

THE EASTERN CARIBBEAN SUPREME COURT  
SAINT LUCIA

IN THE HIGH COURT OF JUSTICE  
(Civil)

SLUHCV2017/0713

BETWEEN:

CLEVELAND EMMANUEL

Applicant

and

THE COMMISSIONER OF POLICE  
THE HON. ATTORNEY GENERAL

Respondents

Before:

The Hon. Mde. Justice Kimberly Cenac-Phulgence

High Court Judge

Appearances:

Mr. Albert Fregis for the Applicant

Mrs. Karen Barnard with Mr. Rene Williams for the Respondents

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2018: May 22.

(Written Reasons Delivered 6<sup>th</sup> June 2018)

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#### WRITTEN REASONS FOR DECISION

- [1] CENAC-PHULGENCE J: On 22<sup>nd</sup> May 2018, having heard counsel for the applicant and the respondents and determining that the applicant had not shown that he had arguable grounds for judicial review with a realistic prospect of success, I dismissed the application for leave to file a claim for judicial review with no order as to costs. I now provide my reasons for that decision.

## Background Facts

- [2] The applicant, Cleveland Emmanuel is a police **constable No. 428 PC (“PC Emmanuel”)** enlisted with the **Royal Saint Lucia Police Force (“RSLPF”)** from 2006. PC Emmanuel was attached to the Immigration Department for some nine years until 8<sup>th</sup> June 2017 when he received a letter advising of his transfer to the Laborie Police Station with effect from 19<sup>th</sup> June 2017. That letter was signed by the acting Deputy Commissioner of Police, Frances Henry (**“DCOP Henry”**). PC Emmanuel resisted the transfer indicating that it was unlawful.
- [3] The facts which gave rise to this application are that on 13<sup>th</sup> March 2017, PC Emmanuel was served with a notice that a disciplinary investigation had commenced in relation to him. The complaint concerned his conduct as an Immigration Officer on 16<sup>th</sup> January 2017 and an allegation that he had brought the RSLPF into disrepute by demanding and accepting money from a Guyanese national to allow her entry into Saint Lucia. Prior to that matter PC Emmanuel averred that there had been no disciplinary issues with him and his disciplinary record was clean. The notice to police officer in disciplinary matters was issued pursuant to regulations 3 and 6 of the Police Regulations.<sup>1</sup>
- [4] PC Emmanuel alleged that the investigation concluded and he was not found guilty but this was never formally communicated to him. The only thing found was that he was neglectful in not having entered a note in the diary that the money had been placed in the Government cash tin.
- [5] PC Emmanuel alleged that the transfer of June 2017 was a punitive measure and was made in violation of his rights to natural justice as he was never given an opportunity to be heard in his defence. The transfer letter stated that it was being made in an effort to maintain operational efficiency within the department. It also spoke of confidence and faith placed in him by the management of the force.

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<sup>1</sup> Cap. 14.01, Revised Laws of Saint Lucia, 2001.

- [6] **PC Emmanuel's evidence was that he wrote to the acting COP by letter dated 14<sup>th</sup> June 2017** advising of his objections to the transfer. He received a response on 13<sup>th</sup> July 2017 in which the acting COP indicated that having reviewed the contents of his letter of 14<sup>th</sup> June 2017, he found no justifiable reason for not complying with the transfer and that it was a breach of Force discipline to blatantly disregard a lawful order given to him. He was directed to discontinue reporting to the immigration Department and report for duty to the Laborie Police Station.
- [7] PC Emmanuel was served by the Commissioner of Police ("**COP**") on 3<sup>rd</sup> January 2018 with a letter suspending him indefinitely on half pay from 4<sup>th</sup> January 2018. PC Emmanuel averred that at the time of the letter he had not been charged. He said that it was in the month of February 2018 that he received the summons to default.
- [8] PC Emmanuel stated that the disciplinary charge emanates from the COP who is the same officer who has to decide his fate. He went on to say that the disciplinary charge came a year after the report was made and was conceived in bad faith and was designed to punish him for not accepting a more accommodating transfer and to circumvent the authority of the Court.
- [9] PC Emmanuel alleged that the disciplinary charge is a sham as no investigator given the evidence available would find him guilty and more so the complainant has returned to Guyana. He claimed that he had suffered intense anxiety and mental anguish. He said that obviously, it is now in the public domain and no doubt people now view him as dishonest. He said that his reputation has likely been tarnished, perhaps irreversibly.
- [10] An application for leave to file judicial review was filed on 7<sup>th</sup> December 2017. That application was amended by an application filed on 19<sup>th</sup> March 2018. In that amended application, PC Emmanuel has sought leave to file a claim for judicial relief.

