[2024] JMSC Civ 126

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2023CV002599

BETWEEN	**KENTON SENIOR**	**APPLICANT**
AND	**JOAN GUY WALKER**	**RESPONDENT**

IN CHAMBERS

Mr Hugh Wildman instructed by Hugh Wildman and Company for the Applicant

Ms. Carlene Larmond, KC and Ms. Giselle Campbell instructed by Patterson Mair Hamilton for the Respondent

Heard: January 24 & October 22, 2024

Application for leave to apply for judicial review - Immigration Officer placed on interdiction – Whether improper delegation of authority – Whether there was one continuous illegal act against which time did not begin to run - Subjective state of mind of the applicant, and his decision to delay challenge not relevant to the application of rule 56.6(1) - An act does not extend over a period simply because the act has 'continuing consequences' - Delay bars grant of leave - Threshold test failed

Part 56 Civil Procedure Rules

WINT-BLAIR J

[1] The application before the court is for leave to apply for judicial review of the decision place the applicant on interdiction and to prefer disciplinary charges against him. By way of an amended Notice of Application for Leave to Apply for Judicial Review filed on December 5, 2023, the applicant seeks the following orders:

i) A declaration that the Respondent is not empowered by law to place the Applicant on Interdiction.

ii) A declaration that under the Proclamation Rules and Regulations, The Delegation of Functions (Public Service) Order, 2007 only the Chief Executive Officer of PICA is empowered by virtue of the said proclamation to place the Applicant on Interdiction.

iii) A declaration that the Chief Executive Officer of PICA has taken no steps to place the Applicant on Interdiction pursuant to the said Proclamation Rules and Regulations 2007.

iv) A declaration that the decision by the Respondent to place the Applicant on Interdiction and to serve the Applicant with charges pursuant to the said Interdiction on the 12th of July 2023 is irrational.

v) A declaration that the decision by the Respondent to place the Applicant on Interdiction is procedurally improper.

vi) A declaration that the Chief Executive Officer of PICA is not empowered by law to delegate the functions delegated to him pursuant to Proclamation Rules and Regulations, The Delegation of Functions (Public Service) Order, 2007 by his Excellency the Governor General, to the Respondent to place the Applicant on Interdiction.

vii) An order of certiorari quashing the decision of the Respondent to place the Applicant on Interdiction.

viii) An order of certiorari quashing the disciplinary charges laid against the Applicant on July 20, 2023.

The Background

[2] The applicant is an Immigration officer employed to the Passport, Immigration and Citizenship Agency ("PICA".) The respondent is the Director, Human Resources ("DHR") at the same agency.

[3] The applicant seeks declarations that only the Chief Executive Officer ("CEO") by virtue of the Proclamation Rules and Regulations Delegation of Functions (Public Service Order), 2007 is empowered to place him on interdiction not the DHR. He alleges that the decision to place him on interdiction was that of the DHR and grounds his challenge in irrationality and procedural impropriety.

[4] He contends that the CEO has no power to delegate his functions to the respondent to place the applicant on interdiction nor to prefer disciplinary charges against him. The applicant seeks an order of certiorari to bring up the decision to this Court in order that it be quashed.

The Applicant's Evidence

[5] The applicant deposed that on the 26th of July 2022, he was at work performing his regular duties when he was summoned to the office of the respondent and shown a document. He was instructed to read its contents but refused, insisting instead that it be read and explained to him. The respondent informed the applicant that he was being placed on interdiction. No reasons were given to him for this course of action. The applicant sought legal advice.

[6] On the 27th of July 2022, the applicant was denied entry to the building in which he worked. He gained entry by way of a colleague and resumed work at his desk.

Again, he was summoned to the office of the respondent who showed him a document. Again, he refused to read it and was informed that it was a continuation of the interdiction served on the applicant the day before. No reasons were given to the applicant on this occasion.

[7] The applicant was interdicted at three quarters pay. On the 12th of July 2023, he was furnished with a document by the respondent, purporting to contain charges against him. He deposed that he was unaware of these charges or the factual circumstances that gave rise to them.

[8] The applicant submits that this application should be granted as it has been made within time, he has a good case with a realistic prospect of success and there are no discretionary bars which would prevail against it.

The Respondent's Evidence

[9] In her affidavit, the respondent said that in her capacity as DHR, she communicates directly with the CEO on disciplinary matters, including interdiction. The delegation of functions, Public Service Order 2007 published in the Jamaica Gazette Supplement on August 29th, 2007, sets out the powers delegated by the Governor General for the appointment, removal, disciplinary control and training to the CEO of all offices of PICA except the office of CEO.[1]

[10] The respondent denies that the CEO delegated the power to place the applicant on interdiction and said that at all times she acted at the direction of and with the approval of the CEO after his consideration on the issue. The decision to interdict was made solely by him.

[11] The applicant is a temporary immigration officer employed to PICA. He was placed on interdiction by letter dated July 27, 2022. That letter was under the signature of

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[1] That Order is exhibited to her affidavit as JG W1.

the respondent “for Chief Executive Officer” as the decision conveyed in the said letter was that of the CEO and the letter was issued at his direction.

[12] By e-mail dated July 8, 2022, the respondent wrote to the CEO attaching for his review and approval copies of an interoffice memorandum dated July 7, 2022, with a draft letter to the applicant. She made a recommendation to place the applicant on interdiction until a thorough investigation had been done into information circulating on social media which raised allegations of a criminal nature concerning the applicant.

[13] The CEO, having reviewed the matter, gave his approval for the interdiction of the applicant on July 24, 2022. It was against that background that the respondent deposed that she finalised and signed a letter dated July 26, 2022, informing the applicant of the CEO's decision and giving him an opportunity to respond to any grounds he would wish to rely on in support of receiving half or three quarters of his salary during the period of interdiction.

[14] On the morning of July 26, 2022, at approximately 9:50am, the respondent and Miss Stephanie Gordon, Director, Passport Services, met with the applicant, to issue him with the said letter of even date. That letter was a notice of intent to interdict the applicant. Its content was explained to him, as he refused to accept it. He took a picture of the letter with his mobile phone.

