[2022] JMSC Civ. 161

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2015 HCV 03989

BETWEEN	**TANISHA PERRY**	**CLAIMANT**
AND	**THE COMMISSIONER OF POLICE**	**1ST DEFENDANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**2ND DEFENDANT**

Mr. Chukwuemeka Cameron instructed by Carolyn C. Reid-Cameron, Attorneys-at-law for the Claimant

Mr. Ricardo Maddan, instructed by the Director of State Proceedings, for the Defendants

Heard: February 14 and September 30, 2022

Administrative law – Declaration - Re-enlistment in police force not automatic – Refusal to re-enlist before application is permissible – Hearing by way of review of decision to refuse to be granted –– Onus on applicant to show cause at hearing – Factors to be weighed - Legitimate expectation –– Conduct of claimant under review qualifies as public interest

WINT-BLAIR, J

[1] The claimant filed a fixed date claim form on August 14, 2015 seeking relief as set out below:

1. *A declaration that the claimant has a legitimate expectation to be re-enlisted.*

2. *Any and all administrative orders that this Honourable Court may deem it fit to grant.*

The Claimant's case

[2] The claimant, Ms. Tanisha Perry was a police officer from January 27, 1997 until January 27, 2011. In her affidavit in support of the fixed date claim form, Ms. Perry said that she applied for and was granted seventy (70) days of vacation leave for the period December 19, 2003 to March 2004 to be spent both locally and abroad. She went on leave on December 19, 2003.

[3] She applied for an additional thirty-five (35) days' vacation leave before the expiration of the approved vacation leave. This she said, would have *"taken me to the month of April."*

[4] On her return to Jamaica in 2004 she was spoken to by her (since deceased), supervising officer in charge of the General Office of the Hunts Bay police station. He told her that her application for the additional thirty-five (35) days' vacation leave had not been approved and that she needed to account for that time period. The claimant submitted medical certificates for the unaccounted for thirty-five (35) days. She was placed on interdiction by Superintendent Newton Amos.

[5] After spending nine (9) months on interdiction, the claimant met with the then Commissioner of Police, Lucius Thomas, who reinstated her with effect from October 2005.

[6] On Wednesday, March 22, 2006 at of 8:15am, she was charged with the offence of uttering false document and taken before a Resident Magistrate for the Parish of St. Andrew (as it was then known) and granted bail in the sum of $30,000.00 with one (1) surety.

[7] On March 21, 2006, the claimant was notified that she would be placed on suspension effective March 22, 2006 as a result of the criminal proceedings and that an investigation was being carried out by the Professional Standards Branch of the Jamaica Constabulary Force ("JCF".) The investigation concerned an allegation of uttering false document. The notice of suspension was dated March 21, 2006 and is exhibited as 'TP2'.

[8] The claimant said that she applied for re-enlistment during the pendency of the criminal matter and that the application was approved effective January 26, 2007 to expire on January 26, 2009. That approval is exhibited as 'TP3'.

[9] The criminal case was disposed of by way of a no order made by Her Honour Ms Judith Pusey (as she then was). A certificate of acquittal under the hand of the Clerk of Court sealed with the seal of the Resident Magistrates Court dated June 28, 2007 is exhibited as 'TP4'.

[10] Within one (1) month of the disposition of the criminal matter, the claimant was contacted by the Superintendent in charge of Crime, Half Way Tree CIB and told to report for duties. She reported for duty in September of 2007.

[11] In 2008, the claimant again applied for re-enlistment and was approved for a further two (2) years. On April 3, 2008, she was served with a letter which is

dated April 3, 2008, exhibited as 'TP5'. The letter stated that the matter had been investigated by the Internal Affairs Division and the file referred to the Commissioner of Police ("the Commissioner") for a decision. The Commissioner directed that disciplinary action be taken against the claimant. Further, that the statements were being reviewed to determine what disciplinary charge(s) if any, the claimant should be called upon to answer. It was signed by the Assistant Commissioner of Police, Administration.

[12] On January 26, 2011, the claimant received a notice of non re-enlistment dated January 25, 2011, exhibited as 'TP6'.

[13] The claimant averred that for two (2) years she had received awards for excellence in conduct. She had been commended by her then Senior Superintendent who described her work, worth and conduct as follows: "highly proficient at her daily tasks and discharged her duties without need for supervision."

[14] She cites unfairness in that the Commissioner took into consideration events that took place in 2003-2004 for which she had been interdicted, charged and acquitted in the criminal court. Further, that the grant of her application to be re-enlisted on the first occasion, gave rise to the expectation that she would be re-enlisted. The actions which took place ten (10) years prior in 2003 are irrelevant considerations in determining whether or not she should be re-enlisted.

The Defendants case

[15] The affidavit in response[1], was from Gervis Taylor, Assistant Commissioner of Police, Administration Branch, Office of the Commissioner of Police. He averred

[1] Filed on December 3, 2015

that the claimant first enlisted as a constable on January 27, 2002. She was trained and posted to the St. James Division until January 2002 when she was transferred to the St. Andrew South Division.

[16] During her time in St. James, the claimant was granted departmental leave two (2) times, with permission to go abroad.

[17] In October of 2001, the claimant applied for re-enlistment for a further period of five (5) years which was approved by the Commissioner. The claimant was given approval to proceed on seventy (70) days of vacation leave for the period November 20, 2003 to March 2, 2004, however she did not resume duties until July 6, 2004.

[18] The claimant was served with a Notice of Interdiction dated December 16, 2004 as ordered by the Commissioner it took effect on December 17, 2004, and is exhibited as 'GT1'.

[19] The allegations against the claimant were that she had reported being sick while abroad at the expiration of her vacation leave. She submitted sick leave certificates totalling one hundred twenty seven (127) days from local doctors for the period she was alleged to have been abroad.

[20] On or about March 2005, a file was submitted by the claimant's commanding officer to the former Internal Affairs Division of the Professional Standards Branch for investigations and thereafter, the file was sent to the Office of the Director of Public Prosecutions ("DPP") for a ruling.

[21] As part of the investigations conducted by the Internal Affairs Division, a statement had been taken from the claimant on March 21, 2005. In it, she stated that she had travelled to the USA in February 2004 and returned on March 2, 2004 on an emergency document as her passport had gone missing. A diplomat

attached to the United States Embassy opined that the entry stamp granting entry into the USA in February 2004 did not appear to be genuine. Further checks made with Jamaican Immigration revealed that the claimant had arrived at the Norman Manley International Airport on June 14, 2004.

[22] For reasons not reflected in the police administration file, the claimant was reinstated with effect December 17, 2004.[2] She resumed duties on October 3, 2005 and was transferred to the St. Andrew Central Division on October 10, 2005.

[23] In March 2006, the DPP's office advised the Internal Affairs Division that the claimant was to be charged under the Forgery Act for the offence of uttering a forged document.

