



[2024] JMSC Civ.19

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CIVIL DIVISION**

**CLAIM NO. SU2019CV03254**

<b>BETWEEN</b>	<b>ISAT AQUABA BUCHANAN</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>THE CUSTOS OF KINGSTON THE HONOURABLE MR. STEADMAN FULLER</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>THE ADVISORY COMMITTEE FOR THE CUSTOS OF KINGSTON</b>	<b>2<sup>ND</sup> DEFENDANT</b>
<b>AND</b>	<b>THE MINISTER OF JUSTICE THE HONOURABLE MR. DELROY CHUCK</b>	<b>3<sup>RD</sup> DEFENDANT</b>

**IN OPEN COURT**

Mrs. Valerie Neita Robertson K.C. and Mr. John Clarke instructed by Knight Junor and Samuels for the Claimant

Mr. Ransford Braham K.C. and Ms. Christina Thompson instructed by Braham Legal for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants

Ms. Lisa White and Mr. Stuart Stimpson instructed by the Director of State Proceedings for the 3<sup>rd</sup> Defendant

**Heard: November 7, 2023, and February 23, 2024**

**Sections 5, 6, 9 and 13 of the Justices of the Peace Act – The significance of the taking of the Oath of Office as a Justice of the Peace – The effect of a material non-disclosure on a claim for Legitimate Expectation – Section 16 (2) of the Charter of Fundamental Rights and Freedoms.**

**CARR, J**

## **Introduction**

- [1] Mr. Isat Buchanan (**Claimant**), a practicing Attorney-at-Law, applied to the Custos of Kingston (**Custos**) to become a Justice of the Peace (**JP**) in January of 2017. He was informed of the approval of his application in a letter which was dated March 15, 2019. He thereafter completed the mandatory training course at the Judicial Training Institute. He received a telephone call on May 17, 2019, and the Custos informed him that he wished to meet with him on May 21, 2019. On that date, the Custos advised him that he and the Advisory Committee for the Custos of Kingston (**Committee**) had reviewed his application and decided that they would not recommend his commission as a JP on the basis that they were not satisfied that he was a person of unquestionable character. Information received by the Custos indicated that the Claimant had failed to disclose that he had previous criminal convictions when making his application.
- [2] The Governor General was to be advised of this decision. Mr. Buchanan applied to the Court for leave to seek judicial review of the decision. Thompson – James, J, granted leave on October 7, 2019, for the Claimant to seek the remedies of Certiorari and Mandamus.

## **The Claim**

- [3] The claim was amended on April 22, 2020, and the request for orders of Certiorari and Mandamus were removed. The Claimant now seeks declaratory relief as follows:
1. A declaration that Isat Aquaba Buchanan was recommended by the 3<sup>rd</sup> Defendant as a person to be appointed as a Justice of the Peace consistent with section 6 (5) of the Justice of the Peace Act, 2018.
  2. A declaration that Isat Aquaba Buchanan in fulfilment of his statutory responsibility under section 6 (6) of the Justice of the Peace Act, 2018 participated and completed the relevant training courses as was

approved by the 3<sup>rd</sup> Defendant as a suitable qualifying training for the Claimant and his fellow candidates for Justice of the Peace.

3. A declaration that Isat Aquaba Buchanan was commissioned as a Justice of the Peace for the parish of Kingston on the 29 May 2019 by the Governor General in keeping with s. 5 (1) of the Justices of the Peace Act, 2018 on or about the 29<sup>th</sup> day of May 2019.
4. A declaration that Isat Aquaba Buchanan, based on the successful completion of the Governor General's process, had a legitimate expectation, along with the rest of his cohort of JP candidates to be commissioned by the 1<sup>st</sup> Defendant by virtue of his taking the oath as a Justice of the Peace, the seal of his office and his ability to act in the office of the Justice of the Peace for which he was 'commissioned'.
5. A declaration that the Custos for the parish of Kingston, the Honourable Steadman Fuller, ought to have complied with s. 5(4) of the Justices of the Peace Act, 2018 following the appointment of the Claimant to the office of the Justice of the Peace by the Governor General.
6. A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> Defendant, without any lawful authority, have failed to fulfil their duty to ensure – in keeping with Section 5 (4) of the Justice of the Peace Act 2018 – that the Claimant, a Justice of the Peace for Kingston, is allowed to:
  - a. Be issued an instrument of office.
  - b. Take the oaths required of a Justice under the Oaths Act; and
  - c. Be entrusted with an official seal of such size or specification as may be prescribed in regulations made under section 21 of the Justice of the Peace Act.

