



[2015] JMSC Civ. 72

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN CIVIL DIVISION**

**CLAIM NO. 2013 HCV06304**

<b>BETWEEN</b>	<b>KEISHA PESSOA-SINCLAIR</b>	<b>APPLICANT</b>
<b>AND</b>	<b>COMMISSIONER OF POLICE</b>	<b>RESPONDENT</b>

**Mrs. Denise Senior-Smith instructed by Oswest Senior-Smith & Co. for Applicant  
Miss Marlene Chisholm instructed by the Director of State Proceedings for  
Respondent**

**Heard: 10<sup>th</sup> and 12<sup>th</sup> March, and 22<sup>nd</sup> April, 2015**

***Judicial Review – Application for Re-enlistment denied – Applicant granted hearing – Short notice – Whether Applicant waived right to legal representation – Order for re-hearing – Whether court has jurisdiction to order remuneration***

**Coram: Dunbar-Green, J (Ag.)**

[1] This is an application for judicial review in which the applicant, Constable Keisha Pessoa- Sinclair, has asked the court to grant the following orders:

1. a declaration that there was procedural unfairness on the part of the Commissioner of Police in arriving at his decision to confirm that the applicant should not be allowed to re-enlist;
2. an Order of Certiorari to quash the decision of the respondent terminating the employment of the applicant;
3. that the respondent be directed to have a hearing concerning the re-enlistment of the applicant before a decision is made;

4. that the applicant be remunerated from 10<sup>th</sup> August 2013 to the date of hearing;
5. damages;
6. costs to the applicant; and
7. such further and other relief as this honourable court may deem just.

[2] These are the grounds on which the reliefs are sought:

1. the decision to remove the applicant was procedurally unfair and flawed;
2. the respondent acted in breach of natural justice principles and the Jamaica Constabulary Force's statutory regulations;
3. the applicant has suffered serious hardship from the dismissal;
4. the applicant is substantially prejudiced;
5. for the fair and just disposal of the matter; and
6. pursuant to the overriding objective of the Civil Procedure Rules 2002, as amended.

[3] The fixed date claim form was filed on 8<sup>th</sup> July 2014, consequent on an order by Anderson, J., on 26<sup>th</sup> June 2014, granting leave. The material provisions of that order are set out below:

1. Leave to apply for judicial review is granted.
2. No order as to costs for today.
3. The applicant shall file and serve this order and shall do so by or before July 11, 2014.

[4] The fixed date claim form was amended, during the hearing, to include a declaration that the decisions of 14<sup>th</sup> August 2013 and 16<sup>th</sup> January 2014 were procedurally flawed and should be quashed.

### **Background**

[5] Constable Pessoa-Sinclair (the applicant) was first enlisted in the Jamaica Constabulary Force (the Force) on 18<sup>th</sup> August, 2003, and was re-enlisted on 17<sup>th</sup> August 2008, for a further term of five (5) years.

[6] On or about 14<sup>th</sup> June 2006, she was served with a warning notice in relation to an alleged involvement with one Omar Lewis.

[7] Sometime in or around June 2006, she was transferred to the Mobile Reserve.

[8] According to the applicant, she then sought audience with the Commissioner of Police (the Commissioner) about her immediate transfer. He convened a meeting at which the Force chaplain and other senior officers were present. She was questioned about her interaction with Omar Lewis but had not been forewarned that this would have been done.

[9] The Commissioner, she said, told her that he believed she had learnt her lesson and he instructed her not to have any further involvement or communication with Omar Lewis.

[10] In February 2007, she was transferred to the St. Ann division.

[11] Sometime in August 2012, she was summoned to the Inspectorate of the Force but was not told for what purpose. A deputy commissioner and three board members were present. She was again questioned about Omar Lewis and asked if she was willing to do a polygraph test, to which she agreed.

[12] In May 2013, she was advised that a report was required in relation to the polygraph test. She gave that report to a Sergeant Clarke.

[13] On the 7<sup>th</sup> August 2013, she was served with a Notice of Non-recommendation of Re-enlistment, dated 2<sup>nd</sup> August 2013. This Notice related to an application for re-enlistment which she had made in January 2013.

