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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2006 HCV 00925

Regina vs. The Commissioner of Police
Ex parte Ira Raphington

BETWEEN	REGINA (<i>Ex parte</i> Ira Raphington)	CLAIMANT
A N D	THE COMMISSIONER OF POLICE	1 ST DEFENDANT
A N D	THE ATTORNEY GENERAL FOR JAMAICA	2 ND DEFENDANT

Mr. Vincent Wellesley for the Claimant, instructed by Arthur G. Kitchen.

Miss Tasha Manley and Miss Danielle Archer for the Defendants instructed by the Director of State Proceedings.

Application for Judicial Review- Promotion granted to member of police force – Promotion on a probationary basis – Promotion reversed without consulting member – Whether member ought to have been afforded a hearing

September 25, 26 & October 25, 2007

BROOKS, J.

Detective Corporal Ira Raphington's joy at being promoted to the rank of Sergeant on December 15, 2005 was short-lived. One week after receiving the felicitous news, he was informed that his promotion had been cancelled. On both occasions it was a publication, known as the "Jamaica

Constabulary Force Orders” and intended to be communicated to all the members of the Constabulary Force, which was used to convey the news. He had no prior notice of the cancellation or that such an action was being considered by the Commissioner of Police who had bestowed the promotion.

Detective Raphington now seeks to have this court review the later action of the Commissioner, set aside the cancellation and order the Commissioner to restore the promotion.

The Commissioner’s response is that the promotion was subject to a probationary period of six months and that in those circumstances he was entitled to cancel it without reference to Detective Raphington. The Commissioner insists that the cancellation did not constitute disciplinary action taken against Detective Raphington. He asserts that, at the time of the granting of the promotion, there were some outstanding investigations concerning the detective, of which he, the Commissioner, was unaware. On being told about the investigations, he cancelled the promotion pending those investigations being concluded. In any event, says the Commissioner, he has since assigned the post to another member of the force.

The issues to be resolved are, firstly, whether the cancellation amounted to disciplinary action which required the Commissioner to follow the relevant procedure laid down in the Police Service Regulations, and

secondly, there being allegations being made against him, whether the natural law principle of affording Detective Raphington a hearing, applied. I shall deal with each issue in turn, but first have to consider a preliminary point raised by Miss Manley on behalf of the Attorney General.

Preliminary point

Miss Manley submitted that the Attorney General is not a proper party to the proceedings and should be removed therefrom. The point made by counsel was that prerogative remedies cannot lie against the Crown since it is the Crown which is the substantive applicant. Counsel relied on the authority of *Millicent Forbes v. The Attorney General of Jamaica* (SCCA 29/05 (delivered 20/12/06)).

Mr. Wellesley, appearing for Detective Raphington, argued that because the Commissioner is a servant of the Crown, it would be necessary to join the Attorney General by virtue of the Crown Proceedings Act. Mr. Wellesley submitted that it would not be appropriate to bring the application solely against the Commissioner.

I am not in agreement with Mr. Wellesley on these submissions. The nomenclature given to the action reveals the nature of the matter. It is the Crown which assists Detective Raphington. In *Millicent Forbes* Harrison, P stated at page 17 that, “[p]rerogative orders, such as *certiorari* cannot be

brought against the Crown because, it is at the instance of the Crown that they are initiated”. Cooke J.A. in that case (at page 32), quoted from pages 623-4 of *Administrative Law* (Wade and Forsyth) 7th Ed.:

“Certiorari is used to bring up into the High Court the decision of some inferior tribunal or authority in order that it may be investigated....The underlying policy is that all inferior courts and authorities have only limited jurisdiction or powers and must be kept within their legal bounds. **This is the concern of the Crown, for the sake of orderly administration of justice, but it is a private complaint which sets the Crown in motion. The Crown is the nominal plaintiff but is expressed to act on behalf of the applicant**, so that an application by Smith to quash an order of (for instance) a rent tribunal would be entitled *R. v. The – Rent Tribunal, ex parte Smith....*” (Emphasis supplied)

I respectfully adopt the view of the learned authors.

Were the matter of a public nature, Detective Raphington would have had to have secured the leave of the Attorney General to bring the claim. It is to be noted that he claims orders of *certiorari* and *mandamus*, and not a declaration. I find that, in these circumstances, the Attorney General is not a proper party these proceedings.

Does the cancellation of the promotion amount to disciplinary action?

The provisions dealing with promotions in the Constabulary Force are outlined in regulation 24(1) and (5) of the Police Service Regulations, 1961 (“the regulations). These require that each promotion is subject to a period of probation and that before the expiry of the probation period a report must be prepared in respect of the member so promoted. The probation period for sergeants is six months. Regulation 24 (4) provides that the report in respect

of the member promoted, should be accompanied by a recommendation that either, the member be confirmed in his appointment, the probation period be extended or the member revert to his former rank.