## Issues

[4] Having heard the submissions of Counsel for the parties, I have identified the following issues for the determination of this claim.

1. Whether the Claimant was appointed a JP in accordance with Section 5 of the Justices of the Peace Act (**JPA**).
2. What is the effect of a material non-disclosure by the Claimant on his application to be appointed as a JP.
3. Whether the Claimant had a substantive legitimate expectation that he would be appointed as a JP.

4. Whether there was a breach of the Claimant's right to due process and a fair hearing as guaranteed by section 16 (2) of the Constitution of Jamaica and/or the common law principles of natural justice.

### **Preliminary matters**

- [5] At the commencement of the hearing of the matter, Counsel for the Claimant made an application to cross-examine the Custos. The application was refused with a promise made to include my reasons in this judgment.
- [6] Counsel's application was grounded on the fact that the affidavit of the Custos was sparse and did not give sufficient details as to what occurred at the meeting of the committee. He contended that the claim was partly based on procedural impropriety and substantive legitimate expectation and that the cross-examination would assist the Claimant in establishing his case. Mr. Clarke acknowledged that the use of cross-examination in matters of Judicial Review was exceptional.
- [7] In response, Mr. Braham K.C. indicated that cross-examination was rarely done in cases of this nature, and that it would only be useful if it would assist the court in determining the issues in dispute. It was argued that the Custos had outlined in his affidavit the reason for the decision that was taken, and this reason has not been challenged by the Claimant. There was therefore no basis for cross-examination.
- [8] Mr. Stimpson asked the court to focus on the material non-disclosure of the Claimant which resulted in the decision that was taken. He argued that there was no challenge to that evidence and that the issue of credibility was not an issue for determination by this court.
- [9] In further submissions Mr. Braham K.C. asked the court to consider whether the Claimant ought to be permitted to proceed on the amended fixed date claim form. It was argued that he did not seek leave, nor was he permitted to amend the claim. In the circumstances, the Court should not consider the amended claim as they

are contrary to the orders for which leave was granted. The amended claim form would therefore be a nullity and should be treated as such.

- [10] For the 3<sup>rd</sup> Defendant, Mr. Stimpson submitted that there was no basis to grant the orders sought on the amended fixed date claim form with respect to the to the 3<sup>rd</sup> Defendant as there was no issue joined between the parties.

### **Discussion**

- [11] The issues before the court are as outlined previously. It is my considered view that cross-examination would not assist the court in determining the matter. The reason for this is that the Custos in his affidavit outlined the circumstances which lead to the decision of the Committee. He stated that an application form was completed by the Claimant in pursu it of an appointment to the office of JP. In that application the Claimant was asked:

*“Have you ever been found guilty of a criminal offence?”*

The Claimant ticked the box “no”. Because the Claimant was an Attorney-at-Law, the Custos stated that he did not refer his application to the police for further checks but instead sent the application to the Minister of Justice (**Minister**) for his consideration.

- [12] The Claimant was then invited to attend the training course. During that period, the Custos was informed by another JP that the Claimant had a prior history with the criminal law. He was also contacted by a senior police officer assigned to the Deportee Centre. That officer indicated that the Claimant would not be a suitable person to attend the Centre as he had been previously processed there as a deportee.