[24] The claimant was served with a notice of suspension on March 21, 2006 and the following day she was charged as directed by the DPP. A copy of the number one information is exhibited as 'GT2'.

[25] The claimant's application for re-enlistment for a further term of five (5) years was approved for only two (2) years effective January 26, 2007.

[26] On June 26, 2007, the charge was dismissed by Her Honour Ms. J. Pusey, then a Resident Magistrate for the Corporate Area by a no order for insufficient evidence, the US Embassy official being unavailable.

[27] The claimant was reinstated with effect March 22, 2006 to the St. Andrew Central Division and resumed duties on September 27, 2007 at the Half Way Tree police station.

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[2] Vide Force Order #3044 dated October 6, 2005

[28] The claimant's application for re-enlistment for a further term of five (5) years was only approved for two (2) years effective January 26, 2009 on the grounds that a court of enquiry charge was pending.

[29] The claimant's application for re-enlistment made in October 2010 was refused for the reasons given in the notice dated January 25, 2011 and she was given the opportunity to respond within fourteen (14) days of receipt. She was also given an opportunity to appear before the Commissioner to show cause why her application for re-enlistment should not be refused.

[30] That on March 4, 2011, the Commissioner met with the claimant, accompanied by her attorney-at-law, Mrs. Carolyn Reid-Cameron and Sergeant Raymond Wilson, Chairman of the Police Federation. Superintendent Oral Ramsay recorded notes. A copy of the hearing notes is exhibited as 'GT3'.

[31] By notice dated September 6, 2013, dispatched on September 9, 2013, the claimant was notified that her application for re-enlistment was refused and that she had been discharged from the JCF effective January 25, 2011. A copy of that notice dated September 6, 2013 is exhibited as 'GT4'.

The Law

[32] Part 56 of the Civil Procedure Rules sets out a number of discretionary orders. The discretion whether or not to grant a remedy at all and what form that remedy should take is for the court to be judicially exercised. In deciding whether to exercise the discretion to grant relief, there are several relevant factors which ought to be taken into account. One factor for consideration in the grant of a administrative order is whether it is necessary to do so. Another factor is whether the dispute has a wider public interest element. For though an order may be of little practical value to the claimant, it may be of greater significance to make a decision in the wider public interest. In the case at bar, the claimant is

seeking a declaration on the basis that she has a legitimate expectation to be re-enlisted.

Discussion

[33] At the outset a number of points are striking. First, the claimant's evidence does not mention that she suffered from any illness or indicate a need for sick leave and then additional leave due to an illness recently acquired. The inference can be drawn that the need for sick leave latently developed when she became aware of the need to account for the unapproved thirty-five (35) days.

[34] Second, the claimant obtained medical certificates despite not being ill. These certificates if they can even be so-called, would have had to have been back-dated to account for the impugned thirty-five (35) days. Neither side produced those medical certificates in evidence. The inference can be drawn from their undisputed existence that a degree of pre-meditation and deliberateness of purpose occupied the mind of the claimant in order to bring about this situation.

[35] Third, the claimant made no enquiries as to the grant or refusal of the additional thirty-five (35) days for which she had applied before continuing on leave.

[36] Fourth, it was for the first time at the hearing before the Commissioner that it was submitted on behalf of the claimant, that while the claimant was on leave abroad, her mother had fallen ill and that this meant the claimant had to stay there. The claimant did not give the address or location of her mother nor the nature of her mother's illness which necessitated her having to request additional days of leave. The affidavit filed by the claimant was bereft of these details.

[37] Fifth, the sick leave for which medical certificates were submitted could not have related to the claimant's mother being ill, but only to the claimant herself.

The Law

[38] In the case of **Glenroy Clarke v Commissioner of Police and Another**,[3] the appellant was a corporal of police in the Jamaica Constabulary Force ("JCF"). He first enlisted in 1978 and successfully applied for re-enlistment in 1983 and in 1988. In 1993 when he applied for re-enlistment he was advised on the orders of the Commissioner of Police ("the Commissioner") that his application would not be approved and he was apprised of the reasons for that decision. Subsequently, the appellant sought and obtained an interview with the Commissioner at which he had counsel, who made submissions on his behalf. Prior to this event, the Chairman of the Police Federation had intervened to make representations on his behalf to the Commissioner. The decision stood. A Force Order dated 18 November 1993 proclaimed his exit at that date.

[39] The appellant felt aggrieved at this treatment, he had received several commendations for his efforts over the years, appointed Corporal in 1992 and acting Sergeant of police in May 1993. He acknowledged that save being fined ten (10) days' pay at a police court of inquiry, he was unaware of any other act of wrongdoing on his part which warranted refusal of his application. He had entertained a reasonable expectation that he would be re-enlisted in the JCF. He obtained leave to apply for certiorari to quash the directions of the Commissioner. The motion was dismissed by the Full Court. On appeal, it was argued that the appellant had not been afforded a fair hearing, the Commissioner having pre-determined the matter and this was also a demonstration of bias.

[40] Carey, JA (as he then was), set out the procedure for re-enlistment:

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[3] (1996) 52 WIR 306

"As indicated earlier, a member of the force is enlisted for terms of five years and when he wishes to re-enlist, he must make an application before the expiration of the current term. It follows that, if there is no application, a member's tenure comes to an end. When an application is made, it is considered by the Commissioner who makes a determination…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. 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 therefor. 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 the court has no power to set the standard of acceptable conduct in the force.

Where the Commissioner has taken a decision not to approve re-enlistment, then, upon any application by the member for re-enlistment the Commissioner is obliged in fairness, to supply the reasons for his decision and to 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 therefor. The opportunity afforded to the appellant to be heard allowed the Commissioner to review his decision in 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 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."

[41] In **Berrington Gordon v Commissioner of Police**, [4] Sykes, J (as he then was) citing the case of **Glenroy Clarke v Commissioner of Police** said of that decision:

"[18] …a decision of the Court of Appeal of Jamaica dealing specifically with the re-enlistment of police officers. What was said by Dyson LJ in paragraph [14] in the AMEC explains why the court in Clarke held that whenever the CP makes the decision not to re-enlist a police officer, the affected officer must be informed of the decision and be supplied with the reasons. This is so because the decision may have been made before the affected person applied for re-enlistment in which case he would be adversely affected without having had the opportunity to make any representation. Thus while the Jamaican Court of Appeal endorsed the view that the CP has the power to decide not to re-enlist a police officer even before an application for re-enlistment has been made fairness demands that he be informed and given reasons so that he can decide whether to ask for a review.

[4] [2012] JMSC Civ 46

[19] The Court of Appeal in Clarke set out, in detail, the process to be followed. In practical terms, the court supplemented the statute by stating what fairness demands in the context of an application for re-enlistment.

