



[2021] JMSC Civ 143

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2013HCV06662 and 2014HCV00497

BETWEEN	DERRON NISH	APPLICANT
AND	THE COMMISSIONER OF POLICE	DEFENDANT

IN OPEN COURT

Shantel Jarrett instructed by Zavia Mayne and Co for the Applicant

Tamara Dickens instructed by Director of State Proceedings for the Defendant

HEARD: July 1st, 2021 and July 30th, 2021

Motion Hearing – Application for Contempt of Court – Application for re-enlistment in the JCF– Absence of Penal Notice in Formal Order – Powers of Court on Application

CORAM: HUTCHINSON J,

Background

[1] This is a matter in which there had been judicial review proceedings before another tribunal in which the then Claimant had sought an order of certiorari to quash the decision of the defendant to discharge him from the Jamaica Constabulary Force, ('the JCF'), and refuse him permission to re-enlist. The Claimant had also sought an order of mandamus to compel the defendant to have him re-enlisted and to pay him all salaries and allowances outstanding as at August 22nd, 2013. An order for costs was also requested. At the trial of the matter, the Claimant did not pursue

the relief of an order for mandamus. The claim then proceeded for an order of certiorari, and the grounds on which the order was sought were as follows:

- 1) The Defendant, in exercising his discretion to dismiss the claimant as a serving member of the JCF, acted in breach of: The Constabulary Force Act and the Police Service Regulations, 1961, or contrary to the principles of Natural Justice and the Rule of Law.
- 2) The claimant was never given an opportunity to be heard in respect of any of the allegations made against him.
- 3) The allegations against the claimant were not substantiated and no evidence was put forward to warrant the penalty of discharge.
- 4) The claimant had not been in breach of any rules or provision of the Jamaica Constabulary Force or any Laws of Jamaica.
- 5) The claimant was denied the legitimate expectation of being heard in respect the allegations brought against him.

[2] Having heard the claim which included the taking of viva voce evidence, at paragraphs 44 and 45 of his judgment, Anderson J stated as follows;

- a. *In the circumstances, I am of the considered view that an order of certiorari should be granted by this court in respect of the defendant's refusal to re-enlist the claimant.*
- b. *If the claimant wishes to be re-enlisted, he will have to re-apply and a fair hearing will have to be afforded to him, albeit that such fair hearing need not be undergone, until after the claimant has been informed as to the reasons why it has been recommended that he not be re-enlisted and after he has been provided with a complete copy of the polygraph test results pertaining to matters of fact which have always been in dispute as between the claimant and the Office of the Commissioner of Police (if a recommendation for the claimant's non-re-enlistment is made and also, if the claimant in fact applies to be re-enlisted).*

[3] Following this pronouncement, the Learned Judge made the following orders;

- i. The Order of Certiorari is granted. The defendant's refusal to re-enlist the claimant as a member of the Jamaica Constabulary Force, is brought before this court and quashed.*
- ii. The claimant is awarded the costs of this claim to the extent of 50% thereof, with such costs to be taxed, if not sooner agreed.*

[4] On April 15th, 2021, the Applicant filed a Notice of Application for Court Orders in which he seeks the following orders: -

- i. The Commissioner of Police is in contempt of the Order of the Honourable Mr. Justice K. Anderson made on the 26th day of January 2018.*
- ii. The Commissioner of Police is to re-instate the Claimant/Applicant to active duty as a serving member of the Jamaica Constabulary Force forthwith.*
- iii. All outstanding wages are to be paid to the Claimant/Applicant forthwith for the period July 25, 2010 — present.*
- iv. Costs*
- v. Such further and other relief as this Honourable Court deems just.*

[5] This application was opposed by the Defendant and the matter proceeded before me on the 1st of July 2021.

DISCUSSION/ANALYSIS

The Court's power to make an order for committal for breach/contempt of its orders is outlined at Part 53 of the Civil Procedure Rules. The relevant rules for the purpose of this application provides;

53.1 This Section deals with the power of the court to commit a person to prison or to make an order confiscating assets for failure to comply with -
(a) an order requiring that person; or
(b) an undertaking by that person,

to do an act-
(i) within a specified time;
(ii) by a specific date; or
not to do an act.

[6] The circumstances in which the power is to be exercised by the Court are stated as follows;

53.2 (1) Where a judgment or order specifies the time or date by which an act must be done the court may by order specify another time or date by which the act must be done.

