[2018] JMCA Civ 28

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 105/2017

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE BROOKS JA
THE HON MISS JUSTICE P WILLIAMS JA

BETWEEN	**ORTHEL WHITTINGHAM**	**APPELLANT**
AND	**THE COMMISSIONER OF POLICE**	**1ST RESPONDENT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**2ND RESPONDENT**

Patrick Peterkin instructed by Zavia Mayne & Co for the appellant

Dale Austin instructed by the Director of State Proceedings for the respondents

22 October and 23 November 2018

MORRISON P

[1] I have read, in draft, the judgment of my brother, Brooks JA. His reasons accurately set out my own reasons for agreeing with the decision made by the court. I have nothing that I can usefully add.

BROOKS JA

[2] We heard this appeal on 22 October 2018 and, at the completion of submissions by counsel, we made the following orders:

> "1. The appeal is allowed. The judgment of [the learned judge], given on 22 September 2017, is set aside;
>
> 2. An order of Certiorari is granted quashing the decision of the Commissioner of Police not to re-enlist the appellant as a member of the Jamaica Constabulary Force;
>
> 3. The appellant be afforded a fair hearing by the Commissioner of Police on the question of whether he should be allowed to re-enlist as a member of the Jamaica Constabulary Force;
>
> 4. No order as to costs in the court below;
>
> 5. Costs of the appeal to the appellant to be agreed or taxed."

At that time we promised to put our reasons in writing. We now fulfil that promise.

[3] The case originated with a decision by the Commissioner of Police to deny Mr (then Constable) Orthel Whittingham's application to re-enlist in the Jamaica Constabulary Force (JCF), after his last enlistment period had expired. Mr Whittingham, aggrieved by the Commissioner's decision, applied for, and was granted, leave to apply for judicial review. The relief that he sought, in his application for judicial review, included a quashing of the Commissioner's decision and an order directing the Commissioner to re-enlist him as an active member of the JCF. His claim was heard by a judge of the Supreme Court, who, on 22 September 2017, refused his application for judicial review.

[4] Mr Whittingham has appealed from the learned judge's decision. He complains, in essence, that the learned judge erred in:

a. finding that the procedure adopted by the Commissioner in considering Mr Whittingham's application was not unfair; and

b. failing to take into account certain relevant portions of the evidence.

The factual background

[5] Mr Whittingham's present difficulties started in 2008, when he was arrested and charged with a breach of the Corruption (Prevention) Act. He was suspended from his job during the pendency of those charges. While he was on suspension, the time for his re-enlistment arrived.

[6] During the consideration of his application for re-enlistment, it was brought to his attention, via a notice dated 31 March 2010, that:

(i) there were audio recordings of him engaging in a conduct which was the subject of the criminal offence for which he had been arrested and charged and

(ii) there was "credible intelligence" that he was involved in an illegal activity.

Subsequently, the Commissioner conducted an oral hearing with Mr Whittingham on 9 July 2010. The Commissioner was apparently not convinced about Mr Whittingham's integrity and probity of conduct in the light of those two matters. Nonetheless, he allowed Mr Whittingham to re-enlist, effective 16 April 2010. The re-enlistment was,

however, only for one year, instead of the usual five years, which is the period specified in section 5 of the Constabulary Force Act. That re-enlistment, it would appear, was contingent on Mr Whittingham having given an undertaking to submit to an "internal integrity vetting process and in particular, polygraph testing" (Commissioner's letter of 8 May 2014).

[7] Mr Whittingham was thereafter re-enlisted for two consecutive one-year periods. The first of the two periods became effective on 15 April 2011. The notice in respect of that re-enlistment indicated that the restricted period was due to the existence of the pending criminal proceedings.

[8] Two important developments occurred during those two periods:

1. The charges against him were dismissed in May 2011; and
2. On 3 July 2012, he underwent a question and answer session as a preliminary step to taking a polygraph test.

The polygraph test was, however, not done on 3 July 2012. He was told that he would be informed when that test would be done. Up to 8 May 2013, the time of the next major development in his career, he had not been called back to do the test.

[9] He was informed by a notice, dated 16 August 2012, of the second of the one-year periods. The notice indicated that the re-enlistment was effective on 15 April 2012.

[10] Mr Whittingham applied, in January 2013, to be re-enlisted. He received a letter, dated 10 April 2013, penned by an Assistant Commissioner of Police informing him that his application was not being recommended. It is unnecessary to set out the Assistant Commissioner's reasons as that letter was followed by a letter from the Commissioner, dated 8 May 2013. In his letter, the Commissioner, refused Mr Whittingam's request for re-enlistment. The letter stated that it superseded any previous notice with which Mr Whittingham had been served. It stated three bases for the refusal:

a. the conduct which was the subject of the criminal charges;

b. the existence of "credible intelligence" that Mr Whittingham was involved in illegal activity; and

c. Mr Whittingham's reneging on his undertaking, given on 9 July 2010, to voluntarily submit to "the internal integrity vetting process and in particular, polygraph testing".

