

**TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**H.C.A. 1002 OF 2004**

**ANTHONY LEACH**

**APPLICANT**

**AND**

**PUBLIC SERVICE COMMISSION**

**RESPONDENT**

**BEFORE THE HONOURABLE MADAM JUSTICE JUDITH JONES**

**Appearances:**

**Mr. Anand Ramlogan instructed by Mr. Lallbharry for the Applicant.  
Ms. Nadine Nabbie for the Respondent.**

**JUDGMENT**

1. By an application for judicial review dated the 28<sup>th</sup> May 2004 the Applicant, Anthony Leach, a Prison officer (hereinafter called “the Applicant”) was granted leave to seek the following relief against the Public Service Commission (hereinafter called “the PSC”):

- (i) A declaration that the suspension of the Applicant for a period of over 4 years without the preferment of any charge is illegal unreasonable and unfair and/or amounts to a punishment without the invocation of any disciplinary procedure;

- (ii) A declaration that there has been unreasonable delay on the part of the PSC in making a decision as to whether the Applicant should be charged with a offence pursuant to its statutory power under regulation 90(6);
- (iii) A further declaration that it would be an abuse of process and/or unfair to charge the Applicant now or at any time in the future in the light of more than four years that has elapsed because of the inaction of the PSC;
- (iv) An order of Mandamus directing the PSC to reinstate the Applicant into the prison service because there is no lawful basis for his continued indefinite suspension;
- (v) A declaration that the Applicant has been untreated illegally and/or unfairly contrary to the principles of natural justice;
- (vi) Costs, and
- (vii) Such further and/or other relief, orders, directions or writs as the Court might consider just and/or appropriate as the circumstances of the case warrants.

2. On the 21<sup>st</sup> June 2004 particulars of charges dated the 28<sup>th</sup> May 2004 were served on the Applicant. On the 24<sup>th</sup> November 2004 leave was given to the Applicant to amend his statement to seek an Order of Certiorari to quash the decision of the PSC to prefer the said disciplinary charges.

## **Facts**

3. The salient facts are by and large not in dispute.
  - (i) The Applicant is a prison officer and has been so for the past 29 years. He now holds the rank of Prison Officer II in the prison service he having passed the promotion examination in order to achieve this rank in the year 1995.
  - (ii) The next rank in line for the Applicant is Prison Supervisor. In order to achieve this rank the Applicant would have to apply for promotion as well as pass an examination.
  - (iii) The last promotion for officers holding the rank of Prison Officer to the rank of Prison Supervisor was in the year 1991
  - (iv) The last promotion examination for the post of Prison Supervisor was held in March 2003.
  - (v) The Applicant did not participate in the examination.
  - (vi) Information as to the holding of promotion examinations is given by way of general orders addressed to all members of the prison service.
  - (vii) By a letter dated and received by the Applicant on the 6<sup>th</sup> April 2000 the Applicant was advised by the Supervisor of Prisons of that supervisor's appointment as an investigating officer into an inquiry into the circumstances surrounding the escape of three condemned prisoners from "C2 condemn division Port of Spain Prison" at approximately 12.15 am on April 6<sup>th</sup> 2000. By the letter the Applicant

was requested to submit a statement on the incident within (7) days of receipt of the letter.

(viii) On the same day the Applicant gave a statement to the said Supervisor of Prisons.

(ix) On the 7<sup>th</sup> April 2000 the Applicant was suspended from duty by the Commissioner of Prisons pursuant to the powers delegated to him by the PSC under section 127 (1)(b) of the Constitution and pursuant to regulation 88 (1) of the Public Service Regulations (hereinafter called “the Regulations”). The letter required that the Applicant comply with certain directions which prevented him from leaving the country and included his reporting to the Prison Supervisor at the Port of Spain Prison every Tuesday at 9am for instructions.

(x) The letter also advised as follows:

“It has been reported to me that you Anthony Leach, Prison Officer II, No. 1073 stationed at Port of Spain Prison and rostered for duty as Officer-in-Charge of the night duty from 9:00pm on Wednesday to 6am Thursday April 6<sup>th</sup> 2000 were negligent in the performance of your duty.

That is to say, that between the hours of 9:00 pm on Wednesday, April 5 2000 and 12:30 a.m. on Thursday April 6 2000 while performing the duties of Officer- in- Charge of the night duty at the Port of Spain Prison you failed to make periodic visits to the officers posted at the Condemn C2 Division or visit the inmates therein and thereafter make

and sign the necessary entries in the relevant Occurrence Book, thereby contributing to the escape of Condemned Prisoners Francis Mansingh, Vijai Mungroo and Steve Mungroo and the attempted escape of Condemned Prisoner Noel Seepersad from the Port of Spain Prison some time between the hours of 10.00pm on Wednesday, April 5<sup>th</sup> and 12:30 am on Thursday April 6 2000.”

