[2024] JMSC Civ. 34

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2023CV00527

BETWEEN	**RAMONE WALKER**	**APPLICANT**
AND	**THE COMMISSIONER OF POLICE**	**1st RESPONDENT**
AND	**THE ATTORNEY GENERAL**	**2nd RESPONDENT**

IN CHAMBERS

Nicholas Chambers instructed by Legal Chambers for the Applicant

Kristina Whyte instructed by Director of State Proceedings for the Respondents

Judicial Review – Application for leave to apply for Judicial Review – Part 56 of the Civil Procedure Rules – Relevant test – Was correct procedure followed on application for re-enlistment – Was the hearing conducted fairly – Legitimate Expectation – Breach of Natural Justice – Delay in filing application – Is there a good reason to grant an extension of time.

Heard: February 15th, 2024 and March 20th, 2024

T. HUTCHINSON SHELLY, J

INTRODUCTION

[1] By way of a Notice of Application for Court Orders filed on February 21st, 2023, the Applicant, Mr. Ramone Walker, is seeking the following:

- An Order for Judicial Review pursuant to Part **56** of the Civil Procedure Rules (CPR) **56.2(1)** and **26)** to apply for: -

    1. An Order of Certiorari to quash the decision of the Commissioner of Police to not re-enlist the Applicant to the ranks of the Jamaica Constabulary Force with effect from July 30th, 2020.

    2. An Order of Mandamus: To command or compel the Commissioner of Police to re-enlist the Applicant as a member of the Jamaica Constabulary Force from July 31st, 2020 for a period of five (5) years forthwith.

    3. A Declaration that the Applicant had a genuine and valid legitimate expectation to be re-enlisted and that was breached.

    4. A Declaration that the 1st Defendant and/or his agents have acted in breach of the Police Service Regulations 1961, the principles of natural justice and the rule of law in the purported suspension and discharge of the Applicant from the JCF.

    5. An Order that the Claimant be retroactively paid all his salary, pension benefits and other benefits from August 5th, 2014, when he was interdicted, to present.

    6. A Declaration that there are clear procedural improprieties and procedural unfairness regarding the Claimant's purported discharge.

    7. An order extending time in which to file this application.

    8. Damages

    9. Costs in the claim.

10. Any other order, relief and/or direction that this Honourable Court may determine to be appropriate and/or just.

BACKGROUND

[2] The background to this matter is provided in the Applicant's affidavit which was filed on February 21st 2023. He stated that in 2006, he enrolled in the JCF and served as a Constable of Police until July 30th, 2020, when he was not re-enlisted by the 1st Respondent. He was placed on interdiction on the 5th of August 2014, after being charged with simple larceny in respect of the theft of a motor vehicle. After a number of dates before the Court, the Crown offered no further evidence in the matter on the 7th of October 2017 and he was acquitted of the charge. In September 2018, he was arrested and charged for illegal possession of firearm and robbery with aggravation. This matter also had a number of Court dates and on the 4th of March 2020, no evidence was offered at the request of the complainant and he was acquitted. Following his acquittals, Mr Walker never resumed duty and his salary, which had been stopped in September 2018, was not restarted.

[3] On the 8th of July 2020, he received a letter dated the 29th of June 2020 from the office of the 1st Respondent in which he was advised that he had not been recommended for re-enlistment. On the 20th of July 2020, his Attorney wrote to the Commissioner of Police requesting a hearing into the decision and taking issue with the reasons provided. In this correspondence, the Attorney sought to correct what was described as misstatements/misdescriptions outlined in the reasons, which were specifically related to the matters that had been before the Court.

[4] Other letters were sent to the Commissioner on the 28th of August 2020, 14th of October 2020 and 6th of January 2021, but no response was received. The Applicant's Attorney was subsequently informed that the matter was being processed. In November of 2021, the Applicant filed his first application for leave to apply for Judicial Review. Following this filing, a letter was received from the 1st

Respondent. It was dated the 29th of October 2021 and indicated that the June 2020 position was confirmed. A 14-day window was provided within which the Applicant should advise if he wished to be heard on the matter. The reasons provided were the same as those stated in the June 2020 letter in which the allegations and charges against him had been stated as the basis for the decision. The October 2021 letter also indicated that although he had been acquitted of the charges, the JCF had lost confidence in his ability to perform his duties and he had brought his office into disrepute.

