

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO COA2023APP00184

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| BETWEEN | ROHAN JAMES | APPLICANT |
| AND | ANDREW LEWIS | RESPONDENT |

Hugh Wildman for the applicant

Peter Champagnie KC and Neco Pagon for the respondent

14 September 2023

(Considered on paper pursuant to rule 2.9(4) of the Court of Appeal Rules)

Rule 1.4(2), (3) and (4) of the Court of Appeal Rules – urgency, criterion for matters to be heard in the long vacation – whether circumstances satisfy criterion

IN CHAMBERS

D FRASER JA

Introduction

[1] This is an application by the applicant, Rohan James, for his application for leave to appeal the decision of Tie-Powell J ('the learned judge') made on 3 August 2023, to be heard during the long vacation.

[2] The decision about which the applicant is aggrieved (order number 9) is the refusal by the learned judge to grant a temporary stay of the applicant's interdiction, that would have had the effect of reinstating the applicant, pending the determination of his application for leave to apply for judicial review of the decision to interdict and prefer charges against him.

Background

[3] The applicant is a member of the Jamaica Constabulary Force (JCF) at the rank of Corporal and the Chairman of the Police Federation ('the Federation'). The Federation, constituted under section 67(1) of the Constabulary Force Act, represents rank and file members of the police force in matters concerning their general welfare and efficiency. The respondent is the Assistant Commissioner of Police in charge of Administration in the Office of the Commissioner of Police.

[4] The interdiction of the applicant arose from statements he made on 15 July 2023 at the funeral of a fallen colleague, concerning non-payment of overtime pay to rank and file members of the Federation, despite a court order requiring such payments. This interdiction was effected by a notice issued to the applicant on 26 July 2003, signed by the respondent, which indicated that following investigations into the remarks he made, the Commissioner of Police had directed that disciplinary proceedings be taken against him at a Court of Enquiry and, accordingly, in the public interest, it was desirable that he cease to perform duties in keeping with regulation 35(1) of the Police Service Regulations 1961. The notice further outlined that he was interdicted from duty with immediate effect on three-quarters of his salary. The applicant additionally received other notifications, including that he was required to hand over all government property in his possession and apply for permission at least two months in advance, should he desire to leave the island.

[5] The applicant's legal response was swift. On 28 July 2023 he filed an application for leave to apply for judicial review of his interdiction, seeking declarations that the decision to place him on interdiction was illegal, null and void and of no effect as it was in breach of section 13(3)(b) and (c) of the Constitution. He also sought orders of *certiorari* to quash both the decision to interdict and the charges brought against him. Additionally, on 31 July 2023, he filed an application for a stay of the decision of the respondent placing him on interdiction, pending the hearing and determination of his

application for leave to apply for judicial review of his interdiction and the preferment of disciplinary charges against him.

The proceedings below

[6] The case management conference for the applications filed on 28 and 31 July 2023 came on for hearing before the learned judge on 2 and 3 August 2023. The note from the learned judge outlining her reasons for the oral rulings she made during the conference, so far as relevant to this application, discloses that:

- a) counsel for the applicant having indicated that he wished to proceed first with the application for the stay filed 31 July 2023, it became apparent that the basis of the application was that the charges laid against the applicant were grounded in Regulations that counsel contended were unconstitutional. Consequently, the court was of the view that it was prudent to hear from the Attorney General's Department, without making the Attorney General a party to the proceedings;
- b) it was decided that the practical approach would be to hear the two applications filed on 28 and 31 July 2023, respectively, together. A date was agreed in consultation with the Registrar of the Supreme Court (28 September 2023) and orders made to facilitate that hearing;
- c) the respondent agreed that all disciplinary proceedings arising from the charges laid against the applicant would be halted until the determination of the applications filed on 28 and 31 July 2023;
- d) having heard submissions on the oral application made on behalf of the applicant for the immediate reinstatement of the applicant to his position the court refused the application. This was on the basis that, "[i]t seemed only logical to the Court that such a ruling must, at the

very least, await the final determination of the various applications before the court.”;

- e) the court ordered, as offered by the respondent, that the applicant was to be paid 99% of his salary; and
- f) the application for leave to appeal by the applicant was refused.

The application that the application for leave to appeal the refusal of the learned judge to grant a temporary stay of the applicant’s interdiction should be heard in the legal vacation

[7] The applicant was displeased with the refusal of the learned judge to grant the temporary stay that would have had the effect of immediately reinstating him to his position pending determination of his applications below. Having been refused leave by the learned judge to appeal her decision, the applicant filed his application for leave to appeal in this court, on 3 August 2023, the same day of the learned judge’s ruling. Then, on 8 August 2023, the applicant filed this application seeking an order that his application for leave to appeal be heard during the long vacation.