[20] Clarke established the following propositions:

a. no police officer who must apply for re-enlistment has an automatic right of re-enlistment;

b. the police officer has to apply for re-enlistment in accordance with the relevant or extant rules and regulations;

c. the power to decide whether the officer will be re-enlisted, according to the Act, lies solely with the CP;

d. it is the CP who determines the standard of conduct expected of police officers. The courts have no power to make this determination;

e. the CP can properly determine that a particular officer won't be allowed to re-enlist even before that officer makes an application for re-enlistment;

f. if the CP decides that a particular officer won't be re-enlisted before he makes such an application, fairness does not require that such an officer be heard before the CP makes that decision;

g. if the officer does not apply for re-enlistment then his time in the police force comes to an end and no right has been breached even if, unknown to the officer, the CP had decided that he would not be permitted to re-enlist;

h. however, if the CP has decided that the particular officer will not be allowed to re-enlist, whether before or after such an application, and such an application is in fact made, fairness demands the CP must (not may)

notify the officer of his decision and the decision must be accompanied by reasons;

i. the officer must (not may) be allowed to make representations to the CP;

j. the right to be heard can only arise if and only if (i) the officer applies for re-enlistment; (ii) the CP informs him that he will not be permitted to re-enlist and (iii) he has been given the reasons for the decision;

k. it is for the CP to decide what form the hearing should take and whether there will be written as well as oral submissions but whatever form the hearing takes, it must be fair;

l. the hearing before the CP is a review where the onus is then placed on the officer to make his case for re-enlistment;

m. the decision not to permit re-enlistment is not a dismissal;

n. in considering whether to permit the officer to re-enlist the CP can take into account the past conduct of the officer.

[23] Forte JA stated that '[t]here was no dispute that the appellant in the particular circumstances had a legitimate expectation that he would be re-enlisted, and consequently was entitled to the opportunity for a fair hearing' (page 313).

[24] Gordon JA stated, "A constable who has a history of aberrant behaviour cannot claim a legitimate expectation to re-enlistment" (page 314). This statement by Gordon JA is not to be understood as a disagreement with the other two Justices of Appeal. His Lordship was not purporting to reverse a specific finding of the Full Court from which the appeal came that Mr Clarke had a legitimate expectation, in light of his

previous re-enlistments, that he would be re-enlisted this time round. All Gordon JA was saying was that a constable with a history of misbehaviour cannot claim that he has a legitimate expectation to re-enlist."

[42] In **Glenroy Clarke**, the Commissioner had considered 'certain intelligence reports' which had not been disclosed. Carey, JA said:

"The Commissioner was obliged to consider the conduct of the appellant over the period of the appellant's service. The fact that he may have been disciplined under previous administrations cannot be disregarded, as if it had been excused or removed from his record. Any résumé of his service must have included that conduct which the Commissioner was obliged to consider. He could not be regarded as a person with an unblemished record by any stretch of the imagination."

[43] In the leading case of **Francis Paponette v Others v The Attorney General of Trinidad and Tobago**[5] the appellants were members of the Maxi-Taxi Association in Port-of-Spain, Trinidad. In 1995 the Minister of Works and Transport who is responsible for the operation of all taxi stands in Trinidad, held discussions with members of the Association regarding the proposed move of the taxi stand from routes two (2) and three (3) from Broadway to City Gate. City Gate is situated on land owned by the Public Transport Service Corporation ("PTSC"), a statutory body. The maxi-taxi operators regard the PTSC as a competitor.

[44] The Minister made certain representations regarding the proposed move which were reluctantly agreed to by the Association. Following the relocation, the government decided that the PTSC should take over the management and

[5] [2011] 3 WLR 219

control of City Gate. Regulations No. 227 of 1997 were introduced which gave the PTSC the responsibility for managing City Gate and the power to charge members of the Association for its use. The regulations also required the maxi-taxi owners and operators to apply to the PTSC for a permit to operate from City Gate.

[45] Initially members of the Association were not charged for its use but after August 2001, they were required to purchase a card which was used to activate barriers at the exit and to pay a fee of $1.00 for each exit journey. Three-quarters of the user fee was retained by the PTSC and one-quarter was given to the Association.

[46] The maxi-taxi owners and operators on routes two (2) and three (3) were the only ones required to pay a fee to use their taxi stand. They were also the only ones who were required to apply to the PTSC for a permit and who were required to satisfy the PTSC that they were fit and proper persons to use the taxi stand.

[47] The appellants filed a constitutional motion in the High Court claiming that the actions of the state had frustrated their legitimate expectations of a substantive benefit in a way which affected their property rights protected under section 4(a) and also their rights under 4(d) of the Constitution, in that their circumstances were not materially differently than owners and operators of routes one (1), four (4) and five (5) so the difference in treatment was not justified.

[48] The trial judge granted the declarations, ordering the executive arm of the State to permit exit without a user fee and from the respondents to the appellants and their representatives, monetary compensation for infringement of their fundamental rights, assessed as a refund of three quarters of the user fees that had been paid by them and costs to the appellants.

[49] On appeal to the Court of Appeal, the appeal was unanimously allowed on the basis that there was no breach of section 4(a) because there was no interference with property or any property right and if there was it was by "due process of law" within the meaning of section 4(a), since there was no frustration of any substantive legitimate expectation. The court also held that there was no breach of section 4(d) as the circumstances of the owners and operators of routes one (1), four (4) and five (5) were materially different from those of the appellants.

[50] On appeal to the Privy Council, it was held that:

> *"In a case where the legitimate expectation is based on a promise or representation, a useful summary of the relevant principles was given by Lord Hoffmann in R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2) [2008] UKHL 61, [2009] AC 453, at para 60:*
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> > *"Page 9 "It is clear that in a case such as the present, a claim to a legitimate expectation can be based only upon a promise which is 'clear, unambiguous and devoid of relevant qualification': see Bingham LJ in R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd [1990] 1 WLR 1545, 1569. It is not essential that the applicant should have relied upon the promise to his detriment, although this is a relevant consideration in deciding whether the adoption of a policy in conflict with the promise would be an abuse of power and such a change of policy may be justified in the public interest, particularly in the area of what Laws LJ called 'the macro-political field': see R v Secretary of State for Education and Employment, Ex p Begbie [2000] 1 WLR 1115, 1131."*
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> …

What are the circumstances in which a public authority is entitled to frustrate a substantive legitimate expectation?

The leading case is ***R v North and East Devon Health Authority, Ex p Coughlan*** *[2001] QB 213. Lord Woolf MR, giving the judgment of the Court of Appeal said, at para 57:*

> *"Where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy."*

[51] This test as set out in **Coughlan** is the applicable test in the case at bar.

