[**2018**] **JMSC Civ 10**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2013HCV06662

IN THE MATTER of an application by Constable Derron Nish for Judicial Review.

AND

IN THE MATTER of the decision of the Commissioner of Police on August 22, 2013.

BETWEEN	**DERRON NISH**	**CLAIMANT**
AND	**THE COMMISSIONER OF POLICE**	**DEFENDANT**

IN OPEN COURT

Mr. Zavia Mayne and Ms. Paula Martin, instructed by Zavia Mayne & Company, for the claimant.

Ms. Tamara Dickens, instructed by the Director of State Proceedings, for the defendants.

HEARD: November 8 & 9, 2017 and January 26, 2018

JUDICIAL REVIEW – REVIEWING THE HEARING PROCESS OF AN INFERIOR TRIBUNAL – DUTY TO ACT FAIRLY – WHAT IS FAIRNESS – NATURE OF DUTY TO PARTICULARIZE GROUNDS OF CLAIM – CERTIORARI – LEGITIMATE EXPECTATION – NATURAL JUSTICE

ANDERSON, K., J

THE CLAIM

[1] This is a claim wherein the claimant is seeking an order of certiorari to quash the decision of the 1st defendant to discharge him from the Jamaica Constabulary Force, ('the JCF'), and refusing him permission to re-enlist. In addition to that order, the claimant also seeks an order of mandamus to compel the defendant to both re-enlist the claimant to the JCF and to pay the claimant all salaries and allowance outstanding to the claimant as at August 22nd, 2013, and finally, the claimant seeks costs. At the trial of the matter however, the claimant did not pursue the relief of an order for mandamus. The claim therefore proceeded for an order of certiorari, and the grounds on which the claimant sought that order were as follows:

1) The 1st defendant, in exercising his discretion to dismiss the claimant as a serving member of the JCF, acted in breach of: **The Constabulary Force Act** and the **Police Service Regulations, 1961**, or contrary to the principles of Natural Justice and the Rule of Law.

2) The claimant was never given an opportunity to be heard in respect of any of the allegations made against him.

3) The allegations against the claimant were not substantiated and no evidence was put forward to warrant the penalty of discharge.

4) The claimant had not been in breach of any rules or provision of the Jamaica Constabulary Force or any Laws of Jamaica.

5) The claimant was denied the legitimate expectation of being heard in respect the allegations brought against him.

THE BACKGROUND TO THE CLAIM

[2] On December 04th, 2013, the claimant filed an application for, inter alia, leave to apply for judicial review and an order of certiorari to quash the decision of the 1st defendant to terminate his employment and failing to re-enlist him as a member of the JCF. The application was supported by an affidavit containing three exhibits. On December 30th, 2013, he filed an amended application for leave, to include the Attorney General as second defendant, along with a further affidavit in support also containing exhibits. Although leave was granted for the claimant to pursue his claim against both defendants, the claimant however, through his attorney, did not pursue the claim against the Attorney General, but proceeded against the Commissioner of Police solely.

[3] On January 20th, 2014, Daye J. granted the claimant an extension of time within which he could apply for leave to apply for judicial review, and also granted the claimant leave to file a Fixed Date Claim Form in support of the application for judicial review. On February 03rd, 2014, the claimant filed a Fixed Date Claim Form with an affidavit in support, seeking an order of certiorari to quash the aforementioned decision of the defendant to discharge him from, or refuse to permit his re-enlistment to the JCF.

[4] At the first hearing of the matter on February 04th, 2016, the court made various case management orders and the matter was set to be heard in open court on November 8th and 9th, 2017.

THE HEARING OF THE MATTER

The case for the claimant

[5] The claimant, in his affidavit filed on February 03rd, 2014, gave evidence that, he was arrested and charged with the following offences in or around July, 2010: (i) illegal possession of firearm, (ii) kidnapping, (iii) obtaining money by false pretences, and (iv) fraudulent use of licence plate. At paragraphs 7 and 8 of the

said affidavit, he stated that at the hearing of the matter at Western Regional Gun Court on April 17th, 2012, a *nolle prosequi* was entered in respect of offences at items (i) to (iii) above. In respect of the offence at (iv) above, that matter came up before the Montego Bay Resident Magistrate's Court, where no evidence was offered and the matter dismissed.

