



[2012] JMSC Civ 166

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CLAIM NO. 2012 HCV04727**

<b>BETWEEN</b>	<b>LEROY THOMPSON</b>	<b>APPLICANT</b>
<b>AND</b>	<b>THE COMMISSIONER OF POLICE</b>	<b>1<sup>ST</sup> RESPONDENT</b>
<b>AND</b>	<b>THE ATTORNEY GENERAL OF JAMAICA</b>	<b>2<sup>ND</sup> RESPONDENT</b>

**Ms. Kedian Francis, of counsel, for the Applicant**

**Mr. Harrington McDermott, instructed by the Director of State Proceedings for the Respondents.**

**HEARD ON: SEPTEMBER 10 & 25, 2012**

**IN CHAMBERS**

**CORAM: ANDERSON, K. J.**

***Application for leave to apply for Judicial Review-Application for extension of time to apply for leave-Good reason - Detrimental to good administration.***

[1] The Applicant, Mr. Leroy Thompson, is a former police officer attached to the Jamaica Constabulary Force (J.C.F.), who was, on or about the 2<sup>nd</sup> day of February 2010, notified by the Police Service Commission that the decision had been taken by that body, to retire him in the public interest with effect from June 11, 2010. The Applicant was notified of same, on June 22, 2010, by letter which was addressed to him.

[2] In that letter, the Applicant was informed that he could apply to the Governor – General’s Privy Council for its consideration and recommendation to His Excellence. The Applicant exercised that option by writing and setting out therein, his grounds for making that application to His Excellency. In those grounds, at paragraph x, he set out as one of his grounds, ‘request that he be supplied with copies of the primary material containing the allegations and the report of the Commissioner of Police so that I can respond fully to the allegations. Anything short of that is almost tantamount to me being required to defend myself with my hands tied behind me in circumstances in which my whole future is at stake.’

[3] By letter addressed to him and dated June 29, 2011 the Applicant was notified that the Privy Council had considered his reference against the recommendation of the Police Service Commission for him to be retired in the public interest and had agreed to advise His Excellency, the Governor-General that his application lacked merit and he should be retired in the public interest. The effective date of his retirement was then scheduled for June 30, 2011.

[4] The Applicant’s Application was, with this Court’s permission, amended so as to be seeking therein, firstly an Order granting an extension of time within which the Applicant could apply for leave to apply for judicial review and secondly, if the Applicant were to be able to overcome that first hurdle, an Application for leave to apply for judicial review.

[5] This matter first came before this Court, in Chambers, on September 10, 2012 and on that occasion, I had granted the amendment as sought, to seek an extension of time within which to apply for leave and had also ordered that the amended Application be served on the Director of State Proceedings (for the 2<sup>nd</sup> Respondent) the

Commissioner of Police (the 1<sup>st</sup> Respondent). That Order vis-à-vis service and filing of the amended application, was duly complied with, by the Applicant.

[6] There exists only one affidavit placed before this Court for the purposes of the Applicant's amended Application and that affidavit is one which has been deposed to by the Applicant himself. From that affidavit evidence it is clear that the Applicant was dealt with by the Police Service Commission, pursuant to regulation 26 of the Police Service Regulations, 1961.

[7] This Court is satisfied that the Applicant was afforded a 'hearing' on paper, by the Police Service Commission in that regard, insofar as he was informed of the two allegations that had been made against him and was afforded an opportunity to respond, in writing, to both of those allegations. The Applicant was not however, afforded an opportunity to view the Commissioner's report which the Police Service Commission was required by regulation 26 to consider, along with the allegations and the reply (if any) to those allegations, as made by the officer who is the subject of the relevant disciplinary proceedings.

[8] In his response to the two allegations made against him, the Applicant had stated, inter alia, in his correspondence which was sent to the Police Service Commission through the Commissioner of Police, as follows – 'I am totally unaware of any circumstances that caused the Commissioner of Police to lose confidence in my ability to discharge my function as a police officer as the allegation made against me was not substantiated. One of the fundamental principles of justice is that "he who asserts must prove." It would be a great act of injustice if I am punished because someone made an allegation and was not able to substantiate it.'

