 Judges Bundle; Report of W/Insp. McKain p. 30 Judges bundle; Statement of Damien Johnson ex. TW 11 to Affidavit of Tamika Watson p. 32 Judges Bundle; W/Cons. Latoya Tomlinson Ex. TW 13 page 35 Judge's Bundle; Statement of Gary Welsh TW 14 p. 36 Judges Bundle; Notes of the Evidence of the Court of Enquiry and in particular Evidence of Gary Welsh p. 80 Judges bundle. Further there is no evidence, either from the

Commissioner Ellington or Assistant Commissioner Burey, both of whom filed affidavits denying that fact. The fact that SSP Welsh reported to ACP Heath does not detract from his position as Commanding Officer at the Police Academy. By that argument since, in these uniformed forces each rank reports to another all the way up to the Commissioner of Police, it would mean only the Commissioner of Police is a Commanding Officer. Clearly, that was neither the intent nor the meaning of the provisions cited above.

[19]. If therefore, as I have concluded, SSP Welsh was a Commanding Officer, he was for the purpose of disciplining members below the rank of Inspector for minor offences, an authorized officer within the meaning of the Regulations. He therefore acted within his jurisdiction when dealing summarily with the situation.

[20] In the absence of a statutory provision enabling him to set aside or disregard the decision of a Commanding Officer, the Commissioner's attempt to embark on a S.47 disciplinary hearing will be ultra vires. On a true construction of the statute S.47 is exclusive of S.46. The Commissioner may not commence S. 47 proceedings if the matter concerns a minor offence that an authorized Officer has already dealt with. In my judgment the transferring of phone credit falls squarely within #29 on the list of minor offences as defined in the Second Schedule to the Regulations.

[21]. The correctness of this position may be demonstrated by an example I put to counsel in the course of argument. A Commanding Officer receives a report that one Constable had taken the other's pen. He calls them both to his office. An admission is made and he directs that the pen be returned. He then reprimands the Constable and sends them back out to duty. The incident comes to the attention of the Commissioner of police one year later and because the Commissioner feels the Commanding Officer was too lenient he constitutes a Court of Enquiry. The Defendant's submission would render the Commissioner's conduct in this example lawful. It would leave Constables, whose Commanding Officers have summarily dealt with minor offences, open to serious disciplinary measures long after they have put the incident out of their mind and have

(hopefully) learned by the experience. Absent some specific statutory provision giving him that discretion the sense of justice in the Courts of common law would lean heavily against such a result.

- [22]. Counsel for the defendant also submitted that I should exercise my discretion and deny a remedy in all the circumstances of the case. In this regard she relied on the authority of ***Chief Cons. of the North Wales Police v. Evans [1982] 3 All ER 141***. In that case notwithstanding the breach of natural justice that occurred the court declined to order mandamus, because to do so would necessarily substitute the Court's opinion for the members of the police force as to who was an appropriate candidate for membership.
- [23]. In the instant matter however a decision to quash the decision of the Court of Enquiry will leave in place the decision of SSP Welsh as to the appropriate way to deal with the matter summarily. This court in quashing the decision of the Court of Enquiry will underscore the duty of the Commissioner to abide decisions of the Authorised Officers made within jurisdiction and within a discretion granted by statute. Any issues which the Commissioner may have with the manner in which a discretion is exercised or with the normative standards of his authorised Officers, are questions he can address I presume by appropriate consultations and internal directives or by changes to the relevant rules or force orders. This court will not allow the lawful exercise of a discretion to be overturned where to do so will affect the rights of a citizen.
- [24]. In this instance the citizen is the Claimant who was entitled to have the matter summarily dealt with by her Commanding Officer (the Authorized Officer). He reprimanded her and directed that she reimburse the other Constable. Reimbursement having occurred, and she having attended counselling sessions as directed, the issue was at an end and she was entitled to graduate. This is not an appropriate case for the withholding of a remedy and I so hold.
- [25]. The Defendant's Counsel also submitted that the Claimant has failed to pursue alternative remedies. S. 131 (4) of the Constitution of Jamaica provides that an

Officer over whom the power to exercise disciplinary control has been exercised may apply to have the case referred to the Governor General's Privy Council. This Right of Appeal ought to be exercised within 14 days, (Regulation 42(1) of the Police Service Regulations (1961). It applies to the exercises of discipline pursuant to S. 47 or Section 46.

- [26]. The Claimant did not appeal to the Governor General's Privy Council. The circumstances are that in its letter of decision, advising of her dismissal (letter dated 15th April, 2011) the Office of the Commissioner of police also stated,

"You may appeal the decision of the Commissioner of Police within fourteen (14) days of receipt of this Notice. If you decide to do so you will be suspended from pay and duty with effect from the date of your dismissal by your Commanding Officer, pending the outcome of your appeal.

Any appeal by you should be submitted to the Commissioner of Police within the time specified for further attention."

- [27] In response the claimant's attorneys wrote a letter dated 12th May 2011. (some 8 days after the letter dated 15th April 2010 was received). That letter stated inter alia:

"This letter serves to notify you of our client's intention to appeal your decision, the skeleton grounds of which will be forwarded to you on our receipt of all written evidence that was presented against her at the court of enquiry held before Mr. A. Martin.

Based on our preliminary review of the matter, it would appear that our client was disciplined twice for the same incident and in two different capacities."

- [28]. It is common ground that there was no response to this letter from the Commissioner of Police. Further that the notes of evidence were only sent after, an Order was made by this Court in these proceedings and that the Commissioner of Police neither convened his own appellate hearing, nor did he forward the notice of intention to appeal to the Governor General's Privy Council.

- [29]. Counsel for the Attorney General relied on the authorities of ***R v Chief Constable of the Merseyside Police, ex p Calveley [1986] 1 QB 424***, and In re

Preston [1985] AC 835 to establish the principle. I have reviewed those cases. In neither was the applicant for judicial review misled by the relevant authority as to the alternate remedies available. In this case the letter from the Commissioner's Office invites an appeal to him which invitation was accepted. The Commissioner did not respond to the Claimants exercise of the right. In any event both cases leave, open the door to judicial review in exceptional cases even where an alternate remedy has not been pursued. In re **Caveley (above)** judicial review was in fact granted notwithstanding the applicant's failure to pursue the alternative remedy. This it seems to me is such an exceptional case mainly, because the Commissioner invited an appeal to himself within the same 14 day period. The claimant understandably sought to pursue that. A Court ought not to drive such a litigant from the judgment seat.

[30]. In the final analysis therefore the decision to dismiss the claimant was outside the jurisdiction of the Commissioner of Police as the matter of the transferred credit had already been dealt with summarily by the Claimant's Commanding Officer. I therefore order certiorari to issue and that the decision of the Commissioner of Police made on the 13th April 2011 by which, the Claimant Woman Constable No. 133346 was dismissed is hereby quashed.

Costs to the Claimant to be taxed if not agreed.

David Batts
Puisne Judge