

CASE TYPE: PUBLIC LAW-ADMINISTRATIVE ORDER-JUDICIAL REVIEW
EASTERN CARIBBEAN SUPREME COURT

COMMONWEALTH OF DOMINICA

IN THE HIGH COURT OF JUSTICE

CLAIM NO.DOMHCV2015/0247

[1] OHSSEL TYSON

Applicant

and

[2] THE CHIEF OF POLICE

Respondent

Before: The Hon. Justice M E Birnie Stephenson

Appearances:

Mrs Gina Dyer Munro of Dyer and Dyer for the Applicant

Mrs Tameka Hyacinth Burton of Attorney's General for the Respondent

2016: April 29
2018: April 18

RULING

[1] Stephenson, J.: This is an application for leave to file Judicial Review pursuant to Part **56 of the Civil Procedure Rules 2000 ("CPR") filed on the 7th October 2015.** 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.

- [2] The Applicant is seeking leave for Judicial Review in the form of several orders, viz mandamus that the Respondent reinstates the Applicant to his employment with the Commonwealth of Dominica Police Force; an order for the return of his property by way of emoluments which have been withheld from him from the date of his dismissal; an order that the **Defendant's decision to terminate his employment was unlawful, illegal, irrational, ultra vires, procedurally improper, unfair, and illegal.**
- [3] Their application was filed on the 7th October 2015 with an affidavit in support sworn to by the Applicant.
- [4] The matter first came up on the 23rd October 2015 when the Applicant was ordered to serve the application on the Respondent, and the written submissions were ordered to be filed by both parties on or before the 16th January 2016.
- [5] On the 15th January 2016, an application for extension of time to file and serve the written submission was filed by the Applicant. The grounds for making that application included that the solicitor for the Applicant was unable to complete the submissions as she had to leave Dominica urgently to seek medical attention abroad.
- [6] On the 11th January 2016, the Respondent filed an application for relief from sanctions and leave to file and serve their written submissions out of time, and for leave to file and serve affidavits in reply by the Respondent. The grounds as stated by the Respondent was that the proceedings were served on or about the 23rd December 2015 and that the application came to the attention of Counsel having conduct of the matter on 15th January 2016, that the proceedings as served on the Respondent were submitted to the Chambers of the Attorney General in a sealed envelope marked **"confidential" and addressed to the Attorney General, who was on leave at the time.** It was upon the **Attorney General's** return to office on the 15th January 2016 that the said envelope was opened and the documents handed to Counsel with conduct of the matter.

[7] Thereafter, Counsel who had conduct of the matter for the Respondent sustained an injury causing her to be out of chambers on sick leave until 15th February 2016.

[8] On the 11th February 2016, the Respondent filed an affidavit in reply with exhibits resisting the application for Judicial Review.

[9] On the 12th February 2016, the applications of both parties were heard in Chambers and both parties were ordered relieved from sanctions and time was extended for them both to file and serve their submissions.

[10]The Court on that day also deemed the affidavit of the Respondent in reply which was filed out of time,properly filed. The Applicant was granted leave to file his affidavit in response to the said affidavit on or before the 4th March 2016.

[11]Written submissions were ordered to be filed on 29th April2016 for the Court to consider the application on written submissions.

[12]The Respondent filed a supplementary affidavit on the 29th April 2016. Submissions were filed by the Respondents on the 29th April 2016. On the 31st March 2017, I made a check at the registry and as of that date the Applicant did not file an affidavit in reply or written submission as ordered.

[13]This Court proceeded to review the submissions and file with a view of making a ruling and pursuant to Part 56.4(3)(c) an order was made for the parties to appear before the Court in the matter.

[14]Todate there have been no written submissions filed by the Respondent in this matter.

The Applicant's Case

[15]The Applicant swore to an affidavit in support of his application for leave and relied on the following facts considered relevant to the Court, that:

- a. he was appointed a member of the Commonwealth of Dominica Police Force (the Police Force) on the 16th September 2010 on probation for two years;

- b. on the 10th April 2012 he was charged with the offence of theft of firearm and ammunition which matters were subsequently discontinued on the 8th April 2014;
- c. his appointment was terminated by the then Commissioner of Police, Mr Cyril Carrette (the COP) on the 23rd April 2012;
- d. that the Police Service Commission (the PSC) is the authorised body to terminate his services with the Police Force as set out in the Constitution of Dominica¹ and the Police Act²;
- e. he was of the view that the COP had a personal vendetta against him as he, the COP, opted not to follow the procedure set out in the Constitution and the Police Act for disciplining police officers who have been charged with criminal offences, and instead terminated his services without affording him a hearing;
- f. other police officers who have been charged with criminal offences have been interdicted and put on half pay pending the determination of their criminal matters, further that their services have not been terminated in the way and manner his services have been terminated. Reference was made to the cases of Carlton Williams and Leafrose Darroux who were charged with very serious criminal offences and that their services were not terminated but they were interdicted and placed on half pay;
- g. prior to his termination he received a letter on the 10th April 2016 from the COP informing him disciplinary charges would be brought against him that there were no disciplinary charges brought against him prior to his termination;³
- h. that he has not been found wanting of character, intelligence or otherwise found unfit to being a police officer;

