[2012] JMSC Civ 46

IN THE SUPREME COURT OF JUDICATURE

CIVIL DIVISION

CLAIM NO 2009 HCV 05590

BETWEEN	**BERRINGTON GORDON**	**CLAIMANT**
AND	**COMMISSIONER OF POLICE**	**DEFENDANT**

IN OPEN COURT

Denise Senior-Smith instructed by Oswest Senior-Smith and Co for the claimant

Curtis Cochrane, Director of State Proceedings for the defendant

April 24 and May 1, 2012

APPLICATION FOR JUDICIAL REVIEW – REHEARING BY DECISION MAKER OF PREVIOUS DECISION - BREACH OF DUTY OF FAIRNESS – WHAT FAIRNESS DEMANDS WHEN THERE IS A REHEARING - LEGITIMATE EXPECTATION – WHETHER DAMAGES CAN BE AWARDED FOR UNLAWFUL ADMINISTRATIVE ACTION

SYKES J

[1] This is an application for judicial review where Corporal Berrington Gordon is asking for:

a. a declaration that the decision not to permit him to re-enlist is void and in breach of the principles of natural justice and his legitimate expectation to be re-enlisted;

b. certiorari to quash the decision of the Commissioner of Police not to permit him to re-enlist;

c. an order that a hearing be held for him to be heard regarding the decision of the Commissioner of Police not to allow his re-enlistment;

d. damages;

e. costs

f. such further or other relief as the court thinks fit.

[2] The relief of damages can be dealt with summarily. It is well established that unlawful administrative action does not generally give rise to a claim for damages. It is true that a functionary can be held liable in damages in negligence, breach of statutory duty and misfeasance in public office but that is because the conduct of the functionary goes beyond mere unlawful conduct. Judicial review is about process not merits and an unlawful process does not usually give rise to damages unless there is some other kind of conduct than just, for example, a failure to be fair. Usually, for damages to be claimed because of an unfair process there usually has to be an assertion (supported by evidence) that the decision maker acted out of malice or spite towards the applicant for judicial review. Also, it is my view that if the claimant is seeking damages the pleaded case ought to set out the factual basis for such a claim. To simply state the claim for damages in the fixed date claim form without following up, in the affidavit, with stating the facts on which the claim is based is not sufficient.

Fairness demands that the defendant knows the case he is going to meet. For these reasons the claim for damages fails.

Summary of facts

[3] According to the Constabulary Force Act (the Act) and attendant rules and regulations, persons of the rank of Corporal Gordon on joining the Jamaica Constabulary Force (JCF) are engaged for five years initially and thereafter they are required to apply for re-enlistment. If successful, the person will be engaged for another five years. This is the process of engagement of police officers until they reach the gazette ranks.

[4] Corporal Gordon enlisted in the Jamaica Constabulary Force (JCF) on August 18, 1994. Since that time he has had two successful re-enlistment applications. In May 2009 he applied to be re-enlisted third time and it was the rejection of this application by the Commissioner of Police (CP) that has sparked this judicial review.

[5] The Corporal stated that on July 29, 2009, he was handed a letter from the CP which stated that he would not be re-enlisted. That letter also stated the reasons for the CP's decision and closed by saying that he had seven days to respond 'as to why [his] re-enlistment in the Jamaica Constabulary Force should not be refused.' By a response dated August 5, 2009, the Corporal refuted the allegations made against him in the CP's letter and asked that he be 'given an opportunity to defend those allegations before a fair and impartial tribunal.'

[6] It appears that neither the CP nor the Corporal regarded the August 5 missive as the only opportunity to be heard after which a final decision would be taken. This is supported by an exhibit to the affidavit of Assistant Commissioner of Police Baldwin Burey. The exhibit is a document headed 'Formal Hearing offered to N0. 6705 Corporal Barrington K. Gordon – St. Catherine North Division.' The first sentence reads 'A formal hearing was granted to No. 6705 Corporal B. Gordon on August 25, 2009 at 3:3opm by the Commissioner of Police.'

