

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV 2009-02708

**BETWEEN**

**SYDNEY ORR**

**APPLICANT**

**AND**

**THE POLICE SERVICE COMMISSION**

**DEFENDANT**

**Before the Honourable Mr. Justice A. des Vignes**

**Appearances:**

Mr. Kenneth Thompson for the Claimant

Mr. Russell Martineau, S.C and

Ms. Monica Smith instructed by Ms. Jankey for the Defendant

1. The Claimant by his application without notice filed on July 27, 2009 applied to the Court for an order giving him leave to make a claim for judicial review of the decision of the Police Service Commission whereby it dismissed the Claimant from the Trinidad and Tobago Police Service by letter dated April 7, 2009, effective 29<sup>th</sup> April 2009. On July 29, 2009 the Honourable Mr. Justice Best granted leave to the Claimant to make an application for judicial review, subject to the making of the claim within fourteen days of the order.
2. By Fixed Date Claim form filed on the 10<sup>th</sup> August 2009 the Claimant claimed the following reliefs:
  1. A declaration that the conduct of the Police Service Commission in continuing the Claimant's suspension until the month of May 2007 without charging him with a disciplinary offence, was unlawful and constituted an abuse of power.
  2. Alternatively, a declaration that the Service of the Commission's letter of the 7<sup>th</sup> day of April 2009, served on the Claimant on the 29<sup>th</sup> day of April 2009, dismissing the Claimant from office was irregularly executed.
  3. A declaration that by virtue of (2) above, the Claimant attained the compulsory retirement age of fifty-five years on the 30<sup>th</sup> of April 2009, as a Police Constable of the Trinidad and Tobago Police Service.
  4. Alternatively, a declaration that the Commission's delay between the 1<sup>st</sup> day of December 2003 and May 2007, in charging the Claimant, was inordinate, unreasonable and contrary to the letter and spirit of Regulation 84 of the Police Service Regulations Chapter 1:01 of the laws of Trinidad and Tobago.
  5. A declaration that the delay of the Commission in informing the Claimant of the penalty of dismissal on the 29<sup>th</sup> day of April 2009, following the conclusion of the hearing into the charge on the 4<sup>th</sup> day of August 2007, was unreasonable, inordinate and contrary to the letter and spirit of Regulation 101 of the Police Service Regulations.
  6. Alternatively, that upon a true construction of the provisions of the Constitution Amendment Act 2006, the Claimant's right of appeal to the Public Service Appeal Board under section 132 of the Constitution of Trinidad and Tobago was unaffected.
  7. A declaration that on the 29<sup>th</sup> day of April 2009, the Claimant enjoyed the aforesaid right of appeal.
  8. A declaration that the aforesaid right of appeal can only be taken away by express constitutional enactment.
  9. A declaration that the conduct of the Commission in causing service of the aforesaid letter of dismissal to be effected on the Claimant on the 29<sup>th</sup> day of April 2009, the

day before he attained his compulsory retirement age of fifty-five years, constituted a violation and frustration of the Claimant's exercise of the aforesaid right of appeal and his fundamental right to the protection of the law, as guaranteed by section 4(b) of the Constitution of Trinidad and Tobago.

10. An order of certiorari removing into court and quashing the decision of the Commission dismissing the Claimant from office.
11. Alternatively, a declaration that Regulation 101 of the Police Service Regulations created in the Claimant a legitimate expectation that the commission would communicate to him expeditiously any penalty imposed on him as a consequence of disciplinary proceedings.
12. A declaration that the delay on the part of the Commission in informing the Claimant of the penalty of dismissal which it imposed on him constituted a violation and frustration of the said legitimate expectation of the Claimant and/or an abuse of power.
13. An order requiring the Commission, its servants or agents to pay the Claimant his pension and gratuity.
14. Interest.
15. Costs.

### **The Evidence**

#### **The Applicant's Evidence**

3. The Applicant's evidence is contained in his affidavit sworn and filed on July 27<sup>th</sup> 2009.

#### **The Defendant's Evidence**

4. The Defendant's evidence is contained in the affidavit of Gloria Edwards-Joseph, the Director of Personnel Administration and the annexed/exhibited documents filed on the 31<sup>st</sup> of March 2010.

