[2016] **JMSC Civ. 220**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2011HCV06044

IN THE MATTER of an application by Conroy Housen, for an Order of Certiorari quashing the decision of the Commissioner of Police to terminate his service as a member of the Jamaica Constabulary Force

AND

IN THE MATTER of the **Police Service Regulations 1961**

BETWEEN	**CONROY HOUSEN**	**CLAIMANT**
AND	**THE COMMISSIONER OF POLICE**	**1ST DEFENDANT**
AND	**THE ATTORNEY GENERAL**	**2ND DEFENDANT**

IN OPEN COURT & HEARD ON PAPER

Mr. Don Foote, instructed by Don O. Foote & Co., for the claimant.

Miss Marlene Chisholm, instructed by the Director of State Proceedings, for the defendants.

April 22 and December 16, 2016

JUDICIAL REVIEW- REVIEWING A DECISION OF AN INFERIOR TRIBUNAL- GROUNDS OF JUDICIAL REVIEW- ILLEGALITY- WEDNESBURY UNREASONABLENESS- PROCEDURAL IMPROPRIETY-

DUTY TO ACT FAIRLY- WHAT IS FAIRNESS- PRINCIPLES OF NATURAL JUSTICE- WHETHER ATTORNEY GENERAL IS A PROPER PARTY TO THIS CLAIM

ANDERSON, K., J.

THE CLAIM

[1] This is a claim wherein the claimant is seeking an order of certiorari to quash the decision of the 1st defendant to discharge him from the Jamaica Constabulary Force (hereinafter referred to as 'the J.C.F.') and refusing him permission to re-enlist. He seeks the following orders, that:

(1) the 1st defendant was in violation of **Regulation 46(2)(3)** of the **Police Service Regulations, 1961;**

(2) the decision of the 1st defendant to terminate his service as a serving member of the J.C.F. be set aside; and

(3) his employment status as a Constable of Police (hereinafter referred to as constable) in the J.C.F. be restored.

The aforementioned reliefs are sought on the following grounds, that:

(1) the 1st defendant in exercising his discretion to dismiss the claimant as a serving member of the J.C.F. failed to disclose any aggravating factor in support of the ultimate decision to dismiss;

(2) the claimant was never given an opportunity to refute the allegations made against him;

(3) the 1st defendant in exercising his discretion to dismiss the claimant acted on information that was false and never proven to be true; and

(4) the 1st defendant failed to have a hearing into allegations made against the claimant.

THE BACKGROUND TO THE CLAIM

[2] On July 06, 2011, the claimant filed an application for, inter alia, leave to apply for judicial review and an order of certiorari to quash the decision of the 1st defendant to terminate his employment and failing to re-enlist him as a member of the J.C.F. The application was supported by an affidavit containing several exhibits. On September 02, 2011, he filed an amended application for leave and a supplemental affidavit also containing exhibits.

[3] On September 15, 2011, Mangatal J. granted the claimant, leave to apply for an order of certiorari to quash the decision of the 1st defendant dated June 15, 2010, but which took effect on April 02, 2010, to discharge him from the J.C.F. and refusing him permission to re-enlist. It was also ordered that leave was conditional on the claimant making a claim for judicial review within fourteen (14) days of the date of the order.

[4] On September 28, 2011, the claimant filed a fixed date claim form with an affidavit in support, seeking an order of certiorari to quash the aforementioned decision of the 1st defendant.

[5] At the first hearing of the matter on January 16, 2012, Edwards J. made case management orders and the matter was set to be heard on May 17, 2012, for one (1) day in open court by a judge alone.

[6] The application was eventually heard and refused by Campbell J. on May 25, 2012. His decision was appealed.

[7] The appeal was heard on April 30 and May 2, 2014 and allowed. The matter was remitted to the Supreme Court to be heard afresh before a different judge.

[8] On June 24, 2015, Laing J. ordered, inter alia, that the trial was fixed for February 19, 2016, for one (1) day before a single judge in open court. On February 19, 2016, the matter was set for final determination on April 22, 2016.

[9] On April 22, 2016, the matter was called up for hearing in open court before me and I had then, with the parties' consent, ordered that the hearing be held on paper and reserved judgment on the claim.

ISSUE:

[10] This court is of the view that there is one primary issue which arises for determination in the instant case and that is:

Whether the 1st defendant, in deciding not to re-enlist the claimant, engaged in a fair decision-making process.

[11] A secondary issue though, which is important, although it has not been addressed by either party, in their respective skeleton submissions, is the issue as to whether or not, in the context of this claim, the 2nd defendant can properly be claimed against, bearing in mind, that, this is a judicial review claim and the claimant has made no claim for damages.

[12] This court has found it prudent to address the secondary issue first.

[13] In the **Minister of Foreign Affairs, Trade and Industry v Vehicles and Supplies Ltd. and Another-** (1989) 39 WIR 270, Lord Oliver of Aylmerton, at p. 281, stated, that: '*as regards the last of these questions, their Lordships entertain no doubt whatever that the Court of Appeal was correct in concluding that the proceedings were not "civil proceedings", as defined by the* ***Crown Proceedings Act,*** *and that the Minister and not the Attorney General was the proper party to proceedings instituted for the purpose of reviewing the exercise of his statutory powers.'*

[14] In the **Minister of Foreign Affairs, Trade and Industry v Vehicles and Supplies Ltd. and Another, supra,** leave to appeal to Her Majesty in Council was granted by an order made on July 21, 1989, in which it was certified that four (4) questions ought, by reason of their general or public importance, to be submitted to Her Majesty in Council. The last of those four (4) questions was

whether, the Attorney General, who is the 2nd defendant in this case, should be named as the respondent in the proceedings, instead of the Minister of Foreign Affairs, Trade and Industry (hereinafter referred to as the 'appellant')?

