[2017] JMSC Civ 213

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2014 HCV 00351

IN THE MATTER OF AN APPLICATION BY CONSTABLE ORTHEL WHITTINGHAM FOR JUDICAL REVIEW

AND

IN THE MATTER OF THE DECISION OF THE COMMISSIONER OF POLICE ON MAY 8, 2013 AND JANUARY 9, 2014

BETWEEN	**ORTHEL WHITTINGHAM**	**CLAIMANT**
AND	**THE COMMISSIONER OF POLICE**	**1st DEFENDANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**2nd DEFENDANT**

HEARD IN OPEN COURT AND ON PAPER

Tashell Powell, instructed by Zavia Mayne & Company for the Claimant

Dale Austin, instructed by the Director of State Proceedings appears for the Defendants

HEARD: October 27, 2016 and September 22, 2017

APPLICATION FOR JUDICIAL REVIEW – REFUSAL OF APPLICATION FOR RE-ENLISTMENT – WHETHER MANDAMUS CAN PROPERLY BE GRANTED – WHETHER THE CLAIMANT WAS DENIED NATURAL JUSTICE – AUTREFOIS ACQUIT – CLAIM FOR DAMAGES

ANDERSON, K. J

Reasons for Judgment

Several issues have arisen from this claim. They are as follows and highlighted for the purpose of emphasis. This court's conclusions with respect to each of those issues, based on the particular facts of this particular claim, are also as follows, and are designated, by the use of the letter, 'A,' which I have also highlighted, for the purpose of emphasis.

[1] *Was the claimant discharged from his employment with the JCF, or was there a refusal to re-enlist him*?

A. The claimant was not re-enlisted, or in other words, the Commissioner of Police refused to re-enlist him. In a letter that was sent to him, which was dated May 8, 2013 and which was under the hand of the Commissioner of Police, the heading is: 'Notice of Non Re-enlistment.' The first sentence of that letter reads as follows: 'Your application dated January 7, 2013 for re-enlistment on completion of your one-year tenure ending April 16, 2013 was received and is denied.'

[2] *Could the claimant properly have had a legitimate expectation that he would have been re-enlisted and if so, did the claimant have that expectation?*

A. In the final analysis on this issue, while the claimant may have in fact had an expectation that he would have been re-enlisted, if there was no proper basis for that expectation, then that expectation will not and cannot avail him in this claim, since that would not then have been a legitimate expectation.

The claimant could not properly have expected that he would have been re-enlisted, for the following reason:

A. The claimant was specifically informed by letter which was addressed to him and dated April 10, 2013, under the hand of the Assistant Commissioner of

Police, Administration Branch, that following upon his application for re-enlistment dated January 7, 2013, his said application had not been recommended to the Commissioner of Police, on several grounds, all of which were set out in that letter and in addition, in respect of all of which ascertains as contained in that letter, the claimant was specifically invited to respond if he wished, both in writing and also, by attendance upon the office of the Commissioner of Police.

Considered particularly in the context of that letter, the claimant could not have had a legitimate explanation that the Commissioner of Police would have re-enlisted him.

[3] The case which, in Jamaica, is viewed as one of the leading cases in this area of the law, is: **Corporal Glenroy Clarke v Commissioner of Police and the Attorney General of Jamaica** – [1996] 33 JLR 50 at pp. 52-53 of the court's reported judgment in that case, Carey JA explained the difference between dismissal and non re-enlistment.

On page 53 of that said judgment, Carey JA stated that, '*There is no such thing as an automatic right to re-enlistment.'* He also stated at a separate juncture on that same page, that: *'The onus is thus on the officer to show cause why he should be allowed to re-enlist.' In a refusal of re-enlistment circumstance, such as this case is, was the claimant entitled to natural justice, prior to any initial decision having been made in that regard?*

A. No. Carey JA stated at page 52 of the court's reported judgment in that case, as follows: '*Altogether different rules govern re-enlistment into the force. In the case of dismissal, there is trial, that is, an enquiry, witnesses are called, there is cross-examination of the witnesses, the procedure is akin, to a trial in a court of law. The officer presiding at this exercise is, plainly exercising a judicial function. In case of re-enlistment, the commissioner is exercising administrative functions in which case it is trite law that he must act fairly. In*

seems to me that in the present case the commissioner was not sitting as a judge, who must of course divorce from his mind all he may have heard of the matter before undertaking the trial. The Commissioner could properly take a decision not to approve re-enlistment of any member even before an application to re-enlist is made. There is no question of hearing the member when that decision is taken because the member is not on trial for any charges.'