#### **The Factual Matrix**

5. The Claimant was Constable No. 10914 in the Trinidad and Tobago Police Service (hereinafter referred to as the Service) attached to the Second Division of the Service. By regulation 47(2)(i) of the Police Service Commission Regulations, Chapter 1:01, he was required to retire on attaining the age of fifty-five years. The Claimant was born on the 30<sup>th</sup> day of April 1954 and, therefore, he was mandated to retire on April 30, 2009. The office of Police Constable is a permanent and pensionable public office.

6. In October 1998, the Claimant was charged with the criminal offences of common assault, assault and battery and assault occasioning actual bodily harm. On the October 12, 1998 the Commissioner of Police suspended the Claimant pending the outcome of the charges.
7. On the 12<sup>th</sup> September 2000, the Claimant was convicted of the offences of assault, assault by beating and assault occasioning actual bodily harm and sentenced to a six month term of imprisonment with hard labour.
8. The Claimant appealed his conviction of the charge of assault occasioning actual bodily harm but his appeal was dismissed on December 1, 2003 on the grounds that his appeal was filed out of time. The Claimant served the sentence and was released from prison in January 2004.
9. In relation to the other offences of common assault and assault and battery, the Commission on the 11<sup>th</sup> August 2003 requested the Commissioner to appoint an investigating officer to investigate the allegations made against the Claimant. However, an investigating officer was not appointed until March 2006 since, despite attempts to locate the Claimant, he could be located at his last known address or at any other address. It was imperative to locate the Claimant before the appointment of an investigating officer since by regulation 84(3), an investigating officer must within three (3) days of his appointment give the Claimant written notice specifying the time within which he must give an explanation concerning the allegations made against him.
10. On the 24<sup>th</sup> March 2006, Mr. Ebenezer Phillip was appointed to investigate the allegations made against the Claimant and by notice also dated 24<sup>th</sup> March 2006, the Claimant was informed of the allegations made against him.
11. Mr. Phillips' report was received by the Service Commissions Department on the 11<sup>th</sup> April 2006 and referred to the Legal Department on the 12<sup>th</sup> April 2006 for their advice. Their advice was furnished on the 4<sup>th</sup> May 2006.
12. On the 1<sup>st</sup> March 2007, the Commission decided to prefer a disciplinary charge against the Claimant. By letter dated March 9 2007 the Police Service Commission wrote to the Claimant informing him that the Commission had met and considered the report of the investigating officer appointed to enquire into the allegation of misconduct made against the Claimant and had decided to prefer a disciplinary charge against the Claimant, namely, the conviction of a criminal offence contrary to Regulation (2) (q) of the Police Service (Amendment) Regulations 1990.

13. Service of this charge was effected upon the Claimant on the 8<sup>th</sup> May 2007 and he was invited to state in writing whether he admits or denies the disciplinary charge, together with any explanation within fourteen days of receipt of the letter. The Claimant did not offer a written reply.
14. On August 7, 2007, the disciplinary charge was heard before a Disciplinary Tribunal appointed by the Commission. At this hearing the Claimant appeared and, although there is a dispute on the evidence as whether the Claimant pleaded guilty or not guilty, (which shall be addressed later in this judgment), the tribunal submitted its report to the Commission on August 23 2007.
15. On October 25, 2007, the Commission considered the disciplinary tribunal's report and decided that the Claimant was guilty of the disciplinary charge preferred against him. This was communicated to the Claimant by letter dated November 8, 2007 and he was invited to submit any representations he wished to make with respect to the penalty to be imposed within fourteen (14) days. The Claimant acknowledged receipt of the letter on the December 24, 2007 but did not submit any representations on the penalty to be imposed within fourteen (14) days or at all.
16. Between January 2, 2008 and September 2008, the Commission requested the Commissioner of Police to supply up-to-date performance appraisal reports as well as salary particulars to enable the Commission to impose the appropriate penalty. On the October 20, 2008, the Commission received the Claimant's staff report.
17. By letter dated April 7, 2009, the Commission dismissed the Claimant from the Police Service effective the date of his receipt of the letter and this letter was served upon the Claimant on April 29, 2009 at his home at Mt. St George Tobago, one day before he attained the compulsory retirement age of 55 years.
18. The letter of dismissal also informed the Applicant that "*at present provisions in the constitution do not provide for an appeal from any decision of the Police Service Commission, as a result of disciplinary proceedings brought against you. However amendments to the Constitution are being pursued in this regard.*"