The Commissioner expressed the view, in that letter, that Mr Whittingham's reneging on his undertaking further questioned his "reliability and trustworthiness"

[11] Mr Whittingham protested the refusal. Ms Althea Grant, attorney-at-law, wrote a strong, detailed letter of protest on his behalf. It countered each of the bases set out in the Commissioner's letter, and sought to demonstrate that they were all invalid. In particular, Ms Grant made the point that Mr Whittingham had undergone the first phase of the polygraph examination which was a question and answer session, and that the

polygraph test had not been done because Mr Whittingham had not been called back to do it.

[12] Mr Whittingham, thereafter, attended a hearing before the Commissioner. The date of that hearing has not been specified. He deposed in an affidavit, filed in support of his application for judicial review, that at the hearing, the Commissioner, upon having played a tape recording to Mr Whittingham, insisted that he admit to wrongdoing. He stated that when he refused to do so, the Commissioner "chased" him from the Commissioner's office, thereby bringing the hearing to an end. There was no response from the Commissioner to Mr Whittingham's affidavit.

[13] Mr Whittingham did the polygraph test in October 2013. He did not receive any report on the results of the test. Despite the fact that he was waiting on the JCF's next step in response to his application for re-enlistment, the JCF's Force Orders of 9 January 2014 stated that he had been "dismissed from the Force with effect from 2013-04-16, as not being permitted to re-enlist".

The learned judge's ruling

[14] The claim was considered by the learned judge on Mr Whittingham's evidence only. The Commissioner and the Attorney-General failed to obey the orders of the court and were barred from filing affidavits in response.

[15] The learned judge, in the course of a written judgment, found that:

a. Mr Whittingham had not been discharged from the JCF, he was, rather, not re-enlisted;

b. Mr Whittingham, having been told that his application for re-enlistment was not recommended, did not have a legitimate expectation that he would have been re-enlisted;

c. the duty lay on Mr Whittingham to show why he should have been re-enlisted;

d. Mr Whittingham failed to avail himself of the opportunity to write to the Commissioner to convince the Commissioner that he should have been re-enlisted;

e. natural justice was not breached by the Commissioner, despite the fact that the hearing, which ended in Mr Whittingham being "chased", was not fair, the overall process was fair;

f. the Commissioner relied on reasons other than the conduct which grounded the criminal charge against Mr Whittingham; his partial reliance on that conduct was not fatal to his decision; in fact he could have relied on that conduct.

Based on those reasons, the learned judge found that the Commissioner's decision not to re-enlist Mr Whittingham was not an unreasonable one and should not be quashed.

Discussion

[16] The provisions which are relevant to the issue of the hearing to which Mr Whittingham was entitled are, firstly, rule 1.10(ii) of the Book of Rules for the Guidance and General Direction of the Jamaica Constabulary Force. The rule states:

> "Sub-Officers and Constables desiring 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 and must be medically examined at least twelve (12) weeks before the current term expires."

The second rule is regulation 37 of the Police Service Regulations, 1961. It indicates that a police officer should not be "dismissed or otherwise punished" in respect of conduct for which he has already been acquitted. The regulation states:

> "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."

[17] It should also be noted that **Corporal Glenroy Clarke v Commissioner of Police and The Attorney-General of Jamaica** (1996) 33 JLR 50 is authority for a number of principles concerning applications by police officers for re-enlistment. The principles include the following:

a. the Commissioner is entitled to make a decision to refuse re-enlistment of any member even before an application to re-enlist has been made by that member;

b. upon an application for re-enlistment, where the Commissioner has taken a decision not to approve re-enlistment, the Commissioner is obliged, in the interest of fairness, to provide reasons for his decision, and afford the applicant a hearing, if the applicant wishes to be heard;

c. the right to be heard can only arise after the applicant had been advised of the refusal to re-enlist him and of the reasons therefor;

d. the right having been engaged and the applicant having expressed a desire to be heard, the Commissioner must conduct a fair hearing, but it is the applicant who bears the burden of convincing the Commissioner to reverse his decision; and

e. the Commissioner, in conducting the process, is acting in an administrative capacity and not a judicial one.

[18] The learned judge was in error in finding that the overall process employed by the Commissioner was fair. The Commissioner's process was flawed in a number of respects:

a. it was improper of the Commissioner (and the learned judge so found) to have "chased" Mr Whittingham from the hearing that had been convened; Mr Whittingham's evidence is to the effect that he was not afforded an opportunity to demonstrate that the Commissioner should have reversed the decision that had been communicated in the letter of 8 May 2013;

b. the Commissioner was wrong to have used audio recordings of the conduct, which was the subject of the criminal charge against Mr Whittingham, as one of the reasons for refusing him re-enlistment; a court had found Mr Whittingham not guilty of that conduct; the use of that material was inconsistent with regulation 37 of the Police Service Regulations, 1961;

c. the Commissioner was in error in finding, in his letter of 8 May 2013, that Mr Whittingham has failed to complete the polygraph testing procedure; on Mr Whittingham's uncontested evidence, it was an administrative failure which had resulted in the test not having been done as at the date of the letter; and

d. the Commissioner apparently made no reference to Ms Grant's letter to him, which sought to refute the reasons that had been advance to refuse Mr Whittingham's re-enlistment.