[15] In that case, the respondents were motor dealers who carried on retail businesses in Jamaica. They applied for allocations of vehicles for the year 1988–1989. The allocations were made by the appellant and on November 25, 1988, the Jamaica Commodity Trading Co. Ltd. (hereinafter referred to as 'JCTC') was instructed by the appellant, to place orders for vehicles of the types and in the quantities allocated. On December 07, 1988, the JCTC notified the respondents of their allocations, which were for quantities substantially less, than in the previous year.

[16] They protested but without result and on January 04, 1989, they issued an ex parte summons for leave to apply for an order of certiorari to quash the allocations, alternatively, for an order of prohibition directed to the appellant, prohibiting him from implementing the allocation and alternatively for an order of mandamus, directing the appellant to make a fair allocation. Paragraph (ii) of the summons asked that 'all allocations of quotas and/ or proceedings consequent on the said allocations, be stayed, pending a final determination of this matter'. On January 11, 1989, Clarke J., in chambers, made an ex parte order, granting the relief sought by the summons, including the stay sought by para (ii). That order was served on the appellant.

[17] The appellant applied to have the order set aside. The part of the order granting the stay, was later set aside by Ellis J., who also gave the respondents leave to appeal. On appeal, the Court of Appeal reversed the order of Ellis J. and restored the stay. They also dismissed the appellant's cross-appeal.

[18] It was the appellant's contention before the Court of Appeal that an application for leave to apply for an order of certiorari or prohibition in respect of a ministerial decision was a proceeding against the Crown, to which the only proper party was

the Attorney General, so that the proceedings before Clarke J., were, in any event, misconceived. The court of appeal unanimously held that the proceedings from which the appeal arose, were not civil proceedings within the **Crown Proceedings Act** and there was thus, no statutory requirement rendering the Attorney General either a necessary or a proper party.

[19] This case, an authority by which this court is bound, makes it explicit, that, proceedings instituted for the purpose of reviewing the exercise of statutory powers, do not constitute civil proceedings, as defined in the **Crown Proceedings Act**. **S. 18** of the **Crown Proceedings Act,** contains a very restrictive definition of civil proceedings and such civil proceedings as defined, do not include proceedings for judicial review.

[20] Accordingly, the 2nd defendant, as named in the instant claim, was incorrectly joined as a party to these proceedings. The claimant, in seeking an order of certiorari, to quash the decision of the 1st defendant, a decision that was exercised pursuant to statutory powers, ought to have properly, brought these proceedings against the 1st defendant only.

SUBMISSIONS

[21] The claimant essentially submits, that:

(1) His evidence is unchallenged and the court is asked to exercise its discretion and grant the order sought based on the evidence placed before it;

(2) The defendants are not contesting the claim nor have they challenged the claimant's affidavit evidence filed in support of the claim.

[22] The defendants essentially submit, that:

(1) The three main issues to be determined are:

(i) Whether the 1st defendant's power to re-enlist could be exercised without regard to **regulation 46** of the **Police Service Regulations**;

(ii) If so, whether the 1st defendant failed to give the claimant an opportunity to be heard; and

(iii) If not, whether the claimant's employment can be restored by the court.

(2) Judicial review is not an appeal from the decision but a review of the manner in which the decision was made, and therefore, the court is not entitled on an application for judicial review, to consider whether the decision itself was fair and reasonable;

(3) The challenge by the claimant that he was dismissed by the 1st defendant is misconceived;

(4) The 1st defendant could properly exercise his discretion with respect to the issue of re-enlistment without regard to **regulation 46**;

(5) It is trite law that a hearing need not be oral, and in light of the fact that the claimant was well aware of the complaints made against him and he was allowed to make representation in writing to the 1st defendant, it is submitted that the claimant had an opportunity to be heard;

(6) The claimant has not demonstrated in this application for judicial review where he was prejudiced by the 1st defendant's conduct, given that, he is not saying anything differently from his written response and the exhibits that he seeks to rely on now were recently obtained;

(7) An order for reinstatement would be equivalent to an order of mandamus and borders on the usurpation of the powers of the 1st defendant by the court; and

(8) It would be impractical to grant the orders, given that, the claimant's term of his enlistment has expired and given that the claimant did not apply promptly for judicial review, there has been a delay of nearly six (6) years since the

claimant was not permitted to re-enlist. In the circumstances therefore, the claimant's application for an order of certiorari should be refused.

THE UNDISPUTED FACTS

[23] This court accepts the following, as an accurate record of the state of events, prior to the filing of this claim, based on the unchallenged evidence of the claimant and the facts narrated by the defendants in their skeleton submissions.

(1) The claimant enlisted in the J.C.F. on April 3, 1998. This is the conclusion drawn by the court, even though in a notice to the claimant via letter, dated March 26, 2010, from the Superintendent of Police for the St. Elizabeth Division, it is stated that the claimant enlisted in the J.C.F. on April 03, 1989. This court views this as a typographical error based on the evidence presented to the court by the claimant and the information contained in the defendants' skeleton submissions.

