[2023] JMSC Civ 31

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2018 HCV 02720

BETWEEN	**DAMION DAVIDSON**	**CLAIMANT**
AND	**THE COMMISSIONER OF POLICE**	**DEFENDANT**

IN OPEN COURT

Mr. John Clarke for the Claimant

Mr. Robert Clarke instructed by the Director of State Proceedings for the Defendant

HEARD: January 25 & February 28, 2023

Judicial Review – Re-enlistment of police officer – Officer fails to respond to notice of non-recommendation before period of enlistment expires – Officer removed from Force – Officer not considered dismissed – Reinstatement not Application re-enlistment – Legitimate Expectations – Jamaica Constabulary Force Act, Police Services Regulations, – Book of Rules for the Guidance and General Direction of the Jamaica Constabulary Force

WINT-BLAIR, J

[1] This matter concerns the decision of the Commissioner of Police ("CP") not to re-enlist Mr. Davidson as a member of the Jamaica Constabulary Force ("JCF").

Aggrieved by this decision, the claimant filed an amended fixed date claim form[1] seeking:

[2] 1. An order of mandamus to compel the CP to re-enlist him in the JCF;

2. An order of certiorari to quash the decision of the CP not to re-enlist the claimant and to discharge him from the JCF.

3. Damages for loss of income

4. Such further and other relief as this Honourable court deems fit and

5. Costs to be costs in the claim.

[3] The claim is grounded in a breach of natural justice; and on the plea of autrefois acquit being open on the facts. In support of the fixed date claim form, the claimant has filed an affidavit[2] which states that he resides in the parish of St. Andrew and was enlisted in the JCF on January 2, 2006.

[4] The claimant deposes that on March 30, 2008, he was charged jointly for the offences of conspiracy to defraud, obtaining money by means of false pretences and creating public mischief. He was served with a notice of suspension with effect from April 4, 2008 pending the outcome of the charges against him. On March 30, 2010, "No Order" was entered in the matter at the Spanish Town Resident Magistrate's Court in the criminal case.

[5] He said the charges were based on a conspiracy between his girlfriend Fredrica Radcliff, Kevin Stewart and Omroy Williams to stage her own kidnapping in order to "*subterfuge her grandmother, Mrs Daisy into paying for her safe release."*

[6] On March 10, 2008, he was summoned by Detective Sergeant Richards to the Criminal Investigation Branch of the Spanish Town Police. He was advised that the aunt of Fredrica, had reported the kidnapping of Fredrica from her home. The Detective

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[1] Filed on October 16, 2018

[2] Filed on October 16, 2018

asked questions about Fredrica and the claimant said he responded to each without hesitation.

[7] The claimant deposed that after Fredrica "resurfaced" he was brought to the Organized Crime Investigation Division. His house was searched and the sum of Two Hundred Thousand Dollars ($200,000.00) was taken from his chest of drawers which he had been saving to buy a car. A couple of days later, he and his attorney were present for a question and answer session at Organized Crime Investigation Division. At the end, he was advised that Fredrica had told them everything and that his two friends were already in custody.

[8] On September 20, 2010 he submitted an application to be re-enlisted in the JCF. On December 23, 2010 he received a letter from the CP stating that his application had been denied on the basis of the charges against him. Further, that he had not made sufficient arrests and that he should produce in writing within fourteen days why his application should be considered favourably. His attorney responded by letter to the CP, Mr. Owen Ellington.[3]

[9] The claimant said he was given a brief audience with the CP, who said his mind was made up with respect to the charges against him. He was not given an opportunity to state his innocence and was immediately removed from the CP's office, the CP having spoken.

[10] The weekly Force Orders dated March 17, 2011 published that he was dismissed from the JCF, a copy of which was marked DD1.

[11] The claimant went to court on March 1, 2018 and the Crown offered no evidence against him. He was discharged and a copy of the order of Her Honour Mrs. Tara Carr (as she then was) was marked DD2.

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[3] This letter was not filed, the attorney is unknown to the court, there is no evidence as to its content, nor was there any evidence of a response.