### **Issues**

19. The following issues arise for determination in this matter:
  - (i) Whether the letter of dismissal was effective to terminate the claimant's employment in circumstances where, according to the claimant, he was not asked to sign a copy thereof by way of acknowledgement;

- (ii) Whether there was inordinate and unnecessarily long delay in the institution of disciplinary proceedings or the notification to the Claimant of the decision to terminate his employment by the Police Service Commission?
- (iii) Whether Regulations 84 and 101 of the Regulations created in the Claimant a legitimate expectation that the Police Service Commission would act expeditiously in charging him with a disciplinary offence and informing him of its findings and the penalty which it had imposed on him? and
- (iv) Was the Claimant deprived of a right of appeal to the Public Service Appeal Board under section 132 of the Constitution by virtue of the actions of the Commission and/or the Constitution (Amendment) Act, 2006?

### Discussion

#### **Service of letter of dismissal**

20. The Claimant submitted that the service of the letter of dismissal upon him was not validly effected and, therefore, there was no impediment to his retirement on the 30<sup>th</sup> April 2009 and consequent entitlement to full pension benefits. The service of letter of dismissal was effected by Corporal Gomez on April 29 2009. The Applicant asserted that he was not asked by Corporal Gomez to sign a copy of the letter of dismissal and drew the Court's attention to the final paragraph of the dismissal letter which states as follows:

*“You are required to sign the attached copy of this letter in acknowledgement of your receipt of the original and return the signed copy to the Officer who delivers the original to you.”*

21. The Applicant submitted that, by reason of this paragraph, the service of the letter of dismissal can only be validly effected when the officer to whom it is addressed signs a copy of the letter in acknowledgement of his receipt of the original, after being requested by the serving officer to do so.
22. The Defendant in response maintained that the Applicant had refused to sign the copy of the letter of dismissal and exhibited a certificate in the handwriting of Corporal Gomez confirming that the letter of dismissal was served upon the Claimant in the presence of his mother, Vera Orr. Further, the Defendant submitted that the signing of the copy and returning same to the serving officer was merely evidence of the

Claimant's receipt of the letter of dismissal and, since the Applicant in his affidavit admitted receipt of the letter, there can be no question of the service being irregular.

23. I am satisfied, based on the Claimant's own evidence as well as the certificate of Corporal Gomez, that the Claimant received the letter of dismissal from the Police Service Commission on April 29, 2009. Therefore, to my mind, it is immaterial whether or not he was asked to sign or he refused to sign a copy of the letter since the real intent of asking for the claimant's signature on a copy of the letter would only have been to prove, in the event of a dispute as to receipt of the letter, that the letter was duly served upon him. Since the claimant has candidly admitted receipt of the letter, there is no such issue raised here and I reject the argument advanced on behalf of the Claimant that service of the letter of dismissal was not properly effected upon him and that, as a consequence, he was not dismissed on the 29<sup>th</sup> April 2009.

#### **Delay**

24. The Claimant has complained about delay in two respects:
- (i) Firstly, it was submitted on his behalf that there was an unreasonable delay in preferring the disciplinary charges against him. According to the Claimant, Regulation 84 of the Police Service Commission Regulations contemplates that disciplinary charges against police officers would be effected expeditiously. Therefore, it was open to the Defendant to charge the Claimant from the date of the dismissal of his appeal on 1<sup>st</sup> December 2003 but charges were only preferred against him on 9<sup>th</sup> March 2007 – a delay of three years and three months.
  - (ii) Secondly, the Claimant argued that the delay in imposing the penalty of dismissal upon him was contrary to Regulation 101 of the Police Service Commission Regulations which requires the Commission to inform the Applicant in writing as soon as possible after the hearing of the charge of its findings and the penalty imposed on him. The Commission decided on October 25, 2007 that the Claimant was guilty as charged and on December 24, 2007 he was served with a letter dated November 8, 2007 whereby he was so notified and invited to make representations as to the penalty to be imposed on him within fourteen (14) days. However, the decision to dismiss the Claimant was not taken until April 7, 2009 – a delay of one year and 5½ months.