(2) Since his enlistment in the J.C.F., he had been stationed in Savanna-la-Mar, Westmoreland. In November, 2006, he requested a transfer to the Manchester Division but that request was denied. He was however, transferred to the St. Elizabeth Division on November 16, 2009. During the period of November, 2009 to March, 2010, he was stationed in St. Elizabeth and remained there up to the time when his application for re-enlistment was refused.

(3) His conduct was brought into question in May, 2006. In the notice via letter, dated March 26, 2010, the claimant was informed at subparagraph (ii) that '*it became necessary to re-enlist him for abbreviated periods from April 2, 2008 – April 2, 2010, due to his unprofessional conduct at the Savanna-la-mar Criminal Investigation Branch office on May 01, 2006'.*

(4) The claimant, who prior to 2006 had never received a warning notice, received two warning notices dated February 05, 2007 and November 13, 2008:

(i) The earlier notice stated that, inter alia, his '*work, worth and conduct were unbecoming and of serious concern to the Management Team and other personnel in the division'*. Furthermore, '*his close association with criminals and gunmen was posing a serious security risk to personnel in the division and undermining the gains made in crime fighting in the parish'.* It also stated that recommendations were being made for him to be transferred to another division in an effort to sever his ties with criminal elements, failing which his services would be terminated;

(ii) In the latter notice, the claimant was informed that it was the decision of the 1st defendant that his re-enlistment in the J.C.F. would only be approved for one (1) year and this was so because they were awaiting the outcome of a Court of Enquiry matter for unprofessional conduct reported against him.

(5) A Court of Enquiry hearing was not held and enquiries made by the claimant revealed that no application was lodged for a Court of Enquiry hearing against him.

(6) The claimant wrote a letter, dated April 02, 2009, which was addressed to the 1st defendant, wherein he stated, inter alia, that he began receiving warning notices after witnessing the Police hit his nephew, Mr. Kevin Reynolds. He further stated that he had not received a reply to his application for transfer, that he loves his job and is not involved in any corruption and as such, was requesting that the 1st defendant intervene and clear up the matter. It is not clear however, if this letter was delivered to the 1st defendant's office.

(7) The claimant was informed via the notice dated March 26, 2010, that his application for re-enlistment would not be recommended to the 1st defendant. He was given seven (7) days in which to respond to the said notice.

(8) He responded to same by letter dated April 01, 2010. This letter was received by Inspector Harpool Givans, at the 1st defendant's office, on April 01, 2010, and Constable K.A. Fagan, at the general office, at the Black River Police Station, on April 02, 2010.

(9) On April 12, 2010, the claimant wrote to the Superintendent of the St. Elizabeth Division seeking audience with the 1st defendant. Therein, he essentially stated that he wished to appear before the 1st defendant along with his counsel, to explain the reason why his application for re-enlistment should be approved. This letter was received by the Black River Constabulary Office on the said date.

(10) He was contacted one evening during the uprising in Tivoli Gardens in May, 2010 and informed of a hearing scheduled with the 1st defendant the following morning. His counsel advised him that the notice was insufficient and in light of the civil disturbances, it was unsafe to venture out. Nevertheless, the next morning, without the presence of his counsel, he visited the 1st defendant's office but the 1st defendant '*did not pay him any mind and ran him out of his office*'.

(11) The claimant was discharged from his duties as a Police Officer on the ground that he was not permitted to re-enlist. He is no longer a serving member of the J.C.F. effective April 02, 2010, by virtue of the 1st defendant's decision dated June 15, 2010. His discharge from the J.C.F. on this ground was published in Force Orders issued on May 20, 2010.

THE RELEVANT PROVISIONS OF THE POLICE SERVICE REGULATIONS, 1961.

[24] This court is of the view that this is an appropriate juncture at which to consider **regulations 44, 45 and 46** of the **Police Service Regulations, 1961.**

[25] On a careful examination of the provisions of **regulations 44 & 45**, this court wishes to make the following observations:

(1) Firstly, a constabulary force member- such as a constable, who is faced with disciplinary proceedings, is not only entitled to know the case to which he must answer, but must also be given sufficient time to prepare that answer;

(2) Secondly, **regulation 45(2)** is only engaged where a member below the rank of Inspector, as in this case, a constable, is represented as being guilty of misconduct but that misconduct, is one that is not so serious, as to warrant proceedings for dismissal in accordance with **regulation 46**, in the opinion of the authorized officer;

(3) Thirdly, the authorized officer is at liberty to dismiss a charge against a member, if he is of the view that, upon investigations, it ought not to be proceeded with. Equally, he shall report the member to the Commissioner, if he is of the view that the charge should be proceeded with; and

(4) Fourthly, where the decision is made to charge the member with misconduct not warranting dismissal and the member is therefore, reported to the Commissioner, the procedure that is to be followed is one that is similar to that prescribed by **regulation 46**.

[26] As regards **regulation 46**, this court agrees with counsel for the defendants, that any contention or evidence by the claimant that he was dismissed, would be misconceived. The procedure stipulated in **regulation 46** is clear, detailed and expressly deals with dismissals. That procedure, as stipulated in **regulation 46**, was not adopted by the 1st defendant in this matter.

