[2025] JMCA Civ 7

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE STRAW JA
THE HON MR JUSTCE BROWN JA
THE HON MR JUSTICE LAING JA

SUPREME COURT CIVIL APPEAL NO COA2024CV00003

BETWEEN	**JOEL LEWIS**	**APPELLANT**
AND	**CLIFFORD CHAMBERS**	**RESPONDENT**

Hugh Wildman and Shemar Bryan instructed by Hugh Wildman & Company for the appellant

Mrs Kristina Jones instructed by the Director of State Proceedings for the respondent

4, 5 February and 4 April 2025

Civil Procedure – Leave to apply for judicial review – Whether the respondent is a proper party to proceedings – Whether the respondent was the decision-maker – Civil Procedure Rules, Part 56

STRAW JA

[1] I have read, in draft, the judgment of my learned brother Laing JA and agree with his reasoning and conclusion.

BROWN JA

[2] I too have read the draft judgment of Laing JA and agree.

LAING JA

[3] By notice and grounds of appeal, filed on 3 Jan 2024, the appellant appeals against the orders of T Carr J ('the learned judge') made on 21 July 2023 refusing the appellant's notice of application for leave to apply for judicial review ('the order').

Background

[4] The appellant enlisted in the Jamaica Constabulary Force ('JCF') on 29 November 2010. He served at the rank of Constable for 13 years. A member of the public complained that he had performed certain acts of dishonesty in a private transaction between them ('the allegations'). Based on the allegations, in June 2018, he was charged with several offences of dishonesty in connection with a stolen motor vehicle and appeared before the Parish Court in Saint Catherine. The prosecution offered no further evidence and, on 18 February 2019, he was discharged on all counts for which he had been placed before the court.

[5] The appellant was due for re-enlistment on 28 November 2020 and submitted an application for re-enlistment dated 16 June 2020. He was advised, by a letter dated 17 November 2020, that his application for re-enlistment was not recommended to the Commissioner of Police ('the COP') on grounds related to the allegations which formed the basis for the offences in respect of which he had been discharged. The appellant's attorney-at-law responded by letter dated 1 December 2020. The appellant received a letter, dated 4 November 2021, which declared that "[t]his supercedes [sic] notice dated November 17, 2020". It advised him that the COP reviewed the recommendation and refused his re-enlistment on grounds that mirrored those in the letter dated 17 November 2020 and the letter dated 4 November 2021.

[6] The appellant's attorney-at-law made representations to the JCF, which resulted in the appellant meeting with the COP on 27 July 2022. The unchallenged evidence of the appellant is that at that meeting, the COP stated that if the charges which were laid against the appellant in 2018 were the only charges against him, he had no need to worry.

[7] By letter dated 12 September 2022 ('the Letter'), the respondent, the Assistant Commissioner of Police for Area 1, advised the appellant that he was directed by the COP to inform him that his application for re-enlistment was not approved. It is this refusal

not to re-enlist him which caused the appellant to seek permission to apply for judicial review, which resulted in the order and this appeal.

The grounds

[8] The grounds of appeal are:

> "1. The Learned Trial Judge failed to appreciate that on the evidence before her, there was nothing to show that the Commissioner of Police had in fact, taken a decision not to reenlist the Appellant for a further period of 5 years as a member of the Jamaica Constabulary Force.
>
> 2. The Learned Trial Judge failed to appreciate that the statement attributed to the Commissioner of Police made to the Appellant, which remained unchallenged, that if the charges of which the Appellant had been acquitted were the only thing against him, he had nothing to fear, clearly indicates that the Commissioner of Police had not taken any steps in failing to reenlist the Appellant to be a member of the Jamaica Constabulary Force.
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> 3. The Learned Trial Judge failed to appreciate that in light of that statement, there is nothing to indicate that the Commissioner of Police had delegated his powers to the Respondent to inform the Appellant that he was no longer reenlisted to be a member of the Jamaica Constabulary Force.
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> 4. The Learned Trial Judge failed to appreciate that in exercising his powers under **section 5** of the Jamaica Constabulary Force Act, the Commissioner of Police had to act fairly in informing the Appellant of the reasons why he was no longer being reenlisted to be a member of the Jamaica Constabulary Force, and on the evidence there was nothing to show that the Commissioner of Police had so informed him.
>
> 5. The Learned Trial Judge failed to appreciate that the reasons given to the Appellant by the Respondent, that is, the purported charges that he was acquitted of, could not properly be regarded as reasons for refusing to reenlist the Appellant as a member of the Jamaica Constabulary Force, having regard to the clear language of **section 37** of the Jamaica Constabulary Force Regulations.