[9] The Applicant is seeking leave to apply for judicial review in terms of seeking an Order of certiorari to quash the recommendation/decision of the Commissioner of Police that the Applicant, 'retire in the interest of the public from the Jamaica Constabulary Force with effect from the 30<sup>th</sup> June, 2011.' The Applicant is also seeking an Order of mandamus, 'to re-enlist the Applicant for active duty for the appropriately standard contract period.' The Applicant has also sought declaratory relief. At this stage however, this Court is only concerned with two things, these being firstly, whether the Applicant's Application for leave should be permitted to be pursued, notwithstanding that the same has been filed outside of the time limit as prescribed by Rule 56.6(1) of the Civil Procedure Rules, this being three (3) months from the date when the grounds for the Application first arose and secondly, whether the Applicant's Application for leave to apply for judicial review, ought to be granted. Of course, the second issue cannot properly be addressed substantively, by this Court at all, unless the first issue is resolved in the Applicant's favour. It should be noted though, that the strength of the Applicant's proposed judicial review Claim is a relevant factor to be considered by this Court for the purpose of determining whether or not there exists 'good reason' as per Civil Procedure Rule 56.6 (2) for the grant to the Applicant by this Court, of an extension of time and also, as to whether or not it would be 'detrimental to good administration' as per Rule 56.6 (5), for the grant of such an Order as is now being sought. The Respondents have contended, through counsel from the Office of the Director of State Proceedings - Mr. McDermott, that the Applicant has failed on both counts, whereas, the Applicant has, through his counsel – Ms. Francis, strongly suggested that he should succeed on both counts.

[10] The Applicant has set out several grounds upon which his amended Application ought to be granted. Only one of those grounds though, relates specifically to the reason for his delay in filing his present Application, as amended. In summary, he has stated at ground 11 of his grounds for the amended Application, that he had previously had an attorney, who ought to have made the application prior to the three months having expired, but his attorney had later advised him that he, 'could not deal with the

matter.' No reasons as to why his prior attorney 'could not deal with the matter,' have at all been proffered to this Court at this time, by the Applicant , as to when it was that his prior attorney was given instructions, nor as to when that attorney had informed him, 'that he could not deal with the matter,' have been provided to this Court by the Applicant. Such have not been provided either in ground 11 or any of the other grounds or in any evidence by affidavit from the Applicant. The failure to provide the same is, in this Court's view, detrimental to the Applicant's application for an extension of time, although not in and of itself, conclusive as to the outcome thereof.

[11] It cannot be over-emphasized that where a Court is to be called upon to exercise discretion in favour of a party, that party cannot be and never is entitled to the exercise of the Court's discretion in his favour, as a matter of right. Evidence of a sufficiently compelling nature must be placed before this court by a party, as could properly serve to justify the Court's discretion being exercised in that party's favour. This Court cannot and ought not to be expected to exercise its discretion on a whim, or in other words, on emotions. This Court must act on that which it determines, based on well-hallowed principles of law, to be proven facts.

[12] This Court is empowered by Rule 56.6(2) of the Civil Procedure Rules to grant the applied for extension of time, if good reason for doing so, is shown. In that regard also, this Court must consider whether the grant of its discretion in favour of a party who is out of time in applying for leave to apply for judicial review, would be detrimental to good administration - See Rule 56.6 (5) of the Civil Procedure Rules .

