



[2018] JMSC Civ.197

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2017HCV04051

BETWEEN	ROBERTO KELLY	CLAIMANT
AND	ATTORNEY GENERAL OF JAMAICA	DEFENDANT

IN CHAMBERS

Ms. Bianca Samuels instructed by Knight, Junor & Samuels for the Claimant

Mrs. Susan Reid-Jones instructed by the Director of State Proceedings for the Defendant

Heard: 27th September and 16th November, 2018

APPLICATION FOR EXTENSION OF TIME WITHIN WHICH TO APPLY FOR JUDICIAL REVIEW & LEAVE TO APPLY FOR JUDICIAL REVIEW.

WOLFE-REECE, J (Ag.)

[1] On November 27, 2017 the applicant filed a Notice of Application for court orders for an extension of time within which to apply for judicial review and leave to apply for Judicial Review.

[2] The notice of application seeks the following reliefs;

(1) An extension of time within which to apply for leave to make a claim for judicial review.

(2) Leave to make a claim for judicial review seeking the following remedies

- (a) A writ of Certiorari to quash the decision of the JDF to dismiss the Applicant from the Force
- (b) A Declaration that the decision to dismiss the Applicant from the Jamaica Defence Force effective 25th March 2000 was made ultra vires
- (c) An Order that the Claimant is entitled to all salary, emoluments and benefits arising and or flowing from the ultra vires decision of the JDF to dismiss the Applicant.

[3] The notice of application was supported by two affidavits, one sworn to by the applicant himself and the other by Bert Samuels attorney-at-Law. The respondent filed 3 affidavits in response to the application.

[4] On September 27, 2018 the application for extension of time was heard and decision was deferred for today's date.

BACKGROUND

[5] In his affidavit the applicant stated that he is ex-Staff Sergeant of the Jamaica Defence force. He was enlisted on 26th March 1974 and served 26 years until he was discharged on 25th March 2000 after 26 years of service.

[6] He says his conduct was always regarded as exemplary, which was evidenced by being awarded the Medal for Long Service and Good Conduct, and the Medal for Meritorious Service Overseas. In 1999 due to an incident that the JDF said he was implicated in and was arrested and charged for that the JDF took the decision to terminate his service and discharge him.

[7] The applicant was charged with others on or about 18th January 2000 for the offences of Larceny and conspiracy and was placed before the Corporate Area Criminal Court. In April 2007 he was acquitted and since then has sought to clear

his name and get compensation for what he considered to be a premature discharge.

[8] He sought the assistance of the Public Defender from 2015. It was however not until August 10 2017 that a letter under the hand of Captain Michael Deans was received by Mr. Herbert McKenzie Deputy Public Defender which was dated May 30, 2017 giving reasons for his dismissal.

[9] Captain Deans responded to issues raised by the letter sent to him by the Deputy Public defender. In regard to the issue of the dismissal he says:

“Ex SSgt KELLY was separated from the JDF pursuant to Section 20 of the Defence Act as a result of Termination of Engagement (he came to the end of his period of engagement). His separation was not as a consequence of disciplinary proceedings.... Therefore, there are no grounds on which he could be reinstated.”

[10] The Applicant says that upon his acquittal he had expected to be reinstated, which has not happened, and is seeking an extension of time and leave to apply for judicial review of the JDF’s decision to terminate his service and a declaration is being sought that the decision to terminate was ultra vires.

THE GROUNDS OF THE APPLICATION

[11] The applicant primarily relied on three of the grounds filed;

- (a) The Applicant has a good reason for the delay in filing his application for leave to apply for judicial review.
- (b) The refusal of leave to apply judicial review will cause substantial hardship to the Applicant
- (c) The grant of leave to apply for judicial review would not cause any hardship to the respondents.

EXTENSION OF TIME FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

SUBMISSIONS

[12] Miss Samuels submitted on behalf of the Applicant that it was accepted that applications for Judicial Review are to be made promptly and no later three months from the date the decision was made. She based her further submission on part 56.6 (2) of the Civil Procedure Rules, specifically:

“...the court may extend the time if good reason for doing so is shown.”

[13] Counsel argued that when the court is considering these applications, there is no hard and fast rule or principle that should be followed, and that there was no rigid definition for what was a good reason. Miss Samuels referred the Court to the case Kleinwort **Benson Ltd. v Barbrak Ltd and other appeals**; *The Myrto* (no 3)[1987] 2 ALL ER 289 where Lord Brandon of Oakbrook stated at page 300, paragraph C:

“The question then arises as to what kind of matters can properly be regarded as amounting to a ‘good reason’. The answer is, I think, that it is not possible to define or circumscribe the scope of that expression. Whether there is [a] good reason in any particular case must depend on all the circumstances of that case, and must therefore be left to the judgment of the judge...”

[14] The applicant submits three months would run from August 10, 2017. This is the noted date when the Deputy Public Defender received the letter. Therefore, the Applicant should have filed his application by November 10th, 2017. The Notice of Application was however filed on November 27, 2017. Counsel argued that the delay in acting was only fourteen (14) days which was due to unfortunate circumstances which is supported by the affidavit of Bert Samuels.

[15] The Respondent submitted and took issue with the date from which time would run and noted that the application was strictly speaking seventeen (17) days over the three (3) months requirement of Civil Procedure Rules of Part 56.6 and not fourteen (14) days as submitted by the applicant, if one were to use the date of August 10, 2017.