[14] The Notice is set out below:

*August 2, 2013  
No. 10953 Woman Constable Keisha Pessoa-Sinclair  
o/c Senior Superintendent of Police  
St. Ann Division*

**Notice re: Non-recommendation of re-enlistment**

*Take note that you enlisted in the Jamaica Constabulary Force on August 11, 2003 and consequently will be due for re-enlistment on August 10, 2013.*

*You have applied and your commanding officer has recommended your re-enlistment for a period of one (1) year after indicating that your work and worth are satisfactory but your conduct is below average.*

*You are however to note that your application for re-enlistment will not be recommended to the Commissioner of Police on the following grounds:-*

*(1) Whilst assigned to the Saint James Division you formed a relationship with Omar Lewis o/c "King Evil" an alleged notorious criminal and gang leader from Canterbury, Saint James, who has been linked to several crimes such as murder, robbery with aggravation and shooting with intent.*

*In August 2004, an operation was carried out by the police in Canterbury for two (2) days to capture Lewis, who was a prime suspect, after two (2) bodies were discovered in a shallow grave.*

*During the operation, two (2) policemen were injured, three (3) men fatally shot and twelve (12) firearms seized. Lewis, however, eluded the police and fled the island.*

*He was thereafter deported to Jamaica from the United States of America in 2006 and taken into custody pursuant to the two (2) counts of murder. Whilst in custody you allegedly facilitated the smuggling of contrabands such as a cellular phone to him.*

*On June 2, 2006, when Lewis was granted bail, you reportedly left your post whilst on duty and accompanied Lewis in a 2000 Toyota Corolla motor car registered 1088EK from the Freeport Police Station compound. Thereafter, you were confronted by your then commanding officer and you admitted knowing Lewis and also stated that you went in the car to be assisted by the driver to transport something. You were served with a Warning Notice on June 14, 2006.*

- (2) You were seen in the company of Lewis on June 10, 2006 at a dance at Pier One, Montego Bay at 2.00 a.m.; subsequently at 4.45a.m. at a dance at Harbour Street, Montego Bay and later that same day at 7.20a.m., you were again seen in his company in the Johns Hall area of St. James in a Nissan Sunny motor car owned by you and driven by Lewis;*
- (3) Citizens of Johns Hall District reportedly telephoned the Freeport Police Station on June 11, 2006 reporting that Lewis was seen at your house;*
- (4) You appeared before the Ethics Committee on August 15, 2012 and were confronted with the allegations made against you. The Chairman of the Ethics Committee has reported that you admitted to previously being intimately involved with Lewis, whom you met while he was in police custody.*

*You also admitted that you own a bar jointly with your common-law husband Garfield Bembow and that same is located close to your dwelling house. You reportedly expressed that you did not doubt that lottery scammers are among the patrons and that ganja smoking is done there but not when you are present.*

*The Ethics Committee formed the view that there were many instances in which you compromised your office and that the damage done to your reputation is irreparable to restore your image and integrity as a member of the Force.*

*Thereafter, a comprehensive report was requested from your commanding officer on your work, worth and conduct and to ascertain from you if you offered any objection to being polygraphed. He reported that: -*

- (a) You are presently stationed at the Runaway Bay Police Station where you are “giving a good account of your stewardship”,*
- (b) You have investigated forty-five (45) cases over the past three (3) years with twenty three (23) being cleared up and three (3) disposed of by the court;*
- (c) You accumulated seventy-seven (77) days sick leave over the past three (3) years;*
- (d) You have no disciplinary charges pending; and*
- (e) You were advised on three (3) occasions to submit in writing any objections you may have to being polygraphed but you have failed to submit same. The last request was made on May 20, 2013.*

*Notwithstanding your reported satisfactory performance, there are serious concerns regarding your integrity and character which have impacted negatively on the image of the Jamaica Constabulary Force. The Jamaica*

*Constabulary Force has therefore lost confidence in your ability to serve the citizenry of Jamaica with professionalism and integrity.*

*You may respond to this Notice within fourteen (14) days of the date of receipt of same to show cause why your dismissal from the Jamaica Constabulary Force should not be pursued.*

*You may also seek audience with the Commissioner of Police either alone or with your representative should the Commissioner of Police direct that your application for re-enlistment be refused.*

*You are to further note that:*

- (a) You will cease to perform duties with effect from August 9, 2013 consistent with the provisions of Rule 1.9 of the Book of Rules of the Jamaica Constabulary Force pending the resolution of the issue of your re-enlistment; and*
- (b) Your salary has been ceased (sic) with effect from August 10, 2013 pending the resolution of this matter.*

[15] In letter dated 13<sup>th</sup> August 2013, the applicant refuted several of the grounds and requested audience with the Commissioner so that she could “confront her accusers”.