[6] The claimant continued at paragraph 9 of his affidavit that, he received a letter from the defendant to the effect that he would not be recommended for re-enlistment on the basis of the charges that were laid against him. That letter, dated November 8th, 2012, stated further that the claimant's 'integrity is suspect' and his 'character has been sullied.' Additionally, that letter outlined an allegation that the service pistol issued to the claimant was discarded in a plastic bag on the compound of the Matilda's Corner Police Station. The letter concluded that it was the culmination of these issues which resulted in the JCF's lack of confidence in the claimant's ability to serve, protect and re-assure the citizenry of Jamaica in a professional manner.

[7] At the final paragraph of the letter, it was stated as follows; in part:

> *'…You may respond to this notice within fourteen (14) days of the date of receipt of same to show cause why you should be re-enlisted.*
>
> *You are also to indicate within fourteen (14) days of the date of service of this notice if you are desirous of appearing before the Commissioner for a hearing either alone or accompanied by a representative.'*

Further to this advisory, the claimant requested a hearing before the defendant which was held on January 16th, 2013, hereafter referred to as the 'January meeting.' At paragraph 12 of his affidavit, the claimant stated: '*that I appeared before the* [defendant] *on January 16, 2013 at which time he requested that I do a polygraph examination. Thereafter the hearing was scheduled for August 21, 2013.*'

[8] A further hearing was then scheduled for August 21st, 2013, hereafter referred to as the 'August meeting', where the defendant advised the claimant of the

polygraph test results, and further informed the claimant of his dismissal from the JCF and that his application for re-enlistment was not approved. He stated at paragraph 13 of his affidavit: *'that having attended unto the* [defendant] *for the hearing with my attorney-at-law, the* [defendant] *instead advised us of the polygraph test and thereafter told us that he has come to his decision and that I was dismissed from the Jamaica Constabulary Force.'*

[9] The following aspect of the claimant's cross-examination was extracted:

> *'Q: I put it to you that at all times when you appeared before the Commissioner of Police, your attorney – at – law was with you?*
>
> *A: I did not appear before the Commissioner of Police.'*

Under re-examination however, this issue was examined further as follows:

> *'Q: Your affidavit, shown to you earlier, particularly paragraph 12, having read that affidavit you further maintained that you did not appear before the Commissioner. Is there any explanation as to why it is stated in your affidavit that you appear, and you are now telling the court that you did not appear?*
>
> *A: Yes. I agree that there is appearance in affidavit. My explanation is I was in a room with Mr. Ellington* [the defendant] *and an officer, and my attorney where Mr. Ellington spoke his mind. So my explanation is that I was in a room with him but I did not appear before him.'*

[10] Again, the claimant went further in his explanation to questions posed to him by the court as follows:

> *'Q: When the hearing was again scheduled for August 21st, 2013, on August 21st, 2013, when you were in a room with the Commissioner of Police, another officer and your attorney, did you get an opportunity to speak?*
>
> *A: No sir.'*

[11] On August 27th, 2013, the claimant received a letter from the defendant dated 'August 22nd, 2013' further reiterating his non-recommendation for re-enlistment. Following this, on August 29th, 2013, the defendant published in the Force

Orders, notification to all related parties that the claimant's application for re-enlistment was refused.

The case for the defendant

[12] The defendant, in his affidavit filed on January 16th, 2014 (hereafter referred to as 'his affidavit'), recounted what transpired at both the January and August meetings. At paragraphs 4 to 7, he recounted that: he handed over his service pistol, identification and vest to Cpl. Barton, pursuant to the Notice of non-recommendation of re-enlistment. The defendant further recounted that the claimant also said that he was not in St. James on the night of July 3rd, 2010 as the criminal charges had stated and that the claimant denied the charges in their entirety and agreed to do a polygraph examination.

[13] According to the defendant, as set out in paragraph 8 of his affidavit, at the August meeting, he reviewed the contents of the Notice of non-recommendation of re-enlistment and the fact that the claimant agreed to do a polygraph test. The defendant further recounted that, he expressed his concern for the claimant's integrity and indicated that he had lost confidence in him. He continued to state: '*I advised Constable Nish that he had failed the polygraph exam and indicated that in the circumstances, I could see no reason for him to be re-enlisted in the Jamaica Constabulary Force.'*

[14] Further, at paragraph 10, the defendant continued to recount the details of the August meeting, and stated: '*He* [the claimant] *advised that he was begging for me to give him another chance. I advised him not to beg and that his action was of concern in relation to his integrity and that I did not accept his story.*'

[15] Under cross-examination with the defendant, the following excerpt was extracted regarding the January meeting between himself and the claimant:

> *'Q: I suggest to you, that Cons. Nish was never allowed to say anything to you on the 16th January 2013.*

A: That's not true. He was invited to respond to the grounds of the notice of December 8th, 2012, all of which I repeated to him in the presence of his attorney. Some of which challenged facts of the grounds of the investigation, hence the request for a polygraph test.'