[7] At the end of the hearing, the CP reaffirmed the decision that the Corporal would not be permitted to re-enlist.

[8] It should be noted that I have not stated what the allegations against the Corporal were. It would not be appropriate in light of the fact that a re-hearing has been ordered and at the end of the day, the allegations against the Corporal may prove to be unfounded. However it must be said that if the allegations are true then the Corporal should not be re-enlisted.

The submissions

[9] Mrs Denise Senior-Smith submitted that what took place on August 25, 2009 was not a hearing as contemplated by the principles of natural justice or fairness. She contended that it was not sufficient for the CP to have a hearing but the hearing must be fair. The court understood her to mean that if the hearing was to be meaningful then the CP ought to approach the matter with an open mind in the sense that he would genuinely listen to the submissions or representations made to him and if they found favour with him, he should be willing to change his mind. There would not be a fair hearing if the CP just went through the motions with no intention of reconsidering his position. Just to make it clear, Mrs Senior-Smith's attack on the CP's decision is not that it is so unreasonable that no reasonable CP could have come to the decision what was eventually made but rather about process and the steps along the way to the final decision.

[10] On the other hand, Mr Curtis Cochrane submitted that the Corporal was the beneficiary of exceptional indulgence. He received not just one (the August 5 response) but two hearings (the August 25 meeting). In effect, the Corporal made written submissions and had an opportunity to make oral submissions. The fact that the CP was unpersuaded by either submission does not translate into a breach of natural justice.

The legal principles

[11] Before examining the issues raised in some detail it is important to state the legal context in which this application will be decided. Though it has been common to speak of natural justice perhaps is it better to speak of the duty to be fair. What is fair is not unchangeable. It all depends on the circumstances. The following cases support this point.

[12] In ***Lloyd v McMahon*** [1987] 1 All ER 1118, Lord Bridge indicated at page 1161:

> *My Lords, the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates.*

[13] Lord Mustill spoke in similar terms in ***Regina v. Secretary of State for the Home Department, Ex parte Doody*** [1994] 1 A.C. 531, 560 - 561:

> *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 derive 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 is 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 procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile 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. …

Conversely, … it is not enough for [the Corporal] to persuade the court that some procedure other than the one adopted by the decision-maker would be better or more fair. Rather, [he] must show that the procedure is actually unfair. The court must constantly bear in mind that it is to the decision maker, not the court, that Parliament has entrusted not only the making of the decision but also the choice as to how the decision is made.

[14] ***Ex p Doody*** was approved by the Court of Appeal of Jamaica in ***Wood and Thompson v DPP*** [2012] JMCA Misc 1 [17].

[15] In the case before this court, the allegation is that there was unfairness in the re-hearing. It has been said in the instant case that there are no rules prescribing the process leading to the decision. That may be so but no decision maker has a license to be unfair. What has just been stated is supported by the case of ***AMEC Capital Projects Ltd v Whitefriars City Estates Ltd*** [2005] 1 All ER 723. The Court of Appeal in that case was speaking in the context of adjudication in a construction contract. However, the principle of fairness stated there applies to this case. ***AMEC*** stated principles that are applicable to an adjudicator who has

been asked to reconsider his earlier decision. Dyson LJ stated at paragraph [14] the general principle applicable to all hearings including re-hearings:

> *The common law rules of natural justice or procedural fairness are twofold. First, the person affected has the right to prior notice and an effective opportunity to make representations before a decision is made. Secondly, the person affected has the right to an unbiased tribunal. These two requirements are conceptually distinct. It is quite possible to have a decision from an unbiased tribunal which is unfair because the losing party was denied an effective opportunity of making representations. Conversely, it is possible for a tribunal to allow the losing party an effective opportunity to make representations, but be biased. In either event, the decision will be in breach of natural justice, and be liable to be quashed if susceptible to judicial review, or (in the world of private law) to be held to be invalid and unenforceable.*