[27] In **Corporal Glenroy Clarke v Commissioner of Police and the Attorney General of Jamaica-** (1996) 33 J.L.R. 50, Carey J.A. explained the difference between dismissal and non-re-enlistment, at pp. 52-53. He stated that:

'*Although the non-approval by the Commissioner of a member of the Force for re-enlistment removes that member from further service in the Force, it is not a dismissal. As Patterson J. (as he then was) pointed out correctly, as I think, in his judgment, "strict laws, rules and regulations govern the exercise of the power of dismissal and also the termination of appointment." Altogether different rules govern re-enlistment into the Force. In the case of dismissal, there is a trial, that is, an enquiry, witnesses are called, there is cross examination of the witnesses, the procedure is akin to a trial in a court of law. The officer presiding at this exercise is, plainly, exercising a judicial function. In case of re-enlistment, the Commissioner is exercising administrative functions in which case it is trite law that he must act fairly. It seems to me that in the present case the Commissioner was not sitting as a judge, who must of course divorce from his mind all he may have heard of the matter before undertaking the trial. The Commissioner could properly take a decision not to approve re-enlistment of any member even before an application to re-enlist is made. There is no question of hearing the member when that decision is taken because the member is not on trial for any charge.'*

[28] Further, the notice via letter, the claimant received from the Superintendent of Police, for the St. Elizabeth Division, dated March 26, 2010, made it clear, that his application for re-enlistment would not be recommended to the 1st defendant. The Certificate of Service and Force Orders were equally clear, that the claimant was discharged on the ground of not being permitted to re-enlist.

[29] For these reasons, the **regulation 46** procedure, is not the one to be adopted by the 1st defendant, when treating with a refusal to re-enlist.

[30] Furthermore, this court has also found that, **regulation 45** is not applicable to the instant case. **Regulation 45** is applicable to a situation, wherein, disciplinary

proceedings are being instituted against a member for misconduct, not so serious as to warrant dismissal. This is distinct from circumstances where, as in the present case, there are allegations of misconduct against a member- such as the claimant, and his supervisor, the Superintendent in charge of the division and an authorized officer pursuant to **regulation 2** of the **Police Service Regulations**, is recommending that he not be re-enlisted. In such an instance, **regulation 45** does not arise at all, as there were no disciplinary proceedings instituted against the claimant. The 1st defendant then, in such circumstances, had only a duty to act fairly.

LAW & ANALYSIS

[31] The law in this area is well settled. On an application for judicial review, the court is not concerned with the substance of the decision made by the inferior tribunal, rather, it is considering the propriety of the method by which the decision was arrived at. It is important to note that the proceedings before this court are supervisory and not by way of an appeal.

[32] In **Chief Constable of North Wales Police v Evans-** [1982] 3 ALL ER 141, Lord Brightman, at pp. 154-155, stated, that: '*Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power....Judicial review.... is not an appeal from a decision, but a review of the manner in which the decision was made.'*

[33] Earlier, in the said judgment, Lord Hailsham LC at p. 143 had stated that: '... *it is important to remember in every case that the purpose of the remedies is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question.'*

[34] The grounds for judicial review are equally, well established. In **Mark Leachman v Portmore Municipal Council and Others-** [2012] JMCA Civ 57, Brooks J.A., at para. 13, stated that: '*The second fundamental principle to be observed is that a court of judicial review has a circumscribed role. The scope of judicial review has been summarised as pertaining to assessing the illegality, irrationality or impropriety of the procedure and decision of the inferior tribunal. This scope was explained in* ***Council of Civil Service Unions v Minister for the Civil Service-*** *[1984] 3 All ER 935. At pages 953j – 954a, Roskill LJ said: '...executive action will be the subject of judicial review on three separate grounds. The first is where the authority concerned has been guilty of an error of law in its action, as for example purporting to exercise a power which in law it does not possess. The second is where it exercises a power in so unreasonable a manner that the exercise becomes open to review on what are called, in lawyers' shorthand,* ***Wednesbury*** *principles (see* ***Associated Provincial Picture Houses Ltd v Wednesbury Corp-*** *[1947] 2 All ER 680, [1948] 1 KB 223). The third is where it has acted contrary to what are often called 'principles of natural* justice*'.*'

[35] In relation to the third head, Lord Roskill further stated at p. 954, that: *' As to this last, the use of this phrase is no doubt hallowed by time and much judicial repetition, but it is a phrase often widely misunderstood and therefore as often misused. That phrase perhaps might now be allowed to find a permanent resting-place and be better replaced by speaking of a duty to act fairly. But that latter phrase must not in its turn be misunderstood or misused. It is not for the courts to determine whether a particular policy or particular decisions taken in fulfilment of that policy are fair. They are only concerned with the manner in which those decisions have been taken and the extent of the duty to act fairly will vary greatly from case to case as, indeed, the decided cases since 1950 consistently show. Many features will come into play including the nature of the decision and the relationship of those involved on either side before the decision was taken.'*

[36] There is no doubt, that it was within the sole prerogative of the 1st defendant to determine whether or not to re-enlist the claimant. **S. 3(2)(a**) of the **Constabulary**

Force Act of Jamaica confers on the 1st defendant, '*the sole operational command and superintendence of the Force'.* Carey J.A., in addressing the matter of re-enlistment in **Corporal Glenroy Clarke v Commissioner of Police and the Attorney General of Jamaica, supra,** at p. 52, stated, that, *'when an application is made, it is considered by the Commissioner who makes a determination.'* Further, in this court's view, there could be no proper basis on which it could be argued, nor has it been so contended, that the 1st defendant came to a decision so outrageous, that no sensible person who had applied his/ her mind to the question, could have arrived at the decision not to re-enlist the claimant.