Later in cross-examination, and after a document was put to the defendant, the following excerpt regarding the August meeting was extracted:

'Q: Having gone through the document, would you agree with me that having reviewed the polygraph test, you have lost confidence in him?

A: Those would not be my exact words, but I explained to Cons. Nish that the result of the polygraph test raised serious concerns about his integrity, bearing in mind that he had counter-facts set up in his notice to defend, and agreed to subject himself to a polygraph test, which he failed. That left me with no other choice than to accept the facts in the notice which to this day the Commissioner still believes to be true.'

SUBMISSIONS

The submissions on behalf of the claimant

[16] Mr. Mayne ('the claimant's counsel') submitted that the claimant's right to be afforded a fair hearing was breached. He also contended that the circumstances of this case evidenced that there was a breach of natural justice. Counsel placed reliance on the case of **Berrington Gordon v Commissioner of Police** [2012] JMSC Civ 46 for the common law rules of natural justice or procedural fairness. At paragraph 15 of that case, Sykes J relied on **AMEC Capital Projects Ltd v Whitefriars City Estates Ltd** [2005] 1 ALL ER 723, paragraph 14, where Dyson LJ stated two of the long-recognized and distinctive features of that which is known as 'natural justice.' These are: firstly, that the affected person has the right to prior notice, and an effective opportunity to make representations before a decision is made, and, secondly, that the affected person has the right to an unbiased tribunal.

[17] Counsel argued that the letter dated November 8th, 2012, was evidence that the defendant would have concluded that the allegations were sufficient to sway his mind prior to the January meeting. Further, counsel contended that, there was

also no evidence that the claimant was given any notice prior to the August meeting, and neither was he afforded any opportunity to see the polygraph test results prior to the said meeting. According to the claimant's counsel, those results were material on which the defendant placed significant reliance and which also disqualified him from being unbiased.

The submissions on behalf of the defendants

[18] Ms. Dickens, ('the defence counsel'), submitted that both the January meeting and the August meeting must be viewed conjunctively. The defendant's counsel argued that the August meeting was the conclusion of the hearing which began from the January meeting. The result of this, she continued, was that the claimant received a fair hearing, as the letter of November 08th, 2012 both outlined the allegations against him and invited him to a hearing, which took place on January 16th, 2013.

[19] The defence counsel continued that the court ought not to consider the issue of the polygraph test results not being disclosed to the claimant prior to the August meeting, as an issue upon which the claimant's contentions can properly succeed. The claimant, counsel posited, knew that the polygraph test results would be revealed in that meeting. The defence counsel continued further that, at both meetings, the claimant was made aware of the allegations outlined in the Notice of non-recommendation for his re-enlistment, and he was given adequate opportunity to respond, which he did. In addition, it was her contention that this court should not even consider this issue because it was not specifically averred as one of the claimant's grounds of judicial review.

[20] Ms. Dickens submitted that the issue of the case at bar surrounded the matter of non-recommendation for re-enlistment, and as such, she placed reliance on **Corporal Glenroy Clarke v Commissioner of Police and the Attorney General of Jamaica** (1996) 33 JLR 50, the leading case in this area of law. Counsel argued that the claimant had no right to a hearing before the defendant

made the decision to refuse his re-enlistment to the JCF. Once that decision was made, counsel again argued, the defendant must give reasons and the affected party be allowed to respond.

[21] In the case at bar, she argued, the claimant was notified of the reasons for his non-recommendation for re-enlistment by way of letter dated November 08th, 2012. The January meeting was subsequently scheduled between the defendant, the claimant and his attorney at law. This hearing was finally concluded in the August meeting when the claimant failed to sway the defendant.

ISSUE TO BE DETERMINED

[22] The primary issue for my determination is: Did the claimant receive a fair hearing from the defendant after he was apprised of the reasons for his non-recommendation for re-enlistment to the JCF? My conclusion in that regard, has caused it to be unnecessary for this court to consider any other issue.