- [13] Having received these complaints, the Custos reviewed the application of the Claimant and referred the application to the Committee. The Committee decided not to appoint the Claimant as a JP, as they formed the view that, *“Mr. Buchanan’s failure to truthfully represent his position in relation to the convictions made it*

*impossible for the Advisory Committee to be of the view that Mr. Buchanan at the time of his application was of “unquestionable integrity”.*<sup>1</sup>

**[14]** It is an undisputed fact that the Claimant was not present at the time the decision was made by the Committee. It is also accepted that the Claimant was not advised of a meeting to discuss his appointment. Further, the Claimant has not alleged that the Custos made him any promises that would give rise to a legitimate expectation. In making that assertion, he relied strictly on the JPA. The credibility of the witness was not in issue and the previous convictions of the Claimant were never challenged. Those facts having been established there was no basis for further questions as this would not be useful in a determination as to the issues in dispute.

**[15]** I turn now to the concerns raised by the Defence as to:

- a) the amended fixed date claim form, and
- b) the claim against the 3<sup>rd</sup> Defendant.

*The Amended Fixed Date Claim Form*

**[16]** Rule 20.1 of the Civil Procedure Rules outlines that a party can amend their statement of case at any time before the case management conference without the permission of the court. The amended claim form must be filed and served, and a Defendant may file and serve an amended defence within 42 days of the service of the amended claim form. Matters involving statutory limitation periods are excepted from this rule.

**[17]** The first hearing of a fixed date claim form is a case management conference. Until orders are made at case management and the matter is fixed for trial a party can amend their statement of case as set out above. It is a well-established principle of law that leave is required to file a claim for judicial review. However, it is noted

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<sup>1</sup> Affidavit of Steadman Fuller filed on January 17, 2020, paragraph 11

that a party does not need to seek leave for declaratory relief. In this instance, the Claimant is no longer pursuing orders of certiorari and mandamus he is asking the court in its inherent jurisdiction to make declaratory orders on a claim for judicial review. I do not agree with Mr. Braham K.C. that this results in the amended fixed date claim form being a nullity.

*The claim against the third defendant*

**[18]** An application was made by the 3<sup>rd</sup> defendant to have the claim against him struck out and this application was refused. The amended fixed date claim form seeks orders in respect of the 3<sup>rd</sup> Defendant as per paragraphs 1 and 2. The 3<sup>rd</sup> defendant elected not to file an affidavit in response to the claim, and as such has not joined issue with the facts as stated by the Claimant. The contention of Mr. Stimpson with respect to the order at paragraph 1 is that it is unnecessary as the 3<sup>rd</sup> Defendant did in fact and in law make a recommendation for the Claimant to be appointed as a JP. The order sought at paragraph 2 does not involve the Minister as it involves the statutory requirement of the completion of a course. In essence, the court would be acting in vain since there is no issue to be determined as between these two parties.

**[19]** I agree with Mr. Stimpson . The court has a wide discretion when exercising its power to grant declaratory relief. This includes making a declaration as to, the rights between parties, the existence of facts, or a principle of law - where those rights, facts or principles have been established to the satisfaction of the court. In the exercise of that discretion , I must consider the question of what will give justice to the parties, and whether the declaration would serve a useful purpose. I must also determine whether there are any special reasons for the granting or refusal to grant the declarations sought<sup>2</sup>.

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<sup>2</sup> Neuberger J in the authority Financial Services Authority v Rourke All England Official Transcripts (1997-2008), [2001] Lexis Citation, 2268 (unreported) judgment dated 19<sup>th</sup> October 2001), page 4

**[20]** In this case there is no issue joined between the parties that requires a declaration from the Court with respect to the 3<sup>rd</sup> Defendant. Additionally, an order making such a declaration takes the case of the Claimant no further as the 3<sup>rd</sup> Defendant has not pursued a course of conduct denying him an appointment as a JP , that is solely within the domain of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants based on the evidence before this court. In the circumstances, I find that orders 2 and 3 ought not to be granted as they are superfluous and will not bring a resolution to this matter.

