ANGUILLA

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

(CIVIL)

CLAIM NO. AXAHCV2009/0089

In the matter of an Application by Jared Adams to apply for Judicial Review of the decision of the Commissioner of Police

And

In the matter of the Anguilla Police Act R.S.A. c. A70 Section 11

BETWEEN:

JARED ADAMS

Applicant

AND

THE COMMISSIONER OF POLICE
OF THE ROYAL ANGUILLA POLICE FORCE
THE HONOURABLE ATTORNEY GENERAL

Respondents

Appearances:

Mrs. Josephine Gumbs-Connor and Ms. Tolulola Agbelusi instructed by JAG Gumbs & Co. for the Applicant

Mr. Thomas Astaphan and Mr. Ivor Greene for the Respondents

2009: August 5, 28

JUDGMENT

[1] **SMALL DAVIS, J (Ag)**: The Applicant has applied under CPR Part 56.3 for leave to make a judicial review claim to quash the decision of the Commissioner of Police

("the Commissioner") made on 20th July 2009 to dismiss the Applicant under section 11 of the *Anguilla Police Act* and for a stay of the Commissioner's decision pending the hearing of such action.

[2] The application for leave is supported by a brief affidavit sworn by the Applicant which exhibited correspondence between his solicitors and the Commissioner and the Commissioner's written decision dated 20th July 2009 by which he was dismissed, the Commissioner there stating "*I am not persuaded that he [the Applicant] is likely to become an efficient and well conducted Police Officer, and therefore his Services are dispensed with by virtue of section 11 of the Police Act R.S.A. cA70, effective July 20th 2009.*"

[3] The Applicant's complaint is that the Commissioner's decision is ultra vires for procedural unfairness and is unreasonable and an abuse of discretion. Ultra vires is a broad term that covers decisions taken in bad faith, made without consideration of relevant matters or upon consideration of irrelevant matters, which no reasonable authority could make and those made without regard to procedural requirements, including natural justice principles.

[4] The Commissioner's discretion to dismiss under section 11 is not absolute and he is obliged to apply principles of fairness and of due process[1].

The factual background

[5] The Applicant was enrolled as a police officer with the Royal Anguilla Police Force on 12th February 2007. He was on three years probation as mandated by section 8 of the Police Act. Section 11 of the Police Act provides:

> *"During the period of probation, or any extension thereof, the services of any subordinate police officer or constable may be dispensed with at any time if the Commissioner of Police considers that he is not fitted, physically or mentally, to perform the duties of his office or that he is not likely to become an efficient and well-conducted police officer; at the end of the period of probation, or any extension thereof,*

[1] Eardley Johnson v Commissioner of Police, unreported, AXAHCV2000/111, 29th January 2002

if his services have not been dispensed with, he shall be confirmed in his appointment.

[6] On 19th May 2009 the Applicant was summoned to the Commissioner's office. He was shown an Appraisal Report ("the Report") on his performance between 1st January and 31st December 2008. This was the first time that the Applicant was having sight of the Report. His performance was assessed as unsatisfactory, with a score of 28 out of 75. The Applicant's supervising officer and an inspector in charge of the department to which he was assigned commented in the Report that his conduct, deportment and his overall attitude were disappointing and remained unsatisfactory despite several warnings. The conclusion of the inspector was that his assessment left a lot to be desired.

[7] In the meeting, the Commissioner referred to meetings and warnings given to the Applicant by the Deputy Commissioner, another senior officer and many of his supervisors who all expressed dissatisfaction with his performance and attitude and informed him that he had to improve his performance. The Commissioner also referred to disciplinary charges that had been laid against the Applicant over the period of his employment. The Commissioner indicated to the Applicant that as a result of his poor performance (including frequent absences due to illness) he should return to his office on 3rd June 2009 to state why he should not be dismissed from the Force and he was advised that he could attend with a legal representative.

[8] The Commissioner was contacted by lawyers representing the Applicant. In response to their enquiry, the Commissioner confirmed that he was purporting to act under section 11 of the *Police Act*, gave disclosure of all documents upon which he sought to rely in forming the view that the Applicant was an unsuitable police officer and agreed to postpone the hearing to 17th June 2009 to accommodate the lawyers.