(2) Where a judgment or order does not specify the time or date by which an act must be done, the court may by order specify a time or date by which it must be done.

(3) The time by which the act must be done may be specified by reference to the day on which the order is served on the judgment debtor.

(4) An application for an order under this rule may be made without notice but the court may direct that notice be given to the judgment debtor.

(5) Any order made under this rule must be served in the manner required by rule 53.3 (in the case of an individual judgment creditor) or 53.4 (enforcement against an officer of a body corporate).

[7] In order to arrive at a decision on this type of application, careful consideration must be given to Rule 53.3 which states;

53.3 Subject to rule 53.5, the court may not make a committal order or a confiscation of assets order unless

(a) the order requiring the judgment debtor to do an act within a specified time or not to do an act has been served personally on the judgment debtor;

(b) at the time that order was served it was endorsed with a notice in the following terms:

“NOTICE: If you fail to comply with the terms of this order you will be in contempt of court and may be liable to be imprisoned or to have your assets confiscated.”,
or, in the case of an order served on a body corporate, in the following terms:

“NOTICE: If you fail to comply with the terms of this order you will be in contempt of court and may be liable to have your assets confiscated.”; and

(c) where the order requires the judgment debtor to do an act within a specified time or by a specified date, it was served in sufficient time to give the judgment debtor a reasonable opportunity to do the act before the expiration of that time or before that date.

- [8] It is not in dispute that the formal order which was filed on the 2nd of February 2018 and served on the office of the Commissioner of Police did not comply with the requirements of Part 53.3. It was contended by the Applicant however, that the Court can still exercise these powers to make this order as well as the other orders requested.
- [9] In considering this argument, I note that the remit of this Court on Judicial Review is confined to a review of the administrative actions taken by the Commissioner of Police insofar as to determine whether they were properly exercised in the circumstances.¹ It is also evident that in conducting this exercise, the Court is not in a position to seek to carry out the administrative function of the officeholder² and I accept the submission of Ms. Dickens that it was for this very reason that the orders sought on the Fixed Date Claim Form compelling the Commissioner to reinstate the Applicant and to pay him all outstanding salaries and allowances was not pursued before Anderson J. Unfortunately for this Applicant, this Court is in no better position and would not be in a position to grant the orders sought for re-enlistment and payment of back wages.
- [10] The issue that remains then, is whether the Commissioner is in contempt of the Court's order as stated in the judgment handed down on the 26th of January 2018.

¹Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1947] 2 All ER 680,685

² Cpl Glenroy Clarke v Commissioner of Police etal (1996) 33 JLR 50

Apart from the order for the Claimant to be paid 50% of his cost, the only other order made by Anderson J was stated at paragraph 3(i) above as follows;

The Order of Certiorari is granted. The defendant's refusal to re-enlist the claimant as a member of the Jamaica Constabulary Force, is brought before this court and quashed.

- [11] His Lordship made no other orders in which a date was specified as the deadline by which the Applicant should have the benefit of a rehearing or an updated decision on his application for re-enlistment by the new office holder. Although it is evident that the provision of this information has been strenuously pursued by the Applicant, the absence of a deadline by which compliance ought to have taken place undermines the argument in favour of the Court being in a position to exercise its powers under this Rule.
- [12] I have reviewed the affidavit which has been provided on behalf of the Defendant in which it seeks to explain the 3-year delay in arriving at a decision or a date for rehearing. I have considered the administrative 'challenges' outlined as well as the fact that there have been two new Commissioners since the judgment of the Court and a decision would first have to be made by the new officeholder³. It is my view that the reasons which have been advanced provide a poor explanation for this lapse of time, as several of the issues identified could have been treated with in a more time sensitive manner.
- [13] The fact that the order was granted quashing the previous decision meant that a fresh decision had to be made or a rehearing convened. The office holder at the time of the judgment was obligated not only to acknowledge this decision but to act with due expediency in light of same and it is my considered view that there has been an abject failure in this regard. In the particular circumstances however,

³ Per Orthel Whittingham v the Commissioner of Police and An'or S.C.C.A 105/2017, para 25

while the Court acknowledges that there are other remedies open to this Applicant, I am unable to grant the reliefs sought herein.

[14] Accordingly, the application for court orders filed on the 15th of April 2021 is denied. Each party is to bear his own costs. Applicant's Attorney to prepare the formal order herein.