The following is the relief which he seeks:

- (a) Certiorari to quash the decision of the acting Deputy COP to transfer PC Emmanuel communicated by letter dated 8<sup>th</sup> June 2017;
- (b) An order of mandamus mandating the respondents to revoke the letter of transfer and return PC Emmanuel to his post as at 8<sup>th</sup> June 2017;
- (c) A declaration that the acting Deputy COP by transferring PC Emmanuel acted unreasonably in that she arrived at her decision on the basis of illegality, irrationality and procedural impropriety;
- (d) Certiorari to quash the decision of the COP to suspend PC Emmanuel communicated by letter dated 3<sup>rd</sup> January 2018 and to reinstate him to his post as of the said 3<sup>rd</sup> January 2018;
- (e) A declaration that the decision of the COP was unreasonable in that it was arrived at on the basis of illegality, irrationality and procedural impropriety;
- (f) **A declaration that the COP's directive of 3<sup>rd</sup> January 2018 was made in bad faith and is de facto punishment for PC Emmanuel's resistance to the transfer'**
- (g) A declaration that the COP by using section 32(1)(a) of the Police Act,<sup>2</sup> to suspend PC Emmanuel sought to circumvent the powers of the Court that the status quo be maintained until such time as the Court had pronounced on the claim;
- (h) Costs;
- (i) Damages in respect of the unlawful order of the COP which has subjected PC Emmanuel to mental anguish and adverse scrutiny by his colleagues and members of the public who now have the impression that he engaged in corrupt practices;
- (j) Interest.

[11] The respondents filed a response to the application by way of an affidavit from the COP, Severin Moncherry ("**COP Moncherry**"). In that affidavit, COP Moncherry averred that he proceeded on vacation leave from 16<sup>th</sup> January 2017 and returned

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<sup>2</sup> Cap. 14.1 of the Revised Laws of Saint Lucia 2008.

to office on 4<sup>th</sup> September 2017. On 5<sup>th</sup> January 2017 the COP signed a memo titled Delegation of Powers-Transfers. That document was in the following terms:

**“Whereas Standing Order No. 3(4)(a) of the Standing Orders of the Royal Saint Lucia Police Force (Amended) 1990, states that “transfers between Divisions and Branches will be made by the Commissioner of Police...”** Having been appointed Commissioner of Police in accordance with Section 94 of the Constitution Order of Saint Lucia 1978, I do hereby delegate the powers conferred upon me by this section [Standing Order No 3(4)(a) to the Deputy Commissioner of Police with responsibility for Administration on this the 5<sup>th</sup> day of January 2017.”

[12] COP Moncherry stated that PC Emmanuel had failed to disclose that he had held at least three meetings with him to discuss the matter of his transfer. He averred that these meetings took place on 6<sup>th</sup>, 8<sup>th</sup> and 30<sup>th</sup> September 2017 and that on the last of these dates, his legal counsel, Mr. Albert Fregis had accompanied him. **PC Moncherry said that he took PC Emmanuel’s personal circumstances** into account including the fact that he lived near Castries and the fact that he had a child to drop to school and proposed two postings in the Castries area. He said PC Emmanuel requested leave to consider his options and he was granted leave from 8<sup>th</sup> September 2017.

[13] COP Moncherry in his affidavit stated that on 30<sup>th</sup> November 2017 when he met with PC Emmanuel along with Deputy COP Milton Desir and Mr. Albert Fregis, it was agreed that PC Emmanuel would indicate which department he wished to transfer to. He said PC Emmanuel did not respond and so he wrote to him on 5<sup>th</sup> December 2017 informing him that his transfer was still in effect. On 12<sup>th</sup> December 2017, COP Moncherry said he wrote to PC Emmanuel advising of his transfer to the Southern Division with effect from 14<sup>th</sup> December 2017 and requesting that he report to the Officer in Charge on the said date.

[14] **COP Moncherry denied that PC Emmanuel’s transfer was a form of punishment** and he stated that any officer is subject to transfer in accordance with the Standing Orders.

