



[2017] JMSC Civ.181

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

**CIVIL DIVISION**

**CLAIM NO. 2014HCV05527**

<b>BETWEEN</b>	<b>MACHEL SMITH</b>	<b>APPLICANT</b>
<b>AND</b>	<b>THE ATTORNEY GENERAL</b>	<b>1<sup>ST</sup> RESPONDENT</b>
<b>AND</b>	<b>THE COMMISSIONER OF POLICE</b>	<b>2<sup>ND</sup> RESPONDENT</b>

Ms. Angel Beswick of Ballantyne, Beswick & Co. for the Applicant

Ms. Tamara Dickens instructed by the Director of State Proceedings for the Respondents

Heard: September 27, 2017

**Wint-Blair, J (Ag.)**

[1] Judicial review is the courts' way of enforcing the rule of law: ensuring that public authorities' functions are undertaken according to law and that they are accountable to law. Ensuring, in other words that public bodies are not "above the law."<sup>1</sup> "[T]he court [has] the constitutional role and duty of ensuring that the rights of citizens are not abused by the unlawful exercise of executive power" and

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<sup>1</sup> Judicial Review Handbook, Michael Fordham, QC, 5<sup>th</sup> 2008, p. 7

“must not shrink from its fundamental duty to ‘do right to all manner of people”:  
Sir Thomas Bingham MR.<sup>2</sup>

- [2] The Applicant sought the orders set out in his fixed date claim form filed February 28, 2015 namely:
1. Certiorari
  2. Declaration
  3. Damages
  4. Costs
- [3] Counsel Ms. Dickens representing both Respondents has correctly conceded that the Applicant had been unlawfully dismissed by the Commissioner of Police and both sides have agreed that he has since been reinstated to his position as an enlisted member of the Jamaica Constabulary Force. Remedies in judicial review proceedings are discretionary. The first two remedies sought appear to be otiose in circumstances where both sides are in agreement that the Applicant has been re-instated with effect from September 16, 2014 and that he resumed duties on May 3, 2016. The Applicant was also compensated with salary and allowances with effect from September 16, 2014.
- [4] This evidence as to the Applicant’s re-instatement is set out in an affidavit filed on September 26, 2017 and short-served on the Applicant’s counsel. Counsel Ms. Beswick took no issue with the content of the affidavit as it merely contains the details of the Applicant’s reinstatement and reversal of the Commissioner’s decision; but she did note that it had been only served on her chambers the day before the hearing. In the interest of having the matter dealt with expeditiously, no request for an adjournment was made by either side and Ms Dickens did not pursue her averment that the overriding objective should be applied to the instant case. Ms Beswick also abandoned her claim for vindictory damages. I applaud

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<sup>2</sup> R v Ministry of Defence, ex p Smith [1996] QB 517, 556D-E

both counsel for their deliberate and mature stance in narrowing the issues joined and ensuring that this matter could proceed without further delay.

[5] The fixed date claim form filed on the February 28, 2015 sought an award of damages. A claim for damages may be included in a claim for judicial review in addition to a prerogative remedy. Damages may only be awarded if they could have been awarded in an ordinary claim, namely, a claim for a private law cause of action. The judicial review procedure does not create any new right or remedy in damages, if a claim for damages exists in private law, it may, in appropriate cases, be claimed in the judicial review procedure alongside the claim for a prerogative or other remedy to vindicate a public law right.

[6] The Applicant has to satisfy the court that damages arising from any matter to which the claim for judicial review relates could have been awarded in an ordinary claim. The Civil Procedure Rules (“CPR”) provides in Rule 56.10 as follows:

*“56.10 (1) The general rule is that, where not prohibited by substantive law, an applicant may include in an application for an administrative order a claim for any other relief or remedy that –*

*(a) arises out of; or*

*(b) is related or connected to, the subject matter of an application for an administrative order.*

*(2) In particular the court may award –*

*(a) damages;*

*(b) restitution; or*

*(c) an order for return of property, to the claimant on a claim for Judicial Review or for relief under the constitution if –*

*(i) the claimant has included in the claim form a claim for any such remedy arising out of any matter to which the claim for an administrative order relates; or*

*(ii) the facts set out in the claimant's affidavit or statement of case justify the granting of such remedy or relief; and*

*(iii) the court is satisfied that, at the time when the application was made the claimant could have issued a claim for such remedy.*

*(3) The court may however at any stage –*

*(a) direct that any claim for other relief be dealt with separately from the claim for an administrative order; or*

*(b) direct that the whole application be dealt with as a claim and give appropriate directions under Parts 26 and 27; and*

*(c) in either case, make any order it considers just as to costs that have been wasted because of the unreasonable use of the procedure under this Part.”*

**[7]** It is clear that an applicant on an application for an administrative order may include a claim for any other relief or remedy which arises out of or is related or connected to the subject matter of the application.