[37] Therefore, in light of the foregoing, this court is of the considered view, that, the third ground of procedural impropriety or the 1st defendant's duty to act fairly, is the ground on which the proceedings for judicial review have been brought. For the reasons aforementioned, this court, in addressing its mind to this matter, will not consider the merits of the 1st defendant's decision, but will assess whether, in the circumstances of this particular case, the 1st defendant in arriving at his decision not to re-enlist the claimant, engaged in a fair decision-making process.

WHAT IS FAIRNESS IN THE LAW?

[38] In **Wood and Thompson v The DPP-** [2012] JMCA Misc 1, Harris J.A. at paras. 17-20, enunciated, that:

*'The modern doctrine of fairness has been eminently pronounced by Lord Mustill in **R v Secretary of State for the Home Department ex parte Doody-** [1993] 3 WLR 154 at page 168 where he said:*

'Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. Since the person affected usually cannot make worthwhile representations without knowing

what factors may weigh against his interests, fairness will very often require that he is informed of the gist of the case which he has to answer. In the circumstances of this case, the learned Resident Magistrate was duty bound to have observed the rules of natural justice. The seizure of the vessel, having not been made in the appellants' presence, it would have been incumbent on the Crown to have served them with due notice of their intention to make the application. The requisite notification having not been transmitted to the owners of the vessel, the power of making an order for forfeiture under the ***Aquaculture Act*** *could only have been exercised after the appellants had been given an opportunity to respond to the application. An order made in breach of the principles of natural justice is void. In* ***Ridge v Baldwin and others-*** *[1964] AC 40, Lord Reid, at page 80 said: 'Time and again in the cases I have cited it has been stated that a decision given without regard to the principles of natural justice is void, and that was expressly decided in* ***Wood v Wood****. I see no reason to doubt these authorities. The body with the power to decide cannot lawfully proceed to make a decision until it has afforded to the person affected a proper opportunity to state his case.' As a matter of law, a void act is a nullity. The court, in* ***MacFoy v United Africa Co Ltd-*** *[1961] 3 WIR 1405, speaking to this proposition, at 1409, stated: 'If an act is void, then it is in law a nullity, it is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.' In keeping with the tenets of natural justice, the appellants were entitled to a hearing. The order made being contrary to the procedural regime prescribed by the Act, renders the decision of the learned Resident Magistrate void. The forfeiture order is a nullity and must be set aside.'*

[39] In **Wood and Thompson v The DPP, supra,** the appeal concerned an order of the Resident Magistrate that a motor vessel owned by the appellants be forfeited

to the Crown. The vessel had been intercepted off Pedro Cays in the territorial waters of Jamaica and the Captain and members of his crew were subsequently convicted of several offences. After the sentencing, the Resident Magistrate, based on an application by the Crown, made an order for forfeiture of the vessel, its equipment and cargo. The contention on appeal was that the Resident Magistrate in granting the order for forfeiture pursuant to the **Aquaculture Act**, had failed to follow the procedure laid down under that act, and the failure to notify the appellants of the intended application, deprived the Resident Magistrate of the opportunity of properly exercising her discretion, as she did not have the benefit of the evidence of the appellants.

[40] In **Roald Nigel Adrian Henriques v Hon. Shirley Tyndall, O.J.and Ors-** [2012] JMCA Civ 18, Harris J.A. at paras. 134-135, stated, that: '*The principle of procedural fairness places an obligation on a decision-maker to ensure his decisions do not give rise to reasonable apprehension of bias. It is a prominent feature of administrative law that a decision-maker should give to such persons who are affected or interested an opportunity to advance their views as well as their evidence. This is not cast in any rigid rule. It, not being confined to any strictures of inflexibility, is subject to variation. The criteria demanded by procedural fairness are dependent on the circumstances of the particular case. A court in considering whether there has been a breach of procedural fairness must take into account several factors.'*

[41] At para. 136, her ladyship later stated, that: '*These factors must be considered within the context of the discretionary powers accorded to the decision-maker by statute, bearing in mind....that a low content of procedural fairness will be invoked where the statute permits the decision-maker the right to select his own procedure. The circumstances in each case vary.* ***The question, in a particular case, is whether the procedural approach by the commission is so unfair that no reasonable commission would have adopted it.'(my emphasis)***

[42] In that case, the court found that the nature of the decision being made, the nature of the statutory scheme and the nature and extent of the duty of fairness owed to the affected persons, were relevant factors for the purposes of that appeal.

[43] The issue then becomes, whether, in circumstances where the 1st defendant had only a duty to act fairly and was entitled to select his own procedure, he employed a procedure that was so unfair, that no reasonable Commissioner of Police would have adopted it and in so doing, he acted in breach of the principles of natural justice.

[44] **S. 5** of the **Constabulary Force Act** of Jamaica provides, inter alia, that : *'Sub-Officers and Constables of the Force may be enlisted for a term of five years, and no Sub-Officer or Constable of the Force, so enlisted shall be at liberty to withdraw himself from the Force until the expiration of that term'.* This provision makes it clear, that a Constable may be enlisted for five (5) years but inferentially, he may also be enlisted for a shorter period of time. The word 'may' as used in the provision, connotes a discretion, one that is within the sole purview of the 1st defendant.