Delay in preferring charge

25. Regulation 84 (6) of the Police Service Commission Regulations provides as follows:

*“The Commission, after considering the report of the investigating officer and any explanation given under sub-regulation 3, shall decide whether the Police Officer should be charged with an offence and if the Commission decides that the Police Officer should be charged, the Commission shall as soon as possible, cause the Police Officer to be informed in writing of the offence with which such Police Officer is charged together with such particulars as will leave such Police Officer with no misapprehension as to the precise nature of the alleged offence.”*

26. The Claimant relied on **Codrington Waldron v The Police Service Commission H.C.A. No. 3512 of 1991** where there was a delay of some 4 years 7 months in instituting disciplinary proceedings by the Police Service Commission against the Applicant, after he had received a promotion. The disciplinary charge stemmed from the Applicant not attending court to prosecute a criminal charge against a fellow police officer. His non-attendance at Court precipitated the dismissal by the Magistrate of the charge for want of prosecution. The Applicant successfully argued that the delay which preceded the bringing of the disciplinary charge was so inordinate that it was reasonable for the Applicant to believe that no charge or charges would have been preferred against him and that the matter had been closed after he received his letter of promotion.

27. In construing Regulation 84, Wills J. said at page 21supra:

*“From the foregoing it would seem that it was the intention of the legislature to avoid delays in the prosecution of these matters. In my view, delay such as evidenced in the matter is contrary to the spirit of the law. It must have been the animus imperentis – the intention of the draftsman and the legislature that expeditiousness should be a paramount importance. In these circumstances, I find and hold that it would be unfair to proceed with the prosecution of the alleged disciplinary infraction.”*

28. In reply to these submissions, the Defendant contended firstly that the Applicant could not be located at his last known address or any other address for a substantial period of time between August 11, 2003, (when the Commission requested the Commissioner of Police to appoint an investigating officer), and March 2006 when such an appointment was made. Since by regulation 84(3), an investigating officer must, within three (3) days of his appointment give the Claimant written notice specifying the time within which he must give an explanation concerning the allegations made against him, it was imperative to locate the Claimant before the appointment of an investigating officer could be made.
29. In the instant matter, the material facts disclose that the Applicant was placed on suspension immediately after being charged with the criminal offence and it was not until December 2003 that his appeal against conviction was dismissed. In the **Codrington** case, however, the officer was on the job receiving pay and performing well enough to earn a promotion. In addition, and more importantly in my view, in **Codrington**, the officer did not submit to the jurisdiction of the disciplinary tribunal but rather challenged by judicial review proceedings the purported demotion handed down by the Promotions Advisory Board.
30. In my opinion, therefore, it does not lie in the mouth of the Claimant to complain in these proceedings that the delay in preferring the disciplinary charge against him was unreasonable when he did not raise this objection at the hearing before the Disciplinary Tribunal before whom he appeared on August 7, 2007. The Claimant submitted himself to the jurisdiction of the disciplinary tribunal and there is no evidence that the issue of delay in preferring the charge was raised by him at that hearing. Accordingly, in my opinion, the Applicant, by his actions, has waived any objection to the laying of the charge against him on grounds of delay and, in any event, having regard to the length of time that has elapsed since the laying of the charge, the Applicant cannot in these proceedings filed on August 12, 2009 succeed in his challenge to the decision of the Commission to prefer these charges against him on March 9, 2007.

Delay in imposing penalty

31. The Applicant submitted that there was inordinate and unnecessarily long delay in imposing the penalty of dismissal upon him and this delay constituted an abuse of power. Further, he submitted that Regulation 101 of the Police Service Commission

Regulations created in him a legitimate expectation that the Commission would inform him of the penalty which it had imposed on him as soon as possible after making a finding of guilt and their delay in so doing violated and frustrated his legitimate expectation.

32. Lord Diplock in the case of **O'Reilly v Mackman (1982) 3 AllER 1124** explained the concept of legitimate expectation thus:

*“Legitimate or reasonable expectation may arise either from an express promise given on behalf of the public authority or from the existence of a regular practice which the Claimant can reasonably expect to continue.”*

33. The Defendant in opposition contends that given the facts of this case, the framers of the Regulations could not have intended that the effect of the breach of Regulation 101 would be to nullify the decision to dismiss the Applicant.