[16] On 14<sup>th</sup> August 2013, seven (7) days after receipt of the Notice of Non-recommendation of Re-enlistment, the applicant was served a Notice of Non-confirmation of Re-enlistment. The material aspects are set out below:

*August 14, 2013*

*No. 10953 Woman Constable Keisha Pessoa-Sinclair  
Runaway Bay Police Station  
Saint Ann*

**Re: Notice of Non Confirmation of Re-enlistment**

*Kindly take Notice that the Commissioner of Police has directed that your application for re-enlistment is not approved. This is against the background of the notice that was served on you on Wednesday August 7, 2013 at the Saint Ann Divisional Headquarters under the signature of Superintendent Egbert Perkins, Commanding Officer, Saint Ann Division.*

*The decision of the Commissioner of Police is based on the issues that were highlighted in the said notice.*

*Take further Notice that on Tuesday August 13, 2013 at 10.00 a.m. a response was received at my office under your signature in respect to the notice that was served on you on 7/08/2013. Your response will be forwarded to the Commissioner of Police for further attention.*

*Take further Notice that you were advised that you may seek audience with the Commissioner of Police in respect to the said non-confirmation of re-enlistment.*

*Superintendent of Police  
Saint Ann Division*

[17] At the date of the Notice of Non-confirmation of Re-enlistment (14<sup>th</sup> August 2013) the applicant's enlistment had already expired on or about 9<sup>th</sup> August, 2013.

[18] On 14<sup>th</sup> January 2014, the applicant was informed by Deputy Superintendent Wright that she was summoned to a meeting with the Commissioner on 16<sup>th</sup> January, 2014. She denied receiving written notice of the meeting.

[19] On 15<sup>th</sup> January, 2014, the applicant's attorney-at-law faxed a letter to the office of the Commissioner indicating an inability to attend on the date requested. The material aspects of the letter are set out below:

*January 15, 2014*

*The Office of the Commissioner of Police  
Hope Road  
Kingston*

**Attention Mr. Owen Ellington (CD; JP; M.Sc.)**



Dear Sir:

**Re: Constable Keisha Pessoa-Sinclair #10953**

We are Counsel to Mrs. Keisha Pessoa-Sinclair who informed us that that on the 14<sup>th</sup> January, 2014 she was advised that a hearing was scheduled for her on the 16<sup>th</sup> January, 2014.

It is worthy of note that if the hearing is in respect of your decision not to re-enlist her, be advised that we have already commenced Judicial Review proceedings in the Supreme Court of Judicature regarding the process leading up to the decision, the reasons for the said decision and your letter dated 13<sup>th</sup> August, 2013 received by her on the 14<sup>th</sup> August, 2013.

In light of the above kindly let us know if you are still minded to conduct a hearing.

If you should decide to proceed with the hearing we would ask that another date be set as Counsel is not available for the date.

Our suggested dates are:

Wednesday, January 22, 2014 at 12.00 p.m.

Friday, January 31, 2014 at 12.00 p.m.

Your kind response is awaited.

[20] The applicant attended the hearing on the 16<sup>th</sup> January 2014, unaccompanied by her attorney-at-law.

[21] According to the affidavit of Mr. Oral Ramsay, prior to the hearing, he had reminded the applicant of her attorney's letter but she indicated that she would attend the hearing with members of the Police Federation.