[19] The learned judge also erred in finding that Mr Whittingham had failed to respond in writing to the Commissioner's letter indicating his decision not to allow Mr Whittingham to re-enlist. It appears that Ms Grant's letter had escaped the learned judge's attention. It was not referenced in Mr Whittingham's affidavit, but was among documents attached to a notice of intention to rely on hearsay evidence. Although it was referred to in written submissions on behalf of Mr Whittingham, had it been pointedly brought to the learned judge's attention, it is unlikely that he would have made the statements that he made at paragraphs [4] and [6] of his judgment, namely:

a. "Even after the Commissioner of Police had made the initial decision to refuse to re-enlist him (the claimant), the claimant was afforded, as the law entitles him to then be afforded, notice, to show cause, in writing, as to why the Commissioner of Police's decision to refuse to re-enlist him, should not be pursued. The Commissioner of Police's letter to the claimant, dated May 8, 2013, makes that clear. **It was the claimant who failed to avail himself of that opportunity which he was thereby and then, afforded**." (Paragraph [4]) (Emphasis supplied)

b. "The fact that the claimant was afforded the opportunity to have at least one fair hearing, **which he could and should have availed himself of in writing**, after the initial decision to refuse to re-enlist him, had been made, to my mind, has served to render the overall process in relation to the refusal to

> re-enlist him, as being fair…." (Paragraph [6]) (Emphasis supplied)

[20] The learned judge's omission in respect of Miss Grant's letter was a significant one. The learned judge's errors are fatal to his decision. The errors in the Commissioner's process are also fatal to that process.

[21] Notwithstanding the foregoing, the learned judge was correct in his finding that the Commissioner was entitled to consider intelligence reports in his consideration of whether to re-enlist Mr Whittingham. The issue then was whether the Commissioner could properly rely on "credible intelligence" in circumstances where Mr Whittingham was not given an opportunity to make representation at the hearing with the Commissioner concerning those intelligence reports and he was not provided with copies of those reports.

[22] As was pointed out above, this court in **Corporal Glenroy Clarke v Commissioner of Police and The Attorney-General of Jamaica** opined, at page 54 of the report, that in considering an application by a member of the JCF, for re-enlistment, the Commissioner is not engaged in an enquiry or trial into charges. The court pointed out that the Commissioner is, instead, reviewing a decision made on reports and recommendations from divisional officers under his command. In those circumstances, the court said, it was entirely fair for the Commissioner to consider the intelligence reports without providing copies of them to the applicant.

[23] The exercise that is conducted by the Commissioner, in that context, is to be distinguished from cases considering the retirement of a police officer in the public interest. In the latter cases, the police officer must be provided with the details of the allegations against him with sufficient particularity so that he or she may challenge them. That was the finding of this court in **The Police Service Commission and Others v Donovan O'Connor** [2014] JMCA Civ 35. In delivering the judgment of the court, Morrison JA, as he then was, stated, in part, at paragraph [36]:

> "…But it seems to me that, in order to be effective, the notice that is required to be given to a member by regulation 26 [of the Police Service Regulations, 1961] must be such as to afford him what the Privy Council characterised, in the well-known older case of **Annamunthodo v Oilfields Workers' Trade Union** (1961) 4 WIR 117, 120, as "a fair opportunity of meeting" the case against him. In the context of regulation 26, therefore, the requirements of fairness demand that the notice of the complaints supplied to the member must be sufficiently particularised and, depending on the nature of the complaints, accompanied by a summary or some other indication of the evidence in support of it, so as to enable the member to respond meaningfully to them…."

Summary and conclusion

[24] Mr Whittingham is entitled to a fair hearing of his application for re-enlistment. On his account, which was the only account before the learned judge, he did not receive one from the Commissioner. The learned judge was in error to have found that since the process that the Commissioner employed was fair, overall, the Commissioner's decision, not to allow Mr Whittingham not to re-enlist, ought not to be disturbed. This is not a case of a disagreement with the exercise of the learned judge's discretion. This

court is, therefore, entitled to state its own stance on the application for judicial review. That stance resulted in the orders set out in paragraph [2] above.

[25] The fact that there has been a change in the person holding the office of Commissioner does not prevent a fresh hearing of Mr Whittingham's application. The incumbent is entitled to carry out that hearing.

[26] It is for those reasons that I agreed to the orders that were set out above.

P WILLIAMS JA

[27] I too have read, in draft, the judgment of Brooks JA. I agree that the reasons he has outlined accurately reflect my own reasons for agreeing with the orders that the court made.