**Whether the Claimant was appointed as a Justice of the Peace in accordance with Section 5 of the Justices of the Peace Act.**

**Submissions**

**[21]** The Claimant contends that he was commissioned as a JP under Section 5 (1) of the JPA and that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are bound by law to complete the process of his appointment by permitting him to take the Oath of Office as provided by the Oaths Act.

**[22]** Mr. Braham K.C. argued that the Claimant could not be considered in law to be a JP, as he had failed to meet the requirements which would make him eligible for qualification and appointment. Even if he received a form of appointment, he would not be appointed in accordance with the law. It was submitted that the Claimant is not of unquestionable integrity by virtue of his failure to declare his previous convictions. He is therefore not entitled to be treated as a JP. In the alternative, it was argued that the Claimant's appointment would not take effect until he took the Oath of Office in keeping with Section 5 (4) of the JPA and Section 12 of the Oaths Act.

**[23]** Mr. Stimpson submitted that the Claimant's appointment to the position of JP would be crystallized upon taking the Oath. The evidence is that he has not been permitted to do so, and as such, he has not been appointed.

**Discussion**



[24] The Custos in his affidavit filed on January 17, 2020, at paragraph 15 stated: “**The Governor-General issued a commission in relation to Mr. Buchanan.**” The commission was exhibited to his affidavit as “**SF2**”. Despite the Governor-General’s Instrument of Commission, the Claimant has not yet taken the Oath of Office, has not been issued with a seal and has not performed the duties of a JP. Although the Claimant uses the term commissioned at paragraphs 3 and 4 of the amended fixed date claim form there is no reference to the word “commissioned” in Section 5 of the JPA, instead that section refers to the word appointment.

[25] A discussion on this issue must therefore involve a fulsome examination of Section 5 of the JPA. Under Section 5 (1) the Governor General may upon the recommendation of the Minister appoint a person to be a JP.

*The Governor- General, acting on the recommendation of the Minister, may appoint, to the office of Justice of Peace, any person **eligible (my emphasis)** under this section to be appointed as a Justice.*

[26] Section 5 (2) provides as follows:

*An individual is eligible to be appointed as a Justice of the Peace if the individual;*

- a. *Is a citizen of Jamaica who is resident in Jamaica at the time of appointment and who is able to read and write in the English Language.*
- b. *Is an individual whom the Governor- General is satisfied –*
  - i. *Is of unquestionable integrity;*
  - ii. *Commands the respect and confidence of the individual's community; and*
  - iii. *Has given good service to the community or the wider Jamaica and who demonstrates the potential for continuing to give such service, and*
- c. *Has attained the age of twenty- three years.*

[27] Section 5 (4) reads:

*Upon appointment under this section, each Justice shall-*

- a. *be issued an instrument of Office:*
- b. *take the oaths required for a Justice under the Oaths Act; and*
- c. *be entrusted with an official seal of such size and specification as may be prescribed in regulations made under Section 21.*

[28] Mr. Clarke has submitted that the word shall is mandatory and that the Custos is bound to issue an instrument of Office and permit the Claimant to take the Oath. I disagree. Upon a literal interpretation of the statute, it is evident that a person's appointment as a JP is conditional upon the Governor-General being satisfied of the eligibility of the individual as per Section 5 (2). In interpreting Section 5, I find that every aspect of the appointment of a JP is grounded in the qualifying criteria. Section 5 (4) speaks to an appointment under the Section, and Section 5 (1) speaks to the eligibility of the person to be appointed. In essence the person shall take the Oath of office **if** all the conditions of the section have been met.

[29] It is also my view that the word "**shall**" in Section 5 (4) is indicative of the fact that the appointment is not complete until the person takes the Oath as set out in the Oaths Act.