[13] The delay in this case, on the Applicant's part, has been quite substantial. He wishes to get leave to challenge the Commissioner of Police's report made in relation to him and to quash the 'recommendation/decision' of the Commissioner of Police that he be retired in the public interest, 'with effect from June 30, 2011.' Of course though, it

was not the Commissioner of Police who made that decision, but instead, the Governor General, on the advice of the Privy Council. In any event though, it was by letter dated February 2, 2010, that the Applicant was notified that the Commissioner of Police had recommended that he be retired in the public interest. This Court does not know when it was that the Applicant received that letter, but certainly, the Applicant was in possession of same before February 24, 2010, because that was the date of a letter which he transmitted to the Police Service Commission in response to the Commissioner of Police's recommendation that he be retired in the Public interest. Thus, if, as he is, the Applicant is challenging the Commissioner's recommendation and report made in relation to him, time certainly was running against him insofar as the making of an Application for leave to apply for judicial review is concerned, certainly ever since as of February 24, 2010, if not before then. The Applicant's original without notice Application had not sought an extension of time within which to apply for leave to apply for judicial review. That Application for an extension of time arose by virtue of the amended Application, which was filed on September 18, 2012. The original Application was filed on August 29, 2012. Thus, it is very clear that the delay in challenging in judicial review proceedings, beginning with the required Application for leave, was a delay of over two years and six months and not one year as has been suggested to this Court, by the Applicant's counsel. It would have been a delay of just over a year, or more precisely, just over a year and two months, if the Applicant's Application was one seeking leave to challenge the Governor General's Privy Council's decision in relation to him. The Applicant however, has not framed his amended Application for leave in that way, although it was certainly open to him to have done so, if he had wished.

[14] I am not satisfied, on the evidence as presented before me, that any good reason has been shown as to why this Court's discretion ought to be exercised in the Applicant's favour. The failure of an attorney to act in accordance with his instructions, can hardly be a good reason, bearing in mind that such attorney is, provided that he is acting in that capacity, the agent of the party instructing him, that being his client. Thus, the failure of the attorney to act in accordance with his instructions ought properly to be

equated with the failure of the client, or in this case, the Applicant, to act. If it were otherwise, it would be all too easy for dilatory litigants to avoid the strict time limits that apply in judicial review proceedings.

[15] Whilst in proper cases, the failure on the part of an Applicant to have obtained legal aid, may provide good reason for his/her having failed to apply for leave within time, this certainly should not be understood as meaning that this will be so in all cases.

[16] In the case at hand, the Applicant has provided no evidence whatsoever, to show that he even attempted to obtain legal aid. Whilst it may be that if he had made such an attempt it perhaps would not have assisted him as much as he would have wished, nonetheless, it is the case that legal aid does exist in Jamaica for persons of limited financial means. Bearing in mind the urgency and importance of this matter, such should have been sought by the Applicant. Insofar as there is no evidence that the same was even sought, this must also heavily imperil his Application. In any event though, this Court is left to wonder, what is it about his financial state as of August of this year, which enabled him to file his Application for leave at that time, as against within three months of the Commissioner of Police's decision in recommending that he be retired in the public interest? Wouldn't the Applicant have been as impecunious in August of this year, as he was, two years and three months ago? No answer has been provided to this Court, by means of affidavit evidence from the Applicant, to either of those last two questions. The failure to provide such answers does not at all assist in supporting the Applicant's contention that he has shown good reason as to why this Court should extend time in his favour.

[17] The Applicant has contended through his counsel, upon the Court's consideration of his amended Application that he has been denied natural justice and fairness and thus, has a strong case and that this should be considered by this Court

with a view to this Court exercising its discretion by extending time as is now being applied for. How strong though, is the Applicant's proposed judicial review case? Certainly, the Jamaican Court of Appeal cases cited and referred to this Court by counsel for the Respondents, these being: **Nyoka Segree and Police Service Commission – Supreme Court Civil Appeal No. 142/2001** and **Kenyouth Smith and the Police Service Commission and the Attorney General – Supreme Court Civil Appeal No. 60 of 2005**, clearly do not support any of the Applicant's propositions on the substance of his proposed judicial review case, in the matter at hand.

[18] Those two-mentioned cases though, are undoubtedly, significantly different from the present case now under consideration by this Court, in at least one material respect. This is insofar as both of those cases addressed challenges to the exercise by the Police Service Commission, of its discretion to retire the appellants in each of those cases, in the public interest. In the case at hand however, the Applicant wishes to apply for leave to challenge the decision of the Commissioner of Police to recommend to the relevant Service Commission, this being the Police Service Commission, that he be retired in the public interest.