Legitimate Expectation – The Court's Role

[52] In **Regina v North East Devon Health Authority, Ex parte Coughlan**[6], Lord Woolf M.R. sets out the proper considerations for a court faced with balancing the interests of a member of the public as against those of a public body:

> *"55. ...what is in issue is a promise as to how it would behave in the future made by a public body in the exercise of a statutory function. In the past it would have been argued that the promise was to be ignored since it*

[6] [2000] 2 WLR 622

could not have any effect on how the public body exercised its judgment in what it thought was the public interest. Today such an argument would have no prospect of success,

56. What is still the subject of some controversy is the court's role when a member of the public, as a result of a promise or other conduct, has a legitimate expectation that he will be treated in one way and the public body wishes to treat him or her in a different way. Here the starting point has to be to ask what in the circumstances the member of the public could legitimately expect. In the words of Lord Scarman in Re Findlay [1985] 1AC 318 at p338, "But what was their legitimate expectation?" Where there is a dispute as to this, the dispute has to be determined by the court, as happened in Findlay. This can involve a detailed examination of the precise terms of the promise or representation made, the circumstances in which the promise was made and the nature of the statutory or other discretion.

57. There are at least three possible outcomes. (a) The court may decide that the public authority is only required to bear in mind its previous policy or other representation, giving it the weight it thinks right, but no more, before deciding whether to change course. Here the court is confined to reviewing the decision on Wednesbury grounds. This has been held to be the effect of changes of policy in cases involving the early release of prisoners (see Re Findlay [1985] AC 318; R v Home Secretary ex parte Hargreaves [1997] 1 WLR 906.

(b) On the other hand the court may decide that the promise or practice induces a legitimate expectation of, for example, being consulted before a particular decision is taken. Here it is uncontentious that the court itself will require the opportunity for consultation to be given unless there is an

overriding reason to resile from it (see A-G for Hong Kong v Ng Yuen Shiu [1983] 2 AC 629) in which case the court will itself judge the adequacy of the reason advanced for the change of policy, taking into account what fairness requires.

(c) Where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy as was set out in the case of Coughlan.

58. The court having decided which of the categories is appropriate, the court's role in the case of the second and third categories is different from that in the first. In the case of the first, the court is restricted to reviewing the decision on conventional grounds. The test will be rationality and whether the public body has given proper weight to the implications of not fulfilling the promise. In the case of the second category the court's task is the conventional one of determining whether the decision was procedurally fair. In the case of the third, the court has when necessary to determine whether there is a sufficient overriding interest to justify a departure from what has been previously promised.

59. In many cases the difficult task will be to decide into which category the decision should be allotted. In what is still a developing field of law, attention will have to be given to what it is in the first category of case which limits the applicant's legitimate expectation (in Lord Scarman's

words in Re Findlay) to an expectation that whatever policy is in force at the time will be applied to him. As to the second and third categories, the difficulty of segregating the procedural from the substantive is illustrated by the line of cases arising out of decisions of justices not to commit a defendant to the Crown Court for sentence, or assurances given to a defendant by the court: here to resile from such a decision or assurance may involve the breach of legitimate expectation see *Reg. v. Grice* (1977) 66 Cr.App.R. 167; cf. *Reg. v. Reilly* [1982] Q.B. 1208, *Reg. v. Dover Magistrates' Court, Ex parte Pamment* (1994) 15 Cr.App.R.(S.) 778, 782. *No attempt is made in those cases, rightly in our view, to draw the distinction. Nevertheless, most cases of an enforceable expectation of a substantive benefit (the third category) are likely in the nature of things to be cases where the expectation is confined to one person or a few people, giving the promise or representation the character of a contract. We recognise that the courts' role in relation to the third category is still controversial; but, as we hope to show, it is now clarified by authority."*

[53] In **Paponette**, having considered the test in **Coughlan**, the court would have gone on to identify any overriding public interest which justified the government acting inconsistently with the representations. The case at bar falls into category (c); the **Coughlan** test applies. Therefore, the court must move on to determine whether there is a sufficient overriding interest to justify a departure from what has been previously promised.

Issues

[54] The issues to be decided at this juncture are:

1. Has the legitimacy of the expectation been established;

2. Whether there is a sufficient public interest to frustrate any legitimate expectation; and

3. If numbers one and two are answered in the affirmative, whether there was frustration of a legitimate expectation.

Burden of proof

[55] The Board in **Paponette** discussed the burden of proof in this way:

> *"37 The initial burden lies on an applicant to prove the legitimacy of his expectation. This means that in a claim based on a promise, the applicant must prove the promise and that it was clear and unambiguous and devoid of relevant qualification. If he wishes to reinforce his case by saying that he relied on the promise to his detriment, then obviously he must prove that too. Once these elements have been proved by the applicant, however, the onus shifts to the authority to justify the frustration of the legitimate expectation. It is for the authority to identify any overriding interest on which it relies to justify the frustration of the expectation. It will then be a matter for the court to weigh the requirements of fairness against that interest.*
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> 38 *If the authority does not place material before the court to justify its frustration of the expectation, it runs the risk that the court will conclude that there is no sufficient public interest and that in consequence its conduct is so unfair as to amount to an abuse of power. The Board agrees with the observation of Laws LJ in Nadarajah v Secretary of State for the Home Department [2005] EWCA Civ 1363 at para 68: "The principle that good administration requires public authorities to be held to their promises would be undermined if the law did not insist that any failure or refusal to comply is objectively justified as a proportionate measure in the*

circumstances." It is for the authority to prove that its failure or refusal to honour its promises was justified in the public interest. There is no burden on the applicant to prove that the failure or refusal was not justified.

39 How an authority justifies the frustration of a promise is a separate question which is of particular significance in the present case….

41 …The Board rejects the proposition that the court can (still less, should) infer from the bare fact that a public body has acted in breach of a legitimate expectation that it must have done so to further some overriding public interest. So expressed, this proposition would destroy the doctrine of substantive legitimate expectation altogether, since it would always be an answer to a claim that an act was in breach of a legitimate expectation that the act must have been in furtherance of an overriding public interest.

42 It follows that, unless an authority provides evidence to explain why it has acted in breach of a representation or promise made to an applicant, it is unlikely to be able to establish any overriding public interest to defeat the applicant's legitimate expectation. Without evidence, the court is unlikely to be willing to draw an inference in favour of the authority. This is no mere technical point. The breach of a representation or promise on which an applicant has relied often, though not necessarily, to his detriment is a serious matter. Fairness, as well as the principle of good administration, demands that it needs to be justified. Often, it is only the authority that knows why it has gone back on its promise. At the very least, the authority will always be better placed than the applicant to give the reasons for its change of position. If it wishes to justify its act by reference to some overriding public interest, it must provide the material on which it relies. In particular, it must give details of the public interest so that the court can decide how to strike the balance of fairness between the

interest of the applicant and the overriding interest relied on by the authority. As Schiemann LJ put it in R (Bibi) v Newham London Borough Council [2001] EWCA Civ 607, [2002] 1 WLR 237, at para 59, where an authority decides not to give effect to a legitimate expectation, it must "articulate its reasons so that their propriety may be tested by the court".