[22] The notes of the meeting, as recorded by Mr. Ramsay, are set out below:

Keisha Pessoa  
Sgt. Wilson, Raymond  
Sgt. McCalla, Cecil  
W/Cons. Thompson, Rosalee

*Commissioner of Police: You are Woman Constable Pessoa and you were served with a notice of refusal of re-enlistment?*

*Woman Constable Pessoa: Yes Sir.*

*Commissioner of Police proceeded to read the contents of the notice aloud after informing Woman Constable Pessoa that he read her response and it appears that she did not read the notice in order to formulate her response. Your response is lacking and is contrary to the facts. You have been found wanting in many respects regarding your integrity. Is there anything else you want to tell us?*

*Woman Constable Pessoa: I have applied for Judicial Review in the Supreme Court and I stand by the contents of my response.*

*Commissioner of Police: O.K., we will go ahead with the decision.*

*N.B A letter was received from Mrs. Denise Senior-Smith, Attorney-at-law on January 15, 2014, indicating that she represents Constable Pessoa but was not available for the hearing on January 16, 2014. On January 16, 2014 Woman Constable Pessoa attended the Commissioner's Office and spoke with me. I reminded her of the letter from her attorney but she said she will attend the hearing with the Police Federation representatives.*

*/s/ Oral Ramsay, SP  
16/1/2014*

[23] The applicant's version of what transpired is set out in her affidavit filed 26<sup>th</sup> June 2014. At paragraph 22, she deposed:

I went to Office of the Commissioner of Police on 16<sup>th</sup> January, 2014 and he advised me that he was not satisfied with my response and what do I have to say. I was speechless. I told him hesitantly that the matter was in Court. I handed to him the letter dated January 15, 2014 from my attorney-at-law and his response after reading the letter, directed the Staff Officer who was present to go ahead with my dismissal. The next thing I know I was listed in the Force Orders as being dismissed.

[24] In her affidavit filed 5<sup>th</sup> March 2015, in response to that of Mr. Ramsay's, she deposed at paragraph 5:

Paragraphs 6 and 7 are denied in so far as they allege that the response letter from my attorney-at-law was received by the Office of the Commissioner on January 15, 2014 and that I was reminded of the existence of the letter and indicated a desire to proceed with the hearing. I state that it was upon the hearing having been convened and upon the Commissioner of Police having asked me to further respond to the allegations against me, since he was not satisfied with my August 13, 2013 written response, that I informed him that the matter was before the Court and handed him the response letter from my attorney-at-law dated January 15, 2014. The Commissioner's response after reading the letter was a directive to the Staff Officer who was present to go ahead with my dismissal.

[25] The applicant's non re-enlistment was published in the Force Orders of 23<sup>rd</sup> January 2014 under the heading "Dismissal". There is also evidence of a letter dated 20<sup>th</sup> January 2014, confirming that the re-enlistment had not been approved. The relevant aspects of the letter are set out below:

**A19/P801**

*January 20, 2014*

*No. 10953 Woman Constable Keisha Pessoa-Sinclair  
c/o Senior Superintendent of Police  
St. Ann Division*

*I am directed by the Commissioner of Police to inform you that your application for re-enlistment in the Jamaica Constabulary Force for a further term of five (5) years is **not approved**. Your discharge from the Jamaica Constabulary Force therefore took effect on August 10, 2013.*

*Notice dated August 2, 2013 which was served personally on you on August 7, 2013 is relevant.*

*Assistant Commissioner of Police  
Administration Branch*

*/cd-c*

### **Applicant's Submissions**

[26] Mrs. Senior-Smith submitted that the hearing before the Commissioner on 16<sup>th</sup> January 2014, to which the applicant was summoned by two days' notice, and for which no reason was given, did not constitute an opportunity to be heard in the spirit of natural justice.

[27] She relied on *In Re Hamilton; In Re Forrest* [1981] AC 1038 at 1045B-D, in which Lord Fraser stated that adequacy of notice and an opportunity to be heard are important principles of natural justice.

[28] She also relied on *Berrington Gordon v Commissioner of Police* (2012) JMSC Civ. 46, in which Sykes, J. observed at paragraph 34, that fairness required that an applicant be given an opportunity to prepare adequately for the hearing, which includes being told the place, date, time and purpose of the meeting.

[29] The applicant contended that there was no adequate notice and the purpose for the meeting was not indicated. Consequently, there was no opportunity to properly prepare for the hearing or to retain the services of counsel, to assist in presenting her case.

[30] Counsel submitted that the letter to the Commissioner on 15<sup>th</sup> January 2014, made it clear that the applicant had been confused about the purpose of the meeting. The confusion, she said, arose from the fact that the applicant's service had already been terminated by the Notice of 14<sup>th</sup> August 2014. The

expectation, therefore, was that the Commissioner would have sought to clarify the purpose of the meeting and reschedule with adequate notice, rather than proceeding to “dismiss” the applicant. She added, that in the context of what reportedly transpired at the meeting, there was no indication of the applicant having given up her right to legal representation.