[12] The claimant applied for reinstatement in the JCF, by letter dated March 16, 2018, which was marked DD3. He said, in doing so, he acted upon the words of the CP, who had stated that his previous application of September 20, 2010 was denied based on the pending charges.

[13] He received a letter from the Office of the Commissioner dated April 18, 2018 which stated that his request could not be countenanced at that time. It was marked DD4. The CP has not afforded him due process; he has not been heard nor has he been given an opportunity to exculpate himself.

[14] He deposes that he is personally and directly affected by the decision to refuse to re-enlist him. He has not found employment since. During his period of enlistment, he was occupying rented premises with his minor child, of whom he is the breadwinner and sole caretaker. Since being refused re-enlistment, he has been forced to move and to reside with family members as he cannot afford to pay rent. His daughter now lives with his mother who is better able to provide for her maintenance. He was very independent and could provide for the needs of both himself and his child while he was enlisted, now he has been crippled in his efforts to do so.

[15] He had been a constable for over eleven years and up to the point of being charged, had an unblemished record of service and no disciplinary sanction had ever been recorded against him.

[16] In the affidavit in response[4], the claimant said, he was invited to a hearing with the CP about his matter. He attended the hearing alone. He waited for about an hour, after the agreed time. He was ushered into an office and was not introduced to the persons in the office nor was he told whether the meeting was being recorded. He recalled only being able to say “Good Morning.” The CP skipped through some documents and looked at him and said he would stick by his decision. He was not allowed to speak, to present his case, further submissions or any information to the CP.

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[4] September 30, 2022

The hearing lasted eight to nine seconds. The CP did not ask him any questions, nor did the CP seek to confirm whether the letter sent to him was prepared by the claimant and contained his full appeal in relation to the matter.

[17] The CP did not consider the outcome of the criminal case, as no judgment had been given against him. When he was leaving the hearing, he overheard the CP saying that no order meant he was found guilty of the criminal matter.

[18] The record of proceedings is false and was only seen for the first time on the date he swore to this affidavit. Senior Superintendent Andrew Lewis was not at the hearing.

[19] On the morning of March 4, 2011, there were about ten persons waiting to see the CP. Persons went in before the claimant and the meeting timelines were very short, most persons were out within a minute.

[20] In cross-examination, the claimant was shown a letter marked AL3, which was a letter from himself to the CP dated January 5, 2011, in which he said that *"he deeply recognized the fundamental error on my part, to have allowed myself to be lured into activities which led to my arrest and charge. Over the last (1) year and nine (9) months I have had the opportunity to reflect on my actions and behaviour and have come to the conclusion that I must reform my ways and I now call out for help in this regard.*" The claimant accepted the contents of the letter.

[21] Andrew Lewis, Acting Assistant Commissioner of Police and Officer in charge of Administration, JCF, gave evidence on behalf of the CP. He said that he was familiar with the claimant's case, having read his administrative file. There is no dispute as to the dates the application for re-enlistment was made, the period of suspension, or the determination of the criminal matter. Mr. Lewis adds that the "No order" was entered, the complainant having indicated that she no longer wished to proceed with the matter.

[22] He deposed that the notice of non-recommendation for re-enlistment gave the reasons for the non-recommendation as the low level of productivity, the charges before

the court and the findings of investigations into those charges. The investigations revealed that the claimant had conspired with Mrs Wallace Radcliff to stage her kidnapping. The claimant was found in possession of Four Hundred and Ten Thousand Dollars ($410,000.00) in his home, which he admitted was a portion of the ransom money collected to pay for the release of Mrs Radcliff. The matter was dismissed without the facts of the case being ventilated at the instance of the complainant and the court directed that the sum of money mentioned be returned to the complainant.

[23] In response to the notice of non-recommendation, which was marked AL2, the claimant responded by letter dated January 5, 2011, in which he admitted to having been lured into activities which led to his arrest and charge, he sought to implore the CP to exercise leniency. That letter was marked AL3.

[24] The claimant was given a hearing by the CP on March 4, 2011, the latter having had the benefit of the response of the claimant dated January 5, 2011. The CP took the decision not to re-enlist the claimant, the record of the hearing was marked AL4.