- (xi) On or about the 8<sup>th</sup> August 2000 the Applicant received a letter from Mr. Justin Bowen, Divisional Fire Officer (hereinafter called “the Investigating Officer”) dated the 20<sup>th</sup> July 2000 advising of his appointment as investigating officer to investigate the following allegation:
- “That you Prison Officer II #1073 Anthony Leach, committed an act of misconduct which resulted in the escape of prisoners from the Port of Spain Prisons on 6<sup>th</sup> April 2000.”
- (xii) The Investigating Officer sought and was granted two extensions of time to complete his investigations. His report was received by the PSC, Discipline Division on the 20<sup>th</sup> September 2000.
- (xiii) On the 22<sup>nd</sup> September 2000 the report of the Investigating Officer was sent by the Discipline Section of the PSC to the Legal Section of the PSC for their advice.
- (xiv) By a letter dated the 26<sup>th</sup> April 2004 the Applicant wrote to the Chairman of the PSC enquiring as to the status of the matter. To date there has been no reply to this letter.

- (xv) On the 6<sup>th</sup> May 2004 the Legal Section referred their advice and the drafted charges to the Discipline Section of the PSC.
- (xvi) The PSC met on the 21<sup>st</sup> May 2004 and took a decision to prefer charges against the Applicant.
- (xvii) By a letter dated the 28<sup>th</sup> May 2004, the same date as the filing of the instant application, the PCS preferred four charges against the Applicant. Save as to the differences in the name of the prisoners and in the case of the prisoner Seepersad a reference to his attempted escape the charges are all in the following terms:

“STATEMENT OF CHARGE

“NEGLECT OF DUTY” contrary to Regulation 20(2) (d) (ii) of the Prison Service (Code of Conduct) Regulations, 1990.

PARTICULARS OF CHARGE

That you No.1073 Prisons Officer II Anthony Leach on the night of 5<sup>th</sup> April 2000, at the Port of Spain Prison, by carelessness or neglect contributed to the escape of prisoner Francis Mansingh”

- (xviii) These charges were served on the Applicant on the 21<sup>st</sup> June 2004.

- 4. The facts set out at paragraphs 10 to 15 above were unknown to the Applicant at the time of the filing of the application. The fact set out at paragraph 16 had not occurred at the time of his filing these proceedings and it is unclear whether the Applicant knew of the promotion examination as set out in paragraph 3.

5. In support of his application the Applicant says that he has suffered mental anguish and stress from the continued suspension without the preferment of charges. He says that the likelihood is that by the time the charges are heard he would be nearing retirement, he being aged 52 years and the compulsory retirement age being 55 years. He says, as well, that the fact of his suspension has meant that he has lost the benefit of acting appointments, training courses and promotions.

6. In justification of the delay the PSC pleads lack of proper staffing of their Legal Section. Detailed particulars are given as to the duties performed by the section, their staffing problems from 1996 and the number of pending files. According to the PSC in 2004 temporary posts were created to deal with the backlog of files and in March and April of that year three temporary legal officers joined the Legal Section. According to the PSC there are two tribunals hearing disciplinary matters and the Applicant's matter has not as yet been referred to either of them. It is anticipated that this would be done in three to six months.

**Submissions.**

7. The submissions made on behalf of the Applicant simply put are:
  - (i) The Regulations provide strict time limits for the bringing of disciplinary proceedings and the PSC has breached these time frames;

- (ii) The fact that the PSC failed to prefer charges against the Applicant for some four years during which time the Applicant remained on suspension amounted to an abuse of process.
- (iii) The fact that the Applicant was on suspension for such a long period of time made the suspension itself unlawful and a penalty.

According to Counsel for the Applicant the combined effect of these illegalities is to entitle the Applicant to the relief sought.

8. In response to the Applicant's claims the PSC says:
- (i) There is no right to a speedy trial in our jurisdiction;
  - (ii) Delay is only relevant if the Applicant can show that he is unable to get a fair hearing before the disciplinary tribunal;
  - (iii) In any event the Courts must have regard to the constraints imposed by harsh economic reality and local conditions;
  - (iv) The judicial relief procedure should not have been used since the Applicant has an alternate remedy namely to make the submissions before the disciplinary tribunal;
  - (v) In any event the Applicant has not shown that he has been prejudiced in any way by the failure to prefer the charges promptly, and
  - (vi) The Court is not entitled to usurp the function of the PSC and in the circumstances the relief of mandamus is not open to the Applicant.