[30] Section 12 of the Oaths Act provides that:

*The oath of allegiance and judicial oath shall be taken by each of the officers named in the Second Part of the said Schedule, as soon as may be after his acceptance of office and before his entering upon the duties thereof, and such oaths shall be tendered and taken in manner in the said Second Part indicated.*

[31] The Second Part of the Schedule includes a JP. The Oath shall be taken as soon as may be after the acceptance of the Office but prior to the person performing their duties. It is only after taking the Oath that the person is issued with an Instrument of Appointment.

[32] Further, Section 17 of the Oaths Act is also helpful, as it demonstrates that the taking of the Oath solidifies an applicant's official appointment to the Office of a JP.

The appointee as confirmed by the section **must take and subscribe** the Oath, and having done so if he is reappointed under a new Commission, he will not be required to retake that Oath. It states:

*Any person who has been, or shall be appointed a Justice of the Peace by any commission, and has taken and subscribed, or shall take and subscribe, the oaths prescribed by Section 12, shall not be obliged again to take and subscribe the same oaths for or by reason of his having been or being again appointed a Justice of the Peace by any commission which shall have been or shall be granted during the reign of the same Sovereign, and shall not incur any penalty or forfeiture for the not taking or subscribing the said oaths on such reappointment.*

[33] I find also, and most significantly that contained within the Governor- General's Commission was a Writ of Dedimus which authorized and appointed the Custos or any other JP for the parish of Kingston to administer the Oath of Allegiance and the Oath of Office to the Claimant. The Writ is to be returned to the Governor-General indicating that the Claimant took the Oaths and signed the roll of a JP. I find that this demonstrates that the taking of the Oath would in fact complete the Claimant's appointment as a JP. I must mention at this juncture that the document exhibited as "SF2" was signed and dated by the Custos approximately a month after the meeting with the Claimant. I attach no significance to that signature or date as the evidence supports the conclusion that despite this the Claimant was never administered the Oath.

[34] The submissions of Mr. Braham K.C. and Mr. Stimpson are accepted. The Claimant has not been duly appointed to the office of JP as he has not taken the Oath of Office as prescribed by the Oaths Act.

**What is the effect of a material non-disclosure by the Claimant on the application to be appointed as a Justice of the Peace.**

### **Submissions**

[35] Mr. Braham KC submitted that the court ought to take into consideration the conduct of the party applying for judicial review when determining whether to grant

relief<sup>3</sup>, such conduct counsel argued, can include suppression of material facts prior to the filing of the court action<sup>4</sup>.

[36] It was argued that the claimant's response in his application was blatantly dishonest and untrue, and he could not be considered as a person of unquestionable integrity. In failing the integrity test the claimant has not complied with the conditions as set out in Section 5(2) (b) (ii) of the JPA. It was further submitted that even if the Claimant was allowed to take the Oath, he could not assume the office of a JP as he would be a person with a criminal conviction for a serious offence and this is contrary to Section 14(4) of the JPA. The section provides that a JP who has been convicted of a serious offence is required to cease performing duties until the Minister's advice to the contrary.

[37] Mr. Stimpson argued that the failure of the Claimant to disclose his antecedent history rendered the application a nullity and such an act is a direct contravention of what is expected in the Justice of the Peace Code of Conduct. Counsel relied on the authority of **William Faulkner T/A Policylink and Apsley Homes Estates Agency and Financial Services Authority**<sup>5</sup>. The facts of this case are similar to the instant case. Mr. Faulkner, the applicant was a sole trader, who was granted permissions on January 2005 by the Authority under the Financial Services Markets Act(FSMA) to carry out certain financially regulated activities. After the granting of permission, the Authority became aware that Mr. Faulkner had a number of convictions through an undisclosed source and that he had been dishonest in his completion of the application form when asked about his previous convictions.