[15] As to the suspension on half pay, COP Moncherry averred that this was done pursuant to section 32(1)(a) of the Police Act<sup>3</sup> pending the hearing of a disciplinary charge against PC Emmanuel. According to COP Moncherry the disciplinary charge has not been heard.

#### The Law

[16] Judicial review is available in cases where a decision making body exceeds its powers, commits an error in law, commits a breach of natural justice, reaches a decision which no reasonable tribunal could have reached or abuses its powers.<sup>4</sup> 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.

[17] The leave stage is to weed out cases that are unarguable.<sup>5</sup> PC Emmanuel 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*<sup>6</sup> and *Mitchell v Georges et al.*<sup>7</sup> 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. The test was expressed in this way in the *Sharma* case:

**“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 ... But arguability cannot be** judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application. As the English Court of Appeal recently said with reference to the civil standard of proof in *R (N) v Mental Health Review Tribunal (Northern Region)* [2006] QB 468, para 62, in a passage applicable, mutatis mutandis, to arguability:

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<sup>3</sup> Cap. 14.01, Revised laws of Saint Lucia, 2001.

<sup>4</sup> See *Preston v Inland Revenue Commissioners*, [1985] 2 All ER 327.

<sup>5</sup> *R v Monopolies and Mergers Commission* [1986] 1 WLR 763.

<sup>6</sup> (2006) 69 WIR 379.

<sup>7</sup> (2008) 72 WIR 161.

**“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 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.”**

It is not enough that a case is potentially arguable: an applicant cannot **plead potential arguability to “justify the grant of leave to issue proceedings** upon a speculative basis which it is hoped the interlocutory processes of the court may strengthen” (my emphasis.)

[18] I am reminded of the following. 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 on an application for leave is not concerned with whether a decision is right or wrong on its merits.

[19] It is noteworthy that the application consists of things done by the attorney which should not be part of the application. The application is being made by PC Emmanuel yet speaks from the voice of the attorney. (See paragraphs 6, 7, 12, 16 of the grounds for relief.) The submissions are riddled with hearsay, recounts things which do not appear in the affidavit of the applicant and introduces new evidence which did not form part of the **applicant’s affidavit in support of his** application. It must be remembered that submissions are intended to outline the legal basis for the application and provide the court with authorities to support these arguments.

Whether the acting Deputy COP by transferring PC Emmanuel acted ultra vires her authority and for an improper purpose

[20] Standing Order 4 of the Standing Orders of the Royal Saint Lucia Police Force 1990 as amended states that “transfers between Divisions and Branches will be made by the Commissioner of Police.”

[21] Counsel for the applicant, Mr. Albert Fregis (“**Mr. Fregis**”) argued that the acting COP transferred PC Emmanuel pursuant to section 8 of the Police Act and section 50 of the Police Regulations. Section 8 states:

“Absence of Commissioner of Police

8. A Deputy Commissioner of Police shall have all the powers and duties of the Commissioner of Police— (*Amended by Act 23 of 2011*)

(a) During any absence, incapacity or suspension from duty of the Commissioner of Police;

(b) During any vacancy in the office of the Commissioner of Police, but shall not have power to act by virtue of this section for a continuous period exceeding 3 months except with the consent of the **Governor General.**”

[22] Section 50 of the Police Act **states: “Any subordinate officer or constable may be transferred from one police station to another.”**

[23] It is clear from the memo dated 5<sup>th</sup> January 2017 that the COP delegated his power to transfer to the Deputy COP. There can therefore be no dispute about the authority of Deputy Commissioner of Police, Frances Henry to issue the letter of transfer to PC Emmanuel. This is not disputed by the applicant who in his **submissions stated “the applicant** is here concerned with the fourth limb of illegality, i.e. using a power for an improper purpose, as the applicant accepts that the Deputy Commissioner had the authority to transfer him, but that she exceeded her power by using it ultra vires the **legislative intent.**”

[24] The facts put before the Court by PC Emmanuel constitute speculation. There is nothing on the evidence in his application to suggest the nexus which counsel Mr. Fregis wishes the Court to accept exists between the report of discreditable conduct and the transfer of the applicant.

[25] Mr. Fregis submitted that in the exercise of her powers, the Deputy COP was bound to observe the principles of natural justice. There is nothing in the Standing Orders, the Police Act and Regulations or the Constitution which mandates that an



officer be heard before being transferred. Even **if I accepted counsel's** submissions, the evidence from COP Moncherry was that he convened at least three meetings with PC Emmanuel to discuss the matter of the transfer. He stated **that he offered alternative postings taking into consideration the officer's place of** residence and the fact that he had to drop off his child. This is not a case where an allegation has been made against an officer in which case the principles of natural justice would have to be observed. This is a case of transfer between divisions.