[19] The decision of the Commissioner of Police to make that recommendation was an interim decision made in relation to the Applicant, by his head of department, in respect of the Applicant's employment status with that department, this being the Jamaica Constabulary Force. At that interim stage, the applicant would not have a right to natural justice, this because, he would have to have been, afforded natural justice, at later stages of the disciplinary process, such as happened when the Police Service Commission was about to embark upon its consideration of the recommendation made against the applicant by the Commissioner of Police and thereafter, even at the local Privy Council level, if the Applicant had chosen to exercise that option, which he in fact did. The Applicant was afforded a hearing at each of those later stages of the process which was conducted in relation to him, this being the same process which ultimately



led to the decision by the Governor General on the advice of the local Privy Council, that the Applicant be retired in the public interest. Thus, in **Rees v Crane [1994] 2 W.L.R. 476**, Lord Slynn in rendering his judgment in that Privy Council case, recognized that according to the authorities, preliminary or initiating proceedings would not require a hearing, although that was by no means to be taken as being an absolute rule. Thus, persons in comparable situations to a Judge who has security of tenure, may very well be entitled to natural justice even in the preliminary stage of a process such as was utilized by the relevant authorities in the case at hand. Thus, in **Rees v Crane**, it was held that the appellant – Judge, was entitled to natural justice even at the preliminary stage of the process seeking to have him be removed from office. In the case of **Barnwell v Attorney General of Guyana [1993] 49 W.I.R. 88**, the Court of Appeal of Guyana, applying **Rees v Crane**, similarly so held.

[20] The case at hand is entirely different from **Rees v Crane & Barnwell v Attorney General** however, in that, in the case at hand, the Applicant has no security of tenure, but instead, is employed on contract and can therefore be removed from his employment with the Jamaica Constabulary Force in accordance with the terms and conditions thereof. This is not all equivalent to a person who is employed with security of tenure.

[21] In order for an Application for leave to apply for judicial review to be successful, all that need be shown by the Applicant is that he/she has an arguable case. See **R v The Principal of the Norman Manley Law School, ex parte Janet Mignott - Suit No. M-9 of 2002, per Daye J. & R v Legal Aid Board, ex parte Hughes [1992] T.L.R. 499**. Based on the law as aforementioned in this Judgment, the Applicant's proposed case on judicial review, is, as framed, not arguable. The situation may very well though, have been significantly different, if the Applicant had challenged the decision of the Police Service Commission in relation to him. That may have been what he would have

wished, or even have intended to challenge, but that is not in fact what he has, through documents filed with this Court on his behalf to date, actually done.

[22] In any event though, the Applicant has failed, in my considered opinion, to even cross the first hurdle that was in front of him, that being the hurdle of delay being a potential bar to his even pursuing an Application for leave to apply for judicial review. Good reason as to why this Court ought to exercise its discretion in the Applicant's favour, by granting him the extension of time sought, has not been shown. The application, if permitted to be pursued at this time, would not only have to be permitted in the absence of good reason being shown, but also in the absence of any evidence to show that it would not be detrimental to good administration if the extension of time as sought were to be granted in this case.

[23] The delay is so long and the nature of the Applicant's proposed case as presently framed, is so weak, that it would undoubtedly be detrimental to good administration if this Court were to grant the Application for an extension of time as sought. As was stated in the oft-quoted dictum of Ld. Diplock as rendered in **O'Reilly v Mackman** – **'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.'** [1983] 2 A.C. 238, at pp. 280-281. This Court will apply that dicta to the case at hand.

[24] For all of the reasons as given, the Applicant's Application for an extension of time is denied. Even if same had been granted, for all of the reasons earlier mentioned, his Application for leave to apply would also have had to have been denied. This is stated though, merely for the sake of completeness.

[25] The Respondents shall file and serve the Order.

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**Honourable K. Anderson, J.**