[45] In the case at bar, the claimant was enlisted in the J.C.F. in 1998. It would appear that up until 2008, he would have enlisted and had been re-enlisted for two separate five (5) year periods. There is no doubt that by 2008, he was also expecting to be re-enlisted again. He was re-enlisted, but by the second warning notice, dated November 13, 2008, he was advised that he would only be re-enlisted for a year by the 1st defendant.

[46] The said notice also indicated that his next re-enlistment date was April 02, 2009. It does appear that in 2009, he was re-enlisted for another year. The court draws that conclusion from the letter the claimant received concerning his non-recommendation for re-enlistment, dated March 26, 2010. Therein, it was stated

that he was re-enlisted for abbreviated periods totalling two (2) years with effect from April 02, 2008 and he was due for re-enlistment on April 01, 2010.

[47] This court will now examine the content of the letter informing the claimant that, he would not be recommended for re-enlistment.

THE LETTER OF MARCH 26, 2010

[48] This letter was written to the claimant care of the Superintendent of Police for the St. Elizabeth Division. Therein, it was stated that the claimant would not be recommended for re-enlistment on the following grounds:

(i) That in 2007, the Superintendent of Police in charge of Westmoreland, found it necessary to serve him a warning notice, which cited, that his work, worth and conduct were unbecoming and of serious concern to the Management Team and Personnel in the Division.

(ii) This letter also referred to the content of the said warning notice, which contained the following information, that:

a) despite the fact that the claimant was aware that his nephew, Dermott Williams, was wanted for murder, he failed to assist the Police to arrest him, and thereby compromised his duty and responsibility as a law enforcement officer;

b) the claimant is considered to be a conduit for the leaking of information to criminal elements;

c) his actions seriously jeopardized his service in the organization and the division had lost trust and confidence in him; and

d) there would be a recommendation for his immediate transfer from the division in order for him to sever ties with criminal elements.

(iii) The letter itself contained further statements that, it became necessary to re-enlist the claimant for abbreviated periods from April 02, 2008-April 02, 2010, due to his unprofessional conduct at the Savanna-la-mar Criminal Investigation Branch office on May 01, 2006 and that his work, worth and conduct continued to be a concern for the Management Team in the Division. It also noted that Notices dated November 13, 2008 and April 01, 2009 were served on the claimant.

(iv) The letter also referred to a report dated January 27, 2010, from the Superintendent in charge of Westmoreland to the Superintendent in charge of St. Elizabeth, where it was highlighted that despite the fact that the claimant had brought twenty-five (25) cases before the courts and he is always clean and on time for duty, his conduct gave cause for concern based on his association with criminals and gunmen, which undermined the division's crime fighting efforts and further, there was a strained relationship between the claimant and his peers, caused by his obstinate disposition and which results in disputes.

(v) Finally, it was asserted in that letter, that it was counter-productive that after twelve (12) years' service, there was a need to closely monitor his conduct and inclination to associate with persons of ill-repute. In that regard, his lack of usefulness to the organization in achieving its mission to serve, protect and reassure the citizenry of Jamaica, was brought into focus.

[49] This letter obviously contained very serious allegations of misconduct. The claimant, a law enforcement officer, who had sworn to serve, protect and reassure the citizenry of Jamaica, was now faced with damning allegations. If such assertions were proven to the 1st defendant's satisfaction, it would have no doubt warranted his appropriate response. The process of conveying that response however, must have been fair.

[50] In response to these allegations, the claimant maintained his innocence.

[51] In his letter of response dated April 01, 2010, which was received by Inspector Harpool Givans, located at the 1st defendant's office and by Constable K.A. Fagan located at the general office, of the Black River Police Station, the claimant stated, inter alia, that:

(i) He had been a member of the J.C.F. for 12 years and up to November 16, 2006, when he requested a transfer from the Westmoreland Division to the Manchester Division, there was no complaint about the quality of his work or his commitment to duty.

(ii) On May 1, 2006, he witnessed his colleagues beating Mr. Kevin Reynolds, his nephew, on the station compound of the Criminal Investigation Branch office. He did not intervene, save and except, to advise his nephew not to retaliate. Mr. Reynolds was later charged by the said Police personnel that had beaten him but was subsequently acquitted in the Savanna-la-mar Resident Magistrate's Court.

(iii) It is after he witnessed the incident of his nephew being beaten by Police personnel and found himself in a position of being a potential witness, that he received his first warning notice in 2007, accusing him of unprofessional conduct. Further, it was after his nephew lodged his complaint with the Police Public Complaints Authority that he received a second warning notice concerning what appears to be the same issue before.

(iv) He was advised in the warning notices that a Court of Enquiry hearing had been pending for him for unprofessional conduct but checks with the said court panel has revealed that there was no application lodged for a Court of Enquiry hearing in relation to him, and that fact was confirmed by the Police Federation.

(v) He is related to a Mr. Dermot Williams, who is his nephew but they are not close. His nephew has been charged for murder and has been before the court since 2006, but he has had nothing to do with the matter. He has not been in a position to assist the Police as he does not have any information concerning the matter but where he had information, he assisted two Police Officers in that regard. There has been a broad suggestion that he has 'leaked information' but at no time has anyone pointed to any specifics and so, all that there has been is pure speculation and conjecture. He denies leaking information or any ties with gunmen.

(vi) He was the one, who requested a transfer from as far back as November, 2006 and there was no need to recommend his immediate transfer from the division in order to sever his ties with criminal elements.