[38] As a part of the application process Mr. Faulknor was required to complete an application form, he failed to disclose his previous convictions despite pointed

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<sup>3</sup> R. v. South Holland Drainage Committee 112 ER 901 [2006]

<sup>4</sup> R. v. Kensington General Commissioners of Income Tax ex. p. Polignac [1917] 1 KB 486

<sup>5</sup> [2006] Lexis Citation 4791 Case Decision 39

questions on the form requiring him to make disclosure. The case was appealed to a Tribunal that found that there was a statutory duty on the part of the regulating body to ensure that the requirements of the statute had been met with respect to the applicant's integrity and fitness. Counsel emphasized the point that the party can be disqualified even if the material non-disclosure is discovered after the person has been appointed to the position <sup>6</sup>.

**[39]** The Claimant in this instance made a material non-disclosure on his application form. The question was quite specific "Have you ever been found guilty of a criminal offence?", and his response was "No". It is that response which propelled the Custos to make a recommendation. The recommendation was therefore made on an answer which undeniably was false. The Claimant cannot now seek to rely on that recommendation since the Custos was not seized of all the facts.

**[40]** In his affidavit the Custos stated:

*That having received an application I reviewed the application and exercised one of two options, that is to say, I may send the application to the Police for carrying out of further due diligence and thereafter refer to the Advisory Committee or I may refer the application immediately to the Minister of Justice for consideration.*

*In the case of persons who are in the legal profession unless there are issues of concern raised on the application form it is my usual practise to refer the application directly to the Minister of Justice for his consideration. Mr. Buchanan being a member of the legal profession, I opted to refer his application to the Minister of Justice without requiring the Police to carry out further due diligence. <sup>7</sup>*

**[41]** The discretion exercised by the Custos is within the ambit of Section 6 (3) of the JPA.

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<sup>6</sup> Therrien v Canada( Minister of Justice) et al [2001] 5 LRC 575

<sup>7</sup> Affidavit of Steadman Fuller, paragraphs 6-7

*“Upon receipt of an application in accordance with this section, the Custos—*

*(a) **May** (my emphasis), in order to ensure that the applicant is suitable for appointment, cause a member of the Jamaica Constabulary Force, not being a member below the rank of Inspector, to make discreet inquiry into the background of the applicant and*

*Shall refer the application to the Advisory Committee together with the results of the inquiry (if any) under paragraph (a) and a statement-...”*

It is the content of the application form that is utilized by the Custos in deciding as to the suitability of a candidate for appointment. The Claimant had a duty to make full and frank disclosure if he expected to be treated fairly in having his application determined. It is not enough for him to say that he expected the Custos to do his due diligence. It follows therefore that any recommendation made on the inaccurate response to the question posed is sufficient to nullify the appointment made.

**Whether the Claimant had a substantive legitimate expectation that he would be appointed as a Justice of the Peace.**

[42] The principle of legitimate expectation has its genesis in natural justice. It arose out of the concept of fairness and the expectation that an individual will be heard before an adverse decision is made against him by a public body. Since then, the principle has developed and is now classified into two categories that of procedural legitimate expectation and substantive legitimate expectation. In this case the Claimant raised the issue of substantive legitimate expectation.

[43] Under substantive legitimate expectation the court must assess the effect of a promise or representation made on behalf of public administrative bodies which results in a substantive benefit to an individual. The courts have found that where there is a promise or representation that gives rise to a substantive legitimate expectation there may be legal consequences.

[44] The first hurdle the claimant must surpass is whether there was in fact and in law a legitimate expectation. In the case of **R. v. North and East Devon Health Authorities ex p Coughlan**<sup>8</sup> the court held that a party who seeks to establish that there was a substantive legitimate expectation must prove that the Defendant made a promise, representation, or carried out a course of conduct which would cause the Claimant to believe that he had a legitimate expectation. The evidence of the Claimant is that he applied for a position as a JP and that he received communication indicating that he was duly recommended.

[45] He was then advised that he had to participate in the training course, which he did. Subsequently, he was invited to a dinner attended by all prospective JP's and was merely awaiting his appointment to the office. The promise and/or representation was made in the communication which suggested that he was recommended for the post. Having been recommended he had a legitimate expectation that he would be appointed in accordance with the Act.