[5] The Applicant's Attorney confirmed in writing that a hearing was requested and on the 5th of September 2022, correspondence was received from the 1st Respondent scheduling the hearing for the 16th of September 2022. The Applicant attended the hearing with his Attorney. He was asked whether disciplinary proceedings had ever been brought against him and he indicated that this had never occurred. On the 23rd of September 2022, the Applicant withdrew the first application for leave to apply for Judicial Review. He explained that this was done following discussions at Court in which it was determined that it was better to withdraw the application to await the decision of the Commissioner and then re-file the action if it was adverse to him.

[6] On the 5th of January 2023, the Applicant received a letter dated the 22nd of November 2022 in which it was confirmed that he would not be re-enlisted. No reasons were given, he was merely informed that the letter of October 2021 was relevant. In respect of the delay in filing his application, Mr Walker explained that this was due to his pursuit of the appeal process and the protracted period of delays involved. He also indicated in his grounds that he had financial challenges. He asserted that he had acted promptly, once he had been notified of the decision after the hearing and asked the Court to note that he had been exonerated in the matters referred to in the Commissioner's reasons. He contended further that the explanation provided for the decision had no merit. The Applicant laid claim to a legitimate expectation that he would have been re-enlisted and described the process as unfair and plagued by delays.

[7] The position of the 1st Respondent was outlined in an affidavit sworn to by Andrew Lewis, an Assistant Commissioner of Police attached to the Administration Branch. In that affidavit, it was stated that investigations had been carried out by the JCF into both sets of charges which had been brought against the Applicant and statements were collected. Mr Lewis indicated that the 1st Respondent was aware that both matters had been disposed of. He confirmed that the Applicant had been provided with notice of his non-reenlistment by correspondence dated the 29th of June 2020. He explained that in light of the information obtained during the investigation, the office had been brought into disrepute by the Applicant's conduct and the JCF had lost confidence in his ability to discharge his duty.

[8] Mr Lewis acknowledged that a letter had been received from the Applicant in November 2021, in which a hearing was requested. The 1st Respondent was served with the first application for Judicial Review in suit number **SU2021CV04765** on December 8th, 2021. After a number of adjournments, they were informed that the first application for leave was scheduled for hearing on the 26th of September 2022. Mr Lewis stated that during the hearing before the Commissioner on the 16th of September 2022, the Applicant's Attorney-at-Law made submissions. The Applicant was then informed that no decision would be made on the matter as it was before the court. The 1st Respondent was subsequently informed that the application before the Court had been withdrawn and on the 28th of September 2022, the Commissioner confirmed his decision. Correspondence was later dispatched to convey same.

APPLICANT'S SUBMISSIONS

[9] In submissions made on behalf of the Applicant, Mr Chambers identified the issues for the Court as:

1. Whether the Applicant has a good arguable case with a real prospect of success?

2. Should the Court exercise its discretion to allow Mr. Walker's application for permission to apply for Judicial Review out of time and allow him to apply for Judicial Review?

[10] In addressing the first issue, Mr Chambers submitted that the Commissioner of Police's decision to refuse the Applicant's re-enlistment is baseless, unfair and unreasonable as he was exonerated of the charges against him. Without any further allegation of improper conduct or disciplinary wrongdoing, the Applicant should not have been barred from being enlisted in the JCF and had a legitimate expectation to be re-enlisted.

[11] Counsel placed reliance on two (2) authorities to bolster this point, namely, **Corporal Glenroy Clarke v Commissioner of Police and the Attorney General of Jamaica** (1996) 33 JLR 50, CA and **Regina v The Commissioner of Police, ex parte Kadia Warren** [2014] JMSC Civ. 97. In **ex parte Kadia Warren** (supra), the Applicant was enlisted as a Constable of the JCF on November 23rd, 2003 for a term of five (5) years. He applied for re-enlistment on August 15th, 2007 and it was granted for a year. A further application for re-enlistment was approved on October 21st, 2009 for one (1) year. After that one-year period, the Applicant applied for re-enlistment on October 21st, 2010. This was denied by the Commissioner of Police. In 2007, the Claimant was placed on interdiction in connection with a suspected murder. No disciplinary action was taken against him. A written ruling was subsequently issued by the DPP which declared that no one was criminally responsible for the death of the individual. On the 8th of June 2010, the Applicant was suspended arising from an alleged breach by him of the Corruption Prevention Act. Two criminal charges were subsequently laid against him for soliciting a bribe and accepting a bribe in relation to his duties as a Public Officer. His last application for re-enlistment came before the Commissioner of Police while his suspension was still pending and it was denied. He claimed that he was not provided with any reasons for the Commissioner's decision to refuse to re-enlist him. The Court found that the hearing was unfair as the Claimant was not given the opportunity to consider the reasons for refusal. The Court also found

that the Applicant should have been informed in writing that he was entitled to have an Attorney present to represent his interest and to make representations on his behalf. The decision of the Commissioner of Police was quashed. The matter as to whether or not the Claimant should be re-enlisted was remitted to the Commissioner of Police for reconsideration.