[31] The court was urged to conclude that the hearing before the Commissioner did not meet the minimum standards of fairness, and that the decision to approve the applicant’s non-confirmation of re-enlistment was procedurally flawed.

[32] It was, therefore, submitted that the applicant should be remunerated from 10<sup>th</sup> August 2013. Mrs. Senior-Smith relied on **MCLaughlin v Governor of the Cayman Islands** (Cayman Islands) (2007) UKPC 50 (23 July 2007), in which the Privy Council held that an office holder is entitled to remuneration until his tenure of office is lawfully brought to an end by resignation or lawful dismissal (para 14).

[33] Counsel further contended that it is the Commissioner who has the sole statutory responsibility to deal with enlistment under section 5 of the **Constabulary Force Act** (the Act). That authority, she submitted, cannot be delegated. Accordingly, the Notice of Non-recommendation of Re-enlistment dated 2<sup>nd</sup> August 2014, which was issued by an Assistant Commissioner, was null and void.

[34] She further submitted that the Notice of Non-confirmation of Re-enlistment which was issued within the 14 day period during which the applicant was entitled to show cause, signalled the end of the process without affording the applicant a response to her letter of 13<sup>th</sup> August 2014. The procedure adopted was, therefore, flawed and unfair.

### **Respondent’s Submissions**

[35] The Director of State Proceedings (DSP) submitted that judicial review is not an appeal from the decision but a review of the manner in which the decision

was made (**Chief Constable of the North Wales Police v Evans** [1982] 3 ALL E.R. 141).

[36] Further, the DSP contended that there is a difference in proceedings for re-enlistment and dismissal. This was articulated in **Corporal Glenroy Clarke v Commissioner of Police and The Attorney General of Jamaica** SCCA No. 84/94 delivered 11<sup>th</sup> March 1996, in which the court found that the Commissioner's decision not to re-enlist a member, was not a dismissal and did not require a hearing. However, as a matter of fairness, the Commissioner is obligated, upon an application by the member, to state the reasons for his decision and allow the member an opportunity to be heard. That hearing is akin to an appeal and not a trial, and the onus is on the officer to show cause why he should be enlisted.

[37] The DSP submitted that there was nothing wrong with the manner in which the Commissioner exercised his administrative function in the Notices of 2<sup>nd</sup> and 14<sup>th</sup> August 2013.

[38] The DSP also contended that the relevant decision for review was the one made at the hearing on 16<sup>th</sup> January 2014, and communicated by letter of 20<sup>th</sup> January 2014.

[39] The purpose of summoning the applicant to that hearing, the DSP contended, could only have been in relation to the re-enlistment.

[40] At the hearing, the applicant had an opportunity to be represented but opted to proceed without her attorney-at-law and with representatives of the Police Federation present. By doing so, she waived the requirement for a longer notice period.

[41] The DSP submitted, further, that in the event the court found that there was a breach of natural justice, the relief sought should not be granted because it would likely be detrimental to good administration, and there was undue delay by the applicant. The DSP relied on rule 56.6. (5) of the CPR.

[42] The DSP also submitted that the issue of remuneration would have to be subsumed under the head of “damages,” and the application before the court had not satisfied the provisions of rule 56.10(2)(iii) of the CPR, as at the time of filing, the applicant could not have sued for damages. This was so because the applicant’s enlistment had expired and there was no dismissal. In any event, the DSP contended, the court had no jurisdiction to make an order for remuneration.

### **Applicant’s Response**

[43] In response to the submission that it is the decision of 16<sup>th</sup> January 2014 which is before the court, Mrs. Senior-Smith referred to **Smith v Parole Board** [2003] 7 EWC Civ. 1014 and **Regina v Barnsley Metropolitan Borough Council, Ex parte Hook** [1976] 1 WLR 1052 to support her submission that the court has power to grant permission to argue grounds not canvassed or specified when leave for judicial review is sought.

[44] Counsel also submitted that the application for re-enlistment is still pending, based on the notice dated 2<sup>nd</sup> August 2013, which indicated that the applicant’s duties and salary would cease “pending resolution of [the] matter.”