[25] The notice of refusal for re-enlistment was sent to the claimant and marked AL5. The Force Orders published this refusal and was marked AL6.

[26] Mr. Lewis gave evidence that in response to the claimant's application of March 16, 2018, that the claimant's attempt to re-apply to be reinstated in the JCF did not require that he be heard by the CP, as would have been required in circumstances where he was seeking to be re-enlisted. The fact of his non-re-enlistment as at March 10, 2011 was not challenged. This meant that the claimant was no longer a sub officer or constable in the JCF entitled to be considered for re-enlistment and would therefore not be entitled to utilise the same procedure as that for re-enlistment.

[27] A letter was therefore, sent to the claimant advising that his re-admission into the JCF could not be approved at this time and marked AL7.

[28] In cross examination, Mr. Lewis was referred to the findings of an administrative investigation which was supplied to the claimant in the notice of non-re-enlistment

marked AL2. The results of the investigation were stated as grounds (a) to (d) and reads as follows:

[29] *"The investigation established that: -*

(a) You shared an intimate relationship with Mrs. Radcliffe and in a confession statement she said she wanted to remove from the matrimonial home to co-habit with you and being short on money conspired with you to stage her kidnapping with a view to having her grandmother pay the ransom money;

(b) Mrs Wallace-Radcliffe persuaded you to carry out the plot and secured the services of other men to accompany you;

(c) On March 30, 2008, in pursuance of the investigation of the kidnapping of Mrs Wallace-Radcliffe, a search team found the sum of Four Hundred and Ten Thousand Dollars ($410,000.00) at your house. You reportedly admitted to investigators that it was a portion of the ransom money you collected from Mrs Daisy Senior earlier that day to pay for Mrs Radcliffe's release;

(d) On March 30, 2010 Mrs Senior attended the Spanish Town Resident Magistrate's Court and petitioned the magistrate that she has no further interest in the matter. Consequently, the case was dismissed without the facts of the case being ventilated. In keeping with the directive of the court, the sum of money under reference was returned to Mrs Senior on March 31, 2010.

[30] The notice goes further to say:

Your role in this matter reflects that you are susceptible to being drawn into corrupt and unethical activities. Having being found in possession of the ransom money serves to impugn your character and tarnish the image of the Jamaica Constabulary Force.

Notwithstanding your reportedly good discipline and professional approach to your job prior to your suspension, your role in the matter for which you are suspended and which compromised integrity and your low level of productivity have eroded the confidence of the Force in your ability to serve, protect and reassure the citizenry of Jamaica.

In this regard you are not[sic] deemed to be unsuitable[sic] for continued service in the Jamaica Constabulary Force.

You may respond to this Notice within seven (7) days of the date of receipt of same, stating reason(s) if any, why your re-enlistment application should be approved.

[31] This notice was signed by the Assistant Commissioner of Police, Administration.

SUBMISSIONS

[32] The claimant enlisted as a member of the JCF on January 2, 2006. The chronology is uncontested. The claimant relies on Police Services Regulations 34, 37 and 44 which are set out below:

"34-- (1) Where criminal proceedings have been instituted against a member, disciplinary proceedings upon any grounds arising out of the criminal charge shall not be taken until after judgment has been given and the time allowed for an appeal from the judgment has expired; and where a member after conviction has appealed disciplinary proceedings shall not be taken until after the withdrawal or determination of the appeal.

(2) Nothing in this regulation shall prevent the member being interdicted from duty pursuant to regulation 35.

37. A member acquitted of a criminal charge shall not be dismissed or otherwise punished in respect of any charge of which he has been acquitted, but nothing in this regulation shall prevent his being dismissed or otherwise punished in respect

of any other charge arising out of his conduct in the matter, unless such other charge is substantially the same as that in respect of which he has been acquitted.

44. A member acquitted of a criminal charge shall be restored to his rank and pay and be paid the full amount of his salary for the period of his interdiction or suspension."