43 There may be circumstances where it is possible to identify the relevant overriding public interest from the terms of the decision which is inconsistent with an earlier promise and the context in which it is made. In such a case, the terms of, and background to, the decision itself may provide enough material to enable the court to decide how the balance should be struck. But that is likely to be a rare case. The 1997 Regulations fall far short of providing such information for the purposes of the present case."

[56] It is for the court to decide how to strike a balance of fairness between the interest of the claimants, and any overriding public interest relied on by the defendants. It is for each side to place sufficient evidence before the court to establish their interests.

[57] In the case of **Glenroy Clarke**, the reasons for refusal in 1993, were related to incidents between 1979, 1982, 1983, 1988, 1992 and 1993. Clarke had enlisted first in 1978. He was tried in a court of enquiry for the incident in 1992.

[58] In the case at bar, the claimant, was first enlisted on January 27, 1997. She embarked on vacation leave on December 19, 2003 according to her affidavit evidence. She applied for an additional thirty five (35) days which would take her to the "*month of April 2004*." The claimant does not give a date on which she was expected to resume duties.

[59] She said that on her return to Jamaica in 2004, she was advised that the additional leave was not approved and that she needed to account for that thirty five (35) - day period. She submitted 'sick leave' for the unaccounted thirty five (35) days. As a result of this, "*sometime in 2004*" she was placed on interdiction. The court notes the lack of specificity in the dates averred by the claimant, in a matter which directly involves her and which is the subject of records.

[60] It is Gervis Taylor for the defendants who exhibited the notice of interdiction.[7] It shows that the claimant was given approval for seventy (70) days' vacation leave to commence on November 20, 2002 and to end on March 3, 2003. I will reproduce the notice here as it is very different from the evidence of the claimant.

42 "THE JAMAICA CONSTABULARY SOUTHERN DIVISION

P.O. BOX 221

KINGSTON 1

16 December 2004

#7428 Woman Constable Taneisha Perry

c/o Hunts Bay Police Station

NOTICE OF INTERDICTION VS #7428 WOMAN CONSTABLE TANEISHA PERRY – ST. ANDREW SOUTH DIVISION

Consequent on you proceeding on seventy (70) days vacation leave for period 30/11/2003 to 03/03/2004 to be spent at 100-216 60th Mangate, Fort Lauderdale, Florida, United States of America, you reported sick abroad at the expiration of your vacation leave.

[7] GT1

That you did not return to Jamaica until the 27th June, 2004 and you subsequently submitted sick leave which were issued by Doctors locally whilst you were abroad for period 3rd March, 2004 to 27th June, 2004, which is one hundred and twenty-seven (127) days sick leave.

That you have violated Forces Standing Orders #2902 dated 16th January, 2003, dealing with Sick Leave abroad. It is clear that you were trying to cover up your failure to adhere to Force Policy.

That you knowingly supplied information that were false and misleading and that you deliberately and calculatedly state such falsehood to deceive your seniors in contravention to Force's Standing Orders treating on Sick Leave whilst abroad.

You have admitted that you were overseas as the time when the medical certificates covering your illness were issued.

As a result of the foregoing, the Commissioner of Police has ordered that you be interdicted with immediate effect and that you be placed on three (3) quarters pay pending the outcome of the case.

Take Notice also that you are not to leave the island without permission of the Governor General acting on the recommendation of the Police Services Commission.

You are to hand over all Government Properties in your possession and forward to your Divisional Officer an address at which you can be located.

This is in accordance with Regulation 34(1) of the Police Service Regulations, 1861.

Superintendent of Police

i/c St. Andrew South"

[61] The notice states that the approved vacation leave began on November 30, 2003 and not December 19, 2003 as has been averred by the claimant. One hundred seventy five (175) days of sick leave was obtained by means of false medical certificates supplied by the claimant to her commanding officer. Further, the claimant violated Force Standing Order # 2902; that she admitted to being overseas while relying on medical certificates from local doctors. She did not return to the island until June 14, 2004 rather than the vague averment that she returned to Jamaica in 2004 and she did not resume duties until July 6, 2004.

Chronology

[62] By way of chronology, the claimant was interdicted with effect December 16, 2004 and then she was reinstated with effect the next day, December 17, 2004.[8] She resumed duties on October 3, 2005 and was transferred to the St. Andrew Central Division on October 10, 2005. This anomaly has been explained by the defendants as follows:

> *"That for reason [sic] not reflected on the file, the Applicant was reinstated with effect December 17, 2004 vide Force Order #3044 dated October 6, 2005. The applicant resumed duties and was transferred to the St. Andrew Central Division on October 10, 2005."*[9]

[63] The claimant's explanation was that after nine (9) months on interdiction, she had a meeting with then Commissioner Lucius Thomas and based on his intervention, she was reinstated in October 2005.[10]

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[8] vide Force Order #3044 dated October 6, 2005
[9] Para 12 of the Affidavit of Gervis Taylor
[10] Paras 12 and 13 of the Affidavit of Tanisha Perry

[64] On or about March 2005, a file was submitted by the claimant's commanding officer to the former Internal Affairs Division of the Professional Standards Branch for investigations and thereafter, the file was sent to the DPP for a ruling.

[65] In March 2006, the DPP's office advised the Internal Affairs Division that the claimant was to be charged under the Forgery Act for the offence of uttering a forged document. The claimant was served with a notice of suspension on March 21, 2006 and the following day she was charged as directed by the DPP. The claimant was reinstated with effect March 22, 2006 to the St. Andrew Central Division and resumed duties on September 27, 2007 at the Half Way Tree police station.

[66] During the criminal proceedings she applied for re-enlistment and this application was approved effective January 26, 2007 to expire on January 26, 2009. The claimant was acquitted in the criminal court on June 28, 2007. She reported for duty in September of 2007. In 2008, the claimant's application for re-enlistment was again approved for a further two (2) years effective January 26, 2009 while a court of enquiry charge was pending. The claimant's application for re-enlistment for a further term of five (5) years was approved for only two (2) years effective January 26, 2007 on the ground that a court of enquiry charge was pending.

[67] The claimant's application for re-enlistment made in October 2010 was refused for the reasons stated in the notice of non-re-enlistment dated January 25, 2011. She was given the opportunity to respond within fourteen (14) days of receipt. She was also given an opportunity to appear before the Commissioner to show cause why her application for re-enlistment should not be refused.

[68] On March 4, 2011, the Commissioner met with the claimant, accompanied by her attorney-at-law, Mrs. Carolyn Reid-Cameron and Sergeant Raymond Wilson, Chairman of the Police Federation.

[69] By notice dated September 6, 2013, the claimant was notified that her application for re-enlistment was refused and that she had been discharged from the JCF effective January 25, 2011.