[46] If the court accepts that there was evidence of a substantive legitimate expectation the burden shifts to the defendant to prove that the administration was justified in the frustration of that expectation. In this case the Custos has given evidence on affidavit that the failure of the Claimant to disclose his previous convictions makes it sufficient for the court to find that there was justification in frustrating his expectation.

[47] He stated:

*Mr. Buchanan in completing the application form for the office of Justice of the Peace was obliged to complete the application form honestly and truthfully. Mr. Buchanan when asked to indicate whether he was ever convicted of a criminal offence, dishonestly and untruthfully gave an answer in the negative, when he was in fact convicted twice in two separate jurisdictions of serious criminal offences.*

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<sup>8</sup> [2001] Q.B. 213 para. 56-58

*Mr. Buchanan's conviction and/ or his response on the application form do not support a conclusion that he is a person of unquestionable integrity.<sup>9</sup>*

[48] The argument of legitimate expectation I find would be open to persons who were duly recommended and for some reason had failed to be appointed perhaps out of spite or malice. In this case the claimant did not give the Custos or the Committee an opportunity to assess the importance or relevance of his past convictions to the question of his integrity. Instead, it was omitted.

[49] In the face of that omission, I do not find that the Claimant had a legitimate expectation to be appointed as a JP. If that view is not accepted it is also my finding that any legitimate expectation would be open to frustration by the Custos, and the Committee based on the Claimant's own course of conduct which was less than forthright. I accept the evidence of the Custos that this would bring the office into disrepute and that the conduct of the Claimant ought not to be condoned by permitting him to take the Oath of Office.

**Whether there was a breach of the Claimant's right to due process and a fair hearing as guaranteed by section 16 (2) of the Constitution of Jamaica and/or the common law principles of natural justice.**

### **Submissions**

[50] Mr. Clarke submitted that by virtue of his appointment the Claimant is no longer an applicant and is entitled to due process if he is to be terminated from his position. For his termination to be valid it would have to be in accordance with Section 16 (2) of the Constitution and Sections 9 (2), 9 (3), 9 (4) and 13 of the JPA.

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<sup>9</sup> Affidavit of Steadman Fuller para. 18



- [51] It was argued that the Governor -General was not consulted prior to the decision to revoke the Claimant's appointment, neither was there a process as outlined by Section 9 (4) of the JPA.
- [52] Counsel also submitted that the Claimant was not afforded a hearing in contravention of the common law principles of natural justice. He cited the cases of **Ridge v. Baldwin**<sup>10</sup> and **R v. Secretary of State for the Homes Department, ex parte Doody**<sup>11</sup> in support of his arguments. It was argued that the Custos was both the complainant and the decision maker in this instance and that this was sufficient evidence to demonstrate that the Claimant was not afforded due process.
- [53] In response Counsel on behalf of the Defendants contended that there was no breach of a constitutional right. It was submitted that such a breach could only be determined if it was established that such a right was created and that it has been infringed. In this case there is no infringement as the eligibility requirements for a JP have not been met. The suitability of persons to be appointed is a matter within the discretion of the Custos. Counsel argued further that the right to a hearing is only relevant after the person is appointed, and in this case the appointment is not crystallized until the Claimant takes the oath of office.
- [54] Section 13 (3) (r) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011 (Charter) provides that a person is entitled to due process as provided in Section 16 (2) of the Constitution of Jamaica. Section 16 (2) states:

*In the determination of a person's civil rights and obligations or of any legal proceedings which may result in a decision adverse to his interests, he*

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<sup>10</sup> [1964] AC 40

<sup>11</sup> [1994] 1 A.C. 531

*shall be entitled to a fair hearing within a reasonable time by an independent and impartial court or authority established by law.*

[55] In determining matters for breaches of the Constitution I am guided by the authority of **Julian Robinson v. The Attorney General of Jamaica**<sup>12</sup>. The starting point is that the Claimant must demonstrate by the evidence that his right has been, is being or is likely to be infringed by the Defendant. It is only after the Court is satisfied of this fact that the burden shifts to the Defendant to demonstrate whether the breach is demonstrably justified in a free and democratic society.