LAW AND ANALYSIS

[23] The burden of proof in matters such as these rests with he who raises the allegations, hence the well-known phrase, 'he who asserts must prove.' The claimant asserted that he was not afforded a fair hearing before the defendant, in that he was not permitted by the defendant, to make representations in light of the decision to refuse his re-enlistment to the JCF. The claimant therefore has the burden of proving the truth of that allegation, that is, he must adduce evidence upon a balance of probabilities to make out his case against the defendant.

[24] It was undisputed that the issue before the court related to the refusal of the defendant to recommend the re-enlistment of the claimant to the JCF and not that of dismissal. The **Police Service Regulations** places a requirement on the serving members of the JCF to apply to the defendant for re-enlistment after every five years. The law, as it relates to re-enlistment of members to serve in

the JCF, was settled in **Corporal Glenroy Clarke v Commissioner of Police and the Attorney General of Jamaica,** *supra,* relied on by Ms. Dickens. There, at page 52, Carey, JA noted the following:

> *'Although the non-approval by the Commissioner of a member of the Force for re-enlistment removes that member from further service in the Force, it is not a dismissal. As Patterson J. (as he then was) pointed out correctly, as I think, in his judgment, "strict laws, rules and regulations governs the exercise of the power of dismissal and also the termination of appointment." Altogether different rules govern re-enlistment into the Force. In the case of dismissal, there is a 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. 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.'*

[25] Notwithstanding the administrative function of the Commissioner of Police in matters such as these, the Commissioner is bound to act in fairness to the member of the JCF concerned. In **Clarke,** Carey, JA said further, on page 53:

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

Therefore, on an application for judicial review, the court is not concerned with the substance of the decision made by the defendant, but rather, is considering the propriety of the method by which the decision was arrived at. In other words, a judicial review proceeding is supervisory only. It is not akin to an appeal.

[26] One of the main issues in this case, is one as to whether or not, in refusing the claimant's re-enlistment with the JCF, the defendant did so in accordance with natural justice.

[27] It is well established in law that, where an inferior tribunal is alleged to have acted contrary to the principles of natural justice, then the process of the making of its decision is amenable to judicial review. See: **Mark Leachman v Portmore Municipal Council and Others** [2012] JMCA Civ 57, Brooks J.A., at para. 13. Further, at para. 13 in that case, Brooks J.A cited with approval the dictum of Lord Roskill in **Council of Civil Service Unions v Minister for the Civil Service** [1984] 3 All ER 935, where the principles of natural justice were expounded. Lord Roskill stated at p. 954:

> *'That phrase [natural justice] perhaps might now be allowed to find a permanent resting place and be better replaced by speaking of a duty to act fairly. But that latter phrase must not in its turn be misunderstood or misused. It is not for the courts to determine whether a particular policy or particular decisions taken in fulfilment of that policy are fair. They are only concerned with the manner in which those decisions have been taken and the extent of the duty to act fairly will vary greatly from case to case as, indeed, the decided cases since 1950 consistently show.'*

[28] What then is fairness in law? In **Wood and Thompson v The DPP** [2012] JMCA Misc 1, Harris J.A. at paras. 17-20, enunciated, that:

> *'The modern doctrine of fairness has been eminently pronounced by Lord Mustill in R v Secretary of State for the Home Department ex parte Doody- [1993] 3 WLR 154 at page 168 where he said:*
>
> *"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. 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…"*

[29] The issue in the case at bar, stated above, may be appropriately addressed by a recapitulation and assessment of the relevant facts pertaining to the hearing before the defendant. It is not in dispute that the claimant received a letter dated November 8th, 2012 advising him of his non-recommendation for re-enlistment and the reasons for that conclusion. Also contained in that letter was an advisory informing the claimant that he may challenge this decision within fourteen days of

the receipt of the letter, to show cause for his re-enlistment. The 1st defendant, to my mind, acted fairly, in relation to the claimant, in having advised him of that decision, and supplied reasons for that decision and in having invited the claimant to show cause at a subsequent hearing, if he (the claimant) so desired. That though, was only a part of the entire process which ultimately led to the defendant having refused to re-enlist the claimant.

[30] The claimant requested the hearing and the January meeting was held. The claimant testified both in his affidavit and under cross-examination that he was not afforded an opportunity to speak at the January meeting. I reject the evidence of the claimant that he was not afforded an opportunity to speak at that meeting, as I accept the evidence of the defendant that the claimant refuted the criminal charges in their entirety at the January meeting. If the claimant was never allowed to speak, then it would be illogical and extremely unlikely to have occurred, that the defendant would then have requested the claimant's permission for him to be the subject of a polygraph test. I find that, as a result of the contradicting assertions of the claimant, which he made during that January meeting, the defendant resorted to the polygraph examination, in an effort to assist himself in assessing the veracity of the claimant's assertions.