- [16] Mrs. Reid Jones submitted that despite the argument that the Applicant has filed his Application only seventeen days over the relevant date of the letter giving him reasons the court should consider the length of time the actual facts of the matter arose and find that the resurrection of the matter from eighteen (18) years ago (factually) is inimical to good administration.

APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

SUBMISSIONS

- [17] Miss Samuels submitted that the Applicant is applying for leave for judicial review of the decision from the JDF whilst he was being investigated by officials at the JDF which is contrary to the protection paragraph 15 of the First Schedule of the Enlistment and Service Regulations guarantees. This provides as follows;

“If at the time you are due to be discharged or transferred to the Reserve you are liable to be proceeded against for an offence against service law, your discharge or transfer to the Reserve will be postponed until after the proceedings have been concluded.”

- [18] Counsel further submitted to the court that if the decision to discharge the Applicant was made in his absence and without a hearing the decision fell into the realm of unlawfulness as the Applicant as a citizen of Jamaica has a right to a fair hearing.
- [19] The Respondent however disagreed with these submissions and relied on the affidavit of Captain Deans & Major Anglin to support the point that the applicant having served the 22 years could obtain an annual continuance at the discretion of Headquarters. Mrs Reid Jones, on their behalf quoted from paragraph 10 of the affidavit of Captain Deans:

“...The Respondent will say the Ex-Staff Sergeant Kelly enlisted in the Jamaica Defence Force on 26 March 1974 and completed 22 years of Colour Service on 25 March 1996. He was allowed to continue in the service beyond 22 years at the discretion of Headquarters of the Jamaica Defence Force and each continuance was for one year, for a total of 4 years until 25 March 2000.”

[20] The Respondent also advanced in support of the submission, Section 20 (2) of the Defence Act which states;

“Any soldier of the regular Force who shall have completed a period of twenty-two years’ colour service may, if shall so desire and with the approval of the competent military authority, continue to serve in all respects as if his term of colour service was still unexpired except that it shall be lawful for him to claim his discharge at the expiration of the period of three months beginning with the day on which he gives to his commanding officer notice of his wish to be discharged.”

[21] Mrs Reid Jones submitted that the underline words above reflected clearly that this extension of colour service is in the discretion of the military authority and is not a right, but rather a privilege.

ANALYSIS

[22] The first issue for consideration is the application for the extension of time to apply for leave for judicial review. The second application is predicated on the decision made in the first.

[23] The applicant has put forward that once he became aware of the reasons why he was discharged that he acted with all alacrity to make the application for leave to apply for judicial review.

[24] Part 56.6 (1) sets the framework and states that “an application for leave to apply for Judicial review must be made promptly and in any event within three months from the date when the grounds for the application first arose.”

[25] Applying this Rule, the court must look at when the grounds first arose. The Applicant argument is that it arose on August 10, 2017 when Mr. Herbert McKenzie, the Deputy Public Defender received a letter of response from Captain Deans. It is a strange proposition from the Applicant who states in his affidavit dated 28th of April 2018 at paragraph 14:

“Paragraph 19 is admitted in that there was a formal interview but I deny that the run-out date communicated was 25 March 2000. I was told that I would not be allowed to continue beyond 2001...”

[26] It is clear that any grounds for the application would have arisen on 25 March 2000 or at the latest 25 March 2001.

[27] Shelly-Williams J in the case of **Dewayne Thomas v. Commissioner of Police** [2015] JMSC Civ.26, after reviewing several cases, stated at paragraph 35:

“The significance of these cases is that in all of them it was held that time starts to run when the decision is made, not when the Defendant would have acquired knowledge of it..”

[28] It is therefore concluded that the date of discharge would be date the decision was made and therefore the date the ground for this application would have arose.

[29] Both Counsel submitted that the Court has power to extend time. The exercise of this power in favour of the applicant must be predicated on the applicant showing good reason. In the instant case the applicant has delayed his application for over 17 years. He has sought to lay blame on the Jamaica Defence Force for failing to provide him with fulsome reasons for his dismissal.

[30] I am of the view that the date which he received fulsome reasons is relevant only and should be considered in determining the issue of whether he had good reasons for the delay.

[31] In the case **Secretary of State for Trade and Industry, ex parte Greenpeace Ltd** [1998] Env LR 415, Laws J noted that:

“... a judicial review applicant must move against the substantive act or decision which is the real basis of his complaint. If, after that act has been done, he takes no steps but merely waits until something consequential and dependent upon it takes place and then challenges that, he runs the risk of being put out of court for being too late...”

[32] The instant Applicant has taken a high risk and has not been able to satisfactorily proffer any good reason to substantiate this delay.

[33] I have considered every reason given by the Applicant and I reject his explanation as to the reasons for the delay for over 17 years can amount to a good reason and

I conclude that he failed to act promptly since he was discharged on August 25 2000.

[34] In light of the above-mentioned the application for extension of time to apply for leave for judicial review is denied on the basis that the applicant has failed to satisfy this Court of any good reason for the delay of almost 18 years.

DISPOSAL

1. The Applicant's Notice of Application for extension of time and leave to apply for judicial review filed on November 27, 2017 is denied.