(vii) At no time has he ever been accused of corruption, nor has he been accused of unprofessional conduct by law abiding citizens in either Westmoreland or St. Elizabeth. Further, no orderly room charges or Court of Enquiry charges has been brought against him in his time of enlistment and the Clerks of Court of St. Elizabeth and Westmoreland are willing to give recommendations on his behalf; and

(viii) There is no need to monitor his conduct and his current Divisional Commander can support his views on this. He ends his letter by asking for his non-recommendation to be revisited.

[52] It was also his evidence, that prior to 2006, he never received a warning notice. He further stated that neither his superiors nor the persons, with whom he worked, had any complaints about or problems with him. He also said that it was after the incident where he witnessed his colleagues beating his nephew and the case against his nephew was subsequently dismissed, that he was given a

warning notice dated February 05, 2007 and informed that he was associating with known criminals and that he defended his other nephew who he was aware was wanted for murder.

[53] He further averred that when he saw his colleagues beating his nephew, he did not interfere with the situation or the process. He stated that even if he wanted to assist, he was unable to do so, as he was barred from the room when the assault was taking place and instructed to remove from the area immediately. He said, he merely shouted to him that he should not fight back or retaliate. His nephew subsequently made a report to the Police Complaints authority. A letter to that effect was exhibited.

[54] In the instant case, two warning notices were sent to the claimant, the second of which informed him, that, inter alia, his superiors were awaiting the outcome of a Court of Enquiry matter for unprofessional conduct reported against him. The claimant averred that no such hearing has been scheduled and he has made several checks with the Court of Enquiry and was informed that there had been no application lodged for a Court of Enquiry hearing relating to him. This evidence has remained unchallenged.

[55] In **Corporal Glenroy Clarke v Commissioner of Police and the Attorney General of Jamaica, supra,** Carey J.A. at p. 53, expressed that:

"*Where the Commissioner has taken a decision not to approve re-enlistment, then, upon any application of the member for re-enlistment the Commissioner is obliged, in fairness, to supply the reasons for his decision and allow the officer affected, an opportunity to be heard in relation to that material if the officer requests it...Any right which the appellant had to be heard could only arise after the appellant had been advised of the decision not to approve and the reasons therefore. The opportunity afforded to the appellant to be heard allowed the Commissioner to review his decision in the light of any submissions made to him by the officer or his attorney. The reasons having been supplied, must then be*

answered by the attorney. Consequently, the exercise is akin rather to an appeal process than to a trial process. The onus is thus on the officer to show cause why he should be allowed to re-enlist.'

[56] On the said page, his lordship also stated, that, '*the conduct of the officer over the various terms of his enlistment would necessarily be the basis of the Commissioner's decision. The officer may have been charged previously and disciplined therefore. That previous misconduct can properly be taken into account in determining whether he is a fit and proper person to remain a guardian and preserver of the peace. There is no such thing as an automatic right to re-enlistment. Approval should be and doubtless is granted where the conduct of the member is satisfactory. The level of conduct or performance is to be determined by the Commissioner and certainly the court has no power to set the standard of acceptable conduct in the Force'*

[57] In the above-mentioned case, Corporal Clarke had successfully re-enlisted twice. However, in 1993 his application to re-enlist was not approved by the Commissioner. The chairman of the Police Federation unsuccessfully intervened on his behalf. Corporal Clarke was thereafter interviewed by the Commissioner who remained adamant. The Court of Appeal held, inter alia, that the decision not to re-enlist Corporal Clarke was not a dismissal but a removal from further service and that the Commissioner was obliged to provide the applicant with the reasons for his decision and to afford him an opportunity to be heard.

[58] It is clear to this court that, it is the 1st defendant who chooses the format of the hearing. By parity of reasoning, it should also be borne in mind that the right to be heard is a constitutionally protected right but 'being heard' is not restricted to an oral hearing.

[59] In **Nyoka Segree v Police Service Commission**, SCCA No 142/2001, judgment delivered March 11, 2005, Panton J.A. (as he then was) expressed at pp. 24-25, that: *'It is surprising that at this stage of our jurisprudential development, it is*

being thought that to be heard means that evidence has to be taken viva voce. This Court has said on several occasions, for example in respect of disciplinary proceedings such as the instant matter as well as in relation to applications for licences, that the right to be heard is not confined or restricted to a viva voce hearing. The management of public affairs in this regard would be too hamstrung if all proceedings of this nature had to be done completely viva voce. The unbridled fact is that the appellant was given ample information as to what was being alleged, and was given generous opportunities to respond.'

[60] It must also be the case, that since the requirements of fairness will, of necessity, vary from case to case, depending on the particular circumstances, that means, that in some cases, the hearing can take place before refusal, whereas in other cases, the same may have to be done after.

[61] In the **Clarke case, supra,** in accordance with the Court of Appeal's order, if the hearing took place, it would have taken place after the Commissioner of Police had refused to re-enlist the claimant. In view of when it was, that the Court of Appeal's order was made in that case, it was not possible for the Court of Appeal to have ordered that the hearing take place, prior to the Commissioner of Police having refused re-enlistment. Ideally though, the hearing ought to take place before the decision is made by the Commissioner of Police to refuse to re-enlist a member of the Constabulary.