**[8]** In Rule 56.10(2) the powers of the court are set out and paragraph (a) provides that damages may be awarded subject to the inclusion in the claim form of a claim for any such remedy arising or apparent on the facts set out in the claimant's affidavit or statement of case to justify the grant of such an award and that at the time the application was made, the claimant could have issued a claim for such a remedy.

[9] In the case of **Berrington Gordon v The Commissioner of Police**<sup>3</sup> my most learned brother, Sykes, J makes the point at paragraph 2 as follows:

*“It is well established that unlawful administrative action does not generally give rise to a claim for damages. It is true that a functionary can be held liable in damages in negligence, breach of statutory duty and misfeasance in public office but that is because the conduct of the functionary goes beyond mere unlawful conduct. Judicial review is about process not merits and an unlawful process does not usually give rise to damages unless there is some other kind of conduct than just for example, a failure to be fair. Usually, for damages to be claimed because of an unfair process there usually has to be an assertion (supported by evidence) that the decision maker acted out of malice of spite towards the applicant for judicial review.”*<sup>4</sup>

[10] There is no evidence before this court to support a finding of malice, spite or ill-will on the part of the decision maker who was the Commissioner of Police in respect of the decision. In fact, the Commissioner of Police has reversed the previous decision and accordingly the orders sought arguably have become unnecessary.

[11] The most difficult problem posed by this application was to decide what remedy was appropriate and further what the form of declaration should be made so that its practical consequences are certain. So far as it lies within the court’s power, it should, be made clear to the parties what their respective rights and obligations are in consequence of any order to be pronounced. There is no doubt in my mind that the Applicant has suffered a grievous wrong. It should not be beyond the power of the courts to provide a suitable remedy.

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<sup>3</sup> [2012] JMSC Civ 46 at paragraph 2

<sup>4</sup> Berrington Gordon v The Commissioner of Police [2012]JMSC Civ. 46

- [12]** The Applicant has throughout claimed damages. To this end there is some evidence set out in the affidavit of the Applicant to support issues of financial loss, reputational damage and emotional distress, however these need to be further particularized and the Respondents ought to be afforded the opportunity to address these issues.
- [13]** The orders sought are necessary in that the Applicant was dismissed with effect from September 9, 2014 and reinstated with effect from September 16, 2014. There is then the issue of the days between the 9<sup>th</sup> and 16<sup>th</sup> of September which in my view, without the grant of the prerogative remedies sought could be construed negatively against the Applicant and achieve the very ends from which the Applicant now seeks relief.
- [14]** To this end, it will be to the detriment of the Applicant if the orders sought in his fixed date claim form for prerogative remedies are not granted as the unanswered question would remain- how will that period of time be viewed? The applicant has not been paid for those days, nor can it be said that the Applicant faced disciplinary action or suspension between the 9<sup>th</sup> and 16<sup>th</sup> of September, 2014, in the face of the concession that the dismissal of the Applicant was unlawful. The simple answer lies in the grant of the orders sought to ensure certainty on both sides.

Orders:

The court orders as follows:

1. The decision of the Commissioner of Police to dismiss the Applicant from the Jamaica Constabulary force by way of letter dated September 16, 2014 and pursuant to Regulation 24(6)(a) of the Police Service Regulations 1961 is hereby quashed.
2. A declaration is hereby made that the Applicant is and was at all material times a confirmed member of the Jamaica Constabulary Force with effect from the 9<sup>th</sup> day of September, 2014 pursuant to Regulation 24(6)(b) of the Police Service Regulations 1961.

3. No order as to costs

Case management orders:

1. The Applicant is to file and serve particulars of claim setting out the details of his claim for damages within thirty days of the date of this order.
2. The Respondents are to file and serve their defence if any, within thirty days of the date of service of the Applicant's affidavit.
3. Statement of agreed of facts and issues to be filed by March 2, 2018.
4. Witness statements to be filed and exchanged by March 2, 2018.
5. Pre-trial review is set for March 9, 2018 at 12:30pm.
6. The issue of assessment of damages is set down for hearing on the May 8, 2018.
7. Applicant's attorney to prepare, file and serve orders made herein.