> 6. The Learned Trial Judge failed to appreciate that on the evidence, there is nothing to show that the Commissioner of Police had rejected the Appellant's application to be reenlisted for a further period of 5 years in the Jamaica Constabulary Force." (Bold as in the original)

[9] The various grounds of appeal can conveniently be grouped under the following issues:

(1) Whether the respondent is a proper party to the claim;

(2) Whether the COP made a decision not to re-enlist the appellant (grounds 1, 2 and 6);

(3) Whether the COP's decision was properly communicated to the appellant (grounds 3 and 4); and

(4) Whether in exercising his discretion not to re-enlist the appellant, the COP could rely on the charges, especially in light of the unchallenged evidence that the COP had reassured the appellant that if the dismissed charges were the only thing against him, he had nothing to fear (ground 5).

[10] Whether the respondent is a proper party to the claim is an issue that is determinative of the appeal. This issue was introduced by Mrs Jones in her response. The issue is relevant because the appellant argued that the COP did not delegate the authority to the respondent to communicate the refusal to re-enlist to the appellant, and consequently, he had no authority to do so. The appellant advanced the proposition that the respondent was a proper party because, without authority, he communicated the fact of the COP's refusal to re-enlist the appellant to him. It is, therefore, necessary for the court to interrogate whether this communication by the respondent provides a proper legal basis for the claim to be brought against him.

[11] Although this issue of whether the respondent is a proper party to the claim may be determinative of the appeal, the second issue of whether he took a decision not to re-enlist the appellant is raised tangentially and will be addressed insofar as it supports the determination of the first issue.

[12] The fourth issue raised by ground 5 is of intellectual interest only, and, in any event, it would not be appropriate for this court to engage in a robust analysis thereof.

Whether the respondent is a proper party to the claim

The appellant's submissions

[13] Grounds 3 and 4, as argued by Mr Wildman, raised the issue of whether the respondent was empowered with the requisite authority to act on the COP's directions and to advise the appellant of the COP's decision not to re-enlist him. Mr Wildman argued that the manner of the communication of the COP's decision to the appellant was a matter that was reviewable by the court, and there was no evidence that the COP had delegated his power to communicate his decision and by virtue of that delegation to the respondent, the respondent had the appropriate power.

[14] Counsel argued that the respondent substituted himself for the COP and submitted that nowhere in the Constabulary Force Act ('the Act') was the respondent, as an Assistant Commissioner of Police, empowered to act on behalf of the COP. He further argued that this action by the respondent of communicating the decision amounted to usurpation of the powers of the COP and was in breach of the maxim *delegatus non potest delegare* (a delegate cannot delegate). He relied on a statement from the learned authors of HWR Wade and CF Forsythe, 11th Edition, page 260, as follows:

> "In the case of statutory powers, the important question is whether, on a true construction of the Act, it is intended that a power conferred upon A may be exercised on A's authority by B. The maxim merely indicates that this is not normally allowed. For this purpose, no distinction need be drawn between delegation and agency."

[15] Mr Wildman submitted that the fact that the respondent was the person who communicated to the appellant the COP's refusal to re-enlist him provided the basis for the respondent, having inserted himself as an active participant in the process, to be named as a party to the application. In para. 19 of his written submissions, Mr Wildman encapsulated the appellant's submission as follows:

> "… there is nothing in the language of **section 5 of the Constabulary Force Act**, or any other section of the act, that one could construe that the Assistant Commissioner of Police is permitted to discharge anyone from the Jamaica Constabulary Force. The Respondent, as the Assistant Commissioner of Police, has clearly exceeded his authority and committed jurisdictional error as stated by Lord Reed in **Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147**." (Bold as in the original)

The respondent's submission

[16] The respondent's response to grounds 3 and 4 was premised on the assertion that there was no evidence that the COP's powers were delegated, usurped, or exercised by the respondent. It was emphasised that the respondent did not purport to make any decision in his own right related to the appellant's re-enlistment. It was argued that the respondent was merely a conduit acting on the instructions of the COP.