[12] In respect of the delay in filing this action, Learned Counsel highlighted Rule **56.6** of the CPR which sets out the requirements for applications for Judicial Review. Counsel also cited the decision of **Miguel Pine v Commissioner of Police** [2015] JMSC Civ. 182 wherein Campbell J stated at paragraph 48 of the judgment as follows:

> *"that the issue of delay is an important consideration in determining whether or not the court ought to grant leave to apply for judicial review. An application for leave for judicial review must be made promptly or within three (3) months after the grounds to make the claim first arose. There have been cases that have been brought within three (3) months and have failed the promptitude test. The court must be satisfied that the application was made promptly."*

[13] Having made this observation, Campbell J affirmed the principles in **R v Secretary of State for Transport ex parte Presvac Engineering Ltd** (1991) 4 Admin L. Rep 121, where it was stated that:

> *"...the court noted that the time limit begins to run from the date when the grounds for the claim first arose. The time does not run from the date when the claimant first learnt of the decision or action under challenge nor from the date when the claimant considers that he has adequate information to bring the claim, such matters may be relevant to the separate question of whether an extension of time should be granted."*

[14] Applying these legal principles to the instant case, Mr Chambers made the following submissions:

i. The Court is required to examine when the time begins to run as it is significant in determining if the delay was too inordinate or if

based on Rule **56.6 (2)**, the Court can extend the time **"if good reason for doing so is shown."** The Court is obliged to consider whether the grant of relief or the refusal of leave would be likely to cause substantial hardship to or substantially prejudice the rights of any person or be detrimental to good administration.

ii. Delay is the essential element which is central to rule **56.6** of the CPR. Thus, the Applicant must satisfy the court, by presenting compelling evidence, that although there was delay on his part, there are good reasons for the Court to extend the time for leave to apply for Judicial Review.

iii. In the instant claim/application by the Applicant, the Applicant is of the view that he (the Applicant) acted expeditiously in seeking Counsel to handle the matter on his behalf. The Applicant also asserts that he has acted reasonably and prudently in both his application for enlistment and this present application before the Court.

iv. The Court must now carefully examine/scrutinize the Applicant's evidence (Affidavit) in support of the application in order to determine if the Court should exercise its discretion in favour of the Applicant.

[15] Mr Chambers also relied on three (3) additional authorities to bolster this point. These were **Grant, Odean v The Commissioner of Police and the Attorney General of Jamaica** [2017] JMSC Civ. 78, **R v Commissioner for Local Administration ex-parte Croydon London Borough Council** [1989] 1 All ER 103 and **Jermaine Spencer v Public Broadcasting Corporation of Jamaica, Ministry of Labour and Office of the Service Commission** [2022] JMSC Civ. 71 which examine the issue of delay in making an application before the Court.

RESPONDENT'S SUBMISSIONS

[16] The Respondents agreed that the primary issue for consideration is whether the Applicant has an arguable case/ground for Judicial Review with a realistic prospect of success. Ms Whyte argued that in order to determine this, the Court would need to consider:

a. Whether the Respondent acted ultra vires Section **5** of the Constabulary Force Act, Regulation **44** of the Police Service Regulations (1961) and Rule **1.10** of the JCF Book of Rules when he purported to bar the Applicant from re-enlistment;

b. Whether the Respondent breached the principles of Natural Justice in not providing any reasons for not approving the Applicant's application for re-enlistment;

c. Whether the Respondent acted unreasonably/irrationally;

d. Whether the Respondent exercised his discretion for an improper purpose when he purported to refuse the re-enlistment of the Applicant;

e. Whether the application is barred by delay on the part of the Applicant; and

f. Whether there is an alternative remedy that is available to the Applicant.

[17] Ms Whyte agreed with the Applicant that applications for Judicial Review are governed by Part **56** of the Civil Procedure Rules 2020 (as amended). The germane sections for this instant application are Rules **56.2**, **56.3** and **56.4** of the CPR. The Privy Council case of **Sharma v Brown-Antoine and Others** [2006] UKPC 57 was also highlighted as outlining the relevant test which had to be satisfied by the Applicant.