[31] The January meeting was then adjourned, and the August meeting was scheduled for the continued hearing into this matter. The claimant, by that time, would have done the polygraph test and the defendant was furnished with the results. The evidence of both the claimant and the defendant were in agreement to the extent that, at the August meeting, the results of the polygraph test were revealed to the claimant and the reasons for the refusal to permit his re-enlistment were reviewed by the defendant. I accept the evidence of the claimant that, at that meeting, he was not granted an opportunity to reply to the defendant, and that, the defendant 'spoke his mind.'

[32] There was no evidence given by either party, as to precisely when the results of the polygraph test were first made known to the claimant. The only reasonable

inference shown, from the evidence of the claimant and the defendant, which was in agreement that at the August meeting, the results of the polygraph test were revealed to the claimant, is that those results were, for the first time, revealed to the claimant, during that August meeting.

[33] The evidence of the defendant regarding the August meeting revealed that he was, by that time, affirmed in his decision not to permit the re-enlistment of the claimant. In the words of the defendant under oath:

> *'I explained to Cons. Nish that the result of the polygraph test raised serious concerns about his integrity, bearing in mind that he had counter-facts set up in his notice to defend, and agreed to subject himself to a polygraph test, which he failed. That left me with no other choice than to accept the facts in the notice which to this day the Commissioner still believes to be true.'*

The polygraph test results should have caused the defendant to afford an opportunity to the claimant to respond to those results. The defendant ought to, in the context of the re-enlistment approval which the claimant was seeking, have done so as a matter of law, and fairness to the claimant. As expounded in **Clarke**, *op. cit,* at page 53, the defendant was now obliged in fairness to allow the claimant an opportunity to be heard. The defendant had an evidentiary burden to discharge in showing that the claimant was so afforded that opportunity.

[34] Instead, there was no evidence forthcoming from the defendant that the claimant had an opportunity to respond, and I am of the view that that was unfair to the claimant. By the actions of the defendant in this meeting, the claimant was precluded from making representations in an attempt to attain a favourable outcome on his behalf, as regards his application for re-enlistment. Added to that, the evidence has clearly disclosed that by the very next day after the August meeting had been held, the defendant notified the claimant by letter, that his application for re-enlistment had been refused. One week later, it was published

in the JCF's official publication, The Force Orders, that the claimant's application for re-enlistment had been refused.

[35] As I have said before, it is not the role of this court to assess whether or not the reasons for the non-recommendation for re-enlistment were plausible or good reasons. What this court has instead assessed, in the context of this particular case, is whether the process of the defendant's decision was fair in the overall circumstances as natural justice encapsulates the fairness of the entire process. I therefore find, that by virtue of the claimant having been prevented from advancing representations regarding the polygraph test results, which was the final determining factor for his non-recommendation for re-enlistment, the process of the hearing, when considered holistically, was unfair.

[36] I will address this unfairness more pointedly in the context of this case and the law as laid down in the **Clarke** case, *op. cit,* further on, in these reasons. Considered in that context, it is abundantly clear that there was unfairness as regards the defendant's ultimate decision to refuse to re-enlist the claimant.

[37] The defendant undoubtedly relied heavily on the outcome of the polygraph test which the claimant had undergone, to make his final decision to refuse re-enlistment. Accordingly, it was incumbent upon the defendant to have afforded to the claimant, a fair opportunity to be heard, as regards the polygraph test results. To the contrary though, what in fact occurred is that, not only did the claimant not get a fair opportunity to be heard in relation to same, he in fact got no opportunity at all.

[38] He did not get that opportunity because the defendant did not afford same to him. Instead, what the defendant used the August meeting to do, was to inform the claimant that he had refused to re-enlist him, and also to inform him of the reasons for that refusal. The main reason of which, or at the very least, an important one of which was, the results of the polygraph test, which clearly were not favourable to the claimant. In the final analysis, it was that last stage of the

process which was unfair. It was unfair because the claimant was not afforded, either at that August meeting, or any subsequent time, the opportunity to respond to the polygraph test results. Instead, the defendant sent a letter to the claimant dated 'August 22nd, 2013,' reiterating his non-recommendation for re-enlistment, and subsequently caused to be published in the Force Orders dated August 29th, 2013, a publication notifying all the related parties that the claimant's application to re-enlist was refused.