### **Which decision is to be reviewed?**

[45] At the time the ex parte application for leave for judicial review was filed, the decision not to approve re-enlistment had been communicated by Notice of Non-confirmation of Re-enlistment dated 14<sup>th</sup> August 2013. The decision was not final. It was conditional on no cause being shown at a hearing, if one were requested, as had been earlier advised in Notice dated 2<sup>nd</sup> August 2013.

[46] By the date of the hearing of the application, the later decision which was made by the Commissioner at the hearing of 16<sup>th</sup> January 2014, and communicated by letter of 20<sup>th</sup> January 2014, was before the court, as it had been included in the applicant’s affidavit.

[47] Although the order of Anderson, J. did not specify any particular decision he had granted leave in relation to, it was not necessary for his lordship to have done so. Clearly, the order was in respect of the decision to proceed with the non-reenlistment, as communicated in letter of 20<sup>th</sup> January 2014.

### **Re-enlistment**

[48] The relevant provisions of the Act are set out in sections 3(2)(a) and 5.

[49] Section 3(2)(a) provides:

“... (2) Subject to the provisions of subsection (3) the Force shall consist of –

(a) A Commissioner who shall have the sole operational command and superintendence of the Force;...

[50] Section 5 provides:

“Sub-Officers and Constables of the Force may be enlisted for a term of five years,...”

[51] The relevant provisions of the **Book of Rules for the Guidance and General Direction of the Jamaica Constabulary Force** (made pursuant to s. 26 of the **Constabulary Force Act**) are set out in rules 1.9 and 1.10

[52] Rule 1.9 provides, inter-alia:

#### **CESSATION OF DUTIES**

No one can perform the duties of a Constable after the expiration of a term of enlistment until he has again been sworn in, which shall be done the day before his term expires...

[53] Rule 1.10 provides, inter-alia:

#### **RE-ENLISTMENT**



Sub-Officers and Constables may be enlisted for a term of five (5) years and no Sub-Officer or Constable so enlisted shall be at liberty to withdraw himself from the Force until the expiration of that term ...

Sub-Officers and Constables desiring to be re-enlisted for a further term of five (5) years must make an application at least fourteen (14) weeks before the expiration of the current term ...

[54] It is clear from section 5 of the Act and rule 1.10 that there is no automatic right to re-enlistment. The Notice of Non-confirmation of 14<sup>th</sup> August 2013 advised the applicant that her re-enlistment had not been approved. This was further to the Notice of 2<sup>nd</sup> August 2013, which had indicated that her re-enlistment had not been recommended, advised that she would cease to perform duties with effect from 9<sup>th</sup> August 2013 and that her salary would cease from 10<sup>th</sup> August 2013, pending resolution of the matter.

[55] I make the observation that the Notice of 2<sup>nd</sup> August 2013 was a Notice of Non-recommendation of Re-enlistment and not a decision of the Commissioner. That Notice referenced a cessation date for duties and payment of salary which was a statement of fact, since the applicant's duties would have ceased naturally on 9<sup>th</sup> August 2013, in accordance with the provisions of rule 1.9, unless the Commissioner decided otherwise.

[56] The Superintendent of Police, who signed the Notice of 14<sup>th</sup> August 2013, stated that he was acting under the direction of the Commissioner. This was not a delegation of the Commissioner's authority to enlist but rather a direction from the Commissioner that his decision be communicated. It would be an absurdity to conclude that Parliament intended by section 3(2)(a) of the Act that the Commissioner could not direct and delegate to sub-officers, functions that support the carrying out of his operational command of the Force.

[57] Counsel made much of the fact that although the applicant had submitted a response on 13<sup>th</sup> August 2013, to the Notice of Non-recommendation dated 2<sup>nd</sup> August 2013, her response had not been considered at the time the Notice of Non-confirmation was issued on 14<sup>th</sup> August 2013.

[58] It is clear that the intention behind the Notice of Non-confirmation was to give the applicant an opportunity, if she so desired, to appeal to the Commissioner. In the penultimate paragraph, the applicant was notified that: “[Her] response [would] be forwarded to the Commissioner of Police for further attention.” In the last paragraph, it was also stated: “Take further notice that you were advised that you may seek audience with the Commissioner of Police in respect to the said Non-confirmation of re-enlistment.”