The Court can merely direct the PSC to reconsider its decision to charge the Applicant.

9. With regard to the submission of no prejudice to the Applicant, according to the PSC, there is ongoing development courses for senior prison officers and if reinstated the Applicant will be given the opportunity to attend. With respect to the Applicant's claim as to loss of promotion opportunities, the PSC says that his suspension did not prevent the Applicant from writing the promotion examinations knowledge of which he would have obtained from the general orders which were available to him on request.

**The Public Service Regulations.**

10. Regulation 90 of the Regulations provides, so far as is material to this case, as follows:

- (i) Where a report or allegation of misconduct is received the Permanent Secretary or Head of Department shall report the matter to the Director for the information of the Commission and shall concurrently warn the officer in writing of the allegation and shall forthwith refer the matter to an investigating officer appointed by him.
- (ii) The investigating officer shall within 3 days of his appointment, give the officer written notice specifying the time not exceeding seven days from the date of the receipt of such notice within which he may, in writing give an explanation.
- (iii) The investigating officer shall require all those persons who have direct knowledge of the alleged indiscipline or misconduct to make

written statements within 7 days for the information of the Commission.

- (iv) The investigating officer shall, with all possible dispatch but not later than 30 days from the date of his appointment forward to the Commission for the information of the Commission, the original statements and all relevant documents together with his own report.
- (v) Where the Commission considers that the circumstances warrant an extension of time the period referred to above may be extended for a period not exceeding 30 days.
- (vi) The Commission after considering the report and any explanation given by the officer in writing shall decide whether the officer shall be charged with an offence and if the Commission so decides shall as soon as possible cause the officer to be informed in writing of the charge together with such particulars as shall leave the officer under no misapprehension as to the precise nature of the allegations on which the charge is based.

11. Once the investigating officer is appointed therefore he has a maximum of 60 days to send his report together with all the relevant documents to the PSC. The Regulations provide no time frame within which the PSC must consider the report and any other documents provided to it by the Investigating Officer and decide whether or not to prefer charges. Once a decision is made however the PSC “shall as soon as possible” cause the officer to be informed of the charge

together with such particulars as shall leave the officer under no misapprehension as to the precise nature of the allegations on which the charge is based.

12. With respect to the clear time frames set by the Regulations therefore it is clear that in the instant case the investigating officer exceeded the time allowed him by at least two days. After making their decision the PSC took one month to inform the Applicant of the charges preferred against him.

**Delay.**

13. In the case of **Hubert Charles v The Judicial and Legal Service Commission and The Disciplinary Tribunal. Privy Council Appeal No. 26 of 2001** the investigators report was submitted some two months outside the required time limit. In coming to their decision their lordships noted at paragraph 17 that

“the delays were in good faith, they were not lengthy and they were entirely understandable. The appellant suffered no material prejudice; no fair trial considerations were or could have been raised and no fundamental human rights are in issue”.

and came to the conclusion that

“Bearing in mind the relevant aspects of regulation 90 and its regulatory environment, and the other relevant circumstances of the case, including the lack of significant impact of the time defaults on the appellant, their Lordships came to the clear view that the regulations cannot have been framed with the intention that breaches of the kind in issue would deprive the Commission of jurisdiction to act as it thought fit on the

investigating officer's report and thereby fulfill its public responsibilities.”

Paragraph 18 of the judgment.

14. In the circumstances I am of the view that the breach in the time frame provided by the Regulations for the Investigating Officer to submit its report or the fact that the PSC took one month to inform the Applicant of its decision are in themselves not sufficient reasons to challenge the decision of the PSC.

15. It is in my view the fact that the PSC took over three years from the receipt of the report of the Investigating Officer and the effect of that on the time taken to prefer the charges against the Applicant which must now engage the consideration of the Court.

16. The brunt of the submissions made on behalf of the PSC centered on the cases dealing with the right to a speedy trial and the acknowledgment by the Courts of the need to give consideration “to past and current problems which affect the administration of justice”. In this regard Counsel referred the Court to the cases of **Bell v Director of Public Prosecutions (1985) 32 WIR 317; Director of Public Prosecutions and Another v Jaikaran Tokai and Others (1994) 48 WIR376** and **Sieuraj Sookermany v Director of Public Prosecutions (1996) 48 WIR 346** all cases arising out of the criminal jurisdiction of the court.

17. It is accepted that the constitution of Trinidad and Tobago, unlike that of Jamaica and other jurisdictions, does not provide for the right of speedy trial but rather for a fair trial. That said, the issue of delay remains important when considering the question of the fairness of a trial.