[9] Amongst the documents disclosed to the Applicant's lawyers was a letter dated 3rd June 2009 from Sergeant Marva Brooks ("Brooks report"). Sergeant Brooks had been the Applicant's supervising officer during the last quarter of 2007 immediately

after the Applicant had returned from his initial training at the Regional Police Training Center.

[10] A hearing was held on 17th June 2009 at which the Applicant was present and represented. The Commissioner informed the Applicant that he had considered his deportment, attitude to work, the number of verbal warnings he had been given, his disciplinary record, his training record, his overall general performance on duty and the lack of improvement up to and including the date of the hearing in coming to the view that the Applicant's services ought to be terminated.

[11] The Applicant did not give any evidence and called no witnesses. Submissions were made on his behalf. The chief argument made was that having been given the Appraisal Report only in May 2009, the Applicant ought to have had an opportunity to take the necessary steps to raise his standard of performance and that the absence of any assessment of his performance during 2009 denied the Commissioner the opportunity to properly consider whether his performance may have improved since December 2008. The Applicant's Counsel also criticized the Appraisal Report for having no input from one of the Applicant's supervisors. The Applicant attacked the Brooks report on the basis that it appeared to have been solicited to "stack the record" against the Applicant and that it dealt with a period of the Applicant's performance in the distant past. It was submitted on behalf of the Applicant that he had "pulled up his socks" and that he ought to be given a second chance.

[12] The hearing concluded and the Commissioner indicated that he would deliver his decision on 23rd June 2009.

[13] On 19th June 2009 the Commissioner wrote to the Applicant's lawyers. He indicated that he accepted the criticism that the Applicant's second supervising officer's assessment ought to have been included in the Appraisal Report and that he had therefore solicited a report from that officer as well as an account of the Applicant's 2009 performance from his supervising officer and the head of his department. Copies of these reports were enclosed, with the invitation that the lawyers should comment on them before the Commissioner made a decision. The Commissioner

also indicated that he was willing to postpone the continuation of the matter to 30th June 2009 "*to allow for proper consideration of the reports*."

[14] The Applicant's lawyers responded in writing on 30th June 2009 informing the Commissioner that they were "unable" to comment on the reports because (a) the reports came after the hearing which was adjourned expressly for the delivery of his decision, (b) his acceptance of the validity of the submissions made on behalf of the Applicant that he had nothing to assess performance for 2009 should enure to the Applicant's benefit and he had therefore shown cause why he should not be dismissed, (c) his solicitation of the reports after the conclusion of the hearing was in conflict with his quasi judicial role, and (d) reliance on any material obtained after the hearing was unfair and irregular. The Commissioner was urged to disregard the reports.

[15] The Commissioner replied on 1st July 2009 disputing the contentions made above. He pointed out that the proceedings were not completed and since no decision had been rendered, he had discretion to consider additional evidence so long as he gave the Applicant an opportunity to comment on it. The Commissioner also indicated that if the Applicant persisted in his view that he should decline to consider the reports, he would be prepared to completely disregard them and base his decision solely on what was before him at the hearing. The Commissioner repeated the invitation to comment and offered another day of hearing for the Applicant to do so. He asked for a response by 3rd July 2009. There was no response from the Applicant's lawyers.

[16] The Commissioner gave his decision on 20th July 2009 in which he set out his reasons for concluding that the Applicant was not likely to become an efficient and well conducted police officer.

[17] The Commissioner's decision is the best means we have of knowing what matters he took into account in arriving at this conclusion and exercising his power under section 11 to dismiss the Applicant while he was still on probation.

Consideration of the application

[18] Judicial review is available in cases where a decision making body exceeds its powers, commits an error in law, commits a breach in natural justice, reaches a decision which no reasonable tribunal could have reached or abuses its powers. See **Preston v Inland Revenue Commissioners**[2]. The grant of leave to an applicant to institute judicial review proceedings is discretionary. In determining whether to grant leave I am to consider whether the Applicant has made out a proper case.