Mr. Wellesley submitted that in order to comply with these provisions, the Commissioner ought to have awaited a report in respect of Detective Raphington. Counsel conceded that the Commissioner need not have waited for a further five months to secure the report, but stated that the Commissioner was nonetheless required to have such a report before he acted. Mr. Wellesley concluded in this regard, that the reversion amounted to the taking of disciplinary proceedings. Such a step said Mr. Wellesley, meant that the provisions of Part V of the regulations became applicable. Mr. Wellesley stressed, in support of this point, the basis given by the Commissioner for taking the decision. The Commissioner had stated in his affidavit, that he took the decision to revert Detective Raphington when he discovered that there were “some unresolved matters that directly affected (Raphington’s) suitability to be promoted to the rank of Sergeant”. These were continuing “investigations into an allegation of corruption that was made against the [detective] in August 2005”.

The difficulty with Mr. Wellesley’s submissions is that they do not sufficiently take into account the fact that the promotion was probationary.

The Jamaica Constabulary Force Orders, in respect to the granting of this type of promotion, states:

“These sub-officers are on six (6) months probation from the date of promotion and a report must be submitted by the Officers concerned in accordance with Regulations 24(5) of the Police Service Regulations, 1961.”

The condition is consistent with the requirements of regulation 24.

Whereas there is no provision directing the Commissioner as to the step he should take upon receiving the report, it would be seem that it is open to the Commissioner to either act on the recommendation or apply one of the other options set out in the regulation. This is because there is no provision which requires the Commissioner, if he does not accept the recommendation made by the author of the report, to consult with either the author or the member concerned. That is consistent with section 3 (2) (a) of the Constabulary Force Act which provides that the Commissioner has “sole operational command and superintendence of the Force”.

“Command and superintendence” gives the Commissioner the authority to make administrative decisions in the best interest of the Constabulary Force as a whole and of the public which it serves. In this context the evidence of the Commissioner, at paragraph 6 of his affidavit, is:

“After considering this additional information presented to me, I concluded that the decision to promote the [detective] could not stand, and that it was at best a premature decision. The decision to promote the [detective] and the publication of his promotion was therefore made in error and that error had to be corrected.”

In *Selwyn's Law of Employment 14th Ed.*, the learned author in dealing with the issue of probationary employees at paragraphs 2.84 – 2.86 says:

“The essence of a probationary appointment is that the employer retains the right not to confirm the appointment after a specified period, particularly on the grounds of capability...a decision not to retain a probationer may be justified even though a similar decision made with respect to a fully established employee may not be justified....**If an employee is told that his appointment is subject to a probationary period of a certain length of time, this does not give him a legal right to be employed for that length of time**, and the employer may lawfully dismiss him before that period has expired...as long as he is given his correct contractual notice....” (Emphasis supplied.)

Based on this principle, the evidence from the Commissioner and the fact that this was a promotion made subject to a probationary period, I find that the cancellation of the promotion was not in breach of regulation 24. I agree with Miss Manley that this was an administrative decision which did not require him to consult with Detective Raphington.

I am convinced that the reversal does not constitute disciplinary action requiring the procedure set out in Part V. This is because the cancellation would not, in any way prejudice the investigation of the allegations against Detective Raphington. Neither would it prevent him from being interdicted or charged with any offence or breach with which it may be thought prudent to charge him at the conclusion of the investigations. He, in my view, could not properly claim that the cancellation of the promotion was punishment already meted out for any such offence or breach.

I find support for my finding in the case of *Munusamy v Public Services Commission* [1967] 1 A.C. 348 which was cited by Miss Manley. In that case a Malayan immigration officer was appointed as an assistant passport officer. The appointment was however subject to a probationary period of one year from the date of the appointment. At the end of that period he would be “eligible for confirmation”. Subsequent to the appointment, it was discovered that he had made a false statement in his application for the post. His appointment was terminated within the probationary period and he was reverted to his former post. These steps were taken without prior reference to him. The Judicial Committee of the Privy Council, in considering the case, was primarily concerned with the application of article 135(2) of the Constitution of Malaysia which stated:

“No member of [the general public service] shall be dismissed or reduced in rank without being given a reasonable opportunity to be heard.”

Their Lordships found however, that the right to be heard:

“applied only when dismissal or reduction in rank was inflicted involving the imposition of a punishment or penalty; that reduction in rank if it carried penal consequences, the two tests being whether the servant had a right to the post or the rank, or whether evil consequences, such as the forfeiture of pay or allowances, loss of seniority in substantive rank, stoppage or postponement of future chances of promotion, followed as a result of the order...” (pages 348-9)

In that case the Privy Council found that the reduction in rank could not be characterised as being by way of punishment. In any event, their Lordships found, the officer’s appointment was only probationary and as

such only meant that he was “fit to be chosen” to be permanently assigned to the superior post.

In the case of *Dalgleish v Kew House Farm Ltd.* [1982] IRLR 251, the United Kingdom Court of Appeal had to consider the construction of a clause in a letter of appointment which stated:

“Your position will be probationary for a period of three months at the end of which time your performance will be reviewed and if satisfactory you will be made permanent.”