[17] Predicated on these submissions, it was further argued that the respondent is an improper party to the claim, and the application for leave was properly refused. It was asserted that an application for judicial review must be brought against the decision maker, and, in support of this position, counsel relied on **Council of Civil Service Unions and Others v Minister for the Civil Service** [1985] AC 374 ('**CCSU**'). Accordingly, it was maintained that the failure of the appellant to join the COP was dispositive of the appeal because the court is not empowered to grant orders for judicial review of a decision made by a party who is not a litigant before it.

A. *Whether the COP made a decision not to re-enlist the appellant (grounds 1, 2 and 6);*

The appellant's submissions

[18] I will only refer to grounds 1, 2 and 6 to the extent that they raise an evidential issue that assists in resolving the primary issue.

[19] In relation to grounds 1 and 6, Mr Wildman argued that as a matter of evidence, the Letter did not constitute evidence that the COP had taken a decision not to re-enlist the appellant because the COP was not the author of the letter, and, accordingly, its contents constituted hearsay evidence. He submitted that, with regard to the importance of the decision, it was necessary for the COP to advise the appellant of his decision directly, even if by way of correspondence. In support of these submissions, Mr Wildman relied on the case of **Carlton Smith v Lascelles Taylor, Commissioner of Police and The Attorney General of Jamaica** [2015] JMCA Civ 58 ('**Carlton Smith**').

[20] Ground 2 implicitly asserts that the statement to the appellant by the COP that if the charges were the only thing against him, he had nothing to fear, constitutes evidence that the COP did not take any steps in failing to re-enlist the appellant.

The respondent's submissions

[21] The essence of the submission of Ms Ferguson was that the Letter was clear on its face, as a matter of construction, using its plain and ordinary meaning. Counsel submitted that it constituted ample and admissible evidence that the COP had taken the decision not to re-enlist the appellant, which was communicated to the appellant.

Discussion and analysis

[22] In **Carlton Smith**, the claimant, Mr Smith was a District Constable attached to the May Pen Police Station. Following an incident at the police station, Inspector Taylor relieved Mr Smith of his duties, sent him home, and cancelled his duties. Mr Smith

received no further communication from the police for over a year regarding his employment until he pursued the matter by a letter to the COP. He was advised by Superintendent Bent, who was in charge of the station, that it would be recommended that his services be terminated. Mr Smith filed civil proceedings seeking a declaration that his termination was unlawful, null and void and of no effect because Inspector Taylor had no legal authority to terminate his services. He also sought a declaration that only his services as a District Constable could have been discontinued by the Commissioner of Police under section 2 of the Constables (District) Act.

[23] The respondents filed a notice of application for court orders asking the court to strike out Mr Smith's statement of case on the ground that the issue in the claim should properly have been determined by judicial review since it was a public law matter. Mr Smith filed an application for summary judgment. Both applications were heard, and the judge struck out the statement of case. On appeal, the court held that on the evidence before the judge, there was no termination of Mr Smith's employment as a district constable. Under the provisions of the Constables (District) Act, only the COP had the authority to appoint and dismiss Mr Smith.

[24] In para. [21], the court found as follows:

> "[21] Both counsel are correct in contending that rule 56.9 allows the court to enquire into that status regardless of whether the employment was founded in public or private law. The rule states in part:
>
> > '**How to make an application for administrative order**
> >
> > 56.9 (1) An application for an administrative order must be made by a fixed date claim in form 2 identifying whether the application is for –
> >
> > (a) judicial review;
> > (b) relief under the Constitution;
> > (c) a declaration; or

> (d) some other administrative order (naming it) and must identify the nature of any relief sought.' (Emphasis as in original)
>
> It may be gleaned from the rule that judicial reviews and declarations are separate administrative orders that are available to a claimant. The rules in part 56 of the CPR do not place on applications for declarations the restrictions that they place on applications for judicial review…." (Bold as in the original)

The court concluded the judge was in error in finding that Mr Smith's claim could only have been pursued by judicial review. Furthermore, that it was appropriate for Mr Smith to pursue the remedy of a declaration which was available under rule 56.9 of the Civil Procedure Rules ('CPR'), which did not have a time or other restriction, unlike a claim for judicial review, although both are administrative orders available to a claimant. Accordingly, the judge should have permitted Mr Smith to pursue that remedy.