[16] The Applicant complains that the COP had no authority to terminate his services as a police officer. He also complains that the principle of natural justice was not applied

¹Chapter 1:01 of the Laws of Dominica

²Chapter 14:01 of the Laws of Dominica

³ This letter was not exhibited as stated

to him in that he was not given an opportunity to be heard neither was there any attempt to wait on the outcome of his criminal charges and he was not afforded the right to be heard in defense of himself.

[17]The Respondent resists this application for leave to apply for Judicial Review and filed an affidavit in reply sworn to by Mr Daniel Carbon, the current Commissioner of Police.

[18]The COP in his response made the following statements of fact which are considered to be relevant to the application being dealt with, that:

- (i) **the Applicant's employment was properly terminated by the then COP who is** the proper authority to terminate the appointment of an officer below the rank of Sergeant;
- (ii) pursuant to section 92 (3)of the Constitution of Dominica, the Police Service Commission is delegated the power to remove from office, police officers below the rank of Sergeant;⁴
- (iii) the Applicant was appointed for a probationary period of two years and was expressly subject to summary dismissal within that probationary period;
- (iv) whilst the Applicant was on probation he was charged with the offence of theft of a fire arm belonging to the Government of the Commonwealth of Dominica;
- (v) there were also allegations of indecent assault and unlawful sexual intercourse being leveled against the Applicant;
- (vi) subsequent to the Applicant being charged he was interdicted and placed on half salary in the first instance⁵;
- (vii) on the 11th April 2012, the COP wrote to the Applicant informing him of reports of conduct prejudicial to good order and discipline which were made against him. The impugned conduct was listed as follows:
 - i. *"Investigation into allegation of rape against him on the 30th day of June 2011;*

⁴ See Delegation of Powers by the Police Service Commission dated 29th June 2000

⁵ See Exhibit DC3 Interdiction letter dated 10th April 2012 signed by Cyril Carrette Chief of Police

ii. Disciplinary charges for discreditable conduct on the 9th day of January 2012;

iii. Arrest and investigation in respect to an allegation of theft of a firearm against him on the 7th April 2012; and

iv. Criminal charge for theft of a firearm on the 10th April 2012⁶.

(viii) **the Applicant** was directed by the COP to submit in writing no later than April 20th 2012, reasons why his appointment should not be terminated as is required by Section 7(2) of the Police Act.

(ix) the Applicant responded through his attorney by letter of the 20th April 2012, and in that letter he denied the allegation of rape and the disciplinary charge against him; and that as it regarded the criminal charge of theft that that charge was before the Court and it ought not to be dealt with until the determination of said charge. It was also stated in the letter that the Applicant ought not to be terminated unless he was given a fair hearing before a tribunal established in accordance with the laws of Dominica;

(x) That the Applicant was sent a letter of termination on the 23rd April 2012 and the criminal charge brought against him was discontinued by the Learned Director of Public Prosecution on the 8th April 2014;

[19]The COP averred that the Applicant made his application for leave to file Judicial Review some twenty nine months after his services were terminated(emphasis mine)

[20]It was further averred by the COP that the employment of a police officer is a peculiar category of employment. That the COP is tasked among other things with ensuring the suitability of police officers, ensuring that the integrity of the Police Force is maintained and also safeguarding the safety and security of the State and its Citizenry.

[21]The COP maintained that the action taken was not a determination of the guilt of the Applicant but rather consideration was given to the serious allegations against the

⁶ Paragraph 10 of affidavit of Daniel Carbon, Commissioner of Police dated and filed on 11th February 2016 and exhibit DC4

Applicant in order to determine whether in all the circumstances, whether he was wanting in character or otherwise had shown himself to be unsuited to be permitted to continue as a member of the Police Force.

[22]The COP went into some detail as to the allegations and evidence gathered regarding the circumstances surrounding the theft of the firearm including a confession from the Applicant, the statement from the person he admitted handing the firearm over to, the statement of the investigating officer and the Arms Keeper of the Police Force and then stated that based on all of the intelligence gathered and in all the circumstances of the case, the Applicant was found wanting in character and found to be unsuited to be a member of the Commonwealth of Dominica Police Force and that his conduct brought the Police Force into disrepute; and that **therefore the Applicant's dismissal by** the COP was reasonable in all circumstances of the case.