[19] The permission stage is to weed out cases that are unarguable[3]. The Applicant must show that there is an arguable ground for a claim for judicial review having realistic prospects of success: **Sharma v Brown-Antoine and others**[4] and **Mitchell v Georges and another**[5]. It is not enough that a case is potentially arguable. The nature and gravity of the issues raised in the application have to be considered in determining the sufficiency and cogency of the evidence presented.

[20] The court exercises a supervisory role. Judicial review is not an appeal procedure. The court cannot compel the public authority to exercise its power in a particular way nor can it compel it to make a decision which it believes to be the correct one. The court is not concerned with whether a decision is right or wrong on its merits: **In re Evans.**

Procedural unfairness

[21] The *Police Act*, under which the Commissioner derives his authority to dismiss the Applicant, makes no provision for the procedure to be followed when the Commissioner is considering whether to dismiss an officer during the probation period. Nevertheless, the proceedings will be examined and judged against standard principles of fairness in order to determine whether the proceedings were conducted fairly. The Commissioner is required to ensure that the substantial requirement of justice is not violated.

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[2] [1985] 2 All ER 327

[3] R v Monopolies and Mergers Commission [1986] 1 WLR 763

[4] 69 WIR 379

[5] 72 WIR 161

[22] In considering the procedural complaint made in this application for leave to apply for judicial review, I am mindful of the fact that I am called upon not to review the merits of the Commissioner's decision but rather to consider whether the Applicant has made out a prima facie case that the procedure adopted by the Commissioner was unfair, unreasonable or in violation of the principles of natural justice. The primary facts that are relevant to my consideration are therefore those that set out the series of events which culminated with the Commissioner's decision under complaint.

[23] Procedural fairness requires that the Applicant be given a fair hearing, which will dictate that he should be informed of the allegations against him, be given an opportunity to meet the allegations, and if there is a hearing he should be informed of his right to be assisted by legal counsel.

[24] The Applicant developed seven criticisms of the procedure that the Commissioner followed in written and oral argument which are largely the same objections they made to the Commissioner before he rendered his decision. They can be condensed as follows:

(a) Reliance on the Appraisal report was unfair. It was produced to the Applicant at the same time that he was given notice that he would have to return to show cause why he should not be dismissed, which was five months after the end of the assessment period and further, the form ought to have been reviewed and signed by the Applicant in acknowledgment of its contents;

(b) The Brooks report was prepared for the hearing that was scheduled for 3rd June 2009, hence it was almost a year and a half subsequent to the supervised period. The timing of the report raises suspicions as to the manner and purpose for which it was solicited, which was suggested to be to support the Commissioner's predisposition to dismiss the Applicant thereby making the hearing procedure a mere formality;

(c) Although the Commissioner said he would disregard the Brooks report, he quoted from it in his statement of the facts, therefore he took into account irrelevant considerations;

(d) The solicitation of the 2009 report after the hearing is evidence that the Commissioner did not have sufficient information at the material time that he sought to dismiss the Applicant. Further, it showed that the Applicant had made out his defence and it was therefore improper and irregular and against the principles of fairness for the Commissioner to step into the role of investigator.

[25] The Appraisal Report was of primary concern to the Applicant. The Applicant's Counsel submitted to the Commissioner that it was unfair to place much emphasis on the Report because (a) it had only been brought to the Applicant's attention some five months after the period under review, (b) that it did not have the input of the other officer who had supervised the Applicant and (c) that the Applicant ought to have been given the Report in a more timely fashion so as to give him an opportunity to review the comments and where necessary, take steps to improve the areas assessed as unsatisfactory. It was contended that the purpose of the assessment was defeated since the Applicant had not been given an opportunity to redress matters of evaluation during the probationary period.

[26] Another area of primary concern to the Applicant was the absence of a current appraisal for the five months of 2009. It was contended that the Commissioner could not properly assess whether the Applicant had made any improvement since the end of 2008 and therefore a proper basis for termination could not be established.