18. In the case of **Sookermany** the Court of Appeal held that the common law did not itself confer a right to a trial within a reasonable time other than as incidental to the right to a fair trial. Accordingly, other than in exceptional circumstances, a Court should only order a permanent stay of criminal proceedings if satisfied that an accused suffered actual prejudice in his defense by reason of the delay and that such prejudice would not be remedied at the trial.

19. In his judgment de la Bastide C.J. accepted that the principles to be applied by the Court in determining whether a stay for delay should be granted included (a) the length of the delay; (b) the explanation for the delay; (c) the extent of the assertion by the accused person of his right to a speedy trial and (d) the actual prejudice to the accused person and went on to say:

“I wish to make one or two observations; heads (a) and (b) are obviously linked.

In **Bell’s case** and **Mungroo v R [1991] 1 WLR1351** the Privy Council, in dealing with the explanation for the delay, said that the nature of the delay must be weighed in the realistic social, economic and cultural circumstances of the jurisdiction involved. That the Courts must balance the fundamental right of the individual to a fair trial within a reasonable time against the public interest in the attainment of justice in the context of the prevailing local conditions. With these observations no one can quarrel. The question is for how long would the Courts accept lack of available resources and congested Court lists as an acceptable explanation for delay: not indefinitely.”

20. These cases all arise out of the criminal jurisdiction of the Court. The submission of Counsel for the Applicant is that insofar that they attempt to limit the Court's jurisdiction to make the orders sought they are not relevant to the instant case. According to him the Regulations form part of the contract of employment of the Applicant and as such must be strictly complied with. In support of this submission he referred to the case of **Regina v Chief Constable of the Merseyside Police, Ex Parte Calveley and Others [1986] 1 QB 424**. In that case there was a delay of over two years before serving the police officers with the notices of disciplinary action, the regulations there provided that the notices be served "as soon as practicable".

21. In that case, despite the fact that the officers had notice of the allegations made against them by virtue of there being earlier criminal proceedings brought against them, the delay of two years in serving them with the notices was held to be a serious departure from the regulations sufficient to entitle them to have the proceedings quashed. According to Sir John Donaldson M.R:

".....a police officer's submission to police disciplinary procedures is not unconditional. He agrees to and is bound by these procedures taking them as a whole. Just as his right of appeal is constrained by the requirement that he will give prompt notice of appeal, so he is not to be put in peril in respect of disciplinary, as contrasted with criminal, proceedings unless there is substantial compliance with the police disciplinary regulations."

22. While I accept the submission of Counsel for the Applicant with respect to the Applicant's terms and conditions of employment, there are two factors which need to be considered, and which, in the instant case, will serve to qualify the above statement of the law. The first is the decision of the Privy Council in the **Hubert Charles case** where it was demonstrated that minor breaches in time limits will not serve to vitiate the disciplinary proceedings. The second and more fundamental is the fact that the regulations do not provide a time frame for the making of the decision by the PSC.

23. In this regard I can do no more than go back to the judgment of de la Bastide CJ in the **Sookermany case** where he states:

“it has been said that in assessing whether a person's rights have been infringed by the delay in trying him on a criminal charge the touchstone is fairness.”

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and the statements quoted earlier from the **Hubert Charles case** and ask the questions: Were these delays in good faith? Were they lengthy? Were they entirely understandable? Did the Applicant suffer material prejudice? Are there any fair trial considerations or fundamental human rights in issue? These must, in my opinion, be the questions for the court in circumstances like these. At the end of the day what this Court is called upon to determine is whether in all the circumstances it is fair, given the delay of over four years between the institution of the disciplinary procedure and the preferring of the charges, to allow the disciplinary proceedings to continue. It is in dealing with this question of fairness

that both the reasons for the delay given by the P.S.C. and the prejudice suffered by the Applicant are relevant.

24. Attorney for the PSC submits that there is no evidence of prejudice to the Applicant. I do not accept this submission. At the very least the Applicant has lost the opportunity for promotion. The suggestion that while on suspension the Applicant had a responsibility to request general orders to ascertain whether any promotion examinations were to be held, is to my mind, preposterous, particularly in the light of the fact that the last time such an examination was held was in the year 1991. Further, despite the fact that there is no positive averment by the Applicant that he would be prejudiced in the presentation of his defense, I am of the view that I can take this factor into consideration. The fact that for the first time, some four years after the incident the Applicant is now being informed of the charges that he is called upon to answer must affect his ability to properly defend himself. What is the likelihood of his at this stage being able to marshal witnesses or evidence favourable to him?