[59] I find that at the meeting of 16<sup>th</sup> January 2014, the Commissioner did consider the applicant’s response to the grounds outlined in the Notice of 2<sup>nd</sup> August 2013. This is clear from both accounts of what transpired. In the notes of the meeting, it is stated that the Commissioner “proceeded to read the contents of the notice aloud after informing Woman Constable Pessoa **that he read her response** and it [appeared] that she did not read the notice in order to formulate her response.” (my emphasis). The applicant, at paragraph 22 of her affidavit of 26<sup>th</sup> June 2014, stated that “...[the Commissioner] advised me that **he was not satisfied with my response...**” (my emphasis).

[60] The meeting with the Commissioner was the appropriate forum for the applicant’s response to be considered. This was the final act, as it were, and not the two Notices previously referenced.

[61] I am in no doubt that what transpired on 16<sup>th</sup> January 2014, was a hearing with the Commissioner. The question, to which I now turn, is whether that hearing was conducted fairly.

### **Was there a Fair Hearing?**

[62] At the outset, I should make it clear that in the exercise of his role as sole operational commander of the Force, the Commissioner’s decision whether to re-enlist a member is an administrative function and not a judicial one. This was established by the Court of Appeal at page 4 of the judgment in **Clarke**.

[63] The process of deciding whether to re-enlist should, therefore, not be treated in like manner as the process to dismiss. The procedures are discrete, as Carey, JA observed in *Clarke*. In the case of a re-enlistment, the only question that arises is whether the Commissioner had acted fairly by affording the applicant a hearing which he is under an obligation to do, if so requested. Furthermore, As Carey, JA puts it at page 5 of the judgment:

“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 ...”

[64] There is no statutory guidance on how such a hearing should be conducted but the judicial position is that it must be fair.

[65] Lord Mustill, in *Regina v Secretary of State for Home Department Ex parte Doody* [1994] 1 A.C. 531, 560-561, enunciated the requirements of fairness in this way:

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 derive 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 is to be taken into 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 usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer..."(my emphasis).

[66] This statement of the law was cited with approval by the Court of Appeal in *Wood and Thompson v DPP* [2012] JMCA Misc. 1(17).

[67] In *Berrington Gordon* Sykes, J., helpfully summarized the principles of fairness, in the context of re-enlistment, which were enunciated in *Clarke*:

- ...(e) the Commissioner of Police 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 Commissioner of Police decides that a particular officer won't be re-enlisted before he makes such an application fairness does not require such an officer be heard before the Commissioner of Police 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 Commissioner of Police had decided that he would not be permitted to re-enlist;
- (h) however, if the Commissioner of Police 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 Commissioner of Police 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 Commissioner of Police;
- (j) the right to be heard can only arise if and only if (i) the officer applies for re-enlistment, (ii) the Commissioner of Police 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 Commissioner of Police 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 Commissioner of Police 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; and
- (n) in considering whether to permit the officer to re-enlist the Commissioner of Police can take into account the past conduct of the officer. (paragraph 20).

[68] Although the Notice of Hearing referenced in these proceedings was purportedly written on 6<sup>th</sup> January 2014 and despatched on 10<sup>th</sup> January 2014, the applicant deposed that she only received verbal notice of the meeting on 14<sup>th</sup> January 2014. This was not challenged. I, therefore, accept that the applicant was given only two (2) days' notice of the hearing.

[69] I agree with counsel that by any measure, the notice was short and although there was no specific objection in the letter to the Commissioner, it must have been apparent that counsel was unable to appear within such a short time.

[70] However, I do not accept that the applicant did not know that the meeting of 16<sup>th</sup> January 2014, was for the purpose of giving her a hearing in relation to re-enlistment. It is of significance that counsel's letter of 15<sup>th</sup> January 2014, stated that the applicant had instructed that she was advised that " **a hearing** was scheduled for her on the 16<sup>th</sup> of January, 2014."(my emphasis).

[71] The sequence of events would have also made this obvious. The applicant's term of enlistment had come to an end by the time she requested a hearing with the Commissioner, in her letter of 13<sup>th</sup> August, 2013. Also, in the Notice of Non-confirmation of re-enlistment issued 14<sup>th</sup> August 2013, the applicant was advised that her letter would have been forwarded to the Commissioner. So, for what other purpose could she have been invited to a hearing than that of considering her request for an audience with the Commissioner in relation to her re-enlistment? The applicant herself seemed to have been in no confusion as to why she was at the Commissioner's office as there is no evidence that she asked what the meeting was about.