[70] Between the approval of vacation leave in 2003 and the court of inquiry charges in 2010, none of the applications for re-enlistment were granted for the full five (5) year term.

[71] There is nothing before this court regarding the dates of hearings in the police court of enquiry.

Does the claimant have a legitimate expectation to be re-enlisted

[72] The claimant bases her legitimate expectation on the following grounds:

1) *That she should be allowed to re-enlist barring some good reason not to permit her to do so.*

[73] This ground can be dismissed outright as being inconsistent with the law as set out in **Glenroy Clarke**. There is no automatic re-enlistment. It is the claimant who has to show cause. This submission reverses the onus. "*The onus is thus on the officer to show cause why he should be allowed to re-enlist."* It is also clear from **Berrington Gordon** that in considering whether to permit the officer to re-enlist, the Commissioner can take into account the past conduct of an officer. In addition, "*a constable who has a history of aberrant behaviour cannot claim a legitimate expectation to re-enlistment" (page 314, per Gordon, JA.)*

2) *The Commissioner took incidents into account upon which she was not afforded a hearing.*

[74] This submission fails to acknowledge the law as set out in **Glenroy Clarke** which states that the decision to refuse to re-enlist an officer can be made before an

application is made by that member. "*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."*

3) That she had been punished by Superintendent Amos without a hearing.

[75] The claimant refers in her affidavit to being placed on interdiction by Superintendent Newton Amos sometime in 2004. This complaint is without merit as it is not Superintendent Amos who made the decision to place the member on interdiction. That decision could only have been made by the Commissioner. A decision to place an officer on interdiction without a hearing has not been argued in this trial. It is a separate legal issue for which no evidence was led and no submissions made by either side. The court takes the view that this ground is not being pursued with any seriousness.

4) *That the claimant was investigated for the same offence without a hearing.*

[76] The claimant provided no authority for this proposition. She was subject to the police service regulations, the Book of Rules for the Guidance and General Direction of the JCF[11] ("the Book of Rules") and the law per **Glenroy Clarke and Berrington Gordon**. In considering an application by a member of the JCF, for re-enlistment, the Commissioner is not engaged in an enquiry or a trial into charges.

[11] Section 26 of the Constabulary Force Act prescribes that the rules relative to the Force may be made by the Minister.

[77] The court in **Glenroy Clarke** made it clear that the Commissioner is, instead engaged in a review. In order to make a decision, he is entitled to take into account reports and recommendations from divisional officers under his command. In those circumstances, the court said, it was entirely fair for the Commissioner to consider the intelligence reports without providing copies of them to the applicant. The instant claimant was being investigated for dishonest dealings with her superiors, there was no evidence or authority cited by the claimant to suggest that there is a need for a hearing at the investigative stage.

5) She believed and expected to be re-enlisted no other offence having been committed since 2003/2004. She had been re-enlisted on two other occasions. She had received a good worth, work and conduct report from her commanding officer and she had won awards for excellence in 2009 and 2010

6) It is unfair for the Commissioner to take into account events that took place in 2003/2004 for which she had already been punished by way of disciplinary action and acquitted in the criminal court. The actions in 2003/2004 were no longer relevant considerations as they took place ten (10) years prior to her dismissal and should not have formed part of the determination of her re-enlistment.

7) Having refused to re-enlist the claimant on the earliest occasion has given rise to the expectation that she would be re-enlisted.

[78] Grounds (5) to (7) are dealt with together. The court of appeal in **Glenroy Clarke** made it clear that the level of conduct or performance of the members of the Jamaica Constabulary Force is to be determined by the Commissioner and the court has no power to set the standard of acceptable conduct in the force. In addition, at the show cause hearing before the Commissioner, the claimant's

positive attributes and conduct ought to have been placed before him. It was at that time that past conduct, efforts at rehabilitation and reformed conduct would have been relevant. In the notes of the show cause hearing, there is no mention of any of this being brought to the Commissioner's attention.

[79] It is for the claimant to establish the legitimacy of her expectation. In order to do this, the expectation must be founded on a promise or practice by the public authority that is said to be bound to fulfil the expectation.[12] The claimant admitted to all of the events which led up to her interdiction and suspension. The claimant did not say whether or not she received approval for the additional thirty five (35) days of vacation leave for which she had applied, however as events unfolded it was clear that she had not. Nevertheless, she remained off the island. She did not deny returning in June 2004. She did not deny falsifying medical certificates in order to "account" for the unapproved days of vacation leave. These were acts which could be proven by records and documentary evidence.

[80] The claimant did not give to the court the dates on which she left or returned to the island, nor has she given the additional days for which she had applied, while abroad, and if it had been approved when she would have returned to the island.

[81] She did not explain why she resumed duties on July 6, 2004, having returned on June 14, 2004. Furthermore, when taxed by her commanding officer with producing her passport, the claimant produced a passport issued in December 2003. It showed travel to the Unites States of America on February 4, 2004 with a return on June 14, 2004. Her commanding officer opined that the passport presented by the claimant had been issued after her return to Jamaica on June

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[12] Wade & Forsyth, Adminstrative Law, (11th edn.), page 453

14, 2004. This is important as I have indicated that the claimant has failed to provide the dates of her travel to and from the island. She was then charged criminally as a result of a ruling by the DPP for uttering a false document in relation to the said passport.

[82] The claimant has to acknowledge that clear statutory words override any expectation howsoever founded or believed. The Book of Rules states the following:

"4.10 NON-PERFORMANCE OF DUTY

When members are unable for any reason to perform their duties, they shall urgently inform those to whom they are immediately responsible. A claim of illness as the reason for non-performance of duty will not be entertained unless promptly reported and subsequently supported by a Medical Certificate submitted within 48 hours. In any event no member shall proceed on any form of leave of absence before advising his supervisor of the address where he may be found.

4.26 EXTENSION OF LEAVE

Leave of absence granted to a member will not be extended except in a case of necessity which must be clearly shown by the member and in the event of sickness being the plea, a Medical Certificate must accompany the application.

4.20 SICK LEAVE

(a) Full pay sick leave not exceeding twenty-eight (28) days in any calendar year may be granted to a member on production of a Medical Certificate.

(b) On the expiration of leave at (a), a member may utilise his unused departmental leave and not more than one half of his unused vacation leave from the commencement of such sick leave on full pay.

(c) Should the member's illness necessitate his continuous absence beyond the provisions at (b) because such illness entails major surgery or prolonged treatment the Permanent Secretary responsible for the Police may grant further special sick leave on full pay subject to 4.22. (a)."

[83] The words "must accompany the application," in rule 4.26 lend themselves to the interpretation that an application for extension of leave requires a medical certificate to form part of the application. In other words, an application for sick leave is incomplete without certification from the medical practitioner. The obvious reason for this is that the member cannot diagnose his/her own illness. The member is the one who must be ill and the certification of illness must preface any decision as to the grant of leave.