[27] Counsel for the Respondent was at pains to remind the court that the main consideration must be whether the Applicant had a fair hearing. From the evidence before me, the Applicant was informed of the case against him, he was given an opportunity to be heard and he had the assistance of legal counsel.

[28] I am satisfied that the Applicant was given a fair hearing. The Commissioner informed him of his dissatisfaction with his performance as an officer based on the Commissioner's own observations and interaction with the Applicant over a period of time and the conclusion and assessment in the Appraisal Report which he provided the Applicant with. The Applicant was invited to comment on the Appraisal Report

and the Commissioner's expression of dissatisfaction and when he informed the Commissioner that he was at a loss for words, the Commissioner gave him an opportunity to be heard as to why he ought not to be dismissed. The Applicant took advantage of that opportunity and attended a hearing almost one month after being informed of the Commissioner's disposition, ably assisted by legal counsel. Notwithstanding that he had received the Appraisal Report in May 2009 and prior to that date had not been asked to review it, make his own comments on it and sign it, he was given ample opportunity to comment on it and address its contents between 17th May and 17th June 2009, which he did. The criticism made in paragraph (a) above is without merit. In my judgment this ground is not well founded and is not itself sufficient to establish a claim for judicial review.

[29] As to the Brooks report, the Commissioner had rejected the Applicant's criticism that it related to a period too far back in the Applicant's employment and was therefore irrelevant to his consideration but he said he would not have any regard to it because it had not been brought to the Applicant's attention until 8th June 2009. The Applicant contended that having indicated that he would disregard it, it was procedurally unfair for the Commissioner to have relied on it, as he evidently did by his reference to some of its contents in the written decision.

[30] The Applicant submitted that the mere fact of the Commissioner's recital of a line from the Brooks Report when he said he would not refer to it is reason enough to make the decision ultra vires both for procedural unfairness and because it would indicate that the Commissioner took into account irrelevant considerations. Counsel quoted from **General Medical Council v Spackman**[6] to make the point that in the event of any procedural unfairness or violation of natural justice, it is immaterial that the same decision would have been arrived at if there had been due observance of those principles and that the appropriate thing to do is to quash the decision.

[31] Mr. Astaphan argued for the Respondents that the Commissioner was not obliged to disregard the Brooks Report. His argument was that having disclosed it to the Applicant on 8th June 2009, what is important to bear in mind is that the Applicant

[6] [1915] A. C. 120

had an opportunity to respond to it. How Mr. Astaphan put it is that the Commissioner was simply seeking to bend over backwards to accommodate the Applicant's complaints when he proposed that he would not have any regard to it but that if he did have regard to it or any part thereof, that is not sufficient to vitiate his decision because his decision was not based on the Brooks Report alone. He pointed to all of the Commissioner's actions in striving to ensure that the Applicant had a fair hearing.

[32] The Applicant considered that the Brooks Report was irrelevant for the Commissioner's consideration for the reasons set out in paragraph 23(b) above. I am of the view that the fact that it was made by an officer who had supervised him a year and a half prior to that date does not make it irrelevant. Undoubtedly, the Commissioner is entitled to consider the Applicant's performance as an officer over the entire period of his employment.

[33] The Commissioner's reasons for the dismissal are set out in paragraphs 46 and 47 of the written decision. I am satisfied from a perusal of the Commissioner's reasons for dismissal that the decision is not based on Sergeant Brooks' expressed opinion of the Applicant's performance. If it was considered by the Commissioner at all, that is not evident on the face of the document and he set out the matters to which he had regard in coming to the decision, which included his own observations of the Applicant's performance. The Applicant has not made out an arguable case that the reference to the Brooks Report renders the decision ultra vires.