[25] The important feature of this case that distinguishes it from **Carlton Smith** is that the instant claim is for judicial review. For that reason, it is subject to the restrictions applicable to judicial review proceedings. In **CCSU**, the court at page 409B confirmed the principle that for a decision to be susceptible to judicial review, the decision-maker must be empowered by public law to make the decision that is being challenged. In **Carlton Smith**, it was permissible for Mr Smith to join the decision maker, Inspector Taylor, although Inspector Taylor was not empowered by law to dismiss Mr Smith because he was seeking declarations pursuant to Part 56 of the CPR.

[26] In the instant case, the paramount question is who is the maker of the decision not to re-enlist the appellant ('the decision maker')? In this regard, it is helpful to examine the Letter which is in the following terms:

> "September 12, 2022
>
> No.14373 Constable Joel Lewis
> c/o Assistant Commissioner of Police

> Area 1
>
> 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 **November 29, 2020**.
>
> Notice dated November 17, 2020 which was personally served on November 26, 2020 is relevant.'
>
> Assistant Commissioner of Police
> Administration Branch" (Emphasis as in the original)

[27] Mr Wildman submitted that to the extent that the COP was not the author of the Letter, it cannot be admitted to prove that it was the COP who made the decision to refuse to re-enlist the appellant because that would infringe the hearsay rule if used for such a purpose. There are many formulations of the hearsay rule. I am attracted to the rule as stated in Cross and Tapper on Evidence, 12th edition, at page 551, as: "[A] statement other than one made by a person while giving oral evidence in the proceedings was inadmissible as evidence of any fact stated". Morrison P (Ag) (as he then was), in **National Water Commission v VRL Operators Limited and Others** [2016] JMCA Civ 19 at para. [9], explained it as follows:

> "[9] As is well known, evidence of a statement made by someone not called as a witness may or may not be admissible. If what it is intended to prove by the evidence is the fact that the statement was made, then it will, generally speaking, subject to considerations of relevance and any other exclusionary factor, be admissible for that purpose. However, if the evidence is tendered to establish the truth of what is contained in the statement, it is hearsay evidence and as such generally inadmissible."

[28] However, resolving the hearsay point is unnecessary in order to determine the appeal. It is important to note that Mr Wildman has not asserted that the respondent is the decision maker. The appellant accepts that the respondent was not empowered to

make the decision to refuse to re-enlist him. The appellant goes a step further and asserts that the respondent was not even empowered to inform him of the decision not to re-enlist him unless the COP had delegated that power, and there was no evidence to indicate that the COP had delegated that power so to do. It is the absence of this delegation of the power to inform the appellant that forms the substratum for ground 3. By this ground, the appellant has tacitly accepted that the Letter is admissible as evidence that the respondent communicated the COP's decision.

[29] If the Letter is not admitted as proof that the COP is the decision maker for purposes of the claim but is admissible for the limited purpose of proving that the respondent purported to communicate the COP's decision, that does not assist the appellant. There is no evidence that the respondent is the decision maker and, in the absence of such evidence, he is not the proper party to this claim. In such circumstances, there is no utility in setting aside the decision of the learned judge since, in any event, judicial review cannot interfere with the decision not to re-enlist the appellant, it not having been made by the respondent.

Conclusion

[30] There is no evidence that the respondent is the decision maker. The respondent, by communicating the decision of the COP, was merely a conduit. Mr Wildman has not provided any authority, nor do I accept, that the act of the respondent in forwarding the COP's decision, in such circumstances, would make him a proper party to the claim challenging the decision. For this reason, I am of the opinion that the appeal has no merit and should be refused.