SUBMISSIONS

[33] Part 56 of the Civil Procedure Rules sets out a number of discretionary orders. The discretion whether or not to grant a remedy at all and what form that remedy should take is for the court to be judicially exercised. In deciding whether to exercise the discretion to grant relief, there are several relevant factors which ought to be taken into account. One factor for consideration in the grant of an administrative order is whether it is necessary to do so. Another factor is whether the dispute has a wider public interest element. For though an order may be of little practical value to the claimant, it may be of greater significance to make a decision in the wider public interest. In the case at bar, the claimant is seeking a declaration on the basis that he has a legitimate expectation to be re-enlisted.

[34] Both sides cited the case of **Glenroy Clarke v Commissioner of Police and Another**,[5] in which the appellant was a corporal of police in the Jamaica Constabulary Force ("JCF"). He first enlisted in 1978 and successfully applied for re-enlistment in 1983 and in 1988. In 1993, when he applied for re-enlistment he was advised on the orders of the Commissioner of Police ("the Commissioner"), that his application would not be approved and he was apprised of the reasons for that decision. Subsequently, the appellant sought and obtained an interview with the Commissioner at which he had counsel, who made submissions on his behalf. Prior to this event, the Chairman of the Police Federation had intervened to make representations on his behalf to the

[5] (1996) 52 WIR 306

Commissioner. The decision stood. A Force Order dated 18 November 1993 proclaimed his exit at that date.

[35] The appellant felt aggrieved at this treatment, he had received several commendations for his efforts over the years, appointed Corporal in 1992 and acting Sergeant of police in May 1993. He acknowledged that save being fined ten (10) days' pay at a police court of inquiry, he was unaware of any other act of wrongdoing on his part which warranted refusal of his application. He had entertained a reasonable expectation that he would be re-enlisted in the JCF. He obtained leave to apply for certiorari to quash the directions of the Commissioner. The motion was dismissed by the Full Court. On appeal, it was argued that the appellant had not been afforded a fair hearing, the Commissioner having pre-determined the matter and this was also a demonstration of bias.

[36] Carey, JA (as he then was), set out the procedure for re-enlistment:

> *"As indicated earlier, a member of the force is enlisted for terms of five years and when he wishes to re-enlist, he must make an application before the expiration of the current term. It follows that, if there is no application, a member's tenure comes to an end. When an application is made, it is considered by the Commissioner who makes a determination…It 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 charge. The conduct of the officer over the various terms of his enlistment would necessarily be the basis of the Commissioner's decision. The officer may have been charged previously and disciplined therefor. That previous misconduct can properly be taken into account in determining whether he is a fit and proper person to remain*

a guardian and preserver of the peace. There is no such thing as an automatic right to re-enlistment. Approval should be and doubtless is granted where the conduct of the member is satisfactory. The level of conduct or performance is to be determined by the Commissioner and the court has no power to set the standard of acceptable conduct in the force.

Where the Commissioner has taken a decision not to approve re-enlistment, then, upon any application by the member for re-enlistment the Commissioner is obliged in fairness, to supply the reasons for his decision and to allow the officer affected an opportunity to be heard in relation to that material if the officer requests it…

Any right which the appellant had to be heard could only arise after the appellant had been advised of the decision not to approve and the reasons therefor. The opportunity afforded to the appellant to be heard allowed the Commissioner to review his decision in light of any submissions made to him by the officer or his attorney. The reasons having been supplied, must then be answered by the attorney. Consequently, the exercise is akin to an appeal process than to a trial process. The onus is thus on the officer to show cause why he should be allowed to re-enlist."

[37] In **Berrington Gordon v Commissioner of Police**, [6] Sykes, J (as he then was) citing the case of **Glenroy Clarke v Commissioner of Police** said of that decision:

"[18] …a decision of the Court of Appeal of Jamaica dealing specifically with the re-enlistment of police officers. What was said by Dyson LJ in paragraph [14] in the AMEC explains why the court in Clarke held that whenever the CP makes the decision not to re-enlist a police officer, the

[6] [2012] JMSC Civ 46

affected officer must be informed of the decision and be supplied with the reasons. This is so because the decision may have been made before the affected person applied for re-enlistment in which case he would be adversely affected without having had the opportunity to make any representation. Thus while the Jamaican Court of Appeal endorsed the view that the CP has the power to decide not to re-enlist a police officer even before an application for re-enlistment has been made fairness demands that he be informed and given reasons so that he can decide whether to ask for a review.