[72] It seems to me to be overly formalistic to say that where the purpose of the meeting had not been stated, in circumstances where it must have been apparent, this would constitute a breach of natural justice.

[73] I do not find **Berrington** to be helpful on this point. In that case, the applicant continued to be a serving member of the Force throughout the hearings. It followed, as the learned judge decided, that the Commissioner could have invited the applicant to his office for any number of reasons. Fairness, therefore, demanded that he be told the specific purpose of the hearing. In the instant case, the hearing could have been for only one, obvious purpose.

[74] But in circumstances where the notice was short, counsel had written to say that she was unavailable, and alternative dates were suggested, was it fair for the Commissioner to have proceeded with the hearing?

[75] Mr. Ramsay deposed that the Office of the Commissioner had received the attorney's letter on 15<sup>th</sup> January, 2014. Yet, there is no evidence that this was disclosed to the Commissioner prior to or at the hearing. Based on the applicant's averment, the

only mention of the attorney's letter in the meeting, was when she delivered it, nearing the end of the proceedings.

[76] In my view, the letter should have been brought to the Commissioner's attention so that it could have been dealt with as a preliminary issue along with the express question of whether the applicant had desired or intended to waive her right to being represented by counsel.

[77] Even if, as Mr. Ramsay deposed, he had raised the issue of the letter with the applicant prior to the hearing and she indicated a desire to proceed with the members of the Federation present, it was not for Mr. Ramsay to decide whether the hearing should proceed or the form it should take. That was a matter for the Commissioner.

[78] In any event, there is no evidence of the applicant being represented, as nothing was apparently said or asked of any federation representatives. In the circumstances, I, therefore, do not accept that the applicant's presence and appearance before the Commissioner was a waiver of her right to legal representation, without more.

[79] It is clear from the evidence that the request by the applicant's legal representative for a postponement was never considered. It ought to have been dealt with, as a matter of fairness.

[80] It was not fair for the Commissioner to have proceeded with a hearing under those circumstances, especially as the onus was on the applicant to show cause. In discharging the duty to be fair, reasonable notice should have been given so that the applicant would have had time to consider her position and prepare her case, and her legal representative be given an opportunity to present it.

### **Can The Court Grant The Reliefs Sought?**

[81] I do not find in this case any delay or conduct by the applicant which would justify a denial of all the reliefs sought. Nor has there been any support for the DSP's submission that there would likely be a detriment to good administration.

[82] Rule 56.16(2) of the CPC provides:

where the claim is for a order or writ of certiori, the court may if satisfied that there are reasons for quashing the decision to which the claim relates –

- (a) direct that the proceedings be quashed on their removal to the court; and
- (b) may in addition remit the matter to the court, tribunal or authority concerned with a direction to reconsider it in accordance with the findings of the court.

[83] Whilst it is the Commissioner's prerogative to determine the format of a hearing, it is necessary that the applicant be given reasonable notice of it and the opportunity for legal representation. In the circumstances of this case, I find that the most appropriate remedy is for the matter to be remitted to the Commissioner for a re-hearing with reasonable notice and an opportunity for legal representation.

[84] At the close of submissions, the applicant abandoned the claim for damages and submitted that the court had the jurisdiction to make an award for remuneration.

[85] I do not find the case of *McLaughlin* relevant. That was a Privy Council decision dealing with dismissal rather than re-enlistment. The court held that the claimant was entitled to salary lost in circumstances where there had been an unlawful dismissal.

[86] It has already been established that non- reenlistment is not a dismissal, and that re-enlistment is not automatic. I accept the DSP's submission that in any event a claim for remuneration would have had to be subsumed under the head of damages, which was abandoned by the applicant. I will, ++++++therefore, grant no order for remuneration.

### **The Orders**

[87] I make the following orders:



- (i) a declaration that there was a procedural flaw in the hearing of 16<sup>th</sup> January, 2014;
- (ii) the decision to confirm the applicant's non-re-enlistment is quashed;
- (iii) there is to be a rehearing by the Commissioner of Police in accordance with the findings of this court; and
- (iv) no order as to costs.