[39] Apart from the fact that that was perhaps the most important stage of the process, since it was at that stage, that the results of the polygraph test were made known to the claimant, and those results played such an important role in enabling the defendant to reach the final conclusion which he did, as to not re-enlist the claimant, in any event, from a legal standpoint, it was at that latter stage that fairness had to be afforded to the claimant.

What was the unfairness at that stage?

[40] It is worthwhile at this stage, once more, to reiterate what was stated by Carey, J.A. as reported in the **Clarke** case, *op. cit.* page 53:

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

The claimant was heard at the January meeting, however, he was not permitted to respond to the polygraph test results at the August meeting. The polygraph test had been ordered by the defendant as a consequence of what he, the defendant, had heard from the claimant during that January meeting. The defendant took the decision not to approve the claimant's application for re-enlistment after he was made aware of the polygraph test results. He was obliged in fairness to the claimant to supply those materials, (the polygraph test results), to the claimant, sufficiently in advance of that August meeting, in order

to have allowed the claimant a fair opportunity to be heard on that material. Further to that, after the defendant had made his decision to refuse to re-enlist the claimant, he defendant, did not afford the claimant an opportunity to be heard in relation to that decision.

Particularization of the grounds of the claim

[41] Counsel for the defendant advanced arguments to this court that the claimant did not particularize his claim for breach of natural justice, to include, by having specifically alleged as part thereof, that the failure of the defendant to have allowed the claimant to respond to the results of the polygraph test, was a breach of natural justice. For my part however, I cannot accept that contention as correct, as, according to Rule 56.3(4) of the Civil Procedure Rules, 2002: '*the application must be verified by evidence on affidavit which must include a short statement of all facts relied on*.' That requirement under Rule 56.3(4) was appropriately met by the claimant at paragraph 13 of his affidavit, wherein he deponed:

> *'that having attended unto the [1st defendant] for the hearing with my attorney-at-law, the [1st defendant] instead advised us of the polygraph test and thereafter told us that he has come to his decision and that I was dismissed from the Jamaica Constabulary Force.'*

[42] That evidence qualified as a 'short statement of a fact' being relied on by the claimant in alleging that the 1st defendant, did not afford him a fair hearing, insofar as the defendant did not permit the claimant to address him on the results of the polygraph test, in the context of his (the claimant's) application for re-enlistment, I find that this was sufficient.

[43] The claimant averred, additionally, in his claim that he was denied a legitimate expectation of being heard in respect of the allegations being brought against him. That averment, for the reasons given above, does not take the claimant's case further and consequentially, is of no usefulness in determining this matter.

CONCLUSION

[44] In the circumstances, I am of the considered view that an order of certiorari should be granted by this court in respect of the defendant's refusal to re-enlist the claimant.

[45] If the claimant wishes to be re-enlisted, he will have to re-apply and a fair hearing will have to be afforded to him, albeit that such fair hearing need not be undergone, until after the claimant has been informed as to the reasons why it has been recommended that he not be re-enlisted and after he has been provided with a complete copy of the polygraph test results pertaining to matters of fact which have always been in dispute as between the claimant and the Office of the Commissioner of Police (if a recommendation for the claimant's non re-enlistment is made and also, if the claimant in fact applies to be re-enlisted).

Submissions on Costs

[46] The defendant's counsel, submitted that, where the court is minded to find for the claimant and award costs to him, then the court should only award 50% of such costs. The reason she advanced was that, the claimant did not pursue all the reliefs sought in his claim, but abandoned his claim for an order of mandamus and sought an order of certiorari only. The claimant's counsel, in response, submitted that the injustice that was done to the claimant in this case, justified a full award of costs to him and that the court ought not to accept the contention of the defence counsel.

[47] I considered the submissions of both counsel in this regard and I accept the argument of defence counsel, and therefore award costs to the claimant to the extent of 50% thereof.

Orders

[48] The Order of Certiorari is granted. The defendant's refusal to re-enlist the claimant as a member of the Jamaica Constabulary Force, is brought before this court and quashed.

[49] The claimant is awarded the costs of this claim to the extent of 50% thereof, with such costs to be taxed, if not sooner agreed.

[50] The claimant shall file and serve this order.

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Hon. K. Anderson, J.