[19] The Court of Appeal in Clarke set out, in detail, the process to be followed. In practical terms, the court supplemented the statute by stating what fairness demands in the context of an application for re-enlistment.

[20] Clarke established the following propositions:

a. no police officer who must apply for re-enlistment has an automatic right of re-enlistment;

b. the police officer has to apply for re-enlistment in accordance with the relevant or extant rules and regulations;

c. the power to decide whether the officer will be re-enlisted, according to the Act, lies solely with the CP;

d. it is the CP who determines the standard of conduct expected of police officers. The courts have no power to make this determination;

e. the CP can properly determine that a particular officer won't be allowed to re-enlist even before that officer makes an application for re-enlistment;

f. if the CP decides that a particular officer won't be re-enlisted before he makes such an application, fairness does not require that such an officer be heard before the CP makes that decision;

g. 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 CP had decided that he would not be permitted to re-enlist;

h. however, if the CP 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 CP must (not may) notify the officer of his decision and the decision must be accompanied by reasons;

i. the officer must (not may) be allowed to make representations to the CP;

j. the right to be heard can only arise if and only if (i) the officer applies for re-enlistment; (ii) the CP informs him that he will not be permitted to re-enlist and (iii) he has been given the reasons for the decision;

k. it is for the CP 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;

l. the hearing before the CP is a review where the onus is then placed on the officer to make his case for re-enlistment;

m. the decision not to permit re-enlistment is not a dismissal;

n. in considering whether to permit the officer to re-enlist the CP can take into account the past conduct of the officer.

[23] Forte JA stated that '[t]here 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' (page 313).

[24] Gordon JA stated, "A constable who has a history of aberrant behaviour cannot claim a legitimate expectation to re-enlistment" (page 314). This statement by Gordon JA is not to be understood as a disagreement with the other two Justices of Appeal. His Lordship was not purporting to reverse a specific finding of the Full Court from which the appeal came that Mr Clarke had a legitimate expectation, in light of his previous re-enlistments, that he would be re-enlisted this time round. All Gordon JA was saying was that a constable with a history of misbehaviour cannot claim that he has a legitimate expectation to re-enlist."

[38] In **Glenroy Clarke**, the Commissioner had considered 'certain intelligence reports' which had not been disclosed. Carey, JA said:

> *"The Commissioner was obliged to consider the conduct of the appellant over the period of the appellant's service. The fact that he may have been disciplined under previous administrations cannot be disregarded, as if it had been excused or removed from his record. Any résumé of his service must have included that conduct which the Commissioner was obliged to consider. He could not be regarded as a person with an unblemished record by any stretch of the imagination."*

DISCUSSION

Legitimate expectation

[39] The claimant argues that he had a legitimate expectation to be re-enlisted. This head has to be assessed in light of the prevailing circumstances and what was before the CP. The doctrine was laid down in the well-known case of **Council of Civil Service Unions v Minister for the Civil Service** [1985] AC 374 ("CCSU") at 408 by Lord Diplock. In his statement of the law, the learned Law Lord said:

[40] *"The decision must affect some other person either:*

(a) by altering rights or obligations of that person which are enforceable by or against him in private law;

or (b) by depriving him of some benefit or advantage which either

(i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or

(ii) he has received assurance from the decision-maker it will not be withdrawn without first giving him an opportunity of advancing reasons for contending that it should not be withdrawn."