[15] By e-mail dated July 26, 2022, the respondent immediately reported to the CEO, in order to receive his directive. During ongoing discussions between them, she deposed that he directed her to prepare a letter of interdiction, extending the opportunity to the applicant to submit a response by July 29, 2022, with respect to the portion of salary to be withheld during the period of interdiction.

[16] In a letter sent by email dated July 27, 2022, the applicant wrote to the CEO, copied to the respondent, stating that he would be represented by the National Workers’

Union ("NWU".) On that date, the respondent emailed both letters dated July 26 and 27, 2022 to the applicant who responded later that evening, that the NWU would respond on his behalf.

[17] By letter dated July 28, 2022, the NWU responded on behalf of the applicant which the respondent sent to the CEO via email the next day, and on August 3, 2022, she also sent a copy of the judgment in the case of **Faith Webster v Public Service Commission**[2], a case relied on by the NWU in its response.

[18] By letter dated August 5, 2022, the respondent having received the approval of the CEO, wrote to Mr Khurt Fletcher, the representative of the NWU. Mr Fletcher responded by email on August 8, 2022, stating that no portion of the applicant's salary should be withheld and that the matter should be handled as expeditiously as possible. The respondent deposed that her understanding of this response was that the only issue with the interdiction process joined between the parties was the portion of salary the applicant should receive.

[19] The respondent immediately brought the e-mail from the NWU to the attention of the CEO who responded with his own e-mail, directing that PICA should comply with the Public Service Regulations which state that salary should not exceed 75% during the period of interdiction.

[20] By letter dated August 8, 2022, sent on behalf of the CEO, the respondent deposed that the applicant was informed of the decision that he would be interdicted at three-quarters salary effective July 27, 2022. The interdiction process and all matters having to do with that decision were complete at this point.

[21] The respondent deposed that investigations into the alleged misconduct by the applicant were carried out and it was determined that he should be invited to an investigative meeting. An invitation was extended to him by way of a letter dated

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[2] [2017] JMSC Civ. 69

January 16, 2023. A response was received from the NWU on his behalf. It was not limited to the applicant's matter and was not exhibited in her affidavit for reasons of confidentiality. That response letter concerns disciplinary procedure and does not treat with the question of the authority to place the applicant on interdiction.

[22] Following the exchange of correspondence between the NWU and the PICA a second letter of invitation to an investigative meeting scheduled for February 27, 2023, was sent to the applicant.[3] Neither the applicant nor a representative from the NWU attended. A letter dated February 27, 2023 was sent to the union advising that PICA would proceed to the next step in the disciplinary procedure.

[23] By letter dated July 12, 2023, the applicant was informed that certain charges would be preferred against him. His attorneys responded on July 24, 2023, taking issue with those disciplinary charges and the proposed disciplinary hearing. Correspondence flowed back and forth between PICA and counsel for the applicant with respect to the disciplinary charges and the interdiction of the applicant.

Submissions

Applicant

[24] The applicant is a public officer governed by section 125 of the Constitution of Jamaica and the Public Service Rules and Regulations. On August 29, 2007, His Excellency the Governor General pursuant to Section 127(1), of the Constitution of Jamaica and every other power hereafter enabling made the following order:

> *"Subject to the provisions of Section 127 (4) of the Constitution of Jamaica and of the Public Service Regulations, 1961, the powers of the Governor General specified in the Schedule to this Order shall be exercisable by the*

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[3] Dated February 13, 2023

appropriate authority specified in that Schedule in relation to the respective offices and officers specified in that Schedule."[4]

[25] In that order, His Excellency purported to delegate his powers of appointment, removal, discipline and training for all offices in PICA, except the office of the CEO to the CEO. The effect of this delegation is to vest the powers of the Governor General in so far as the named officers and the named subject matter are concerned into the hands of the CEO to exercise those powers on behalf of His Excellency.

[26] There is no provision in the delegation of functions order which allows for the CEO to sub-delegate this authority to any other person, the delegated powers can only be exercised by him. The applicant contends that the respondent is not empowered by law to assume the functions and powers of the CEO to place the applicant on interdiction or to prefer charges against him for any alleged breach of discipline.

[27] In the letters dated July 26 and 27, 2022, to the applicant, the respondent purports to sign for and act for the CEO. She informed the applicant of the allegations made against him, that he was being placed on interdiction and would be paid one-half or three-quarters salary. In a letter dated July 12, 2023, the respondent sets out the charges preferred against the applicant pursuant to the interdiction of 2022. and purports to act on behalf of the CEO. It is clear that the decision to place the applicant on interdiction and to bring charges against him was made by the respondent on behalf of the CEO and not the CEO himself.

[28] It was argued that the respondent denies that the CEO delegated any such power to her and states that at all material times, she acted at the direction of and with the approval of the CEO after his consideration of the matter; the decisions were made solely by him with respect to the interdiction of the applicant. From this response, there is a clear admission by the respondent that she acted on behalf of

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[4] The Delegation of Functions (Public Service) Order, 2007

the CEO in a delegated capacity. It is submitted that the respondent calls it "acting on the direction of," however, it amounts to the same.

[29] Further, that the instrument executed by His Excellency did not clothe the CEO with power to direct the respondent to place the applicant on interdiction nor to prefer disciplinary charges against him. Neither has power been given to the respondent to act on the direction of the CEO to place the applicant on interdiction or to prefer disciplinary charges against the applicant. She therefore cannot place the applicant on interdiction or prefer charges against him for a breach of discipline.

[30] The applicant submitted that certain judicial or quasi-judicial functions relating to discipline in or removal from office cannot be delegated in the absence of a statutory power. In **Vine v National Dock Labour Board**[5], the House of Lords held that the determination of the appellants employment was invalid as a result of the unlawful delegation to the Committee. The delegation was therefore a nullity which could not be cured, and the decision of the delegation was quashed.