[16] Later on his Lordship focused specifically on re-hearings. At paragraph he held [20]:

> *Judges are assumed to be trustworthy and to understand that they should approach every case with an open mind. The same applies to adjudicators, who are almost always professional persons. That is not to say that, if it is asked to redetermine an issue and the evidence and arguments are merely a repeat of what went before, the tribunal will not be likely to reach the same conclusion as before. It would be unrealistic, indeed absurd, to expect the tribunal in such circumstances to ignore its earlier decision and not to be inclined to come to the same conclusion as before, particularly if the previous decision was carefully reasoned. The vice which the law must guard against is that the tribunal may approach the rehearing with a closed mind. If a judge has considered an issue carefully before reaching a decision on the first occasion, it cannot sensibly be said that he has*

a closed mind if, the evidence and arguments being the same as before, he does not give as careful a consideration on the second occasion as on the first. He will, however, be expected to give such reconsideration of the matter as is reasonably necessary for him to be satisfied that his first decision was correct. As I have said, it will be a most unusual case where the second hearing is for practical purposes an exact re-run of the first.

[17] When it comes to determining what is fair, the courts are the sole judges of that. The concept of fairness is not determined by reference to what is known as Wednesbury unreasonableness but rather by reference to standards established by the courts over the years (***R v Panel on Take-overs and Mergers ex parte Guiness plc*** [1990] 1 QB 146). In this case, the issue is not whether the CP thinks he has been fair. He may think so and honestly hold that view but that is beside the point. The test is whether what he did was in fact fair when viewed objectively.

[18] All this learning from the four cases cited is reflected in the case of ***Clarke v Commissioner of Police*** (1996) 52 WIR 306, 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 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.

[21] It should be noted that the ***Clarke*** case did not decide what form the hearing should take and neither will this court. Whatever method or procedure the CP uses it must be fair.

[22] Carey JA indicated that even though there is no automatic right to re-enlistment '[a]pproval should be and doubtless is granted where the conduct of the member is satisfactory' (page 309).

[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.

[25] This question of legitimate expectation becomes important in this case because the Corporal, like Mr Clarke, had had two previous successful re-enlistments. In light of this, despite Mr Cochrane's submission to the contrary this court holds that the Corporal had a legitimate expectation that he would be permitted to re-enlist barring some good reason not to permit him to do so.

The resolution

[26] It is true that neither the Act nor the attendant regulations prescribe the manner in which a hearing ought to be held. This led Mr Cochrane to submit that this meant that it was in the sole discretion of the CP to decide of the form that the hearing should take.

[27] While Mr Cochrane's submission is accurate, the Corporal's complaint is that the process was not fair. The Corporal did not think that his response to the CP's letter was a hearing, or at least did not think that the response to the letter was all that there would be. He thought he was simply responding to the letter from the CP. He expressed the desire to be heard in person or at least be afforded an opportunity to make representations other than what was state in his letter to the CP.

[28] What is clear to this court is that the CP and the Corporal had the same thoughts about the response to the CP's letter: it was simply a step in the hearing process. The CP had decided to grant a formal oral hearing. This is the best explanation for the CP summoning the Corporal to a meeting on August 25, 2010. The difficulty arose because it was not clearly indicated by the CP that this August 25 meeting was to be the hearing requested by the Corporal. It is obvious that the CP thought that the August 25 meeting was the rehearing while the Corporal laboured under the misapprehension that he was simply summoned to see the CP. This is the best way of understanding the unusual nature of the exchange between the CP and the Corporal. The communication from the CP did not make

clear what was the purpose of the August 25- meeting and the Corporal did not seek clarification and so both men were at cross purposes.