[41] However, it is not enough to simply raise the existence of an expectation, it must be legitimate. This is a weighing up of the expectation reasonably entertained by one party as against the countervailing considerations of law or policy of the other party. For an expectation to be legitimate it must first be founded upon a promise or practice by the public authority that is said to be bound to fulfil the expectation.[7] Second, the clear statutory words override any expectation howsoever founded. Third, the notification of a relevant change of policy destroys any expectation founded upon the earlier policy. Fourth, there is no artificial restriction on the material on which a legitimate expectation rests. Fifth, the individual seeking protection of the expectation must themselves deal fairly with the public authority. Sixth, consideration of the expectation may be beyond the jurisdiction of the court, when it would involve questioning proceedings in Parliament contrary to the law of parliamentary privilege. Seventh, the expectation must be within the powers of the decision-maker before the question of protection arises.[8]

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[7] Wade & Forsyth, Administrative Law, 11th edn, p. 453

[8] Supra p. 454

[42] Whether or not the claimant in this case has shown that an expectation exists is a question of fact. There has been a distinction drawn between a procedural expectation and an expectation of a favourable decision by public authority. The duty to act fairly is not to be confused with the protection of legitimate expectations. Therefore, it is important for a claimant to do more than simply allege the existence of an expectation, it is the incumbent upon him to refine the point further towards its legitimacy.

[43] The substantive expectation of the claimant [9] is protected procedurally, in that the claimant is to be given the opportunity to make representations before the expectation is dashed. Procedural fairness requires that the decision maker, make a proper decision taking into account all relevant considerations. The claimant's substantive legitimate expectation is one such consideration.

[44] The Commissioner on the authority of **Glenroy Clarke** could properly take the decision to refuse to re-enlist any member before or after an application for re-enlistment was made. It is the conduct of the member, during the period of service over the various terms of enlistment, which would form the basis for the Commissioner's decision. It is clear that there is no automatic right to re-enlistment even in the face of an acquittal in a criminal court.

[45] The claimant bases his legitimate expectation on the ground that he should be allowed to re-enlist barring some good reason not to permit him to do so. This submission can be dismissed outright as being inconsistent with the law as set out in **Glenroy Clarke**. There is no automatic re-enlistment. It is the claimant who has to show cause. This submission reverses the onus. "*The onus is thus on the officer to show cause why he should be allowed to re-enlist."* It is also clear from **Berrington Gordon** that in considering whether to permit the officer to re-enlist, the Commissioner can take into account the past conduct of an officer, conduct is not limited to a

[9] supra

conviction or acquittal. In addition, "*a constable who has a history of aberrant behaviour cannot claim a legitimate expectation to re-enlistment"*[10]*.*

[46] It was further submitted, that the Commissioner took incidents into account upon which he was not afforded a hearing, in that he was not allowed at the meeting with the CP to respond to the allegations. This submission fails to acknowledge the law as set out in **Glenroy Clarke** which states that the decision to refuse to re-enlist an officer can be made before an application is made by that member. "*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 charge*[11]*."*

[47] The court in **Glenroy Clarke** made it clear that the Commissioner is, instead engaged in a review. In order to make a decision, he is entitled to take into account reports and recommendations from divisional officers under his command. In those circumstances, the court said, it was entirely fair for the Commissioner to consider the intelligence reports without providing copies of them to the applicant. In the instant case, the substance of the investigation against the claimant was disclosed to him in the notice of non-recommendation of re-enlistment.

[48] The Court of Appeal in **Glenroy Clarke** made it clear that the level of conduct or performance of the members of the Jamaica Constabulary Force is to be determined by the Commissioner and the court has no power to set the standard of acceptable conduct in the force.

Irrationality

[49] The CP took all relevant considerations into account. The CP took into account, the information contained in the investigation, the recommendation of the ACP in charge

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[10] *page 314, per Gordon, JA.*

[11] Supreme Court Civil Appeal No. 84/94, page 4, Per Carey JA

of Administration, the determination of the criminal case, the letter submitted in response to the notice of grounds. The notice of non-recommendation of re-enlistment sets out the considerations sought in the letter dated January 5, 2011 concerning matters of good discipline and professionalism, it said notwithstanding these matters, the adverse decision was made.

Whether there was a breach of natural justice.

[50] The CP enjoys a wide discretion. Pursuant to section 3(2)(a) of the Jamaica Constabulary Force Act, the Commissioner has the sole operational command and superintendence of the Force. The discretion given to the CP is to be exercised fairly and reasonably.