[18] Counsel also made reference to **Section 5 of the Constabulary Force Act** which governs the process of enlistment and is summarised as follows:

- Sub-Officers and Constables of the Force may be enlisted for a term of five years.
- No Sub-Officer and Constable of the Force shall be at liberty to withdraw himself from the Force until the expiration of that term.
- No Sub-Officer and Constable of the Force who has not been enlisted for a term shall be at liberty to withdraw himself from the Force until the expiration of six (6) months from the time he had given notice in writing of his intention to do so to the Officer under whose immediate orders he is under.
- If any Sub-Officer and Constable resigns or withdraws himself before the expiration of such term, without the permission of the Commissioner or without such previous notice, he shall forfeit and pay a penalty not exceeding twenty dollars on summary conviction.
- The Court can commit the Sub-Officer and Constable to an adult correctional centre with or without hard labour for any period not exceeding three (3) calendar months, if such a penalty is not paid by the Sub-Officer and Constable.

[19] Rule **1.10** of the JCF Book of Rules was also identified as relevant to the matter and provides:

- Sub-Officers and Constables of the Force may be enlisted for a term of five years.
- No Sub-Officer and Constable of the Force shall be at liberty to withdraw himself from the Force until the expiration of that term.
- No Sub-Officer and Constable of the Force who has not been enlisted for a term shall be at liberty to withdraw himself from the Force until the expiration of six (6) months from the time he had given notice in writing of his intention to do so to the Commanding Officer.
- Sub-Officers and Constables who are desirous to be re-enlisted for a further term of five (5) years must make an application at least fourteen (14) weeks before the expiration of the current term.
- The Sub-Officer and Constable must be medically examined at least twelve (12) weeks before the current term expires.

[20] The decision of **Glenroy Clarke v Commissioner of Police and the Attorney General of Jamaica** (supra) was also commended to the Court as providing useful

guidance in relation to applications for re-enlistment. Ms Whyte asserted that the Applicant does not have an arguable case with a realistic prospect of success as he failed to meet the threshold test as laid out in **Sharma v Brown Antoine and others** (supra). The Commissioner did not act "*ultra vires'* as he followed the proper/required procedure in his consideration and refusal of the Applicant's application for re-enlistment. The delay in filing the proceedings operated against the Applicant as a discretionary bar. There is no automatic right to re-enlistment and as such, there was no basis for the Applicant to claim that he had a legitimate expectation that he would be re-enlisted.

[21] Ms Whyte concluded her submissions by asking the Cout to find that the Attorney-General is not a proper party on the basis that the decision for non-reenlistment of the Applicant was made by the Commissioner of Police and not the Attorney-General.

ISSUES

[22] The issues in this matter are twofold:

a. Whether the Applicant has a realistic prospect of succeeding on the application for Judicial Review; and

b. Whether the Applicant should be granted an extension of time to apply for leave to apply for Judicial Review

RELEVANT LAW AND ANALYSIS

Real Prospect

[23] The threshold test for leave to apply for Judicial Review was outlined in the decision of **Sharma v Brown-Antoine and others** [2006] UKPC 57 where it was stated '*the court will refuse leave to claim for judicial review unless satisfied that*

there's an arguable case for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy'.[1]

[24] The procedure in respect of an application for leave to apply for Judicial Review is outlined at Rule **56.3** of the CPR as follows:

> *56.3 (1) A person wishing to apply for judicial review must first obtain leave.*
>
> *(2) An application for leave may be made without notice.*
>
> *(3) The application must state –*
>
> *(a) the name, address and description of the applicant and respondent;*
>
> *(b) the relief, including in particular details of any interim relief, sought;*
>
> *(c) the grounds on which such relief is sought;*
>
> *(d) whether an alternative form of redress exists and, if so, why judicial review is more appropriate or why the alternative has not been pursued;*
>
> *(e) details of any consideration which the applicant knows the respondent has given to the matter in question in response to a complaint made by or on behalf of the applicant;*
>
> *(f) whether any time limit for making the application has been exceeded and, if so, why;*
>
> *(g) whether the applicant is personally or directly affected by the decision about which complaint is made; or*
>
> *(h) where the applicant is not personally or directly affected, what public or other interest the applicant has in the matter;*
>
> *(i) the name and address of the applicant's attorney-at-law (if applicable); and*

[1] Paragraph 14

(j) the applicant's address for service.

(4) The application must be verified by evidence on affidavit which must include a short statement of all the facts relied on.

[25] Section **5** of the Constabulary Force Act addresses the issue of re-enlistment and has been outlined above. In determining if the Applicant has met the threshold test to be granted leave, the Court must decide if the Commissioner followed the proper procedure in considering and refusing the application. Mr Chambers has asked the Court to find that the Commissioner did not comply with all procedural requirements as he acted in breach of Section **37** of the Police Service Regulations by considering charges for which the Applicant had been acquitted. This provision states as follows:

37. A member acquitted of a criminal charge shall not be dismissed or otherwise punished in respect of any charge of which he has been acquitted, but nothing in this regulation shall prevent his being dismissed or otherwise punished in respect of any other charge arising out of his conduct in the matter, unless such other charge is substantially the same as that in respect of which he has been acquitted.