[31] The fundamental principle from **Vine** is that decisions of a judicial or quasi-judicial nature cannot be delegated. In the absence of a statutory power, the delegated power can only be performed by the person to whom the delegated power was given; that power cannot be sub-delegated. In **Vine**, the House of Lords unreservedly approved the Court of Appeal decision in **Barnard v the National Dock Labour Board, and another**.[6]

[32] The case of **Barnard** is similar to the instant case in that the secretary in Barnard is in a similar position to the respondent. Just as the secretary could not suspend the plaintiff in **Barnard**, the respondent cannot place the applicant on interdiction or prefer disciplinary charges. An administrative function can often be delegated;

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[5] [1957] HL 488

[6] [1953] 1 All ER 1113

a judicial function rarely can be. The respondent in the instant case is acting as a usurper of the power and is without jurisdiction.

[33] In **Arthurine Webb v Donovan Stanberry**[7], the claimant was retired from the public service. She challenged the decision of the defendant who purported to act on behalf of the Public Service Commission on the basis that her services were no longer required. The learned judge, G. Fraser, J (as she then was), quashed the decision and it was no defence that the defendant purported to act on behalf of the Public Service Commission.

[34] The applicant further relied on **Carlton Smith v Lascelles Taylor and Ors**[8] in which the claimant was successful on appeal as the Commissioner of Police had taken no steps to dismiss the claimant and the Inspector who had purported to do so had no such lawful authority. In **McKane v Parnell**[9], the Resident Magistrate for the parish of Trelawny directed the Clerk of Courts to sign a warrant which only the former was empowered to sign. The Court of Appeal held that the signing of the warrant by the Clerk was an unlawful act and quashed the warrant as a nullity.

[35] In conclusion, it is submitted that the CEO cannot ratify the actions taken by the respondent in the instant case in reliance on the dictum of Lord Denning in **Barnard**.

Respondent

[36] The respondent submits that there is a factual error in the evidence presented by the applicant. The charges were not preferred on July 20, 2023, rather on July 12, 2023. The respondent deposed that this letter of July 12, 2023, informing the applicant of the charges is exhibited to the affidavit of the applicant. The issue of

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[7] [2019] JMSC Civ 100

[8] [2015] JMCA Civ 58

[9] [1956] 7 JLR 32

delay is therefore live, as the application filed on December 5, 2023, is out of time in contravention of rule 56.6(1).

[37] The applicant has also not prayed in aid rule 56.6(2) as there is no application to extend time before the court. Rules 56.6(1) and 56.3(3)(f) require that an application for leave to apply for judicial review must be made promptly and in any event within three months from the date when the grounds for the application first arose. The application must state whether any time limit for making the application has been exceeded and, if so, why. The applicant has failed to meet these requirements.

[38] The case of **George Anthony Levy v The General Legal Council**,[10] which cited the case of **City of Kingston Co-operative Credit Union Limited v Registrar of Co-Operative Societies and Friendly Societies**[11] was cited for the settled legal position that the date of the decision is the relevant date and not the date the applicant became aware of it.

[39] The timeline is important as the applicant has not fully disclosed to the court all that transpired and it also shows that July 27, 2022, is the date when grounds for an application for judicial review first arose:

i) On July 7,2022 an interoffice memorandum attaching a draft letter to the applicant was sent by the respondent to the CEO. The memorandum recommended placing the applicant on interdiction based on matters which had come to her attention, until a thorough investigation was carried out.

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[10] [2013] JMSC Civ 1

[11] (unreported) Claim No 2010HCV0204 delivered October 8, 2010

ii) On July 24 2022 the CEO wrote to the respondent by e-mail of even date indicating that the respondent should proceed with issuing the letter to the applicant.

iii) On July 26 2022 the respondent finalized and signed the letter, informed the applicant of the CEO's decision and gave him the opportunity to respond in relation to the portion of his salary to be paid to him during the period of interdiction. It is undisputed that the respondent explained the letter to the applicant and that he refused to accept it, rather he took a picture of it with his cell phone.

iv) On July 26 2022 by way of e-mail the respondent reported to the CEO. She said she was directed to prepare a letter of interdiction to be delivered to the applicant. The letter was to extend to the applicant a period ending on July 29, 2022 over which he could indicate the portion of his salary to be withheld during the period of interdiction.

v) The respondent did as she was directed and prepared the draft letter of interdiction which she emailed to the CEO on July 27th 2022. She later signed it having received his verbal approval to do so.

vi) The respondent met with the applicant on July 27 2022 he was given the letter of interdiction and she reported to the CEO after that meeting.

vii) Following the meeting, the applicant sent an email to the CEO stating that he was represented by the NWU to whom all the materials and evidence relating to the allegations against him should be made available within four business days.

viii) The respondent emailed the letters of July 26 and 27 2022 respectively to the applicant having regard to his refusal to accept them.

ix) The applicant replied by e-mail on July 27, 2022 stating that the NWU would respond on his behalf and he would have his work ID and proxy cards

delivered in short order, he provided his permanent address and contact number.

x) On July 28, 2022 the NWU responded on the applicant's behalf objecting to the interdiction in writing for the reasons stated in their letter and proposed that the interdiction be put on hold, until PICA was able to conduct its investigations to determine whether or not the public interest required that the applicant cease to perform the functions of his office.

xi) This request was refused by the CEO who responded in a letter approved by him but sent by the respondent.

xii) On August 8, 2022, the NWU representative responded by e-mail asking that interdiction be with full pay.

xiii) In response the CEO stated that salary should not exceed 75% in compliance with the Public Service Regulations.

xiv) On August 8, 2022, the respondent wrote to the applicant in an e-mail attaching a letter of even date which stated that the CEO “has given approval for you to be interdicted from duty on three quarters (3/4) salary with effect from July 27, 2022, in accordance with regulation 32(3)(a) of the Public Service Regulations, 1961, pending the outcome of the investigation into the matter.”

[40] It is submitted by the defendant that the applicant was fully aware that the interdiction letter is dated July 27, 2022, and so was his representative from the NWU, as in the response on behalf of the applicant dated July 28, 2022, they asked that the interdiction be put on hold. When the request was refused, the NWU shifted its focus to the portion of salary to be withheld.