[23]The COP also averred that the Application on behalf of the Applicant was made some two and a half years since his dismissal, and more than one and half years after the matter was discontinued against him, which amounts to inordinate delay.

[24]**It was further averred that the Applicant's** application for Judicial Review should also be dismissed as it has no prospect of success based on the facts of the case.

The Court's Considerations

[25]The sole issue before the Court for determination is whether or not the leave should be granted to the Applicant to apply for Judicial Review.

The Guiding Principles For A Grant of Leave to File Judicial Review

[26]Applications for leave to apply for Judicial Review are said to be necessary in order to filter out unmeritorious claims. The procedure governing administrative law matters including Judicial Review is laid down in Part 56 of CPR.

[27] Part 56.2(1) of CPR 2000 requires an Applicant to first apply for and obtain leave to file Judicial Review and that in applying for leave, the Applicant is required to establish that he has sufficient interest in the subject matter of the application. This he may do by:

- (i) demonstrating, inter alia, that he has been adversely affected by the decision which is the subject of the application;
- (ii) that he has an arguable case that a ground of Judicial Review exists that merits thorough examination at a substantive hearing and that there are no debarring factors such as delay in bringing the application or availability of an alternative remedy.

[28] It is established law that the role of the High Court on an application for leave to apply for Judicial Review is restricted to determining whether or not the decision being challenged was legal, not whether or not it was correct.

[29] In considering this application, the Court is not concerned with the merits of the decision in question. There is no need at this stage to perform an in depth analysis of the **Applicant's case. The Court is concerned with the legality, rather than the merits, of the decision; with the jurisdiction of the decision maker and with the fairness of the decision making process.**

[30] In conducting this assessment I have in mind the relevant learning as enunciated in the case of *Sharma v Browne-Antoine*⁷ where it was held that:

“The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy...the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required

⁷(2006) 69 WIR 379, 2007] 1 WLR 780

for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities.⁸

[31]The grant of leave to an Applicant to institute Judicial Review Proceedings is discretionary. The Court is to consider whether or not the Applicant has made out a proper case. Has he shown that there is an arguable ground for a claim of Judicial Review with a realistic prospect of success?

Delay

[32]Before considering this, the Respondent has submitted that there has been an inordinate delay in making the application for leave. Is this so? It was submitted on behalf of the Respondent,that the Applicant is not entitled to any relief as he is guilty of undue delay.

[33]Part 56.3(3) of CPR states that:

“The application must state whether any time limit for making the application has been exceeded and, if so, why;”

[34]Part 56.5 of CPR states as follows:

“ (1) In addition to any time limit imposed by any enactment, the judge may refuse leave or to grant relief in any case in which the judge considers that there has been unreasonable delay before making the application.

(2) 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) be detrimental to good administration; or (b) cause substantial hardship to or substantially prejudice the rights of any person.”

[35]The Respondent contends that the **Applicant’s claim is hopelessly delayed and leave** should not be granted in the circumstances. It was submitted that the Applicant

⁸ Ibid pages 387-388

sought to make his application for leave to apply for Judicial Review some three years **and three months after his cause of action arose. It was submitted that the Applicant's** cause of action arose based on his complaint on the day he received his letter of termination which was communicated to him on the 23rd April 2012. Even if, which was not accepted by the Respondents, that the cause of action arose on the 8th day of April 2014 when the criminal charge pending against him was discontinued by the Director of Public Prosecutions, there still was a delay in that the application for leave was filed some one year and eight months after the discontinuance.

[36] Learned Counsel on behalf of the Respondent contended that to seek to rely on the date of the discontinuance is flawed in that, the decision which the Applicant seeks to challenge is his termination from the Police Force and not the criminal complaints filed against him.

[37] The Respondent contends that the Applicant has not given any reason for his delay and in the circumstance of the case, the claim is stale and leave should not be granted. Reference was made to Ronald Browne-v- The Public Service Commission⁹

Court's Consideration and Disposition

Delay

[38] It is clear to the Court that the Applicant has a seemingly insurmountable hurdle to cross as it regards delay. Based on the time lines in this case there was delay on the part of the Applicant. It is to be noted at this time that there has been many delays by the Applicant in this matter including the filing of submissions in this matter. This Court ordered that written submissions be filed initially on the 15th January 2016, which time was extended upon the mutual application of the parties to the 29 April 2016. The

⁹ HCV2010/023St Lucia

Respondent filed his submissions as ordered. The Applicant has over one year later, still not filed his submissions.

[39] It is also noted that there is no evidence placed before this Court for its consideration, regarding the likely possible hardship or prejudice to the rights of any person, and whether or not there would be the likelihood of any detriment to administration of justice which the court is required to take into consideration when considering whether to refuse leave, or to grant relief because of the delay.¹⁰

[40] The Court of Appeal examined the issue of delay in making an application for leave to file Judicial Review in the matter of Roland Brown –v- The Public Service Union¹¹. It was noted that CPR 2000, which governs our rules of practice and procedure, does not provide a strict time limited for invoking the supervisory jurisdiction of the Court in St Lucia¹². The Judicial Statement of Justice of Appeal, Ola Mae Edwards, is relevant and applicable to the case at bar.