[26] The regulation was examined by the Court in **Courtney Ellis v The Commissioner of Police 2010HCV01286**. In analysing whether it was relevant to the situation, Haynes J (as she then was) stated as follows:

[44] Counsel for the Applicant cited and relied on The Police Service Regulations made under the Constitution of Jamaica and a number of authorities that are not germane to the Applicant's circumstances. The Applicant is a Constable of Police. His tenure is governed by Section 5 of the Constabulary Force Act. Section 5 of the Constabulary Force Act states that "Sub-Officers and Constables of the Force may be enlisted for a term of five years."

[45] PC Ellis' contractual period had concluded. There was no automatic entitlement. ***Section 5 of the Constabulary Force Act required him to make an application for reenlistment. He was not permitted to re-enlist. The result is that he was discharged. The procedure under that regime is markedly different from that of dismissal. The Police Service Regulations made under***

> ***the Constitution of Jamaica govern the <u>dismissal</u> of a police officer from the service*.** (emphasis added)

[27] The instant claim does not concern a dismissal, what had in fact occurred was the denial of a request for re-enlistment within the context of Section **5** of the Constabulary Act. On a careful review of this provision, it is evident that the section places no bar on material which is adverse to the Applicant being considered; even where the information was in respect of charges for which he had been acquitted. What was emphasised by the Court in the **Courtney Ellis** case as being of paramount importance is whether the procedure followed had been fair and properly conducted. In the course of her judgment, Haynes J also provided useful guidance on what constitutes fairness, where she stated as follows:

> *[54] What constitutes fairness is prescribed by Lord Mustill in R v Secretary of State for the Home Secretary, ex parte Doody [1994]1 AC531, at page 560. His speech was cited with approval by Lord Brown in Bari Naraynsingh v The Commissioner of Police a judgment of the Privy Council from Trinidad and Tobago which was delivered on the 20th April 2004 Lord Brown said at paragraph 16:*
>
> > *"As for the demands of fairness in any particular case, their Lordships, not for the first time, are assisted by the following passage from Lord Mustill's speech in R v Secretary of State for the Home Secretary, ex parte Doody [1994] 1 AC531, 560:*
> >
> > *'What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them I derived that:*
> >
> > *(1) Where an act of parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances.*
> >
> > *(2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type.*

> *(3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects.*
>
> *(4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken.*
>
> *(5)* ***Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both.***
>
> *(6)* ***Since the person affected cannot make worthwhile the mere representations without knowing what factors may weigh against his interests, fairness will very often require that he is informed of the gist of the case which he has to answer.'"***
>
> *[55] Can it be said that the Acting Commissioner in the instant matter exercised his power in a manner which was fair in all the circumstances? Would the principles of fairness not require more than the mere word of the Commanding Officer that he received telephone calls from members of the public and information from police officers of Constable Ellis' involvement in criminal activities? Should not there be specifics regarding the reason/s for which why steps were taken to allegedly curtail his movements? (emphasis added)*

[28] Applying the principles enunciated in these authorities to the case at bar, it is evident that, the Court must consider the following questions:

i. Whether the Applicant knew the reasons for the refusal and

ii. Was he afforded the opportunity to respond to them.

[29] In the analysis of these questions, the Court found useful guidance in the **Glenroy Clarke** decision (supra), the facts of which were helpfully outlined by Wint-Blair J in **Damion Davidson v Commissioner of Police** [2023] JMSC Civ 31 as follows:

[34] *Both sides cited the case of Glenroy Clarke v Commissioner of Police and Another, in which the appellant was a corporal of police in the Jamaica Constabulary Force ("JCF"). He first enlisted in 1978 and successfully applied for re-enlistment in 1983 and in 1988. In 1993, when he applied for re-enlistment he was advised on the orders of the Commissioner of Police ("the Commissioner"), that his application would not be approved and he was apprised of the reasons for that decision. Subsequently, the appellant sought and obtained an interview with the Commissioner at which he had counsel, who made submissions on his behalf. Prior to this event, the Chairman of the Police Federation had intervened to make representations on his behalf to the Commissioner. The decision stood. A Force Order dated 18 November 1993 proclaimed his exit at that date.*

[35] The appellant felt aggrieved at this treatment, he had received several commendations for his efforts over the years, appointed Corporal in 1992 and acting Sergeant of Police in May 1993. He acknowledged that save being fined ten (10) days' pay at a police court of inquiry, he was unaware of any other act of wrongdoing on his part which warranted refusal of his application. He had entertained a reasonable expectation that he would be re-enlisted in the JCF. He obtained leave to apply for certiorari to quash the directions of the Commissioner. The motion was dismissed by the Full Court. On appeal, it was argued that the appellant had not been afforded a fair hearing, the Commissioner having pre-determined the matter and this was also a demonstration of bias.