[4] *Was natural justice breached in respect of the Commissioner of Police's decision to refuse to re-enlist the claimant?*

A. No. Even though the claimant was not entitled to a hearing prior to the Commissioner of Police having refused to re-enlist him, he was in fact afforded such a hearing, both orally and in writing. See the letter sent to the claimant by the Assistant Commissioner of Police, Administration, in that regard. That letter is, as aforementioned, dated April 10, 2013. The claimant has given evidence that he was granted access to the Commissioner of Police prior to the publication in the Force Orders, that he had been refused re-enlistment, but that said hearing was not fair. This court accepts that particular assertion as being truthful, as it has not been challenged or contested in any way, as it could and should have been, if it was untrue. That though, is not the end of the matter. What this court must do, is consider whether or not the overall process was fair and not whether or not, the process of the refusal to re-enlist the claimant was extremely and scrupulously fair. As was stated by Harris JA in **Roald Nigel Adrian Henriques v Hon. Shirley Tyndall OJ and ors.** – [2012] JMCA Civ 18, at paragraph 136 – '*These factors must be considered within the context of the discretionary powers accorded to the decision-maker by statute, bearing in mind... that a low content of procedural fairness will be invoked where the statute permits the decision-maker the right to select his own procedure. The circumstances in each case vary. The question, in a particular case, is*

whether the procedural approach by the commission is so unfair that no reasonable commission would have adopted it.'

Even after the Commissioner of Police had made the initial decision to refuse to re-enlist him (the claimant), the claimant was afforded, as the law entitles him to then be afforded, notice, to show cause, in writing, as to why the Commissioner of Police's decision to refuse to re-enlist him, should not be pursued. The Commissioner of Police's letter to the claimant, dated May 8, 2013, makes that clear. It was the claimant who failed to avail himself of that opportunity which he was thereby and then, afforded.

[5] Considered in that context, the Commissioner of Police's failure to have afforded to the claimant, a fair hearing prior to having refused to re-enlist him, cannot properly be considered as unfair to the claimant, in view of the overall procedure which was adopted in respect of the ultimate decision to refuse to re-enlist the claimant. At the stage when he was denied a fair hearing, in respect of that overall process, the claimant was being afforded a hearing which he had not even legally been entitled to have been afforded. Yes, the denial of a fair hearing prior to the announcement to the claimant, by the Commissioner of Police that the decision had been taken to refuse to re-enlist the claimant, was a mis-step in the overall process of fairness, bearing in mind that even though the claimant had no right to a hearing at that stage, he was nonetheless, afforded one, which should have been fair. That mis-step though, in and of itself, has not, to my mind, sufficiently tainted the overall process of fairness which was otherwise afforded to the claimant *vis-a-vis* the Commissioner of Police's ultimate decision to refuse to re-enlist him.

[6] The fact that the claimant was afforded the opportunity to have at least one fair hearing, which he could and should have availed himself of in writing, after the initial decision to refuse to re-enlist him, had been made, to my mind, has served to render the overall process in relation to the refusal to re-enlist him, as being fair. It is always the overall process that must be looked at in a case such as this

and not, in isolation, that which happened at one stage of a lengthy process which involved more than one stage. To my mind the requirements of 'fairness' as outlined in **R v Secretary of State for the Home Department, ex p. Doody** – [1994] 1 AC 531, have been met.

[7] *Should the claimant be reinstated, pursuant to an order of this court, founded upon this claim, on the ground that the Commissioner of Police's decision to refuse to re-enlist him, was an unreasonable one?*

A. No. This court cannot grant relief to the claimant on that basis, because that was not set out in his Fixed Date Claim Form as one of the grounds upon which he was seeking relief. The claimant was required to have set it out as such, if he wished to rely on that ground. See **rule 56.9 (3) of the Civil Procedure Rules (CPR)** in that regard. No application was made to this court to waive the failure to comply with that rule of court. As such, no such waiver can now be granted. The written submissions of the claimant's counsel, as to whether the commissioner had good and sufficient reason not to re-enlist the claimant, are therefore, of no moment.

[8] *Should this court grant an order of mandamus, if it agrees with the claimant's contention that the Commissioner of Police's refusal to re-enlist him, ought to be quashed?*

A. No. This court does not have the requite jurisdiction to so order. See: **R v Commissioner of Police, ex parte Courtney Ellis** – Claim No. 2010 HCV 01286. A court will not specifically enforce a contract of personal service.