25. The reasons given by the PSC for the delay cannot to my mind be acceptable. It cannot be reasonable for any public body, what ever its staffing situation, to take over three years to advise on whether or not to pursue disciplinary action against an officer and to draft charges. This is even more unacceptable when one looks at the charges as drafted.

26. The Regulations provide that the P.S.C. shall cause the officer to be informed in writing of the charge “together with such particulars as shall leave the officer under no misapprehension as to the precise nature of the allegations on



which the charge is based”. It is to be assumed that it is precisely for that reason the PSC found it necessary to refer the investigators report to its Legal Section for advice and to draft the necessary disciplinary charges. An examination of the charges as laid show that they are vague and lack the particularity required by the Regulations. The question as to whether these charges can in fact be considered charges pursuant to regulation 90(6) has not been canvassed before me and I make no finding in that regard. Suffice it to say that it seems to me to be an arguable point.

27. While I have no reason to doubt the excuses put forward by the PSC for its failure to formulate the charges within a reasonable time, I am not satisfied with the reasons given to my mind they do not justify the length of time that the Applicant has been left in suspense, on suspension and with the added duty of reporting to the Prison Supervisor on duty at the Port of Spain Prison every Tuesday “for instructions”. Far less the prejudice he must suffer in the preparation of his defense.

28. In the circumstances I find that the failure of the PSC take a decision with respect to the bringing of disciplinary charges against the Applicant for a period of over four years from the commencement of the investigation constitutes an abuse of process. I find that it has caused prejudice to the Applicant in the presentation of his defense and generally, and affects his ability to get a fair hearing before any disciplinary tribunal which may be appointed to hear the charges.

### **Alternate Remedy**

29. It is trite law that the judicial review jurisdiction will not normally be exercised where there is an alternate remedy available. In the instant case Counsel for the PSC submits that it is at this stage open to the Applicant to raise all the submissions made before me at the disciplinary hearing. Whereas there is no doubt that this is possible the difficulty with this argument is that at the time these proceedings were brought no charges had as yet been brought against the Applicant. There would, therefore, have been no other forum open to the Applicant to air these issues.

30. In **Caverley's case** in dealing with this issue Sir John Donaldson MR at page 433 letter F referred to a statement of Glidewell LJ in **Ex parte Waldron [1985] 3 WLR1090 at page 1108** where he stated:

“Whether the alternative remedy will resolve the question at issue fully and directly; whether the statutory procedure would be quicker, or slower than procedure by way of judicial review; whether the matter depends on some particular or technical knowledge which is more readily available to the alternative appellate body these are amongst the matters which a Court should take into account when deciding whether to grant relief by judicial review when an alternate remedy is available.”

31. In the case at hand if nothing else is clear it is that the alternate remedy will not be quicker. It took over three years for the Legal Section to draft the charges. According to the Director of Personnel Administration there are two functioning Tribunals and they are at present referring only urgent matters to the

Tribunals. There is no evidence whether in the scheme of things as applies at the PSC this matter is deemed urgent. I dare say, given its history, it is not. The Director anticipates that it would take another three to six months for this matter to be referred to a Tribunal. A grim situation indeed, and not one for which all the blame can legitimately be placed at the feet of the PSC. There is no telling when this matter will be likely to be heard by a disciplinary tribunal. The Director of Personnel Administration does not even attempt to hazard a guess.

32. In all the circumstances of this case I am of the view that the alternative remedy will not resolve the issue at hand nearly as quickly as the judicial relief procedure neither will it be anywhere so convenient, beneficial or effectual as these proceedings.

### **Orders**

33. In all the circumstances of the case and given my finding that there has been an abuse of the process by the PSC it is to my mind not necessary to make the declaration sought with respect to the effect of the suspension suffice it to say the I have read the judgment of Justice Gobin in the case of **Felix Augustus Durity v the Attorney General of Trinidad and Tobago. HCA No 569 of 1997** and note that in the instant case not only was the suspension longer but the conditions imposed by the suspension more onerous. Accordingly I make the following declarations and orders:

- (i) A declaration that there has been unreasonable delay on the part of the Public Service Commission in making a decision as to whether the

Applicant should be charged with an offence pursuant to its statutory power under regulation 90(6) of the Public Service Regulations;

- (ii) A declaration that it is an abuse of process and/ unfair to charge the Applicant now or any time in the future in the light of the more that four years that has elapsed because of the inaction of the Public Service Commission; and
- (iii) An order of Certiori quashing the decision of the Public Service Commission to prefer disciplinary charges by way of a letter dated 28<sup>th</sup> May 2004.
- (iv) The Public Service Commission is to pay the Applicant's costs.

Dated this 14<sup>th</sup> day of February 2005

.....  
Judith A. D. Jones  
Judge