[36] Carey, JA (as he then was), set out the procedure for re-enlistment: "As indicated earlier, a member of the force is enlisted for terms of five years and when he wishes to re-enlist, he must make an application before the expiration of the current term. It follows that, if there is no application, a member's tenure comes to an end. When an application is made, it is considered by the Commissioner who makes a determination…It seems to me that in the present case the Commissioner was not sitting as a judge, who must of course divorce from his mind all he may have heard of the matter before undertaking the trial. The Commissioner could properly take a decision not to approve re-enlistment of any member, even before an application to re-enlist is made. There is no question of hearing the member when that decision is taken because the member is not on trial for any charge. The conduct of the officer over the various terms of his enlistment would necessarily be the basis of the Commissioner's decision. The officer may have been charged previously and disciplined therefor. That previous misconduct can properly be taken into account in determining whether he is a fit and proper person to remain

> *a guardian and preserver of the peace. There is no such thing as an automatic right to re-enlistment. Approval should be and doubtless is granted where the conduct of the member is satisfactory. The level of conduct or performance is to be determined by the Commissioner and the court has no power to set the standard of acceptable conduct in the force**. Where the Commissioner has taken a decision not to approve re-enlistment, then, upon any application by the member for re-enlistment the Commissioner is obliged in fairness, to supply the reasons for his decision and to allow the officer affected an opportunity to be heard in relation to that material if the officer requests it… Any right which the appellant had to be heard could only arise after the appellant had been advised of the decision not to approve and the reasons therefor. The opportunity afforded to the appellant to be heard allowed the Commissioner to review his decision in light of any submissions made to him by the officer or his attorney. The reasons having been supplied, must then be answered by the attorney. Consequently, the exercise is akin to an appeal process than to a trial process. The onus is thus on the officer to show cause why he should be allowed to re-enlist."***

[30] Additional guidance was also found in the decision of **Berrington Gordon v Commissioner of Police** [2012] JMSC Civ 46, a decision of Sykes J (as he then was) which was reviewed by Wint-Blair J, in the **Damion Davidson** decision. The considerations in that matter are equally relevant in the instant claim and the extract from the Judgment reads as follows:

> *[37] In Berrington Gordon v Commissioner of Police, Sykes, J (as he then was) citing the case of Glenroy Clarke v Commissioner of Police said of that decision:*
>
> > *"[18] …a decision of the Court of Appeal of Jamaica dealing specifically with the re-enlistment of police officers. What was said by Dyson LJ in paragraph [14] in the AMEC explains why the court in Clarke held that whenever the CP makes the decision not to re-enlist a police officer, the affected officer must be informed of the decision and be supplied with the reasons. This is so because the decision may have been made before the affected person applied for re-enlistment in which case he would be adversely affected without having had the opportunity to make any representation. Thus while the Jamaican Court of Appeal endorsed the view that the CP has the power to decide not to re-enlist a police officer*

even before an application for re-enlistment has been made ***fairness demands that he be informed and given reasons so that he can decide whether to ask for a review.***

[19] The Court of Appeal in Clarke set out, in detail, the process to be followed. In practical terms, the court supplemented the statute by stating what fairness demands in the context of an application for re-enlistment.

[20] Clarke established the following propositions:

a. no police officer who must apply for re-enlistment has an automatic right of re-enlistment;

b. the police officer has to apply for re-enlistment in accordance with the relevant or extant rules and regulations;

c. ***the power to decide whether the officer will be re-enlisted, according to the Act, lies solely with the CP;***

d. it is the CP who determines the standard of conduct expected of police officers. The courts have no power to make this determination;

e. the CP can properly determine that a particular officer won't be allowed to re-enlist even before that officer makes an application for re-enlistment;

f. if the CP decides that a particular officer won't be re-enlisted before he makes such an application, fairness does not require that such an officer be heard before the CP makes that decision;

g. if the officer does not apply for re-enlistment then his time in the police force comes to an end and no right has been breached even if, unknown to the officer, the CP had decided that he would not be permitted to re-enlist;