[26] Counsel, Mr. Fregis in his submissions argued that under normal circumstances consultation would not be required but suggests that in this case there should have been as the letter of transfer suggests that PC Emmanuel was specially chosen for a vital mission in Laborie. I cannot see the merit in this argument as I see nothing in the transfer letter which suggests as counsel has submitted.

[27] Counsel has also made reference to protocols attached to transfers within the organization having not been observed. **He referred to PC Emmanuel's evidence** that when he inquired none of his supervisors knew of the transfer. The Court does not know of the protocols as PC Emmanuel has not indicated what these are in his evidence. The fact that his supervisor did not know does not make the transfer bad or for an improper purpose.

[28] Counsel for the respondents argued that section 28(1) of the Police Act outlined the punishment which may be imposed on the hearing of a charge or complaint and transfer is not listed as one of these. Counsel stated that the fact that PC Emmanuel suffered no reduction in rank, salary or benefits is clear evidence that the transfer was not a form of punishment. In addition, the letter of transfer never made mention of any breach of discipline on the part of PC Emmanuel. There is force in these submissions.

[29] I therefore find that the applicant has failed to show that he has arguable grounds with a realistic prospect of success on this issue.

Whether the COP can affirm the transfer of the applicant having delegated that power to the Deputy COP

[30] Mr. Fregis argued that although the COP issued a letter of transfer to the Southern Division to PC Emmanuel, having regard to all that had transpired before, it was a **mere affirmation of the Deputy COP's prior transfer.**

[31] Counsel, Mr. Fregis referred to the case of Clifford Jackson v Police Service Commission<sup>8</sup> to support his argument and stated that this case held that the Commissioner of Police had no power to affirm a decision of one to whom he had delegated delegable powers. Mr. Fregis also referred to the case of Thomas v The Attorney General<sup>9</sup> as his authority for arguing that reasons for the transfer ought to be given. I am satisfied that these cases do not assist. In Clifford Jackson, the Commissioner had delegated disciplinary powers to the Tribunal but the power to delegate given in the Antigua Constitution expressly prohibited delegation of the power to remove or reduce in rank officers. Therefore when the Tribunal purported to recommend to the Commissioner removal of Officer Jackson as part of its disciplinary measures, the Court found that it could not purport to do that which it was not expressly empowered to do. In such a case, the Commissioner of Police could not affirm a decision of the Tribunal which was ultra vires from the start.

[32] In Thomas, the case concerned removal of a police officer and the Court found that in such a case the rules of natural justice must apply. The Court in that case held that there was a duty to give reasons so that the court could assess whether **there had been reasonable cause for the officer's dismissal. It must be** remembered that there is no duty to give reasons. In fact each case must be

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<sup>8</sup> ANUHCv2010/0487, delivered 23<sup>rd</sup> August 2012, unreported.

<sup>9</sup> [1982] AC 113.

**determined on its own facts. There is no allegation in the applicant's affidavit that he was entitled to reasons or that he requested same and was denied.**

- [33] It is to be noted that the 12<sup>th</sup> December 2017 letter never referred to any previous transfer. In fact, it informed of a transfer to the Southern Division effective 14<sup>th</sup> December 2017. The previous transfer was to the Laborie Police Station with effect from 8<sup>th</sup> June 2017. I am yet to understand how this is an affirmation when it clearly is a transfer effective from a different date. In any event, it is not disputed that the Deputy COP had the power to effect the transfer of PC Emmanuel and in such a circumstance, the COP would have been well within the law if he had affirmed her decision.

Whether COP by suspending PC Emmanuel acted ultra vires his authority and used his power for an improper purpose

- [34] Section 32(1) of the Police Act states that:
- “32. Payment during suspension**
- (1) An inspector, subordinate officer or constable against whom any complaint or information for an offence punishable on summary conviction or on indictment is laid, or against whom a charge is made for breach of any disciplinary regulation made under this Act, may, pending, and until final determination of such complaint, information or charge—
- (a) be suspended from duty and placed on half-pay by the Commissioner of Police; or
  - (b) if admitted to bail and not so suspended, be employed on full-time duty, in which case he or she shall receive full pay, or if employed on part-time duty he or she shall receive a rate of pay (not being less than half-pay) as the Commissioner of Police thinks fit. (my emphasis)

- [35] PC Emmanuel in his affidavit averred that he was not charged at the date when he was suspended but has produced no evidence in support of this allegation. The letter of suspension was produced but he did not provide the Court with the Disciplinary Form which he said accompanied it nor did he provide evidence of summons to defaulter or any document to show the charges.