[41] One year after the interdiction letter was issued, on July 24, 2023, the applicant's attorneys wrote to Mrs Guy-Walker, referencing the July 27, 2022, letter, outlining why they believed the interdiction was wrong. They too were similarly aware of the interdiction date and the time limit in rule 56.6(3).

[42] To circumvent the requirement to seek an extension of time, the applicant belatedly alleges that the interdiction as initiated by the respondent is from 2022 to July 2023. He now argues that the act of preferring charges on July 12, 2023 represents the last act of illegality in the interdiction process which represents a continuous act of illegality on the part of the respondent and therefore time does not run against him.

[43] It is plain that the time limit has been exceeded as this application has been brought some thirteen months after the decision to place the applicant on interdiction. The applicant also made the deliberate decision not to apply for an extension of time and expressly asserts that there are no discretionary bars which is a baseless position.

[44] It is submitted that reference to the interdiction letter of July 27, 2022 in the charge letter of July 12 2023 is only for context. The opening statement of the charge letter confirms that the applicant was placed on interdiction on July 27 2022. An ongoing investigation ensued and the applicant declined to attend two meetings scheduled in relation to the investigation after consulting with the NWU and with his attorneys. There is no explanation for the applicant's failure to challenge his interdiction before July 12, 2023 when he received the charge letter. Delay therefore bars the grant of the application sought.

[45] The case of **Gorstew Limited v Her Hon. Mrs. Shelly-Williams and Others**,[12] was cited for the statement of the law that leave is not required to pursue declarations. In hearing this application, the court should limit itself to matters that properly arise on an application for leave to apply for judicial review.

[46] The applicant's own grounds are inconsistent with his recognition, through his attorney's letter dated July 24 2023, that it was the letter of July 27 2022 that informed the applicant that he was being placed on interdiction. This circuitous approach on this application is nothing short of an abuse of process. The

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[12] [2016] JMSC Full Court 8

applicant's attorneys' letter of 24th July 2023 came to the court's attention through the respondent and was not disclosed by the applicant in the narrative of evidence given by him. The applicant failed to place all the relevant evidence before the court. With full recognition of the duty of candour on the part of the respondent, it is the affidavit of the respondent which provides the evidence material to the court's proper consideration of the application. The applicant failed to disclose all the relevant material and this goes to his conduct.

[47] The applicant has not met the threshold for leave to apply for judicial review, as there is no arguable ground for the grant of certiorari with a realistic prospect of success. Our courts have consistently been guided by the seminal decision of **Sharma v Brown-Antoine et al**[13] the principles of which are regarded as the modern test for leave to apply for judicial review. The Judicial Committee of the Privy Council held that judicial review will only be granted where there is a realistic prospect of success and there is no discretionary bar.

[48] In the case of the **Hon. Shirley Tyndall, O.J. et al v Hon. Justice Boyd Carey (Ret'd) et al**[14], Mangatal J (as she then was) stated:

> *"It is to be noted that an arguable case with a realistic prospect of success is not the same thing as an arguable ground with a good prospect of success. The ground must not be fanciful nor frivolous. A ground with a real prospect of success is not the same thing as a ground with a real likelihood of success. The Court is not required to go into the matter in great depth, though it must ensure that there are grounds and evidence that exhibit this real prospect of success."*

[49] The crux of the applicant's complaint is that Mrs. Guy-Walker placed him on interdiction without having the authority to do so, arguing that she is not authorized

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[13] [2007] 1 WLR 780

[14] [2010] HCV 00474, unreported, judgment delivered on February 12, 2010

under the Delegation of Functions (Public Service) Order, 2007, and that the powers delegated to the CEO of PICA by the Governor General cannot be subdelegated to the Director of Human Resources without express statutory powers.

[50] PICA contends, based on clear and unchallenged evidence from Mrs. Guy-Walker, that the CEO did not delegate his functions to her. The decision to interdict the applicant and withhold part of his salary was made by the CEO. Mrs. Guy-Walker sought the CEO's guidance at every juncture. She awaited his decision, acted on his directives, and reported to him. Therefore, it is denied that there was any delegation by the CEO to Mrs. Guy-Walker regarding the interdiction decision. Counsel relied on **Llandovery Investments Ltd v The Commissioner of Taxpayer of Appeals (Income Tax)**[15] to argue alternatively that if, (which is denied), there was any delegation, the authorities indicate that one has to consider the nature of the duty and the character of the person.

[51] Regulation 32(1) of the Public Service Regulations, 1961, which is mirrored by Paragraph 13.4.5 of the PICA Human Resource Policies and Procedures Manual[16] states that interdiction is treated as distinct from disciplinary or criminal proceedings. Interdiction may arise where either disciplinary or criminal proceedings are about to be instituted, and the Commission (or CEO) believes that the public interest requires a cessation of duties. In arriving at this opinion, the Commission (or CEO) does not perform a judicial function. No disciplinary proceedings had commenced against the applicant when he was interdicted, and the CEO's decision to interdict was not an exercise of a judicial function or authority.

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[15] [2012] JMCA Civ 19

[16] "Where either disciplinary or criminal proceedings are about to be instituted against an employee and where the CEO is of the opinion that the public interest requires that the employee should immediately cease to do his job then he or she may be suspended by the CEO and be permitted to receive such emoluments as the CEO may decide.

[52] The applicant sought an order of certiorari to quash the disciplinary charges laid against him in July 2023.17 This contradicts the evidence before the court. The introduction of this remedy by way of an amendment is an effort to circumvent the glaring delay and insurmountable deficiency of the challenge to the letter of interdiction.

[53] The Amended Notice of Application was filed 4½ months after the Charge Letter was issued. On August 21, 2023, the initial application for leave was filed, the Charge Letter was in the applicant's possession and exhibited to his affidavit. He did not seek to challenge it, nor did he explain his failure to do so. This belated challenge comes after the respondent raised the issues of delay concerning the interdiction letter.