*h****. however, if the CP has decided that the particular officer will not be allowed to re-enlist, whether before or after such an application, and such an application is in fact made, fairness demands the CP must (not may) notify the officer of his decision and the decision must be accompanied by reasons;***

> ***i. the officer <u>must (not may)</u> be allowed to make representations to the CP;***
>
> *j. the right to be heard can only arise if and only if*
>
> > *(i) the officer applies for re-enlistment;*
> >
> > *(ii) the CP informs him that he will not be permitted to re-enlist and*
> >
> > *(iii) he has been given the reasons for the decision;*
>
> *k.* ***it is for the CP to decide what form the hearing should take and whether there will be written as well as oral submissions but whatever form the hearing takes, it must be fair;***
>
> *l.* ***the hearing before the CP is a review where the onus is then placed on the officer to make his case for re-enlistment;***
>
> ***m. the decision not to permit re-enlistment is not a dismissal;***
>
> ***n. in considering whether to permit the officer to re-enlist the CP can take into account the past conduct of the officer.***

[31] The legal principles enunciated in these cases further affirm that the requirement for fairness can only be met once reasons have been provided and representations allowed. Where this had occurred, it is for the <u>Commissioner</u> to determine if the Applicant should be re-enlisted. Section **5** of the Constabulary Force Act makes this clear.

[32] Although the Applicant has taken issue with the nature of the reasons provided, the Court is satisfied that the reasons were in fact provided to him. He was also informed that the incidents had resulted in a loss of confidence in his ability to perform his duties as a Police Officer. In the instant case, it is the unchallenged evidence of Andrew Lewis that on the 16th of September 2022, the Applicant's Attorney made submissions to the Commissioner. While the Applicant makes no mention of this, there is no affidavit from him rebutting same. It is interesting to note however, that he acknowledged that he was spoken to by the Commissioner and provided a response. These dynamics show that his situation was markedly

different from that of the Applicant in the **Courtney Ellis** case, who the Court found was not afforded the opportunity to make submissions on the adverse material being relied on. For the foregoing reasons, the Court finds that the Applicant has failed to show that the Commissioner acted unfairly or irrationally and did not comply with the principles of natural justice.

Extension of Time

[33] It is incontrovertible that the CPR has established the framework for applications for Judicial Review and this includes the timeline within which actions should be taken, Rule **56.6** which governs the latter provides as follows:

> *56.6 (1) An application for leave to apply for judicial review must be made promptly and in any event within three months from the date when grounds for the application first arose.*
>
> *(2) However the court may extend the time if good reason for doing so is shown.*
>
> *(3) 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.*
>
> *(4) Paragraphs (1) to (3) are without prejudice to any time limits imposed by any enactment.*
>
> *(5) When considering whether to refuse leave or to grant relief because of delay the judge must consider whether the granting of leave or relief would be likely to -*
>
> *(a) cause substantial hardship to or substantially prejudice the rights of any person; or*
>
> *(b) be detrimental to good administration.*

[34] It is acknowledged by Mr Walker that his application was filed several years after receipt of both the June 2020 and October 2021 letters. He explained that this delay had been caused by his vigorous pursuit of the appeal process. He also asked the Court to consider his previous application and the reason why it was withdrawn. Mr Walker asserted that the instant application had been promptly filed once he had been notified of the final outcome. He insisted that no prejudice or

injustice would have been caused to the Respondent by any delay caused. A number of authorities were relied on by the Applicant in respect of the delay and they are examined below.

[35] In **Odean Grant** (supra), a matter in which the application for leave was filed over four (4) years after the notification that the Applicant would not be re-enlisted. V. Harris J (as she then was) emphasised the importance of the timeline for filing the application as follows:

> *[26] It is unambiguous that the filing of an application for leave for judicial review must be made promptly (note the mandatory language of the rule) and in any event* ***within three months from the date when the grounds for the application first arose****. (emphasis added)*

[36] The Learned Judge reviewed the authorities on this provision and found that the four-year delay period was inordinate. She then considered the explanation that the delay was due to issues obtaining the Applicant's case file from previous Counsel and financial challenges retaining new Counsel and stated as follows:

> *[39] While impecuniosity is an issue that can be taken into account when considering an application of this nature, it "must be coupled with the need to act expeditiously in pursuing an application." (Per Shelly-Williams J (Ag) (as she then was) in Dewayne Thomas (supra) at paragraph 40).*
>
> *[40] In Dewayne Thomas the applicant also relied on impecuniosity as the main reason for the delay in making his application for leave for judicial review. There was no evidence (like in the present case) that he had attempted to seek legal aid and his explanation was that he was awaiting legal assistance from different attorneys, as well as, the Public Defender. He also told the court that he had four (4) children and one of them was ill. His application for judicial review was also filed four (4) years after the grounds for the application first arose.*
>
> *[41] In refusing the application Shelly-Williams J (Ag) stated that the applicant had not provided an explanation as to why legal aid was not pursued by him prior to 2014, which was four (4) years after his dismissal. She also rejected that he had acted reasonably and sensibly. She found as instructive the dicta of Sharma J in*