34. The Judicial Committee of the Privy Council in **Herbert Charles v Judicial and Legal Service Commission [2002] UKPC 34** considered what effect, if any, a breach of time limits prescribed by regulation 90 of the Public Service Commission Regulations should have. In that case, the appellant instituted proceedings for judicial review of the decision of the Judicial and Legal Service Commission, to charge the appellant on the ground of the late submission of the Investigating Officer's report. The Board approved the judgment of Lord Hailsham in **London & Clydeside Estates Ltd v Aberdeen District Council [1980] 1 WLR 182 at 189** where his lordship said:

*“At one end of the spectrum there may be cases in which a fundamental obligation may have been so outrageously and flagrantly ignored or defied that the subject may safely ignore what has been done and treat it as having no legal consequence on himself. In such a case if the defaulting authority seeks to rely on its action it may be that the subject is entitled to use the defect in procedure simply as a shield or defence without having taken any positive action of his own. At the other end of the spectrum the defect in procedure may be so nugatory or trivial that the authority can safely proceed without remedial action, confident that, if the subject is so misguided as to rely on the fault, the courts will decline to listen to his complaint.... Most cases will fall somewhere in the middle and it will be for the courts to assess.”*

From the foregoing it is apparent that the Court has a discretion to determine whether the actions of the authority fall at one end of the spectrum or the other or somewhere

in between. In **Wang v. Commissioner of Inland Revenue [1994] 1 WLR 1286**, a decision of the Privy Council, Lord Slynn after citing from the speech of Lord Hailsham of St. Marylebone LC in the **London & Clydeside Estates** case, said at p. 1296:

*“... their lordships consider that when a question like the present one arises—an alleged failure to comply with a time provision—it is simpler and better to avoid these two words “mandatory” and “directory” and to ask two questions. The first is whether the legislature intended the person making the determination to comply with the time provision, whether a fixed time or a reasonable time. Secondly, if so, did the legislature intend that a failure to comply with such a time provision would deprive the decision-maker of jurisdiction and render any decision which he purported to make null and void?”*

35. In her affidavit, Ms. Edwards Joseph explained that after the Claimant was notified on December 24, 2007 that he had been found guilty of the charge, he was given fourteen (14) days within which to make any representations as to the appropriate penalty to be imposed on him. When the Claimant failed to make to any such representations, the Commission requested from the Commissioner up to date performance appraisal reports as well as salary particulars. In my opinion, these were matters which the Commission ought properly to have before it before deciding what penalty to impose upon the Claimant and the Commission acted reasonably in making such requests. The Commission received the Claimant’s staff report on the 20<sup>th</sup> October 2008 and by letter dated April 7, 2009 it notified the Claimant of its decision to dismiss him.
36. Bearing these facts in mind, I am of the opinion that it would not have been in the contemplation of the legislature that, by virtue of regulation 101, a delay in informing the Applicant of the decision to dismiss him should strip the Commission of the authority/ jurisdiction to act or nullify its decision to dismiss the Claimant.

**The Claimant’s right of appeal**

37. The Claimant submitted that by Section 132 of the Constitution, he had a right of appeal to the Public Service Appeal Board against the decision of the Police Service Commission as a result of the disciplinary proceedings brought against him.

