

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2008 HCV 02862

IN CHAMBERS

BETWEEN	LAWRENCE CLAYTON	CLAIMANT
AND	COMMISSIONER OF POLICE	FIRST DEFENDANT
AND	JAMAICA CONSTABULARY FORCE	SECOND DEFENDANT
AND	THE ATTORNEY GENERAL OF JAMAICA	THIRD DEFENDANT

Franklyn Halliburton instructed by Knight, Junor & Samuels for the Claimant

Miss Tasha Manley and Miss Tamara Dickens instructed by the Director of State Proceedings for the Defendants

Claimant Lawrence Clayton present.

M. MCINTOSH, J.            March 2, 2012

This is an Application for Court Orders by the defendants seeking to:

1. Strike out the Claimant's statement of case and in particular the Fixed Date Claim Form filed on June 26, 2008
2. Set aside the Order made on June 12, 2008 granting leave to the Claimant to apply for Judicial Review
3. Alternatively to strike out the claim against the Second and Third Defendants
4. Deal with the claim for a Declaration in separate proceedings
5. Costs be costs in the claim

The grounds on which the orders are sought are:

1. The Claimant has failed to exhaust the alternate remedies available to him;
2. The Attorney General is not a proper party to the proceedings;
3. The Jamaica Constabulary Force is not a competent party for the purpose of the proceedings;
4. The application of the overriding objective favours the grant of the orders sought;
5. The limitation period for the Claimants application has not begun to run and as such the Claimant will not be prejudiced if this application is to be granted.

The claimant was granted leave to apply for judicial review by order made by the Honourable Mr. Justice Pusey on June 12, 2008. This application was brought ex parte by way of a Without Notice Application for judicial review filled on June 4, 2008 and the applicant was granted permission to pursue the application for:

1. An order prohibiting and /or restraining the Respondents from transferring, reverting and /or reassigning the Applicant from the post of Detective to general police duties without being given a fair hearing;
2. A declaration that the Jamaica Constabulary Force Orders, Serial No. 3170 Sub. No. 2 dated 27th March 2008 purporting to transfer, revert and/ or reassign the Applicant are unlawful and in breach of the principles of Natural Justice and /or the Constabulary Force Act and the Police Service Regulations 1961 are unjust, capricious, arbitrary, null and void;
3. A writ of Certiorari quashing the decision of the Commissioner of Police to transfer / reverse the Applicant Detective Corporal at Organized Crime Investigation Division

to general duties at St Catherine South Division by Force Order No. 3173 dated March 27, 2008.

The orders were sought on three grounds. However the substance of the applicant's complaint was that his reversal from the post as Detective and his transfer to general police duties amounted to a punishment which would entitle him to a hearing in accordance with the Police Service Regulation before any such action could be taken against him. Having been deprived of such a hearing, the applicant contends, renders the Force Orders in which his reassignment was published in breach of the principles of natural justice and unreasonable in the circumstances.

The defendants submitted that the Court had the power to discharge the order granted by the Honourable Mr. Justice Pusey notwithstanding that the order was granted ex parte.

The power of the Court to set aside an ex parte order, is derived from its inherent jurisdiction to revoke orders made by it and although Part 56 of the Civil Procedure Rules sets out the procedure for an application for leave there is no provision relating to applications to set aside such leave. The defendants further stated that in the absence of an express rule it would be necessary to examine case law authorities and proceeded to cite cases in support of this.

The jurisdiction of the High Court to discharge the order of another judge of the High Court granting leave to the applicant on the basis of an ex parte application was examined -Reference was made to the case of ADAM & OTHERS v MINISTER FOR JUSTICE EQUALITY AND LAW REFORM [2001] ILRM 452 (5th April 2001) an Irish case which discusses the approach of the English Courts and which states that there is an inherent jurisdiction in the court to set

aside orders made without notice having been given prior notice to the other party including the grant of permission to apply for judicial review.

"That is the appropriate and usual method for challenging the grant of permission. The Courts have emphasised, however, that the jurisdiction is to be exercised sparingly and that they will only set aside permission in a very plain case."

The cases of *R v. SECRETARY OF STATE FOR HOME DEPARTMENT ( Ex parte CHINOY)* and *WEA RECORDS LTD. v. VISION CHANNEL 4 LTD* [1983] 2 All ER 589 were cited in support of the defendants argument.

The question to be determined is whether or not there is a basis for the exercise of the jurisdiction in the circumstances of this case. If the Court finds that it does have jurisdiction should the jurisdiction be exercised in this case.

The defendants submission is that the jurisdiction exists and should be exercised in this case based on three factors. The first is that the claimant has failed to establish that a decision which lends itself to judicial review has been taken by the Commissioner of Police and this is essential to the relief of certiorari which the claimant seeks. The second is that the claimant has failed to demonstrate an "arguable case." The third is that the claimant has not exhausted the remedies made available to him by virtue of the internal grievance procedures of the Jamaica Constabulary Force.

The claimant opposed the application of the defendant to strike out the claimant's Statement of Case, set aside the grant of leave for judicial review and separate proceedings to be instituted to deal with the declaration sought by the claimant.

It was submitted that the test to be applied and the one which was applied by the Learned Judge for whether there was an arguable case for review was whether the court was satisfied that there is a case fit for further investigation at a Full Court with notice hearing of the substantive claim for judicial review.

The claimant stated that leave having been properly granted should not be set aside unless it can be shown that the Court should not have granted leave *ex parte*. In addition the Court's power to set aside leave which has been granted should be invoked very sparingly and only in very plain cases.

It is the claimant case that all internal remedies available to him had been explored and exhausted.

In response to the arguments advanced by the defendants that the Attorney General is not a proper party to the judicial review, the claimant admitted that the local authorities all seem to suggest that the Attorney General is not a proper defendant in a matter of judicial review as judicial review is at the instance of the Crown, but argued that even if the Court was minded to find that the Attorney General is improperly joined in the instant case, the basis for the joinder is not misconceived - the action having been brought against the Commissioner of Police and the Jamaica Constabulary Force (agents of the Crown) the Attorney General has been joined pursuant to section 10 of the Crown Proceedings Act. Additionally, the Civil Procedure Rules contemplates instances where the Attorney General participates in judicial review proceedings

other than by way of instituting proceedings Part 56.4(4) provides that where a Without Notice Application for judicial review has been made:

"The Judge may direct that notice of the hearing be given to the respondent or the Attorney General"

The Jamaica Constabulary Force is a competent party to the proceedings as it is a statutory body (the Commissioner being at its helm) and is in a position to stand as a proper party in these proceedings.

Finally the claimant argued that he had in fact exhausted all the internal remedies available to him and had filed the instant claim three months after receiving no response whatsoever from the Grievance Board.

The Court has considered all the submissions made and agrees with the submissions made by the claimant. The Court is not disposed to striking out the instant claim or setting aside the grant of leave for judicial review made on June 12, 2008. The Court finds that the Jamaica Constabulary Force and the Attorney General are proper and competent parties to the proceedings. Separate proceedings need not be instituted to deal with the declaration.

Notice of application for Court Orders dated 12th day of August 2008 refused. Costs to be costs in the claim.