[56] In construing Section 16 (2), I commence by noting that this matter does not involve the institution of legal proceedings. There is also no application for a determination of the obligations of the Claimant which arise on the facts of this case. It has also been conceded by Mr. Clarke that the Claimant has no right to hold the office of a JP. Section 16 (2) is invoked and engaged in the context of a civil trial, or a matter which involves criminal proceedings. Neither of the two are referenced in this case. There is also no basis to hold that there is a right to hold the office of a JP which is to be protected by the Constitution. The fact that there is an application process and qualifying criteria, is a clear indication that an appointment to that office is purely discretionary. There is therefore no breach of a civil right that is to be determined. In the circumstances, I do not find that the rights guaranteed under Section 16 (2) of the Charter have been engaged or infringed.

*Breach of natural justice*

[57] The other limb of Mr. Clarke's argument is that of the common law principle of natural justice. The submission was premised on the right to a fair hearing. The Claimant was not invited to the meeting that was held by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

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<sup>12</sup> [2019] JMFC Full 04

He was not asked to explain the circumstances surrounding his answer on the application form.

- [58]** The gravamen of Mr. Clarke's submission is that the Claimant was appointed as a JP and cannot be removed without due process. Having found that the Claimant's status as a JP is dependent on his taking the Oath of Office this argument is moot. Nevertheless, I will examine Section 9 of the JPA.
- [59]** The tenure of a JP is for the life of the Justice until he is removed from the register, until he is terminated by either resignation from the office or removal for misconduct or inability to perform the functions of the Office or for any other reason pursuant to the Act. The Governor-General may revoke the appointment of a JP on the grounds that the JP has behaved in a manner that taints the office, is likely to bring the office into public ridicule, cause public scandal or bring the administration of justice into disrepute<sup>13</sup>.
- [60]** There are two separate disciplinary processes that can take place under the Act in respect of a JP. He can either be suspended by the Custos or his appointment can be revoked by the Governor-General. It is only in these circumstances that the JPA makes provision for the person so indicted to be advised of the action to be taken and to cause an enquiry to be made into all the circumstances surrounding the alleged conduct<sup>14</sup>. Upon the conclusion of the enquiries, the JP ought to be given a right to be heard.
- [61]** In this case, there is no indication that the Governor-General has indicated in writing that there was a revocation of the appointment of the Claimant. Neither has a decision been taken as to his suspension by the Custos. The Claimant does not

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<sup>13</sup> Section 9 (4) of the Justices of the Peace Act 2018

<sup>14</sup> Sections 12 and 13 of the Justices of the Peace Act 2018

fall under either category as outlined by the JPA. There is therefore no reason for him to be heard in keeping with the provisions of the Act.

## **Conclusion**

**[62]** Though paragraphs 1-3 of the fixed date claim form were uncontested by way of affidavit evidence I find no useful purpose in granting the orders as it would not advance the status of the Claimant, since what he seeks is to be appointed as a JP. Having found that the Custos is not obliged to administer the Oath of Office, given the material non-disclosure of the Claimant, the declarations sought at paragraphs 4-6 are refused.

**[63]** In summary I have concluded the following:

1. That the declarations sought at paragraphs 1-3 of the Amended Fixed Date Claim Form are superfluous and are refused.
2. That the Claimant is not entitled to a declaration that he had a legitimate expectation to be appointed as a JP as he failed to make full disclosure on his application thereby nullifying his recommendation.
3. That the Claimant is not entitled to take the Oath of Office as the Custos in the exercise of his discretion has found that he has not met the requirements as set out in the JPA.

## **Orders:**

1. The orders sought on the fixed date claim form are refused.
2. No order as to costs.