[29] It is not for the court to decide whether the decision to give the Corporal the opportunity to make oral representations was correct but what the court can say is that once the decision was taken that the process would have a written and a formal oral hearing then fairness required certain minimum standards before it can be said that the process in this case was fair. The Corporal swore in his affidavit that he turned up for work on August 18 and was told by Deputy Superintendent Teware that the CP wished to see him on August 25, 2009. On that date he went to the CP's office. He was not told that this was a formal hearing into his case.

[30] The Corporal also stated that he had informed the Police Federation, the body that represents police officers below the gazetted ranks of the JCF. It is fair to point out that the Corporal, from the receipt of the letter from the CP stating that he would not be re-enlisted, sought the advice and counsel of the Police Federation.

[31] On August 25, 2009 the following took place: the CP began by saying that Mr Gordon had asked to see the CP. Mr Gordon responded by saying that he did not ask to see him and neither did he make a formal request although he (Gordon) wanted to see the CP. The response of the CP was that his decision still stands never mind that the Corporal had received a glowing report from Superintendent Azan Thompson. After this was stated three members of the Police Federation arrived. It would seem to this court that from the response of the Corporal, the CP ought to have realised that the Corporal did not think that this meeting was the hearing requested by the Corporal.

[32] After the arrival of the Police Federation members, the CP repeated his decision not to re-enlist the Corporal. At this point, Sergeant Wilson, one of the Police Federation members, indicated that they had some concerns whether the allegations made against the Corporal were current or past. Thereupon the CP

said the Corporal was the type of police the force do not need. He added some other words and then Sergeant Wilson enquired whether it made sense to say anything. The CP then said that the Corporal knows what to do. The hearing ended.

[33] What has just been recounted is from the document exhibited to Mr Burey's affidavit. Mr Burey identified the document as a true copy of the record of what took place on August 25, 2009 before the CP. This account by Mr Burey accords substantially with that given by the Corporal. The Corporal adds this additional information: he stated that when the members of the Police Federation came in the CP said that he did not know that the Corporal had representation, to which the Corporal replied that they were just observing.

[34] It would seem to this court that fairness in these circumstances demanded that the Corporal be told in sufficient terms that the CP was summoning him to a hearing regarding his re-enlistment. Once it became apparent that there was a misunderstanding of what was the purpose of the meeting it would be incumbent on the CP to make sure that he and the Corporal were agreed on the purpose of the meeting. The purpose should then have been clearly stated and this would have enabled the Corporal to decide how to respond. If he was under the misunderstanding as this court has found, then he could decide to participate in the meeting on the clear understanding that it was the rehearing or he may have applied for an adjournment to prepare himself properly. Why does fairness demand this? Until the officer's services are finally terminated he is still under the command of the CP and he can be summoned by the CP for a variety of reasons other than his application for re-enlistment. It is clear that up to August 25, 2009, no final decision had been made. The CP had made an initial decision and the Corporal was informed of that decision and supplied with reasons. The Corporal responded and asked for a hearing. From what has been stated already, the CP decided to grant the request but having done so, fairness required that the Corporal be given an opportunity to prepare adequately for the hearing. Part of preparing properly for the hearing involves being told the place, date, time and

purpose of the meeting. The Corporal was told the place, date and time but the purpose was not communicated. The unchallenged evidence from the Corporal is simply that he was told the CP wanted to see him. Since he was still a part of the force, he was obliged to obey because as has been stated the CP had the authority to summon him for any legitimate purpose.

[35] Had the Corporal been properly informed he might have been able to secure witnesses or statements from relevant person who may assist his case. He might have been able to retain the services of counsel or any other person whom he believes may be able to assist him in presenting his case. None of these things were afforded the Corporal because the imprecise nature of the notice of the purpose of the meeting.

[36] More important though is that it appears that the CP did not appear to have a mind prepared to consider the matter afresh. Fairness in this context does not demand an impartial and independent person because under the statute and regulations it is the CP alone who decides who should be permitted to re-enlist in the police force. Thus having decided that the Corporal should not be re-enlisted it could hardly be the case that he would not have an interest in the outcome of the case. The CP could hardly be described as neutral, impartial and independent in these circumstances but he is still required to be fair. The standard of fairness in the context of a re-hearing by the same person who made the initial decision has been stated already. A closed mind denies the affected person a fair hearing.