Jones v Solomon (supra) as to the approach to take where an applicant did not have the financial resources to instruct counsel in proceedings of this nature:

[37] In **R v Commissioner for Local Commission, ex-parte Croydon** (*supra*), the application for Judicial Review was made almost two and a half years after the grounds arose. In the interim period, there had been at least two appeals of the Council's decision. The Court found that although there had been delay by the Council in making the application, they had acted reasonably and sensibly by awaiting the outcome of the appeals before doing so. Mr Chambers has asked that the same approach be adopted in the instant case.

[38] While the issue of impecuniosity has received passing mention in the Applicant's grounds, it was not highlighted as the primary reason for the delay in filing the second application. This failure was specifically blamed on the fact that earlier efforts had been discontinued in order to pursue the appeal process which was truncated and plagued with uncertainties. On a review of these arguments, it is evident that the original application had been filed within a short period of the notification in the October 2021 letter, which confirmed that the letter of June 2020 would stand. The Applicant did not sit on his hands in the intervening period but sought to follow-up on the matter to obtain a hearing date. The hearing date and notification of the outcome did not occur until ten (10) months to a year later. During which time, the Applicant had withdrawn the original application for the reasons provided earlier. In the circumstances, Mr Walker would have done enough to show that there was a good explanation for the delay. Unfortunately for him, this is not sufficient to overturn the Court's findings that his application has no real prospect of success.

[39] Before concluding this judgment, in the course of their submissions, the 2nd Respondent asked for an order removing them from the action on the basis that that they are not an appropriate party to the action, as they were not the decision maker. This position is opposed by the Applicant on the basis that they are the legal representatives for State Agencies and are sued pursuant to the Crown

Proceedings Act. In addressing this submission, the Privy Council decision of **Bahamas Hotel Maintenance and Allied Workers Union v Bahamas Hotel Catering and Allied Workers Union and others** [2011] UKPC 4 was considered. This matter involved an action brought for Judicial Review of a decision made by Government Minister in relation to a dispute between the Claimant and 1st Defendant. In the application for leave to apply for Judicial Review, a number of Defendants were named including the Attorney General. Among the orders sought before the Board was the removal of the Attorney General as a Defendant. The Board considered the matter and stated as follows:

> [35] *Judicial review is directed to official decision-making, and the official who took the relevant decision is the natural respondent to such proceedings. The Registrar (who happens to be a senior official in the Ministry but holds a statutory office in his own right) would have been the proper respondent to a challenge to any decision of his in the exercise of his statutory powers (such as the registration of a union with an objectionable name, or a refusal to exercise his powers under section 15). The Minister was the proper respondent to any challenge to his decision, in exercise of his statutory powers, to order a ballot.*
>
> *[36] The Attorney-General was therefore correct in submitting to the Board, through Mr Guthrie QC, that he should not have been made a party. The President was in error in referring to section 12 of the Crown Proceedings Act, Ch 68, since proceedings by way of judicial review are not "civil proceedings" within the meaning of section 12 (see Lord Oliver of Aylmerton in Minister of Foreign Affairs, Trade and Industry v Vehicles and Supplies Ltd [1991] 1 WLR 550, 555, the corresponding restrictive definition being section 17 of the Crown Proceedings Act). The Attorney-General would therefore only very rarely be a proper respondent to judicial review proceedings, since most decisions taken by the Attorney-General himself are not amenable to judicial review (Gouriet v Union of Post Office Workers [1978] AC 435, 487-488).*

[40] Section **12** of the Crown Proceedings Act (CPA) in the Bahamas is the same as Section **13** of the Jamaican Act. Their section **17** is the mirror image of our section **18**. The pronouncement of the Board in that matter, that '*judicial review proceedings are not civil proceedings within the meaning of Section 12'* would be

just as applicable to the instant case. Accordingly, while it is arguable that the 2nd Respondent could have been added as an Interested Party, there does not appear to be a proper basis for adding them as a Respondent/Defendant.

DISPOSITION

[41] Accordingly, the Court makes the following orders:

1. The Application for leave to apply for Judicial Review is denied.
2. The 2nd Defendant is removed as a party in this matter.
3. Applicant's Attorney to prepare, file and serve the Formal Order herein.