[62] The claimant, via letter dated April 12, 2010, sought audience with the 1st defendant and indicated that he wanted his counsel present. Subsequently, at sometime during the uprising in Tivoli Gardens, in the summer of 2010, he received a call in the evening, at approximately 5:00 p.m., informing him that there would be a hearing the following morning. His evidence was that his attorney advised him that the notice was insufficient and due to the civil disturbance, it was not safe to venture out. Despite the social unrest however, he went to the 1st defendant's office personally at the appointed time to ask for an

adjournment, and even though he carried character references with him, the 1st defendant '*did not pay him any mind and ran him out of his office'.*

[63] The proposed *'hearing'* at that stage therefore, clearly, never took place. The question now to be answered though, is whether, looked at in the round, the claimant was treated fairly by the 1st defendant, in terms of the 1st defendant's decision to refuse to re-enlist him.

[64] The claimant was informed by an authorized officer that he would not be recommended to the 1st defendant for re-enlistment. He was also informed of the allegations made against him and given seven (7) days in which to respond. The claimant responded to those allegations. The 1st defendant would have, when he made his decision to refuse to re-enlist the claimant, been in possession of the allegations, as well as the claimant's response to those allegations. To my mind, that was the essence of a fair hearing; no other hearing and no other form of hearing would have been necessary.

[65] In applying the dicta of Harris J.A., in the **Roald Henriques case, supra,** procedural fairness, it must always be recalled, is not cast in any rigid rule. There are many different means by which, fairness can and will be achieved. Everything in that regard, must, of necessity, always depend on the particular circumstances of each particular case.

[66] I therefore, do not understand the dicta of Carey J.A. as referred to in these reasons, at para. 55 hereof, as having laid down any inflexible rule of law as to the procedure to be followed, whenever the Commissioner of Police is treating with the issue, as to whether or not, to approve or refuse re-enlistment. What fairness demands, will, it seems to me, vary, depending on the particular circumstances of each particular case. To my mind, the approach adopted by the Commissioner in the case at hand, was not one which was so unfair, that no reasonable Commissioner would have adopted it.

[67] Finally, this court recognizes that, in addition to the contentions that the claimant was not given an opportunity to refute the allegations made against him and that the 1st defendant failed to have a hearing into the said allegations, the claimant's claim for relief was also founded on the grounds that the 1st defendant failed to disclose any aggravating factor in support of his decision to dismiss the claimant and further, that the 1st defendant in exercising his discretion to dismiss the claimant acted on information that was false and never proven to be true.

[68] In treating with the first of the two latter grounds, referred to in the paragraph above, this court wishes to reiterate that, the claimant herein was not dismissed from the J.C.F. but rather, a decision was taken by the 1st defendant not to re-enlist him as a member of the Force. In view of the evidence presented to this court, it is clear what the aggravating factors were, which influenced the 1st defendant in his decision, to not re-enlist the claimant. These factors were expressly stated in the letter which the claimant received from the Superintendent for the St. Elizabeth Division. He was therefore, acutely aware of these factors and responded to same in his letter, dated April 01, 2010.

[69] As regards the other ground, it ought to be noted that, the 1st defendant in treating with the process of re-enlistment is not functioning as a court of law. He does not have to determine whether the allegations are true or not. The allegations are brought to his attention and he assesses them. He also, no doubt, considers the response of the claimant. Having considered both, he makes a determination to not re-enlist the claimant. That was within his purview. Hence, in light of the foregoing, this court has concluded that these grounds are without merit and the same has been rejected by this court.

CONCLUSION

[70] In the circumstances, I am of the considered view, that no order of Certiorari should be granted by this court, in respect of the 1st defendant's refusal to re-

enlist the claimant. Equally, an order for reinstatement of the claimant could not properly be made, for the reasons already given.

[71] Perhaps, in an appropriate case, it may be an issue as to whether or not, in respect of a person against whom there has been made allegations of impropriety of conduct, following upon which, pursuant to those allegations, there has been a refusal of re-enlistment, there may be a question as to whether or not, that person has been treated in accordance with the equal protection of the law, under the **Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011**, as a member of the Police Force is required to be subject to disciplinary proceedings under **Police Service Regulations 45 and 46**, in circumstances where impropriety is alleged, as constituting misconduct either not so serious as to warrant proceedings for dismissal, or with a view to dismissal.

[72] That may be an issue in an appropriate case, because it may very well be, that in an effort to bypass the strictures of **regulations 45 and 46**, police officers are being hired for short-term periods of time and are thus, required to re-enlist to retain their employment as Police Officers. Once so hired, that officer may be made subject to a refusal of re-enlistment, due to impropriety of conduct as a Police Officer. That is exactly what transpired in respect of the claimant herein. What is concerning about the latter process though, is that, it completely bypasses the strictures of **regulations 45 and 46** and thus, officers who are not subject to re-enlistment are in a stronger position, in terms of the processes that may lead to the termination of their employment with the J.C.F., or lead to the Commissioner imposing any legally permissible disciplinary sanction upon them, than are officers who are subject to re-enlistment, in respect whereof, the process of removal from employment in the J.C.F., is a much more flexible and simple process for the Commissioner to undertake and perhaps also therefore, is a process which does not possess within its ambit, as many safeguards as to fairness for the officer concerned, as would be the case if **regulations 45 and 46** were being applied.

[73] At this time however, since such an issue is not up for consideration by this court, my comments as to same are not to be taken as though they carry any weight whatsoever, whether for present purposes, or for the purpose of any future case.

ORDERS:

(i) The defendants are awarded judgment in respect of this claim.

(ii) No order as to the costs of this claim.

(iii) The defendants shall file and serve this order.

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Hon. K. Anderson, J.