[54] Additionally, the bona fides of the amendment is questionable in that the applicant's attorneys acknowledged receipt of the Charge Letter on July 24, 2023, and requested the relevant information regarding the charges and raised none of the grounds on which the applicant now relies to challenge the Charge Letter. The time limit to seek permission to challenge the Charge Letter has been exceeded, and no application for an extension of time has been made. Therefore, it is submitted that the Court should refuse permission.

[55] There is no complaint that the respondent was not authorized to sign the Charge Letter. The applicant's complaint is that the respondent is not empowered to place the applicant on Interdiction.18 Charges are not made pursuant to a decision to interdict. Interdiction is where an employee ceases to do his job, by reason of a decision having so been made where either disciplinary or criminal proceedings are likely to be instituted against him. During interdiction, an investigation is conducted, and disciplinary charges may or may not be laid against that employee pursuant to the results of an investigation. Quashing the decision to interdict Mr.

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[17] By way of the Amended Notice of Application for Leave to Apply for Judicial Review filed on 5 December
[18] Paragraph 20 of the Witness Statement of Kenton Senior

Senior because of any perceived absence of authority to place him on interdiction, does not inevitably quash the disciplinary charges. The disciplinary charges are a distinctly conducted process of investigation in which Mr. Senior declined to participate.

[56] Even if a court were to quash the decision to interdict Mr. Senior on the basis he contends, PICA could be required to have him resume his duties; but he would still face the charges laid against him while he was on interdiction. There is no arguable ground for judicial review for certiorari to issue to quash the Charge Letter on this basis, which is tenuous and without merit.

[57] Issues

1. **Are there any discretionary bars to the grant of the application.**

2. **Is there an arguable ground of judicial review with a realistic prospect of success.**

Discussion

Delay

[58] In order to assess whether delay is a bar to the grant of the application sought, the timeline of this matter before this court has been set out. On August 21, 2023, notice of application for leave to apply for judicial review was filed. The application seeks six declarations and an order of certiorari quashing the decision of the respondent to place the applicant on interdiction. The application cites the date of the decision to both interdict and prefer charges against the applicant as July 12, 2023. This is not the case as the evidence has revealed.

[59] The hearing dates before the Supreme Court

1. On September 4, 2023, Carr, J makes orders for the inter partes hearing of the application on December 5, 2023, at 2:00pm for 2 hours along with other orders.

2. On December 5, 2023, Orr, J(Ag.) adjourned the hearing of the application to January 24, 2024. An amended notice of application had been filed on the day of hearing resulting in the adjournment.

3. This amendment filed on December 5, 2023, now seeks an order of certiorari to quash the disciplinary charges brought against the applicant on July 20, 2023, which is incorrect.

4. None of the grounds relate to the date of July 20, 2023, nor does the original notice of application speak to that date, rather the material date set out by the applicant is July 12, 2023. That amended application relies on the original affidavit filed on August 21, 2023.

[60] The applicant contends that both the interdiction and charges are one continuous act. This does not change the date of the decision of which he complains. The amended application upon which the applicant now seeks to proceed was filed on December 5, 2023. This is even further from the date of interdiction on July 27, 2022. It is evident from the learned judge's handling of the matter on the date set down for the inter partes hearing that the application had only just been brought to her attention and took the other side by surprise necessitating the adjournment.

[61] There is no explanation in the evidence before this court for the applicant's failure to challenge his interdiction before July 12, 2023 when he received the Charge letter.

[62] There is also no application to extend time before this court either on the application as originally filed or as amended. While this court recognizes that where it is alleged that the fundamental rights of a litigant have been breached, or where an issue of public importance has been raised, the court has the discretion to grant an extension of time to apply for judicial review, there are no such averments in the affidavit evidence before me.

[63] Notice of an application to extend time must be given as the justice of the situation demands that the other side be heard. In the case of **R v Ashford, Kent Justice ex parte Richley**,[19] Lord Goddard observed:

> *"where a person intends to apply to the court for an extension of time he must give notice to the person whom he would serve in the ordinary way as one who would be affected if the order challenged were quashed, that he intends to apply for an extension because the person affected has a right to be heard and to object to such an extension. He very likely has what I will call a vested interest in the upholding of the order. In the same way as if you go to the Court of Appeal out of time you have to give notice of motion for the time to be extended and as you have to do so in this court when justices have not stated a case within the requisite time, so, if you are going to move for certiorari out of time, you must give notice to the person who would be made in the ordinary way a respondent to the motion in order that he may be heard as to whether or not it is a fit case in which to extend the time"*

[64] The failure to file an application to extend time was based on the position of Mr Wildman that there was no need to do so as time had only begun to run on July 12, 2023, which was the date of the last act in the continuing saga of illegality. He did not address the requirement for an extension of time on the amended application before this court.

[65] This gives rise to two determinations on this issue of delay, as one of the remedies to be sought is an order of certiorari to quash the decision of the respondent. Therefore, the date on which the grounds for the application first arose must be determined, in other words:

1) What is the date of the impugned decision and

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[19] [1955] 1 WLR 562, 563

2) Whether there was one continuous illegal act which meant time did not begin to run.

The date of the impugned decision

[66] Rule 56.6 of the CPR, which addresses the issue of delay, provides: that an application for leave to apply for judicial review must be made promptly, that is within three months from the date when grounds for the application first arose. The

court may extend the time if a good reason for doing so is shown. Where leave is sought to apply for an order of certiorari in respect of any judgment, order, conviction or other proceeding, the date on which grounds for the application first arose shall be taken to be the date of that judgment, order, conviction or proceedings.

[67] On a proper construction of rule 56.6(1), the date of the impugned decision to interdict the applicant is the date when grounds for the application first arose. This means that in keeping with rule 56.6(1), the grounds for the application first arose from the decision contained in the letter of July 27, 2022.