[8] In the grounds, the applicant asserts that he has been deprived of his statutory rights under sections 35 and 47 of the Police Regulations, as he had been interdicted before he had the opportunity to respond to the draft charges and the charges were brought by the respondent who has no jurisdiction to do so. In his affidavit in support of his application filed 8 August 2023, he stated that he had been deprived of salary, ability to travel and other benefits including the carrying out of his function as Chairman of the Police Federation in breach of the statutory protection afforded him.

[9] In his earlier affidavit of urgency filed 3 August 2023 in support of his application for leave to appeal, he indicated that, as Chairman of the Federation there are certain statutory duties which he had to perform, such as martialling proceedings arising from the receipt of applications from ailing members of the JCF for financial assistance through the JCF Welfare fund. Further he outlined that, also by virtue of his position as Chairman

he sat on the NHT, Human Resource and IT and Auditing Committees and made up the quorum for them to be able to sit and address the nation's business. Therefore, he asserted, a delay to 28 September would severely disrupt the function of the Federation, that takes care of the welfare of over 14,000 rank and file members of the JCF.

[10] In an affidavit in response to the application for leave to appeal, stay of interdiction and for the matter to be considered in the long summer vacation filed 14 August 2023, the respondent averred that the applicant had not stated any need to travel before 28 September 2023 when the matter is scheduled to be heard and, that, in any event by his status as a member of the police force, the applicant is required to seek permission prior to obtaining leave for the purpose of traveling outside of the jurisdiction. He also asserted that the applicant was not prejudiced by his interdiction as he was receiving 99% of his salary and, that, since the applicant's interdiction the Federation had installed Corporal Arlene McBean as acting Chairman. Further, the respondent stated that any perceived breaches of the Police Services Regulations could be adequately addressed at the Court of Enquiry.

[11] On 15 August 2023, the applicant filed an affidavit in reply stating that, although he had been allowed 99% of his salary, he had been deprived of his VIP Allowance and Upkeep Mileage, which together were just in excess of \$150,000.00; a loss which had placed him a financial crisis, as that sum had been budgeted to cover certain financial responsibilities. He further averred that it was not correct that Corporal Mcbean was now acting as Chairman, but that the Federation was still without a Chairman.

The law and analysis

[12] By rule 1.4(1) of the Court of Appeal Rules ('CAR') "...**long vacation**' means the vacation beginning the 1st August in each year". Rule 1.4(2) - (4) of the CAR provides that:

- "(2) During vacations the court may sit to hear and determine such appeals as the court may direct.

- (3) A party may apply to the court for any appeal to take place or application to be heard in vacation
- (4) Any such application may be determined by a single judge of the court."

[13] The rule, however, does not state any criterion that should be used to assess the merits of such an application. Guidance will therefore be sought from case law. In England the case of **In Re Showerings, Vine Products and Whiteways Ltd's Application** [1968] 1 WLR 1381 was decided under RSC Ord 64 r 4(2) and the inherent jurisdiction of the court. That rule stipulated that a judge could order that a matter be heard in the long vacation if the judge was "satisfied that there is urgent need for the trial or hearing to take place in the Long Vacation...". The standard that was required was described by the court on page 1385 as "a cogent and exceptional combination of circumstances" to justify such an order. Importantly for our purposes, given that rule 1.4 of the CAR does not itself stipulate that there must be an urgent need to justify the order of a hearing during the long vacation, the court had also earlier opined at page 1383, that the standards requisite under the inherent jurisdiction, could not be lower than those established by the sub-rule.

[14] In our jurisdiction the restriction of matters heard during the long vacation to those which are urgent was also found to be the appropriate standard or criterion by Brooks J (as he then was) in the case of **Ocean Chimo Ltd v RBTT Bank Jamaica Ltd and RBTT Bank Ltd** (unreported), Supreme Court of Judicature of Jamaica, Claim No 2010 HCV 02413, judgment delivered 24 August 2011. This was based on the rationale for the long vacation which Brooks J contemplated, by reference to the opinion of Chambers J in his work *Essays on the Jamaican Legal System* and the dicta of both Michael Davies J in **Esso Petroleum Co Ltd v Dawn Property Co Ltd** [1973] 3 All ER 181 and Megarry J in **In Re Showerings, Vine Products and Whiteways Ltd's Application**. That led him to conclude that the reason for the long vacation was, "to provide a respite from the normal business of the court" thereby allowing "the court, its officers and its staff, time off from the rigours of the court's regular business". Later, in 2014, Brooks JA (as he then

was) reiterated the criterion of urgency as the basis for the hearing of matters in the long vacation in the case of **Jamaica Teachers Association v Georgia Waugh Richards** [2014] JMCA App 28.