[9] *Did the defendant 'discharge' the claimant on the basis of criminal charges which were already dismissed by the St. Catherine Resident Magistrate's Court (as that court's name was then) and if so, was that unjust?*

A. It is very clear that one of the grounds upon which the Commissioner of Police acted, in having refused to re-enlist the claimant was a ground which

had already, by the time when the Commissioner of Police made his decision in that regard, been addressed upon a criminal charge in the St. Catherine Resident Magistrate's Court. That is ground number one as set out among the reasons why the Commissioner of Police refused to re-enlist the claimant, in the Commissioner of Police letter to the claimant, dated May 8, 2013. That this is so, is evidenced by exhibit 'OWI' attached to the claimant's affidavit which was filed on December 21, 2015. That though, is only one (1) of three (3) grounds that were relied on by the Commissioner of Police. In total, there were three (3) grounds and thus, two (2) other grounds which were relied on, by the defendant, as having grounded his refusal to re-enlist the claimant.

Accordingly, it is incorrect to assert that: '*The defendant has discharged the claimant for reasons of criminal charges which were already dismissed by the St. Catherine Resident Magistrate's Courts.'* That is incorrect, firstly, because the claimant was not 'discharged,' but rather, was not 're-enlisted.' Secondly, and even more fundamentally, that was only one of the grounds upon which the defendant decided to refuse to re-enlist the claimant.

[10] *Was it unjust for the defendant to have acted, partially, on the basis of a charge which was dismissed against the claimant, in the St. Catherine Resident Magistrate's Court, on the basis of a no-case submission?*

A. No.

The legal principle of *autrefois acquit* has no applicability in circumstances which are not, 'on par' with one another. The considerations of a Commissioner of Police in deciding as to what should be the characteristics of any person who seeks either enlistment or re-enlistment in the Police Force, are, of course, not closed. It must be open to a Commissioner of Police in that regard, to decide as to the specifics of those characteristics and what means he will use in deciding as to what characteristics, a particular police recruit, or even a previously enlisted officer, possesses.

[11] It cannot be that in that regard, the Commissioner of Police can give no weight to a serious criminal allegation made against a previously enlisted police officer, which has not been proven and will not ever be proven in a court of law. The restrictions placed upon evidence in a court of law and the challenges attendant upon the given of evidence in a court of law in a criminal case, are not expected to automatically constrain the Commissioner of Police, in terms of his considerations as to the behaviour and/or characteristics of either a recruit, or a previously en-listed officer.

[12] Thus, for instance, the Commissioner of Police can consider intelligence reports, which may, for confidentiality purposes, have been unavailable to prosecutors, during a criminal trial.

[13] If it were otherwise, then it would, albeit indirectly, be the court in which a criminal charge or criminal charges against the accused police officer, is/are tried, that would be determining what weight (if any), should be given to the allegation (s) which form the basis of that charge or those charges, by a Commissioner of Police in assessing, administratively, whether the person who was once the subject of that charge or those charges, should remain as a member of Jamaica's Police Force. That would, if it were applicable, be, to my mind, a very unhealthy and unhelpful proposition for Jamaica. Thankfully though, to my mind, it is only a proposition, devoid of any proper legal foundation.

[14] In fact, counsel for the claimant, in her written submissions in respect of this claim, which was heard on paper, cited not even a single legal authority, in support of one of the claimant's grounds in support of this claim, that being: *'That the plea of autrefois acquit is opened to the claimant in this case.'*

[15] To my mind, the claimant could properly have been refused re-enlistment on any of the grounds that were set out in the Commissioner of Police's letter to him, as dated May 8, 2013 and also, the Commissioner of Police was perfectly entitled to have taken into account, each and every one of those stated grounds and

applied each of them, as well as all of them, in a manner adverse to the claimant's interests, as far as his application for re-enlistment was concerned.

[16] *Is the claimant entitled to judgment on this claim being awarded in his favour and to an award of damages?*

A. The answer to this compound question is, 'No,' for the reasons given above and also because, the claimant has, in any event, led no evidence capable of even remotely supporting his claim to recover damages. **Rule 56.9 (3) (b) (ii) of the CPR**, requires that such evidence be given, if damages are to be awarded to a claimant, in a claim for 'an administrative order,' such as, for instance, a claim for judicial review.

Conclusion

[17] In the circumstances, judgment on this claim is awarded in favour of to the defendant. There will be no order as to the costs of this claim.

Order

1) Judgment on this claim is awarded in favour of the defendant.

2) No order as to the costs of this claim.

3) The defendant shall file and serve this order.

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Hon. K. Anderson, J.