[68] In the case of **George Anthony Levy v The General Legal Council**,[20] which cited the case **of City of Kingston Co-operative Credit Union Limited v Registrar of Co-Operative Societies and Friendly Societies**,[21] a decision of McDonald-Bishop, J (as she then was) states:

> *"[52] The settled law is that the operative time for the ground to have arisen and which set the timeline within which the application is to be made, is the date of the judgment order or decision and not the date that the applicant became aware of the decision... By 10 May 2008, Mr. Levy would also have*

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[20] [2013] JMSC Civ 1

[21] (unreported) Claim No 2010HCV0204 delivered October 8, 2010

known that the hearing had started so that would have been the date he would have been aware of the proceedings against him, in any event.

[53] It follows from this that Mr. Levy would have to act promptly after 10 May 2008, the date of the impugned 'decision', or, in any event, within three months of that date..."[22]

[69] I agree with the submissions of Ms Larmond, KC, it is unquestionable that the applicant was aware that the interdiction letter is dated 27 July 2022, and so too was his representative, from the NWU and his lawyers. This is evident from the email of July 28, 2022, from Mr Khurt Fletcher of the NWU on behalf of the applicant to the respondent proposing that "the interdiction be put on hold." This is evidence of knowledge on the part of the applicant that the interdiction had commenced as at July 27, 2022. There is no evidence to the contrary. This response from the NWU was not evidence disclosed by the applicant or even referred to in his affidavit, this goes to his conduct.

[70] It is clear that July 27, 2022, is the date of the decision and the date on which grounds for this application arose, it is the date on which time began to run for the purposes of this application.

[71] August 21, 2023, is the date on which this application was filed, that is over one year of delay and far in excess of the three-month time limit. While there is no time limit for the making of an application for a declaration in rule 56.9(1), there is a limit for the grant of an order of certiorari.

[72] This failing on the part of the applicant is considered undue delay. The rules require that the applicant make application promptly and certainly within three (3) months. Where the application is not made within three (3) months it cannot prevail unless there is good reason to justify why an extension should be granted by the court.

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[22] [2013] JMSC Civ 1 paras 52 & 53

Ackner L.J. in **R v Stratford-on-Avon DC, ex p Jackson**[23] expresses the effect of the rule in these terms:

> *"…we have concluded that whenever there is a failure to act promptly or within three months there is 'undue delay'. Accordingly, even though the court may be satisfied in the light of all the circumstances including the particular position of the applicant, that there is good reason for that failure, nevertheless the delay, viewed objectively, remains 'undue delay'. The court therefore still retains a discretion to refuse to grant leave for the making of the application or the relief sought on the substantive application on the grounds of undue delay, if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration."*

[73] In the case at bar there has been both a failure to act promptly as well as to act within three months of the decision to interdict. There is no good reason to extend time before the court in the form of an affidavit.[24]

[74] The applicant has done two things to attract the attention of the court on the issue of delay, the first is that he has amended his application to seek a second order granting certiorari based on the disciplinary charges preferred on July 20, 2023 (there was no application to amend this date, and it is treated as a typographical error). This date is later in time and there would be no delay were the court to regard this letter as the date of the impugned decision and relate it to the original notice of application. This submission does not take into account the breach of the rules as no notice of the amendment was given to the other side as is required by rule 11.8(1).

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[23] [1985] 3 All ER 769

[24] R**(Young) v Oxford City Council** (2002) EWCA Civ 240

[75] This means that the respondent could not have had any notice of or intention to respond to the order sought amending the original notice of application until they arrived at the hearing before Orr, J(Ag.) As a matter of fairness, the amended application was adjourned. The applicant was no longer proceeding on the original application as he now sought new orders, the amended application having superseded it.

[76] If the submission of Mr Wildman is to be accepted, there is also the added difficulty of there being absolutely no explanation as to the delay in filing the amended application given that the date of the Charge letter is July 12, 2023.

[77] The respondent in further submissions on this point, argued that the amended notice of application filed on December 5, 2023, challenging the disciplinary charges was filed some four and one-half months after the Charge letter was issued on July 20, 2023.

[78] When the original notice of application was filed on August 21, 2023, the charge letter was in the possession of the applicant and was exhibited to his affidavit, yet the applicant failed to challenge the disciplinary charges then. In addition, the applicant's attorneys in correspondence with PICA acknowledged receipt of the Charge letter and failed to raise any of the grounds on which the applicant now seeks to rely.

[79] The amended application is also outside of the time limit by one month and three weeks approximately. The additional unexplained delay is without an application for an extension of time in relation to this further period. This submission is without merit, the date the grounds for the filing of this application arose is July 27, 2022, as that is the date of the impugned decision to interdict the applicant.

[80] In terms of the reasons for the time limits in the rules was clearly enunciated in, the case of **City of Kingston Co-operative Credit Union Limited v Registrar of**

Co-operative Societies and Friendly Societies, a decision of Sykes, J (as he then was.)[25]

> *"10. Mrs. Taylor-Wright's point was that it is hornbook law that an application for judicial review must be made 'promptly: The rule says so. Although 'promptly), is not defined, it really means extremely close to the time of the decision. As I understood her position, the three month period is really an outer boundary and not a time limit for applications for leave to apply for judicial review. Counsel urged that it is well known for courts to hold that a person who applies within the three months is late because he did not apply promptly. In effect, counsel was submitting that it is not true to say that an applicant for judicial review has three months within which to apply; what the applicant must do is act promptly but, in any event, not later than three months. The conclusion of counsel's arguments was that if an applicant can be held not to have acted promptly if the application is within the three month period, then if the applicant is outside the three month period, then he is not just late; he is very late and out of time. Being out of time, the submission flowed, means that the applicant must apply for an extension of time. Mrs. Taylor-Wright backed up her point by stating that there is authority for the proposition that an applicant for extension of time must serve the intended respondents to the judicial review. From these major and minor premises, Mrs. Taylor-Wright concluded thus: given that COK*
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> *was out of time, an application for extension of time to apply for leave to apply for judicial review was an absolute necessity.*
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> *11. Mrs. Taylor-Wright reinforced her submission by stating that the mechanism set up by Part 56 which governs judicial review*

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[25] (Unrep) Claim No. 2010HCV0204; October 8, 2010

proceedings is predicated on important public policy considerations. She prayed in aid Lord Diplock's important judgment in O'Reilly v Mackman [l9831 2 AC 237, 280F-281D. From these passages, Mrs. Taylor-Wright, deduced the following propositions. First, the leave requirement is not a mere formality but an important screening device to bar unmeritorious applications. Second, there is a strong rule of practice that applications for leave for judicial review should be made 'promptly), - within days and not weeks. This strong rule of practice is buttressed by the well known fact that courts have held, in some cases, that applications for leave to apply for judicial review failed the promptness requirement even when they were made within three months. Third, SO strong is the rule promptness requirement that an applicant who is out of time must apply for an extension of time failing which a court cannot grant leave to apply for judicial review. Fourth, the principle of not keeping the decision maker and the beneficiary of the decision in suspense was thought to be so important that the pre-order 53 period of six months to apply for judicial review was reduced to three. According to learned counsel, these considerations apply with equal force today to Part 56 of the CPR.