Conflict of Role

[34] The Applicant complains that the Commissioner committed a serious error when he stepped into the role of investigator in soliciting the additional report on the Applicant's performance between January and May 2009. Counsel for the Applicant submitted that in doing so, the Commissioner became a judge in his own cause, that cause being the dismissal of the Applicant. Mrs. Gumbs-Connor referred me to the Court of Newfoundland's decision in **Giles v Royal Newfoundland Constabulary Public Complaints Commission**[7]. In that case, a member of the public filed a

[7] 451 A.P.R. 17

complaint against a police officer who was charged with conduct unbecoming an officer. In the course of disciplinary proceedings he was found guilty by the chief of police. He appealed to the Public Complaints Commission. The Commission was empowered by statute to both investigate and adjudicate the complaint. An investigator was appointed. The police officer refused to give a statement to the investigator. The Commission confirmed the decision of the police chief. The police officer appealed arguing that the Commissioner should not have acted both as investigator and adjudicator and that he should have been given sight of and an opportunity to make submissions on the investigator's report before the Commissioner made a decision. The Supreme Court held that the authorization to be both investigator and adjudicator did not operate as an institutionalized bias and that the police officer's reliance upon the principle that no one should be a judge in his own cause was not well founded as the provision of the legislation was common sense and that those circumstances did not in themselves create a reasonable apprehension of bias.

[35] The question is whether by requesting the 2009 Report, the Commissioner created a reasonable apprehension of bias against the Applicant. The report was not prepared by him. It was immediately made available to the Applicant. It was prepared by the officers who had current supervision of the Applicant. And it was made in response to a criticism that the Applicant made: that the Commissioner was not possessed of current information as to the Applicant's performance.

[36] As a corollary to the objection raised by the Applicant in his lawyer's correspondence subsequent to the hearing and again before the court as a ground for judicial review on the basis of procedural unfairness, the Applicant also says that the very solicitation of the 2009 report establishes the point made in defence: that the Commissioner did not have sufficient and or relevant information to dismiss the Applicant and he had therefore shown cause why he should not be dismissed.

[37] Counsel for the Respondent sought to deflect this limb of the Applicant's argument by pointing to the Commissioner's own interaction with the Applicant, including two meetings in which the Commissioner had expressed his dissatisfaction with the

Applicant's performance and had admonished the Applicant to improve his performance as there were doubts about his suitability to be a police officer. On the second meeting held March 2008, the Commissioner and the Applicant discussed his Police Training School report, which cast the Applicant in a poor light.

[38] I derive support from the dictum of Lord Wright in **General Medical Council v Spackman**[8] in concluding that in conducting a hearing, the tribunal is entitled to obtain information in any manner as is considered appropriate so long as a fair opportunity is given to the subject of the hearing to address any relevant statement by way of contradiction, correction or rebuttal. The dictum of Lord Wright refers to the case of **Local Government v Arlidge,** a case in which, after a hearing at which witnesses had been heard orally, a report was submitted to the tribunal which then decided the matter based on both the oral evidence given at the inquiry and the report. The House reiterated that the decision maker must act judicially and in doing so part of that responsibility is to give the parties an adequate opportunity to address any material upon which a decision would be based.

[39] This was the theme adopted by Counsel for the Respondent, who countered the Applicant's argument by asserting that the hearing was not complete until the decision was rendered and that moreover, there can be no complaint of unfairness because the Applicant was given an opportunity to respond to the 2009 report. Indeed, the Commissioner offered to hold another day of hearing in order that the Applicant could have ample time and opportunity to fully address the 2009 Report.

[40] At the end of the day the Commissioner said he would not have any regard to the 2009 Report given the Applicant's objection to it, even though he disagreed with the position taken. I accept the submission of Mr. Astaphan that the Commissioner had sufficient material on which to base his decision and that procedurally, it cannot be said that it was unfair of him to solicit the 2009 Report in order to assuage the Applicant's concern that he did not have a complete picture of his performance.

[8] [1948] A.C. 627

[41] In the final analysis, the principal question must be whether the Applicant had a fair hearing. The reports covering three months of 2008 and five months of 2009 had been made available to him and he was invited to respond to them. He opted not to. In the end, the Commissioner acceded to the Applicant's submission that he ought not to have regard to them. It is impossible for me to say that the Commissioner did not have sufficient material to make the determination that he did or that his solicitation of these reports are conclusive of the fact that the Applicant had shown cause why he should not be dismissed and that the Commissioner had not had sufficient information at the time he invoked section 11 of the *Police Act*.