[15] The question then resounds, is the application of the applicant for leave to appeal the refusal of the learned judge to grant a temporary stay of execution urgent? There are at least three factors that individually and, even moreso, cumulatively weigh against a determination of urgency and thus the success of the application of the applicant to have his application for leave to appeal heard during the long vacation.

[16] Firstly, the applicant challenges the disciplinary charges laid against him and his interdiction on several grounds including unconstitutionality and procedural impropriety. The court below has yet to have the opportunity to consider those contentions on their merits. This in a context where the date set for the hearing of those challenges was at the time of filing of this application less than two months away and a mere three days after the commencement of the Michaelmas Term of this court.

[17] Secondly, pending that hearing, the effects of the action taken against the applicant has been ameliorated somewhat by his salary having been restored to 99% (although he has lost the benefit of two allowances) and the halting of the disciplinary process against him pending the hearing and determination of his applications.

[18] Thirdly, whether as a consequence of the applicant's interdiction the Federation is now served by an acting Chairman as the respondent has averred, or as the applicant has countered the Federation is still without a Chairman, the Federation has other functionaries, notably, a General Secretary and other officers. While the absence of a Chairman may affect the operation of the Federation in light of the duties reposed in that office, it is inconceivable that the Federation does not possess some mechanism to ensure the continuation of its objects in the short term in the absence of its Chairman. In any event, in the absence of any evidence concerning the inner workings of the Federation, the potential deleterious effects on the Federation being without a Chairman have to be

balanced against a number of other considerations. These being, the rationale for the legal vacation, the fact that the hearing date in the court below is close at hand and the reality that the contentions at the heart of the applicant's grievances have yet to be interrogated by the court below.

[19] In the premises, therefore, the application of the applicant for his application for leave to appeal the decision of the learned judge to be heard in the long vacation, must fail.

Costs

[20] By rule 1.18(1) of the CAR, parts 64 and 65 of the Civil Procedure Rules ('CPR') apply to the award and quantification of costs in this court. Where in its discretion a court decides to order costs, the general rule is that costs follow the event: rule 64.6(1) of the CPR. Paragraphs (3) and (4) of rule 64.6, however, outline that in deciding whether costs should be awarded and, if so, the incidence of those costs, all the circumstances of the case should be considered, including the conduct of the parties and whether it was reasonable for a particular issue to have been raised: **Crichton Automotive Limited v Fair Trading Commission** [2017] JMCA Civ 33 at paras. [24] – [25].

[21] Also relevant is that this matter had its genesis in an application for an administrative order in respect of which, as a special category of cases, costs are not usually ordered against an applicant, unless the court is of the view that the applicant acted unreasonably in making the application, or in the conduct of the application: rule 56.15(5) of the CPR.

[22] The court is of the view that costs should be awarded against the applicant as, while rule 56.15(5) refers to the initial application for the administrative order, the principle in the circumstances of this case, especially in light of rule 64.6(4), is eminently suitable to be applied to the application which has been considered. Given the nature of the order from which the applicant seeks leave to appeal, the circumstances in which the order was made and the short time frame to the scheduled hearing of the applications

filed by the applicant in the court below, it appears to this court manifestly unreasonable for the applicant to have brought this application, seeking that his application for leave to appeal the order of the learned judge be heard in the legal vacation. The parties will, however, be given an opportunity to move the court to make a different order, should they so think fit.

[23] The court accordingly makes the following order:

- (1) The application by the applicant, Rohan James, for his application for leave to appeal the decision of Tie-Powell J, made on 3 August 2023, to be heard during the long summer vacation, is refused.
- (2) Costs to the respondent to be agreed or taxed.
- (3) If either party considers that another costs order should be made, then that party may file and serve submissions outlining the order that he contends should have been made, within 14 days of the date of this order.
- (4) Should either party file such submissions the other party may file submissions in response within seven days of service.
- (5) The court will consider any submissions filed on paper and, thereafter, issue its ruling.
- (6) If no submissions are filed in accordance with paragraph (3) then the costs order outlined at paragraph (2) shall stand as the final order of the court.