12. *Mrs. Taylor-Wright also submitted that the underlying reason for these propositions is that public authorities and beneficiaries of the decisions of public bodies must not be kept in suspense unduly long. Good administration requires that if the challenge does not come 'promptly', then the decision maker and others (particularly beneficiaries of the decision) should be able to act on the decision without fear. As Lord Diplock in Mackman said at page 280H - 281A:*

> *The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers for any longer*

period than is absolutely necessary in fairness to the person affected by the decision."

[81] This dictum of Sykes, J (as he then was) is accepted by this court, and I adopt and apply them to the reasons for strict compliance with the rules governing the filing of applications such as this.

Whether there was one continuous illegal act which meant time did not begin to run

[82] Secondly, it is being argued that the court ought to treat the interdiction as the commencement of the process and the disciplinary charges as the end of the process as this is one continuing act of illegality. Therefore, time would not have begun to run until July 12, 2023.

[83] The court required that counsel appearing file further submissions on the issue of when time begins to run. It was submitted by Mr Wildman that time does not run against the applicant in respect of the interdiction as he would not have known on what basis the interdiction is being made thus, he could not have proceeded to challenge the said interdiction. It was only when the disciplinary charges were preferred that the applicant was made aware of what was being brought against him, the interdiction and disciplinary charges were inextricably bound up together and the applicant has to challenge both as a challenge to the interdiction itself could not stand as interdiction contemplates that charges will be laid and in fact have been laid. Once the disciplinary charges are quashed, then the interdiction will fall away. The applicant relied on **Regina (Robertson) v Wakefield Metropolitan District Council and another**,[26] **Louis Smith v The Director of Public Prosecutions**[27] and **Rovenska v General Medical Council**[28].

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[26] [2001] EWHC Admin 915

[27] [2023] JMCA Civ 33

[28] [1998] I.C.R 85

[84] This submission goes against the documents before the court which set out the reason for interdiction on their face, the allegations and the investigation to be undertaken. Further, interdiction and disciplinary charges are distinct courses of action.

[85] The court is not required to resolve matters of law at the leave stage, the issue of a continuous illegality is one thing, the procedural requirements of the Court are another. The subjective state of mind of the applicant, and his decision to delay his challenge until he received the Charge letter is not relevant to the application of rule 56.6(1).

[86] I find that delay operates as a bar to the grant of the orders sought. I accept the submissions of the respondent on this issue as they are in line with my own view. The time limits set down by the rules cannot be exceeded and moreso without explanation.

[87] If am wrong in this conclusion, I will go on to look at the threshold test. In **Sharma**, which bears no introduction, the court held that the ordinary rule is that the court will refuse leave to claim judicial review unless it is satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy[29].

[88] In considering whether the applicant's case had a realistic prospect of success, the court is to apply the principles set down in **Sharma** and **Matalulu**[30]. In assessing whether the strength or quality of the evidence required for the allegations being made are likely to be proved on a balance of probabilities, potential arguability cannot be the basis for an order to grant leave. Such a grant

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[29] R v Legal Aid Board, Ex p Hughes (1992) 5 Admin LR 623 at 628, and Fordham, Judicial Review Handbook (4th Edn, 2004), p 426.

[30] [2003] 4 LRC 712

would be based on speculation and would have the effect of using the processes of the court to strengthen the case for trial on a fixed date claim.

[89] In essence, this application argues that the letter sent by the respondent did not emanate from the proper authority as is required by the Constitution of Jamaica[31] and the Public Service Regulations.[32]

[90] The letter of July 27, 2022, is before the court, it sets out the allegations and that the applicant is being interdicted pending the outcome of investigations into those matters. In it, the substance of the allegations was set out, explained, and photographed by the applicant, nothing in it could have prevented a challenge to the interdiction.

[91] Further, the applicant having not attended the investigative meeting to which he was twice invited, now submits that he did not know the substance of the charges against him and had to wait for a charge letter which means he could not challenge the interdiction. This means that the letters inviting him the investigative meeting, the earliest of which was dated January 16, 2023, and which are undisputed are accurate depictions of the process.

[92] With respect, in my view, it is the potential arguability of the law relating to the delegation of powers and continuing illegality which is being raised as the justification for the grant of the application.

[93] The strength and quality of the evidence required to prove a claim on a balance of probabilities is found wanting. The decision to prefer disciplinary charges after interdicting the applicant has not been shown by law or evidence to be a continuing act. The case cited by the applicant is to the contrary. In **Rovenska**, it was this

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[31] Jamaica (Constitution) Order in Council 1962

[32] Made under section 81 of the Jamaica (Constitution) Order in Council, 1959, preserved by section 2 of the Jamaica (Constitution) Order in Council, 1962.

dictum of Brooks, JA in **Louis Smith v The Director of Public Prosecutions**[33] which is relevant to the instant application:

> *"[28] Mr Wildman, in his submissions before the Full Court, argued that the initiation of the criminal proceedings was a continuing breach of the appellant's constitutional rights and as such, there was no delay in the making of the application. In the circumstances, the judge of the Parish Court's refusal of the appellant's application to discontinue the criminal proceedings resulted in time beginning to run afresh. Before this court, he made that very same submission and relied on the decision of the court in Rovenska. In that case, Dr Elena Rovenska who qualified as a doctor in Czechoslovakia sought registration to practice as a medical practitioner in the United Kingdom ('UK'). A doctor who trained outside of the UK, was for the purposes of registration required to satisfy the provisions of the Medical Act 1983 which stipulated that he has the "professional knowledge, skill, experience and proficiency in English". The General Medical Council (GMC) would not deem such qualification to have been proven unless the applicant either passed or was exempted from a test conducted by the Professional and Linguistic Assessments Board (PLAB).*
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> [29] *Dr Rovenska failed the test in 1984 and 1985. She also sought exemptions on four occasions, the last being in 1991. Her applications were refused. On 2 December 1991, she was notified of the refusal of her last application. The Greenwich Council for Racial Equality then wrote on her behalf. On 10 January 1992, it received a similar response from the GMC. On 31 March 1992, Dr Rovenska submitted a race discrimination complaint.*
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> [30] *Her complaint was dismissed by an industrial tribunal on the basis that it was outside the requisite three-month time limit. She appealed to the Employment Appeal Tribunal which allowed her appeal on the basis that as*

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[33] [2023] JMCA Civ 33

long as the GMC acted in accordance with note LR 2, with her qualifications, Dr Rovenska's application for exemption was bound to be refused. Her complaint was therefore not a "once-and-for all refusal of an exemption".

[31] *By virtue of note LR 2 an exemption could only be granted to doctors who qualified at certain universities in named countries. Czechoslovakia was not included in that list. The court cited, with approval, the approach taken by Mummery J who delivered the decision of the Employment Appeal Tribunal. The learned judge stated at page 370:*

> *"(1) An act does not extend over a period simply because the doing of the act has 'continuing consequences' over a period. For example, a decision not to appoint an applicant for a particular post or not to upgrade his post (as in [Sougrin v Haringey Health Authority [1992] IRLR 416]) has continuing consequences (eg as to pay). But the act which produced those consequences took place at a fixed moment of time and did not, therefore, extend over a period of time.*
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> *(2) An act does extend over a period of time, however, if it takes the form of a rule, scheme, practice or policy in accordance with which decisions are taken from time to time: for example, an employer's pension scheme, as in [Barclays Bank Plc v Kapur, [1991] 2 AC 355, [1991] ICR 208] or a scheme providing for mortgage subsidies for employees and restricting the benefit of them in such a way that some qualify for the benefits, while others are denied them. In those cases, as long as the scheme, rule, policy or practice is in operation, it may be properly said that there is an act extending over the period of its operation and a complaint may be brought during that period or, at the latest, before the end of the expiration of three months after the rule, scheme, practice or policy has ceased to operate." …*

[34] The decision in the Rovenska case, in my view, does not assist the appellant. In the first place, the laying of the information cannot be properly

classified as a "rule, scheme, practice or policy". This was a matter in which the DPP exercised her discretion based on the circumstances. Secondly, as stated by Mummery J, an act does not extend over a period because it has continuing consequences. In the instant case, the information is dated 3 September 2013 and the matter first came before the court on 5 September 2013. No issue was taken with the charges until 18 September 2019 which was the second day of trial. On that date, the judge of the Parish Court ruled that the matter was to proceed."

[94] The decision to interdict the applicant has not been shown to be a rule, scheme, practice or policy on the evidence raised. The decisions to interdict and to charge are acts which took place on a particular date. They do not extend over a period simply because the decision of the act has 'continuing consequences' over a period. Therefore, the question of a continuing illegality extending time as a matter of law is without merit. There being neither application nor good reason to extend time, the discretionary bar of delay applies to the defeat of the application being granted in favour of the applicant.

[95] Nonetheless, the next consideration is whether to refuse leave or to grant relief would be likely to cause substantial hardship or prejudice to the rights of any person or was detrimental to good administration (see rule 56.6(5) of the Civil Procedure Rules, 2002 ('CPR')).

[96] In **R. v. Dairy Produce Quota Tribunal for England and Wales Ex p. Caswell**[34], it was said that even if the court considers there was good reason for the delay, it might still refuse leave, or if leave had been granted, refuse substantial relief, where in the court's opinion, the granting of such relief was likely to cause hardship or prejudice or would be detrimental to good administration.

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[34] [1990] 2 A. C. 738

[97] As far as I see it, the likelihood of hardship and prejudice to the rights of all interested parties, and what is in the best interest of good administration, must be relevant considerations in determining the evidence presented, I have examined the material before the court including the timeline previously referred to.

[98] I have looked carefully at the grounds on which the application for leave is based. I have taken into account the helpful submissions of counsel on both sides. Having assessed all the evidence and the arguments I cannot find that the refusal of the application for leave would cause any prejudice or substantial hardship to the applicant. The delay in having his matter proceed at the agency level would be more detrimental to him in my view as that affects his prospects and his pay has been reduced. The agency still suffers from the lack of finality in this matter while the unavailability of the post occupied by the applicant has been unduly extended by litigation.

[99] Finally, to grant the application in the circumstances would, in my view, be inimical to good administration. It is in the interest of good administration for matters to be dealt with expeditiously and fairly. The inordinate and inexcusable delay on the part of the applicant is detrimental to good administration and only encourages the rules to be honoured in the breach and discourages the proper conduct of similar proceedings in the future. There is in my view no good and apparent reason in fact or law to permit this application to proceed. The declarations sought need not have been brought by these means.[35] Costs will follow the event given the conduct of the claimant in honouring the rules of this court in the breach and prolonging these proceedings without explanation.

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[35] The case of **Gorstew Limited v Her Hon. Mrs. Shelly-Williams and Others**,[36] states that leave is not required to pursue declarations.

[100] Orders:

1. The orders sought in the notice of application filed on December 5, 2023, are refused.

2. Leave to appeal refused.

3. Costs to the respondent to be agreed or taxed.

4. The applicant's attorneys-at-law shall prepare, file and serve the orders made herein.

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Wint-Blair, J