Ground 5

[31] Mr Wildman conceded that regulation 5 of the Police Service Regulations ('the Regulations') conferred a discretion on the COP in deciding whether to approve an applicant for re-enlistment, but he argued that the charges in respect of which the appellant was acquitted could not provide the basis for refusing to re-enlist a person in

the JCF. He relied on regulation 37 of the Regulations. He argued that regulation 37 was the basis of the refusal to re-enlist, which the COP used. For this reason, he argued that the refusal was in breach of regulation 37, that the decision fell under the rubric of illegality, and that the respondent committed a "jurisdictional error" in that he acted in clear breach of the statute, which governed a statutory power. For this submission, counsel also relied on **Anisminic Ltd v Foreign Compensation Commission** [1969] 2 AC 147.

[32] Mr Wildman developed the point further in his oral presentation and submitted that the exercise of the COP's discretion was also improper with regard to the assurance he had given to the appellant, that if the charges which were laid against the appellant in 2018 were the only charges against him, he had no need to worry. Counsel argued that this assurance created what was akin to a legitimate expectation that the charges would not have been used in a manner that was prejudicial to him.

[33] Counsel argued that this assurance is also important for another reason which is supported by the case of **Glenroy Clarke v The Commissioner of Police**. He maintained that this case confirms that the COP has a wide discretion in considering re-enlistments. Additionally, that the applicant for re-enlistment has a right to be heard after the COP has supplied his reasons and before the formal notification of his decision. It was submitted that after the COP had advised the appellant of the reasons for his non-re-enlistment, by telling the appellant at the meeting that if the charges which were laid against the appellant in 2018 were the only charges against him, he had no need to worry, the COP effectively "wiped the slate clean". Counsel argued that the effect of this reassurance was that the appellant did not need to respond to those reasons for his non-re-enlistment because they were no longer being considered by the COP. It was posited that, consequently, the appellant's right to be heard was not exercised when those same reasons were revived and ultimately used as the basis for the formal decision not to re-enlist him.

[34] Mr Wildman was fortified in his conclusion that the decision not to re-enlist was improper, by the decision of this court granting the appellant leave to appeal the order, in **Joel Lewis v Clifford Chambers** [2023] JMCA App 41 at para. [25], in which it concluded:

> "[25] Although the applicant is not on good ground in arguing that he was dismissed by the Assistant Commissioner, he has an arguable ground of appeal with some prospects of success because, on his unchallenged evidence, the Commissioner assured him that the charges in relation to the stolen vehicle would not be considered, yet that is the only reason advanced for refusing his re-enlistment. The applicant should be given an opportunity to have this seeming inconsistency tested on appeal."

The respondent's submissions

[35] The respondent emphasised his position that there is a clear distinction between a re-enlistment and a dismissal of a member of the JCF. The significance of this is that regulation 37 of the Regulations is not engaged where, as in this case, the appellant's re-enlistment was not approved, and it was not that he was dismissed. Counsel argued that the statement of the COP (that if the charges which were laid against the appellant in 2018 were the only charges against him, he had no need to worry) could not assist the appellant for several reasons. Firstly, this was not a dismissal. The COP was not precluded from considering the fact of the charges despite the favourable outcome of acquittal of the appellant. Secondly, after making the statement, the COP retained the discretion to review any decision he may have previously made, or assurance given and was at liberty to arrive at a different conclusion. Thirdly, the onus remained on the appellant to show good cause for his enlistment to be renewed. Fourthly, it was argued that the statement or assurance could not have properly formed the basis for a legitimate expectation on the part of the appellant that his re-enlistment would be approved in light of his conduct. Counsel submitted that, furthermore, in any consideration of the principle of legitimate expectation, the court still has to decide whether there is any frustration of the legitimate expectation when striking a balance between the interests of the appellant and the

national interest. In support of this argument, counsel commended the case of **Clarke v Commissioner of Police**, at page 311, for our consideration.

[36] I have explained earlier that it is unnecessary for the court to make any findings on ground 5 to determine the appeal. With regard to the views expressed by this court in **Joel Lewis v Clifford Chambers**, to which we have referred in para. [34] herein, I appreciate that my opinion on this ground may be of intellectual interest. However, I am of the view that it is not prudent to make any findings at this time or express any opinions with respect to this ground.

Conclusion and disposition

[37] For the reasons contained herein, I recommend dismissing the appeal and making no order as to costs.

STRAW JA

ORDER

(1) The appeal is dismissed.

(2) No order as to costs.