[36] The submissions sought to introduce evidence which was not in the affidavit of the applicant in support of the application and therefore such cannot be regarded. Evidence of what transpired at the meetings with the Commissioner cannot be introduced for the first time in the submissions and I disregard it. Counsel, Mr. Fregis spoke of the right to be heard. This is certainly a very essential part of the observance of natural justice. However, in this case, section 32 of the Police Act gave the COP the power to suspend on half-pay where he is charged with breach of any disciplinary regulation made under the Police Act pending and until determination of the complaint. This is an administrative function which clearly section 32 gives the COP authority to exercise. There is nothing on the affidavit of PC Emmanuel which raises any arguable ground in relation to his suspension and that it was illegal, irrational or lacked procedural impropriety. The hearing in relation to the disciplinary charge is something totally different as its conduct must be in-keeping with the rules of natural justice. But that is not a matter for me at this time.

[37] Counsel for the respondents submitted that the disciplinary proceedings have not yet been heard and once heard, PC Emmanuel will have a right of appeal to the Public Service Board of Appeal where the COP is the one who makes a determination on the matter pursuant to section 29 of the Police Act. Where the hearing is conducted by an officer appointed by the COP, an appeal lies to the COP and then to the Public Service Board of Appeal. Any discussion regarding that aspect of the proceedings relating to the disciplinary charge and hearing is premature.

[38] I find that the applicant has not shown any arguable grounds with a reasonable prospect of success on this issue.

Attorney General as a Party

[39] Mrs. Barnard, counsel for the respondents argued that the Attorney General was not a necessary party to this application as he exercises no powers or duties in

relation to the Police Force. He may however represent the Commissioner in proceedings. He referred to the case of *Minister of Foreign Affairs, Trade and Industry v Vehicles and Supplies Limited*<sup>10</sup> where the Privy Council ruled that judicial review proceedings unlike other civil proceedings did not have to be instituted against the Attorney General. This is indeed the position but as pointed out at the hearing of the application, the fact that the Attorney General was named as a party would not be fatal to the application as it could survive against the COP. The Attorney General would have to be struck as a party.

#### Non-Disclosure by the Applicant

- [40] The respondents in their submissions argued that the affidavits of PC Emmanuel never disclosed the meetings which were held with the COP in relation to the matter of his transfer and also did not disclose that the COP offered him the opportunity to transfer to Castries and to suggest an alternative placement.
- [41] In *Cable & Wireless v Telecommunications Regulatory Commission*<sup>11</sup> Justice Ellis spoke of the duty of candour and of full and frank disclosure in applications for leave to file judicial review. Counsel for the respondents argued that although the case dealt with an ex parte application, the principle of full and frank disclosure is still relevant. Rule 56.3(f) of the Civil Procedure Rules requires an applicant to **give “details of any considerations 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.”** The applicant by failing to disclose the consideration given by the COP to his complaint in relation the transfer, he has failed to comply with the rules. This is certainly a factor to be considered and could be fatal to an application.

#### Maintaining the Status Quo

- [42] In submissions filed 26<sup>th</sup> April 2018, counsel for the applicant, Mr. Fregis submitted that it is trite law that once an application for leave had been filed and served upon

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<sup>10</sup> [1991] 4 All ER 65.

<sup>11</sup> BVIHCV2012/0179 at para 18.

the Commissioner of Police, he was bound to maintain the status quo until the Court had made its determination. No authority was provided in support of this proposition. At the time the application for leave was filed in December 2017, it concerned the decision to transfer the applicant and had nothing to do with the disciplinary charges against him. I find no support in law for this submissions and I wholly reject it.

#### Conclusion

[43] Having considered the application, I found that the applicant had not shown that he has any arguable grounds with a realistic prospect of success and I therefore dismissed the application with no order as to costs.

#### [44] Order

The application for leave to file a claim for judicial review is dismissed with no order as to costs.

Kimberly Cenac-Phulgence  
High Court Judge

By the Court

Registrar of the High Court