38. He complained about the Commission's letter of dismissal which informed him that there were no provisions in the Constitution which permitted an appeal against its decision and argued that upon a true construction of the Constitution (Amendment) Act 2006 (hereinafter referred to as "the Amendment Act"), his right of appeal had not been taken away and, to the extent that the Commission placed reliance on the provisions of that Act, it had misdirected itself in law.
39. According to his submissions, it was inconceivable that Parliament would give the Commission powers of disciplinary control over police officers after the Amendment Act came into force and not retain the right of appeal granted by section 132 to such officers. Therefore, the Amendment Act had not taken away his right of appeal.
40. Consequentially, by serving the Claimant with the letter of dismissal on the 29<sup>th</sup> April 2009, a few hours before he attained his compulsory retirement age on the 30<sup>th</sup> April 2009, the Commission contravened his fundamental right to protection of the law as guaranteed by section 4(b) of the Constitution since it was not practicable for him to lodge an appeal within fourteen (14) days as stipulated by regulation 6 of the Public Service Appeal Board Regulations.
41. A fundamental factual underpinning to this submission is that the Claimant had good prospects of success on appeal if he had been permitted to lodge an appeal against the decision of the Commission because the certificate of conviction was not admitted into evidence before the Disciplinary Tribunal and was not served upon him as required by the Regulations.
42. Upon a careful review of the Claimant's affidavit, I have observed that at paragraph 15, he stated that in the month of August 2007 he appeared before the Disciplinary Tribunal to answer the disciplinary charge. According to him, he pleaded not guilty and evidence was then led by the prosecution and the defence. In December 2007, he received communication from the Commission notifying him that after considering the report of the Disciplinary Tribunal, it had found him guilty of the charge and inviting him to make representations in writing within two weeks regarding the sentence that should be imposed on him. However, the Claimant failed to make any such representations.
43. This version was contradicted, however, by Gloria Edwards Joseph in her affidavit. She stated, at paragraph 13, that on August 7, 2007 the Claimant appeared before the Disciplinary Tribunal and pleaded guilty. Thereafter, the Commission considered the report of the Disciplinary Tribunal in October 2007 and by letter dated 8<sup>th</sup> November

2007, the Claimant was notified of the decision of the Commission that he was found guilty of the disciplinary charge and he was invited to submit within 14 days any representations he wished to make regarding the penalty to be imposed upon him. This letter was served upon the Claimant personally on December 24, 2007 and he acknowledged receipt by signing a copy thereof.

44. It is significant that even though I granted permission to the Claimant to file and serve an affidavit in reply to the affidavit of the Defendant on or before the 21<sup>st</sup> April 2010, he did not file an affidavit in reply to challenge or dispute the evidence of Ms. Edwards Joseph on this issue. I am left therefore to choose between the Claimant's version and the Defendant's version of what transpired before the Disciplinary Tribunal.
45. On the totality of the evidence, I have come to the conclusion that the Defendant's version of events is more credible for the following reasons:
  - (i) The Statement of charge and particulars of charge set out in the Commission's letter dated 9<sup>th</sup> March 2007 set out clearly and accurately the facts concerning the conviction of the Claimant and the dismissal of his appeal. According to Ms. Edwards Joseph, this letter was served upon the Claimant on the 8<sup>th</sup> May 2007 but he refused to sign a copy acknowledging receipt of same. This has not been contradicted or denied by the Claimant;
  - (ii) The Defendant says that the Claimant pleaded guilty to the charge at the hearing before the Disciplinary Tribunal on August 7, 2007 and the Claimant has not contradicted or denied this;
  - (iii) The Claimant did not in his affidavit state that at the hearing before the Disciplinary Tribunal he raised any issue concerning the service of the certificate of conviction upon him or the production of that certificate at the hearing. In my opinion, this is consistent with the Claimant pleading guilty to the charge since he very well knew that he had been convicted of the criminal offence;
  - (iv) When the Claimant was notified by the Commission that he had been found guilty of the charge, he was given an opportunity to make representations concerning the penalty to be imposed upon him. He made no such representation and he did not at any time between December 24, 2007 (when he was notified that he was found guilty of the charge) and April 2009 (when he received the letter of dismissal) complain to the Commission about the

failure of the Disciplinary Tribunal to provide him with a copy of the certificate of conviction or to produce same at the hearing.

46. Accordingly, I believe that the Claimant pleaded guilty before the Disciplinary Tribunal and that he would not have had any valid grounds of appeal against his conviction or the penalty imposed upon him, as alleged. In those circumstances, I consider that there is no merit in the Claimant's argument that the Commission by its delivery of the letter of dismissal on April 29, 2009 deprived him of his right of appeal and/or contravened his fundamental right to protection of the law.
47. In the circumstances, the Claimant's entire argument as to the legal effect of the Constitution (Amendment) Act 2006 upon his right of appeal as conferred by section 132 of the Constitution is rendered academic and I decline to express any opinion thereon.

**Disposition**

48. Accordingly, the Claimant's claim for judicial review is hereby dismissed with costs to be paid by the Claimant to the Defendant and I will hear submissions from the parties on the assessment of those costs.

Dated this 23<sup>rd</sup> day of May, 2011.

André des Vignes  
Judge