[51] Lord Lloyd, in **Fisher v Minister of Public Safety and Immigration (No.2)**[12] said on behalf of the Board:

> *"…But legitimate expectations do not create binding rules of law. As Mason CJ made clear at page 291, a decision maker can act inconsistently with a legitimate expectation which he has created, provided he gives adequate notice of his intention to do so, and provided he gives those who are affected an opportunity to state their case. Procedural fairness requires of him no more than that."*

[52] Following on the path of Lord Lloyd's reasoning in considering the case at bar, I would say that procedural fairness required no more from the Commissioner than to notify the claimant of the reasons for the decision not to re-enlist him and give him an opportunity to be heard. It is trite that a hearing does not mean an oral hearing.

[53] What constitutes fairness has been prescribed by Lord Mustill in **R v Secretary of State for the Home Secretary, ex parte Doody**[13]. His speech was cited with

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[12] [2000] 1 AC 434, at page 447

[13] [1994]1 A.C. 531, at page 560

approval by Lord Brown in **Bari Naraynsingh v The Commissioner of Police**[14] a judgment of the Privy Council from Trinidad and Tobago which was delivered on the 20th April 2004. In that case, Lord Brown said at paragraph 16:

> *"As for the demands of fairness in any particular case, their Lordships, not for the first time, are assisted by the following passage from Lord Mustill's speech in R v Secretary of State for the Home Secretary, ex parte Doody [1994] 1 AC531, 560:*
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> > *"What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from any of the often cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them I derived that: (1) Where an act of parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type… (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to*

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[14] [2003] UKPC 20

> *procuring its modification; or both. (6) Since the person affected cannot make worthwhile the mere representations without knowing what factors may weigh against his interests, fairness will very often require that he is informed of the gist of the case which he has to answer.""*

[54] The claimant was treated with fairness in that he was a person who would be adversely affected by the decision. He was given an opportunity to make representations on his own behalf in writing.

Autrefois acquit does not arise

[55] The application for re-enlistment marked DD3 states that: "*The matter was mentioned in the Spanish Town Resident Magistrate Court and on the 30th day of March 2010 the crown made a no order verdict in the matter and as I understand it in law the matter wasn't concluded as it could be reinstituted by the crown."* That statement in his evidence is inconsistent with the exhibit marked DD3 which shows that the claimant was discharged, the prosecution having offered **no evidence** against him. There is no merit to the submission that the plea of autrefois acquit is open to the claimant on this claim.

The right to a fair hearing

[56] The position taken by the CP was that there was no need for a hearing as:

a. The claimant had not been re-enlisted as at March 10, 2011, and

b. That non-re-enlistment had not been challenged.

c. The claimant was applying for reinstatement, having not been re-enlisted.

c. The procedure for reinstatement is not the same as that for re-enlistment.

[57] The defendant is correct. This is the chronology:

i. January 2, 2006 – first enlisted

ii. March 30, 2008 - charged criminally;

iii. April 10, 2008 – suspension took effect;

iv. September 20, 2010 - application for re-enlistment

v. December 23, 2010 – notice of non-recommendation of re-enlistment

vi. **January 3, 2011 – end of period of enlistment**

vi **January 5, 2011 – date of response by the claimant to notice**

vii. March 17, 2011 – publication in Force Orders

vii March 1, 2018 – no evidence offered, acquittal entered in criminal case

vii. March 16, 2018 – application for reinstatement in JCF (DD3)

viii. April 18, 2018 – Request for re-admission not approved.

[58] The claimant asserted in his affidavit that his attorney wrote to the CP on his behalf, he having received the notice of non-re-enlistment. There is no proof of this letter[15]. The date is unknown, the name of the attorney was not given in evidence, the content of this letter is at large and there was no response to this alleged letter for there to be even an iota of proof of its existence, he who asserts must prove.

[59] The claimant was an enlisted member of the JCF when he applied for re-enlistment on September 20, 2010 for a term of five years. The application was denied on December 23, 2010. The claimant did not respond until January 5, 2011. This was after the period of enlistment had expired on January 3, 2023. It would have been incumbent upon him to mount any challenge to the non-recommendation while his five year term was still extant as after that he would no longer be a serving member of the JCF.

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[15] It has not been filed.