[84] In the instant case, the claimant avers that the medical certificates were submitted in order to account for the additional days of leave. This means that they were submitted after the application for leave had been made. The necessity for additional leave is separate from a plea of illness in the rule governing extension of leave. The claimant in this case has advanced through submissions to the Commissioner, both necessity, in the illness of her mother and at the same time, illness of self by way of the production of medical certificates.

[85] This was all in a bid to account for the additional days even though she was not the one who was ill. It is surprising that the claimant in her own evidence did not deal with the extension of leave policy of the JCF and her own actions in relation to it, for it would have been useful to the court in weighing the legitimacy of her

expectation. It cannot be said that the claimant seeking protection of the expectation has herself dealt fairly with the JCF.

[86] In my view, firstly, the claimant cannot say that there was a promise, as re-enlistment is not automatic. Secondly, a legitimate expectation based on the grant of two (2) previous applications to re-enlist has to be viewed on the facts as they are. Both applications were granted for two (2) year terms instead of five (5) which was a signal that the matter was under and remained under review. Thirdly, the clear and unambiguous nature of the promise that is required to discharge the burden of proof cannot be qualified. The applications to re-enlist were qualified by ongoing review and a reduction of the usual term of five (5) years. The claimant cannot gloss over the qualified nature of the grants of re-enlistment on each of the applications made.

[87] In my view, the initial burden of proof placed on the claimant to prove the legitimacy of her expectation has not been discharged.

[88] I will continue on, in the event of error. It is for the authority to prove its failure or refusal to honour its promises was justified in the public interest. There is no burden on the applicant to prove that the failure or refusal was not justified.

Whether there is a sufficient public interest to frustrate any legitimate expectation.

[89] Applying the **Coughlan** test, the substantive legitimate expectation would be the continued enlistment of the claimant. This is a benefit to her which it would be unfair to frustrate. The defendant would have to raise an overriding interest and the court would have to weigh that interest against the interests of the claimant in the balance of the requirements of fairness.

[90] The defendant issued two (2) separate notices to the claimant. The first was a notice of interdiction dated December 16, 2004. The relevant portion of that notice is reproduced below:

"Consequent on you proceeding on seventy (70) days vacation leave for period 20/11/2003 to 03/03/2004 to be spent at 100-216 60th Mangate, Fort Lauderdale, Florida, United States of America, you reported sick abroad at the expiration of your vacation leave.

That you did not return to Jamaica until the 27th June, 2004[13] *and you subsequently submitted sick leave which were issued by Doctors locally whilst you were abroad for period 3rd March, 2004 to 27th June, 2004, which is one hundred and twenty seven (127) days sick leave.*

That you have violated Forces [sic] Standing Orders #2902 dated 16th January, 2003, dealing with Sick Leave abroad. It is clear that you were trying to cover up your failure to adhere to Force Policy.

That you knowingly supplied information that were [sic] was false and misleading and that you deliberately and calculatedly state [sic] such falsehood to deceive your seniors in contravention to Force's Standing Orders treating on Sick Leave whilst abroad.

You have admitted that you were overseas at the time when the medical certificates covering your illness were issued.

[13] This date has been stated to be June 14, 2004 in the notice regarding non re-enlistment as well as the affidavit of Gervis Taylor.

As result of the foregoing the Commissioner of Police has ordered that you be interdicted with immediate effect and that you be placed on three (3) quarter pay pending the outcome of the case.

Take Notice also that you are not to leave the island without permission of the Governor General acting on the recommendation of the Police Services Commission.

You are to hand over all Government Properties in your possession and forward to your Divisional Officer an address at which you can be located.

This is in accordance with Regulation 34(1) of the Police Services Regulations, 1961.

Superintendent of Police

i/c St. Andrew South"

[91] The interdiction notice sets out the impugned conduct as noted by the defendant. That conduct was described pejoratively in the notice, it was deemed worthy of disciplinary action and it awaited the outcome of the criminal proceedings pursuant to regulation 34(1).

[92] The second notice was a notice of suspension[14] served on the claimant on March 22, 2006. The relevant portion states:

"Take notice that criminal proceedings are being preferred against you resulting from an investigation carried out by the Professional Standards Branch into your ***conduct*** *in respect of an allegation of utterings [sic] made against you,*

[14] Dated March 21, 2006

subsequent to your submission of one hundred and twenty-seven days (127) sick leave.

It is therefore desirable in the ***public's [sic] interest*** *that you be suspended from pay and duty effective 2006.03.22.*

…..

Snr. Superintendent of Police

*St. Andrew Central (*emphasis supplied)

[93] While it is not in dispute that the charge of uttering a forged document was determined in favour of the claimant, the wording of the notices clearly state that the claimant's conduct was under scrutiny. The conduct of the claimant could not be said to only encompass the ingredients of the offence of uttering a forged document but also would include all of the details of leave, travel, medical certificates, return to the island and accounting for the thirty five (35) days. While the allegation in the criminal charge was a factor, the determination of conduct in my view of the instant case goes further to include all of the circumstances of the case and not just proof of the criminal charge.

[94] The character of a member of the Force and the nature and quality of the conduct of those members must naturally concern the public. It would be antithetical to have a police force whose members could not withstand scrutiny and whose conduct within the organization was questionable.

[95] The question of the investigation of conduct and the quality of the character of member the Commissioner would like to have in his organisation are not questions for this court. They fall within section 3(2)(a) of the Constabulary Force Act which prescribes that it is the Commissioner who shall have the sole operational command and superintendence of the Force.

Was the Commissioner entitled to frustrate the legitimate expectations of the claimant

[96] It is at this juncture that a weighing up must take place. The claimant has not sought to re-enlist, she seeks a declaration from this court. The defendants rely on dishonesty, false and misleading information supplied by the claimant, breaches of force policy and deception to cover up the said breaches. Coupled with the issuance of false documents with the aid of local doctors to misrepresent the facts. The defendants investigated these issues internally and it led to disciplinary action. In the meeting with the Commissioner, the issue was whether or not the claimant was trustworthy. There was no denying that she had committed the wrongs outlined here, what was offered was a justification. The issue for the Commissioner was one of honesty. I cannot emphasise enough that a dishonest person should not be a member of the JCF. However, trust once lost can be regained. The claimant argued that since these incidents, she had rehabilitated herself, committed no further breaches and won awards for excellence in conduct. She was allowed to continue by one Commissioner but not by another.