In circumstances where the employee was summarily dismissed after three weeks, their Lordships ruled that, on a proper construction, the employer was not obliged to wait for the entire probationary period to elapse. They held that the clause contained, “no promise, express or implied, that his probationary status would be one which would in any event continue for those three months”.

Applying those findings to the instant case, I find that Detective Raphington, being on probation, was only **eligible** to be confirmed in the post of sergeant, he had no absolute right to the confirmation. Neither was he entitled to remain in the position for six months before a decision was taken about his status. Secondly, the cancellation of the promotion brought him no penal consequences; there would be no forfeiture of pay or allowances in connection with his substantive post, as a result. There is also

no evidence that would there be any loss of seniority in his substantive rank or any likelihood that prospects of future promotion would be blighted.

Whether the natural law principle of affording a hearing, applied?

Mr. Wellesley made further submissions which may be summarised thus:

- a. Detective Raphington, had a legitimate expectation that he would have been confirmed in the post of Sergeant.
- b. That expectation was founded on the basis that the Commissioner had done investigations prior to the promotion and had convinced himself that Detective Raphington was a fit and proper person to be given the promotion.
- c. The promotion constituted a representation to that effect.
- d. In the absence of any proof of corruption or misconduct against Detective Raphington, the Commissioner was obliged to confirm the promotion.
- e. The Commissioner ought not to have reversed Detective Raphington's promotion without having afforded him an opportunity to address the allegations made against him.

Lord Diplock formulated the concept of a 'legitimate expectation' in *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All E.R. 935 (the *CCSU* case) at page 949f-h, as follows :

"To qualify as a subject for judicial review the decision must have consequences which affect some person...by depriving him of some benefit or advantage which either (i) he has 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 ground for withdrawing it on which he has been given an opportunity to comment or (ii) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn. (I prefer to call [this kind of expectation] a 'legitimate expectation' rather than a 'reasonable expectation' in order thereby to indicate that it has consequences to which effect will be given in public law, **whereas an expectation or hope that some benefit or advantage would continue to be enjoyed, although it might well be entertained by a 'reasonable' man., would not necessarily have those consequences...**" (Emphasis supplied)

The question which therefore arises is was Detective Raphington's expectation a 'legitimate expectation' or merely a reasonable one, on the bases outlined by Lord Diplock. Because the promotion was probationary, and because of the brief period that he was in the post, I find that neither of the two conditions mentioned in the quote from the *CCSU* case apply to Detective Raphington. I find that he did not have a legitimate expectation, that he would not be reverted without being consulted in advance or that he would have been confirmed in the higher post.

Is the relief available?

In the event that I am in error on the matter of the reversal, it also has to be considered whether the remedies claimed by Detective are available.

As previously mentioned the Commissioner deposed that someone else has been appointed to the particular post which was briefly occupied by Detective Raphington. In those circumstances, may the Commissioner be properly ordered to reinstate Detective Raphington and pay to him all the salary that he would have received from the date of his appointment to the present time?

“The Court is reluctant to grant pointless relief”. So said Campbell, J. in *R. (ex parte Livingston Owayne Small v The Commissioner of Police and the Attorney General* 2003 HCV 2362 (delivered September 18, 2006). In that case a Student Constable was dismissed by the Commandant of the Academy. Among his reasons for refusing an application for prerogative remedy, Campbell, J. found that the student could not be reinstated as his class had already graduated.

I have also considered the case of *R. v Commissioner of Police, Ex Parte Keith A. Pickering* (1995) 32 J.L.R. 123. There the Full Court, although granting an order of *certiorari* against the Commissioner of Police, refused to grant an order of mandamus. The reasoning of the court was that it was, “concerned not with the decision but the decision-making process”. It was therefore “content with quashing the decision”, whereby the Commissioner of Police had deprived immigration officers of their offices.

The court held however, that to “reinstate the applicants in their positions ...would usurp the function of the Commissioner of Police”.

Based on these decisions and the evidence that the post is currently occupied, I am of the view that Detective Raphington is not entitled to the remedies which he claims.

Conclusion

Although the swift reversal of his promotion would have been naturally disappointing to Detective Raphington, he is not entitled to have the Commissioner’s decision overturned. There is no provision in the Constabulary Force regulations concerning promotions which has been breached by the Commissioner. The promotion was clearly stated to be for a probationary period. Confirmation was therefore subject to the decision of the Commissioner. The decision taken cannot be viewed as disciplinary action, as the allegations against Detective Raphington were not the basis for that decision. Finally Detective Raphington’s expectation that he would be retained in the post was not a ‘legitimate expectation’ in the sense meant by Lord Diplock in the *CCSU* case.

The orders of the court are therefore:

1. The application for judicial review is refused.
2. Costs to the defendants to be taxed if not agreed.