[60] The Book of Rules for the Guidance and General Direction of the Jamaica Constabulary Force states as follows:

> 1.9 CESSATION OF DUTIES
>
> *No one can perform the duties of a Constable after the expiration of a term of enlistment until he has again been sworn in, which shall be done the day before his term expires, but if that day is a Sunday or a Public Holiday, he shall be sworn in the day preceding.*
>
> *1.10 RE-ENLISTMENT*
>
> *(a) Sub-Officers and Constables may be enlisted for a term of five (5) years and no Sub-Officer or Constable so enlisted shall be at liberty to withdraw himself from the Force until the expiration of that term, and no Sub-Officer or Constable who has not been enlisted for a term shall be at liberty to withdraw himself from the Force until the expiration of six (6) months from the time he shall have given notice in writing of his intention so to do to the Commanding Officer.*
>
> *(b) Sub-Officers and Constables desiring to be re-enlisted for a further term of five (5) years must make an application at least fourteen (14) weeks before the expiration of the current term and must be medically examined at least twelve (12) weeks before the current term expires.*

[61] There is no evidence before this court to suggest that the claimant continued on with his duties. The response submitted by the claimant dated January 5, 2011, outlined his sorrow at his fundamental error and implored the CP for leniency, he set out his previous record of service and his demeanour. (AL3). The five year period of re-enlistment having expired on January 3, 2011, he was nevertheless, granted a meeting with the CP which took place on March 4, 2011. At this point, re-enlistment was not at issue. The CP could not have restored the claimant to his former position as that would have been unlawful. The claimant could not have had the expectation that the CP would commit an unlawful act and restore him to his former position and I so find.

[62] Further, as there was no challenge to the denial of the application to re-enlist, the response marked AL3 having not been within time. It was the claimant who failed to respond to the notice of non-recommendation until after the entire period of enlistment had expired. The decision of the CP therefore stands and the claimant was removed from further service in the JCF. The claimant was not dismissed from the JCF despite his being removed from further service. (see **Glenroy Clarke**.)

Reinstatement is not re-enlistment

[63] When the claimant made the application on March 16, 2018 this was for reinstatement. The claimant was no longer an enlisted member of the JCF. He had no right to become an enlisted member at that point. He would have had to apply for enlistment as set out in the Book of Rules at 1.3. This was not what was done, instead, the claimant wrote a letter to the CP which was not the procedure to be followed. Here again, there could be no legitimate expectation that the CP should depart from the enlistment procedure (and not the re-enlistment procedure) as the CP would have acted unlawfully if he had done so.

[64] The CP exercised a discretion on the application for what is being called reinstatement, in reviewing the conduct of the claimant, the non-recommendation, and the response to that non-recommendation made by the claimant. He was not considering re-enlistment where different considerations apply. He was not required to conduct a hearing with the claimant.

Duty of candour on the part of the claimant

[65] The claimant received in the notice of non-recommendation, the information revealed in an investigation into his conduct. The claimant did not set out the matters said to have been uncovered in the investigation in his evidence, he denied that the ransom money was found in his premises saying that he was lured into criminal activities. He sought to rely on the disposition of the criminal matter as evidence of innocence. It was in the evidence of Andrew Lewis that that the findings of the investigation were fully set out.

[66] Setting before this court, an unblemished service record, without acknowledging or even adducing any credible evidence in answer to the findings of the investigation is a manner of proceeding which did not find favour with this court. The admissions made to the police on the investigation and the CP about the matter concerning the allegations are grave and weighty matters which were not placed before this court by the claimant at his own election. Therefore, this court accepts that the claimant conspired with Mrs Wallace Radcliff to stage her kidnapping. He was found in possession of Four Hundred and Ten Thousand Dollars ($410,000.00) in his home, which he admitted was a portion of the ransom money collected to pay for the release of Mrs Radcliff. The matter was dismissed without the facts of the case being ventilated at the instance of the complainant and that the court directed that the sum of money mentioned be returned to the complainant.

[67] In all the circumstances of this case, the Commissioner of Police cannot be faulted for proceeding in the manner that he did.

[68] **Orders**:

1. The orders sought in the fixed date claim form are refused.

2. No order as to costs.