



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2011 HCV 5631

<b>BETWEEN</b>	<b>EVERTON MCLEAN</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>THE COMMISSIONER OF POLICE</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>THE ATTORNEY GENERAL</b>	<b>2<sup>ND</sup> DEFENDANT</b>

**Mr. L. Equiano instructed by the Kingston Legal Aid Clinic for the Claimant.**

**Ms. Marlene Chisholm instructed by the Director of State Proceedings for the Defendants.**

*Judicial Review – Legitimate Explanation*

**HEARD: 12<sup>th</sup> July, 2012 and 12th November, 2012**

**CORAM: MORRISON, J.**

[1] The facts of this case are simple. The applicant, Mr. Everton McLean says that he was “enlisted in the Jamaica Constabulary Force in April 2000 and was appointed as a District Constable.”

[2] In December 2007 he was engaged in the process of delivering food to officers on location at the Traffic Court, South Camp Road via a van. He entered the premises of the said Court when he was confronted by one of two ladies he had earlier seen on the outside and who had enquired of him as to his intended

length of stay in his parked position. He informed the inquirer that he was not staying and that he was merely dropping off lunches for other police officers.

[3] He having delivered the lunches and as he was in the process of exiting the premises the second lady walked up to the door of the van and "started pointing her finger in my face". According to this deponent, "I immediately warned her that she needs to cease and desist as her actions were tantamount to being classified as assaulting an officer". He was subsequently informed by another police that the finger pointing lady is a Judge. His response having been so apprised was, "Judge or no Judge, she ought to know how to deal with people. In this second lady's parting shot she said to him, "that it was not over and that something will have to come out of the incident".

[4] Ensuing from that December 2009 incident an Enquiry by the Board of Enquiry acting pursuant to the District Constable's Act, was convened on 9<sup>th</sup> December 2009 and 14<sup>th</sup> January, 2010.

[5] The Board of Enquiry heard evidence from Her Honour Ms. Andrea Thomas as well as Mr. Everton McLean, the Claimant. Subsequent to the Enquiry on April 27, 2010 through letter under the signature of Assistant Commissioner of Police in charge of Administration, the Claimant was notified of the findings of the Board of Enquiry.

[6] The letter concluded, "consequently you have been ordered dismissed from the Rural Police Force by the Commissioner of Police consistent with the provisions of the District Constable's Act.... You may appeal the decision of the Commissioner of Police within fourteen (14) days of receipt of this notice....any

appeal by you should be submitted to the Commissioner of Police within the time specified for further attention”.

[7] The Claimant, by way of letter to the Commissioner of Police dated December 3, 2010, appealed the decision of the Board of Enquiry and requested the formal Notes of Evidence along with a copy of the President's Report on which the Commissioner of Police relied. This, he says was in an effort to advance the Judicial Review process. His request was met by the supply to him of the Notes of Evidence and Notice of Suspension.

[8] Through letter dated July 6, 2011 by Assistant Commissioner of Police, Administration Branch, the Claimant was put out of countenance in these terms: “However, you are hereby notified that there is actually no provision in the Constable's (District) Act for the appeal of Board of Enquiry findings and penalties by the Commissioner of Police”.

[9] Hence these tears: “I am contending that it has always been the practice that for disciplinary purposes, District Constables are treated in like manner as member of the Jamaica Constabulary Force and the Island Special Constabulary Force; the decision to terminate my employment as a member of the Rural Police Force was excessive and although the Board of Enquiry stated that the charge was proven, no reason were given for the decision or how the enquirer came to his decision.”

[10] Notwithstanding, Mr. Equiano having obtained leave to apply for Judicial Review has advanced a solitary ground in seeking Judicial Review of the decision of the Board of Enquiry, that is, legitimate expectation. This, he submits, has

come about, as the Claimant was informed of his right of appeal in one letter and much later on in another letter from the same police department the initial advice of a right of appeal had now morphed into no right of appeal.

[11] Before I go to the submissions of both Counsel I must observe and deprecate the dubious practice of failing to supply to the court the authorities on which reliance is being placed. Accordingly, there can be no complaints should the court take the appropriate points on its own motion: See ***Norwich Corporation v. Norwich Electric Tramways Ltd. (1906) 2 KB 119.***

### **The Submissions**

[12] The Claimant was content to rely on the principle of legitimate expectation while the defendant reposed on the view of the absence in the Constables (District) Act of any recourse procedure of appeal.