[42] The Commissioner was clearly mindful of the principles of natural justice. He was careful to inform the Applicant of the assessment, sought his comments and gave him a full opportunity to persuade him from dismissing him. I view his efforts to obtain further reports not as "stacking the record" against the Applicant but of ensuring that he had the fullest record that was available. The Commissioner was fully entitled to inform himself before making the decision, so long as the Applicant was aware of the material that was being considered. It is my view that this ground does not have any realistic prospect of success if it were allowed to form the basis of a judicial review claim.

Abuse of Discretion/Unreasonableness

[43] In considering whether the Commissioner abused the discretion conferred upon him by section 11 of the *Police Act*, it must be shown that he took into account and acted upon matters that were immaterial or irrelevant or that he exercised his statutory power for an improper purpose. It is a basic rule of natural justice that the decision maker must take into account only those factors that are relevant and material for the purpose of exercising the discretion: **Padfield v Minister of Agriculture**[9].

[44] The formula test for unreasonableness on the part of decision makers is often as expressed in **Associated Provincial Picture Houses v Wednesbury Corp**[10], that is, whether the decision is so unreasonable that no reasonable decision-maker could

[9] [1968] AC 897

[10] [1948] 1 K.B. 223

come to it. On this ground of review, the court is concerned with whether the power under which the decision maker acts has been improperly exercised or insufficiently justified. In considering unreasonableness, the court is not confined to simply examining the process by which the decision maker came to the decision, but must consider the substance of the decision itself to see whether the criticism of it is justified. The court must still, however, be careful not to substitute its own exercise of discretion for that which was exercised by the decision maker: **Regina v Secretary of State ex p Brind**[11]. The test is whether the decision is such that it falls within the range of reasonable views open to the decision maker: **Secretary of State for Education and Science v Tameside Metropolitan Borough Council**[12].

[45] The Applicant relied on the absence of any report on the Applicant's performance of duties during 2009 at the time that he invoked section 11 to advance the argument that the Commissioner omitted to take into account relevant considerations. Mrs. Gumbs Connor's submission is that an assessment of the current period is indeed a relevant matter which the Commissioner did not consider at the time that he made the decision to dismiss the Applicant. It was argued that the solicitation of the 2009 report is evidence enough that the Applicant had succeeded in showing cause why he ought not to be dismissed and the Commissioner's decision is therefore patently unfair, procedurally irregular and as such ought to be quashed.

[46] I am unable to say that the Commissioner's view that the Applicant was not fitted to perform the duties of a police officer and that he was unlikely to become an efficient and well conducted officer even as expressed in May 2009, without the benefit of an assessment of his 2009 performance, is one that no reasonable decision maker could have arrived at in similar circumstances. It bears noting that the power given to the Commissioner to dismiss a probationer officer may be exercised even before the end of the probation period. Implicit in that is the inescapable inference that the

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[11] [1991] 1 A.C. 696

[12] [1997] A.C. 1014, at 1064 – "The very concept of administrative discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred."

Commissioner need not wait for the entire period of probation to run its course in order to form a view or come to a conclusion as to the probationer's potential or capacity. It is not that the Applicant's 2009 performance is irrelevant, but rather that what material the Commissioner had, including his own interaction with him rendered the absence of a formal assessment for 2009 a fatal gap of information in evaluating the Applicant's aptitude to be or become an efficient police officer. It seems to me that the Commissioner had ample material and knowledge of the Applicant's performance of his duties such that his decision to terminate his services during the probation period cannot be said to be unreasonable.

[47] For the reasons already set out above, it is my view that the Applicant does not have any realistic prospect of successfully arguing that the decision that the Commissioner came to based on the material he stated that he considered was one which no reasonable decision maker could come to or that it does not fall within the range of reasonable responses.

Conclusion

[48] I am not satisfied that the Applicant has grounds for a judicial review claim that have reasonable prospects of success. Accordingly, the application for leave is dismissed. Each party is to bear his own costs.

[49] I am indebted to Counsel on both sides for the clear and helpful arguments.

Tana'ania Small Davis

High Court Judge (Ag)