*"In exercising its discretion as to whether to grant any relief the court can take into account other factors including that there was unreasonable delay before making the application, whether the claimant acted promptly, or whether it would be detrimental to good administration or cause substantial hardship to the rights of any person or substantially prejudice the rights of any person. To sum it up despite the success of the judicial review claim, the relief may be refused where the judge applies CPR 56.5 and makes a positive finding under that rule"*¹³

[41] Examining the time lines involved in this matter and taking into consideration the provisions of CPR 56.5, this Court has come to the conclusion that the Applicant has been dilatory in making his application for leave and this has in fact extended to the conduct of his matter. His submissions which were due in the matter in support of the

¹⁰ Part 55.5(1) & (2) of CPR 2000

¹¹ *ibid*

¹² This applies with equal force in Dominica

¹³ *Ibid* Per Olamae Edwards JA at page 24

application was never filed in the matter, which is an example of the delay and failure to file that has been his conduct in this matter.

[42]The Respondent also contended that the **Applicant's case is statute barred**. The Respondent made reference to Section 2(1)(a) of the Public Authorities Act ¹⁴ which states:

“Where any action, prosecution or other proceeding is commenced against any person for any act done in pursuance or execution or intended execution of any Act, or of any public duty or authority, or of any alleged neglect or default in the execution of such Act, duty or authority, the following provisions shall have effect:

(a) The action, prosecution or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect or default complained of or, in case of a continuance of injury or damage, within six months next after the ceasing thereof.”

[43]Learned Counsel on behalf of the Respondent submitted that the effect of section 2 as it relates to the case at bar is to set a time limit of six months, within which to bring a claim against an authority for an alleged act done in pursuant of an act. This section was considered by the Court Bryan –v Lindo(1986)¹⁵in which the section was considered, and based on the questions posed by the Court of Appeal it was submitted that the COP is a Public Authority within the relevant Act; that the COP was acting pursuant to the Police Act when he terminated the services of the Applicant; and the time period ran from the 23rd April 2012 when the cause of action arose.

[44]It was further submitted that the case of Mary Williams –v- The Attorney General¹⁶is **applicable when it was held that “Section 2 of the Public Authorities Act in the British Virgin Islands, which is in identical terms of the Dominica Act, was mandatory in that once a cause of action accrued more than six months prior to filing the claim for**

¹⁴ Chapter 7:60

¹⁵ 44 WIR 295

¹⁶ BVIHCV2010/0048

Judicial Review, the latter claim was statute barred¹⁷". **The** Learned Judge went on to apply the decision made in Quorum Island (BVI) Limited and The Attorney General –v- Virgin Island Environmental Council¹⁸where it was held by the Court of Appeal that *"section 2(a) of the Limitation Act simply requires that whatever is the manner prescribed by the rules of court for a person to commence proceeding to obtain the court order that he seeks the proceedings must be commenced within the specified time. It was further held that the application for leave to apply for judicial review, having been filed within the six month limitation period, was commenced in time as required by that section."*¹⁹

[45]It was contended that in the case at bar, the cause of action in this matter arose when the Applicant received his termination letter which was far beyond the six months limitation in the act. I agree with Learned Counsel for the Respondent, that the challenge to the termination letter written by the COP in April 2012 is statute barred and ought properly to be struck out.

Conclusion

[46]Upon consideration of all the evidence adduced in this case and the law as submitted this Court declines to grant leave to the Applicant to apply for Judicial Review on the grounds that:

- a. based on the facts as stated and the law that the COP is the authorised person to issue the letter of termination; **and so the Applicant's case would fail on that ground;**
- b. the Applicant was on probation and was subject to summary dismissal, and upon the facts adduced it is considered that his case has no reasonable prospect of success.

¹⁷ Ibid paragraph 31 per Harriprashad Charles J

¹⁸ HCVAP2008/004 Judgment delivered on the 27 October 2008 [unreported]

¹⁹ Ibid

- c. The Applicant is guilty of undue delay in seeking leave of this court to apply for Judicial Review and based on the provisions of section 2 of the Public Authorities act the claim is statute barred.

[47] For all these reasons the application for leave to file Judicial Review is not granted.

[48] As a short post script to this ruling, due to the unavailability of full court facilities to ensure the timely delivery and proper editing and presentation of this ruling, this Court apologises for the delay in delivering this ruling and for any errors which may appear herein.

M E Birnie Stephenson
High Court Judge

[SEAL]

By the Court

Registrar