[97] The claimant seeks a declaration. In the case of **Gorstew Limited v Her Hon. Mrs. Lorna Shelly-Williams Sitting As Corporate Area Resident Magistrate's Court (Criminal) Holden At Half Way Tree et al,**[15] the Full Court discussed the grant and utility of declarations extensively:

> *"Effect of Declarations generally/Effect of Declaration of nullity*
>
> *[27] A declaration is usually advisory in the sense that it merely informs and does not itself compel any particular course of action." [para. 17.18.1,*

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pg. 598 - Supperstone, Walker & Goudie QC, Judicial Review, 4th Edition, London: LexisNexis]. The nature of the relief was extensively discussed by McDonald Bishop J (as she then was) at paras 161 and 162 of Legal Officer's Staff Association et al v The Attorney General and the Minister of Finance and Planning [2015] JMFC FC 3.

[28] In my view, though public authorities are usually expected to abide by a declaration of the court, and usually do, they cannot be compelled by virtue of a declaration to act. A declaration is simply a formal pronouncement by the court as to the legal state of affairs in particular circumstances. Thus, where there is uncertainty that there will be compliance, and to avoid uncertainty as to what is to obtain and non-compliance, an order of mandamus, prohibition or certiorari is typically sought to direct the actions of the public authority in accordance with the declaration of the court.

[29] In light of the above, it would be apparent that ordinarily, a declaration would be an inadequate remedy depending on the particular outcome desired by the applicant. Generally speaking, in order for a decision of an inferior tribunal to cease to have effect, it is usually necessary for a court to set it aside: R v Panel on Take-overs and Mergers, ex parte Datafin plc [1987] QB 815, [1987] 1 All ER 564 (Pg 558 16.3.4)."

Procedural fairness

[98] The substantive expectation of the claimant [16] is protected procedurally, in that the claimant is to be given the opportunity to make representations before the expectation is dashed. Procedural fairness requires that the decision maker make a proper decision taking into account all relevant considerations. The claimant's substantive legitimate expectation is one such consideration.

[99] The Commissioner on the authority of **Glenroy Clarke** could properly take the decision to refuse to re-enlist any member before or after an application for re-enlistment was made. It is the conduct of the member during the period of service over the various terms of enlistment which would form the basis for the Commissioner's decision. It is clear that there is no automatic right to re-enlistment even in the face of an acquittal in a criminal court.

[100] Lord Lloyd, in **Fisher v Minister of Public Safety and Immigration (No.2)**[17] said on behalf of the Board:

> *"…But legitimate expectations do not create binding rules of law. As Mason CJ made clear at page 291, a decision maker can act inconsistently with a legitimate expectation which he has created, provided he gives adequate notice of his intention to do so, and provided he gives those who are affected an opportunity to state their case. Procedural fairness requires of him no more than that."*

[101] Following on the path of Lord Lloyd's reasoning in considering the case at bar, I would say that procedural fairness required no more from the Commissioner than

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[16] supra
[17] [2000] 1 AC 434, at page 447

to notify the claimant of the reasons for the decision not to reenlist her and give her an opportunity to be heard. There is no dispute that a show cause hearing was held.

[102] What constitutes fairness has been prescribed by Lord Mustill in **R v Secretary of State for the Home Secretary, ex parte Doody**[18]. His speech was cited with approval by Lord Brown in **Bari Naraynsingh v The Commissioner of Police**[19] a judgment of the Privy Council from Trinidad and Tobago which was delivered on the 20th April 2004. In that case, Lord Brown said at paragraph 16:

> *"As for the demands of fairness in any particular case, their Lordships, not for the first time, are assisted by the following passage from Lord Mustill's speech in R v Secretary of State for the Home Secretary, ex parte Doody [1994] 1 AC531, 560:*
>
> > *"What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from any of the often cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them I derived that: (1) Where an act of parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type… (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this to be taken into*

[18] [1994]1 A.C. 531, at page 560
[19] [2003] UKPC 20

account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) 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. (6) Since the person affected cannot make worthwhile the mere 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.'"

[103] The claimant was treated with fairness in that she was a person who would be adversely affected by the decision. She was given an opportunity to make representations on her own behalf. In this instance it was after the decision had been made, and she requested a hearing before the Commissioner with a view to producing a favourable result; or after it was taken, with a view to procuring its modification; or both. It is not being argued that the claimant was unfairly treated nor that she did not know the gist of the case she had to answer.

[104] The claimant was to face a court of enquiry, that procedure engages the provisions for dismissal of the member. The procedure is judicial in nature and accords more with a trial in a court of law. There is no evidence as to what transpired in those proceedings from either side.

Irrelevant considerations

[105] The claimant argues that the Commissioner has taken past conduct that was ten (10) years old and which was irrelevant to the proceedings as she had been re-enlisted since those actions and had a standard of performance which won her two awards and a good work, worth and conduct commendation.

[106] The Commissioner also failed to take into account that the criminal proceedings ended in 2007 and should have taken the desired disciplinary action then. She was re-enlisted despite this misconduct.

[107] The claimant argues that section 32(1) of the Police Service Regulations provides that any report of misconduct on the part of a member shall be made to the Commissioner and dealt with under this part as soon as possible thereafter. This gives rise to two (2) further points, a) that given that the Commissioner did not exercise his powers to deal with the matter as soon as possible after the report of misconduct, the claimant now has a legitimate expectation that she should be re-enlisted. The claimant did not advance what was meant by "as soon as possible." The words used in the regulation were not shown to have a factual nexus to the circumstances of the case in order that the court could glean an understanding of the claimant's interpretation of the statute. It is not for the claimant to throw submissions at the head of the court for a finding to be made on what has not been sufficiently presented. The court will make no finding on this issue as it has not been set out in full and the other side has been deprived of an opportunity to respond as a result.

[108] The difficulty with the argument of the defendants is that in **Glenroy Clarke**, the Court of Appeal held that when an adverse decision is reached in respect of re-enlistment, the Commissioner is required on an application by the officer concerned to supply reasons for his decision and to afford the officer an

opportunity to be heard in respect of those reasons. This hearing took place on March 4, 2011.

[109] In the case at bar, the decision of the Commissioner was not communicated as a foregone conclusion. The claimant was afforded an opportunity to be heard before the decision was made. The claimant had the opportunity to show cause why she should be re-enlisted based on grounds served on her. She was entitled to put her record of performance and commendations before the Commissioner.

[110] The decision made after the show cause hearing was not communicated to the claimant until September 6, 2013. The discharge from the JCF was to take effect on January 25, 2011 and the notice which had been served on the claimant dated January 25, 2011 was no longer relevant (the date of the notice of non-re-enlistment). My understanding of the procedure is that the Commissoner's decision superseded or replaced the notice of non-re-enlistment, the claimant having had a hearing.

[111] Having looked at the case in its entirety, considered all the submissions, the law, the evidence and analysed the issues, it is my considered view that the claimant is not entitled to the declaration she seeks. She has not satisfied the court that she has a legitimate expectation as she has claimed.

[112] Orders:

1. This court refuses the grant of a declaration as sought by the claimant.

2. No order as to costs.