[37] The record of the meeting also shows that after the Corporal's initial response, the CP restated his position before any presentation had been made to him. If the CP had intended this meeting to be an opportunity to be persuaded to change his decision then his conduct is not consistent with this. When the Police Federation members arrived, albeit that they were, from the Corporal's perspective, intended to be observers, the exchange between the CP and the members showed that the CP did not demonstrate a genuine desire to reconsider his position. This court concludes that the hearing before the CP did

not meet the minimum standards of fairness. This formal hearing was a vital part of the process and it was flawed.

Conclusion

[38] In the circumstances of this case, this court finds that the Corporal had a legitimate expectation that he would be permitted to re-enlist unless there was some reason for not re-enlisting him. This expectation is the substantive part of the legitimate expectation. There is also a procedural aspect of legitimate expectation. The procedural aspect is an expectation that he would be treated fairly, and fairly here means being given proper notice and information of the formal hearing so that he could prepare himself mentally, secure evidence he believed would assist him, and secure representation (legal or otherwise) to assist him. Fairness also meant that the CP should have had a mental state that suggested that he was open to persuasion and that he would genuinely consider the submissions put before him. None of the procedural expectations were met. The decision to confirm the Corporal's dismissal was procedurally flawed.

Disposition

[39] As is well known, the remedies in judicial review are discretionary. It is equally well known that the court cannot take into account evidence not placed before it. The court cannot make any assumptions. It is an evidence-driven institution. The court now has to decide what is the best means of disposing of the case in light of the evidence placed before the court.

[40] There is no evidence before the court that the police force has filled the post that the Corporal held. Neither has any evidence been placed before the court to suggest that the police force can no longer accommodate the Corporal.

[41] The first two remedies sought by the Corporal cannot be granted as framed. They are premised on a right to re-enlist and there is no such automatic right. The legitimate expectation to be re-enlisted can only arise if, on a review of the Corporal's work, he has met the standards of conduct set down by the CP. If the

CP has reason (not intuition or speculation, conjecture, suspicion and unsubstantiated rumours) to believe that the Corporal has not met the standards and therefore will not be re-enlisted then the CP, as a responsible person, should take steps to see that he is not re-enlisted but must do so fairly. In this case, the CP had, what in his view, were sufficient reasons not to re-enlist the Corporal. Those reasons, if true, would undoubtedly demand that the Corporal not be re-enlisted. For these reasons the first two remedies sought cannot be granted as stated. The declaration granted is that there was a procedural flaw in the hearing of August 25, 2009 and so the decision to confirm that the Corporal would not be allowed to re-enlist is quashed.

[42] In all the circumstances, the most appropriate remedy is a re-hearing. It is true that there is now a new CP but this should not be viewed negatively because the statutory power attached to the office and not the person. It would seem that since the previous CP had committed to a formal oral hearing, then fairness would suggest that another formal hearing be held. The Corporal should be told in clear terms the date, place, time and purpose of the meeting. The re-hearing should take place in accordance with the Court of Appeal's decision in ***Clarke*** and the additional matters pointed out in these reasons for judgment.

[43] Let it be clear that this court is not saying that in every case the CP must grant an oral hearing. The type and form of the hearing is for the CP to decide. However, in the re-hearing to be done it would be prudent to bear in mind the law has moved to the point where it is now being said that where the outcome of the decision depends on the resolution of factual disputes then it may be prudent to have an oral hearing and failure to do so may mean that a decision arrived at without an oral hearing may be held to be flawed (***R (Smith) v Parole Board (No 2)*** [2005] 1 WLR 350).

[44] Counsel are to prepare an order to give effect to the reasons for judgment. No order as to costs.