### **The Law**

[13] According to the Constables (District) Act, "The Commissioner of Police may, with the sanction of the Governor General, appoint in any parish, such number of persons as he may think necessary, being householders resident in such parish to be district constables, whose power and authority under this Act shall extend to all parts of the Island".

[14] Section 2 (2) states, "The Commissioner may at any time remove any district constable so appointed and appoint some other resident householder in his place".

[15] Section 8 provides sanctions for the neglect of duty through Departmental Inquiry. It reads: "If any district constable shall be guilty of any neglect or violation

of duty in his office, he shall be liable to a fine not exceeding forty cents for every such offence, which may be inflicted after due enquiry by the Superintendent, Deputy Superintendent or Assistant Superintendent of the Constabulary Force in charge of the parish in which such district constable was doing duty at the time of the committing of such neglect or violation of duty, or to a fine not exceeding one dollar for every such offence, which may be inflicted by the Commissioner of Police after due enquiry held by him”.

[16] While I do not see in this Act any provision for an appeal I cannot bring myself to say, even though it was not argued, that the Commissioner of Police can at his mere caprice “remove any district constable so appointed and appoint some other resident householder in his place” without concern for the fairness of the procedure employed to deal with violations of duty.

[17] In any event the Claimant’s contention contained at paragraphs 5, 6, 7, 8, 9, 10, 11 and 12 of his affidavit of 7<sup>th</sup> September, 2011 were not addressed by the defendants. What this means, in my view, is that he having been advised of his right of appeal and for the Administration Board to seek to abrogate it later on, brings it with the principles of Judicial Review.

### **Judicial Review**

[18] Judicial review is a review of public law functions. There are a number of classifications of the grounds upon which a decision by a public authority may be found to be invalid. Looked at through the lens of ***Council Of Civil Service Unions v. Minister For The Civil Service [1985] at 374***, they are:

1. Illegality
2. irrationality, and

3. procedural impropriety

[19] The heads of this classification do often contain grounds which are susceptible of being characterized in more than one way.

[20] Irrationality, inter alia, contains the sub-set of the infringement of a legitimate expectation.

[21] There are a number of cases that deal with this principle including, ***R. V. Liverpool Corporation, Exparte Liverpool Taxi Fleet Operators' Association [1972] 2 Q.B. 299 and R v. Secretary Of State For The Home Department, Exparte Asif Mohammed Khan.***

[22] The principles mined from the cases suggest that to qualify for substantive legitimate expectation:-

- (a) the representation or expectation sought to be relied on must be clear, unambiguous and unqualified;
- (b) the Claimant must be within the class of persons entitled to rely on the representation or alternatively, it must be reasonable for the Claimant to rely upon it;
- (c) there must usually be reliance upon the representation to the detriment of the Claimant;
- (d) there must be no overriding public interest which would entitle the defendant to renege from its representation.

[23] Indeed, there can be a legitimate expectation that a policy will be applied even where the Claimant was unaware of the policy: (***R (Rashid) v. Secretary Of State For The Home Department [2005] EWCA Civ. 744.***

[24] It seems to me that having been told that he had a right of appeal to the decision of the Board of Enquiry the Claimant entertained a legitimate expectation that this would have ensued. The expectation and representation contained in the April 27, 2010 letter was clear, unambiguous and unqualified. Additionally, the Claimant relied upon the representation. The department of Administration having reversed itself in advising that he had no such right of appeal thwarted the Claimant's legitimate expectation to his detriment.

[25] In ***Behuli v. Secretary Of State For The Home Department [1988] IMM AR 407***, Bedlam, LJ said, "although legitimate expectation may in the past have been categorized as a catch phrase not to be elevated into a principle, or as an easy cover for a general complaint about unfairness, it has nevertheless achieved an important place in developing the law of administrative fairness.

[26] It is an expectation which, although not amounting to an enforceable legal right, is founded on a reasonable assumption which is capable of being protected in public law. It enables a citizen to challenge a decision which deprives him of an expectation founded on a reasonable basis that his claim would be dealt with in a particular way.

[27] I conclude therefore, that the claim succeeds in the terms prayed for by the Claimant. An Order of Certiorari quashing the decision of the first defendant is hereby granted.