

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CLAIM CV2008-01072

BETWEEN

CHESTER PRECILLA

CLAIMANT

And

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

DEFENDANT

Before The Honourable Mr. Justice Stollmeyer

Appearances:

Mr. K. Thompson for the Claimant

Mr. R. Martineau SC, Ms. R. Ali and Mr. S. Alsaran for the Defendant

JUDGMENT

The Claimant seeks certain relief by way of a constitutional motion.

First, he seeks a declaration that the Public Service Commission will contravene his rights to the protection of the law and his right to fundamental justice and to a fair hearing guaranteed to him under Sections 4(b) and 5(2)(e) of the Constitution if it considers a report of a disciplinary tribunal making a finding of guilt on the part of the Claimant.

Second, he seeks a declaration that the combined and cumulative effect of the Public Service Commission exercising its powers under Regulations 90, 95, 101, 106 and 107 of the Public Service Commission Regulations is a contravention of his aforesaid rights and is contrary to the rules of natural justice.

Third, he seeks a declaration that Regulation 101 is unconstitutional, void and of no effect since it is inconsistent with Sections 4(b) and 5(2)(e) of the Constitution.

He also seeks an order quashing the said charges and monetary compensation.

The Background

The evidence is set out in the affidavits filed on behalf of the parties. There was no cross-examination and all submissions were in writing.

The Claimant is a Prisons Officer I. It is alleged that while on duty on November 4, 2005 he committed five acts of discreditable conduct contrary to Regulation 20 (2) (a) (i) of the Prison Service (Code of Conduct) Regulations, 1990, and one act of trafficking contrary to Regulation 20 (2) (j) of the said Regulations.

The Commissioner of Prisons dispatched a memorandum dated November 8, 2005 to the Director of Personnel Administration (DPA). That memorandum informed the DPA of the allegations against the Claimant and referred the matter for investigation and disciplinary action. It also recommended that the Claimant be suspended from active duty pending the outcome of the matter.

The Claimant was then informed of the allegations by way of a letter dated November 21, 2005. That letter also notified the Claimant that Mr. Gerald Thompson, Foreign Service Officer IV, Ministry of Foreign Affairs, had been appointed to investigate the matter. A separate letter of the same date informed the Claimant of his suspension. Because of his inability to conduct the investigation, Mr. Thompson's appointment was subsequently rescinded and Mr. Kenrick Martin, Assistant Superintendent of Prisons, was appointed in his place on June 6, 2006.

Mr. Martin submitted his report to the Commissioner of Prisons and charges were proffered against the Claimant on November 27, 2006. The Claimant was informed of the specifics by way of a letter and was invited to answer the said charges in writing. He denied the charges by way of a letter dated January 2, 2007.

The Commission then appointed a three-man tribunal in accordance with regulation 89 of the Public Service Commission Regulations, Chapter 1:01 to hear evidence and unearth the facts in respect of the matter, and the Claimant was informed of this by a letter dated January 12, 2007. The Claimant's Attorney then wrote the Chairman of the Commission on November 14, 2007 requesting that the charges be withdrawn, but the DPA informed the Attorney that the tribunal would proceed with the hearing and would be guided by Chapter VIII of the Public Service Commission Regulations.

Hearing was to commence on March 26, 2008. This claim was filed on that day.

The Constitution

Section 4(b) of the Constitution guarantees the fundamental right of the individual to equality before the law and the protection of the law.

Section 5(2)(e) provides that parliament may not (without prejudice to the provisions of Section 5(1)) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of rights and obligations.

The Claimant's Submissions

The Claimant puts forward first that the Public Service Commission ("PSC") is a creature of statute under the provisions of Section 120 of the Constitution.

Second, the rights and freedoms under Sections 4 and 5 are binding on the PSC.

Third, the regulations are not individually (my emphasis) *ultra vires* and unconstitutional, but their combined and cumulative effect make them so. What offends the provisions of the Constitution is the collective exercise by the PSC of its powers under the Regulations to charge, appoint the disciplinary tribunal, decide the guilt of the Claimant; and impose a penalty upon him. This makes the PSC both prosecutor and judge.

The Claimant relies on the decisions in *Findlay v. The United Kingdom* TLR 27th February 1997; *Hood v. The United Kingdom* TLR 11th March 1999; and *Cable v. The United Kingdom* TLR 11th March 1999 in support of these submissions.

As to the provisions of Regulation 101, the Claimant submits that it came into existence for the protection of prisons officers and other public servants facing disciplinary charges from being convicted on the basis of tenuous evidence.

In its original form Regulation 101 provided that the standard of proof in disciplinary proceedings is to be that required in a court of law in criminal cases *i.e.* beyond a reasonable doubt. By Legal Notice No. 28 of 1991 this Regulation was amended to provide that the standard of proof required is to be that required in civil cases *i.e.* on a balance of probabilities. The submission is that this amendment "further contravened" a prisons officer's fundamental right to protection of the law and a fair hearing on the basis that it collides with Sections 4(b) and 5(2)(e) of the Constitution and is therefore unconstitutional.

Further, it is submitted on behalf of the Claimant that the standard of proof is in any event to be the criminal standard. He relies on the decisions in *Hamlet v. Campbell* [2005] 66 WIR 346 and *In re. a Solicitor* [1993] QB 69.

The Claimant raises no issue as to whether the PSC has the authority to amend its own procedure. The Defendant, however, submits that the PSC does have the power to do so under the provisions of Section 129 of the Constitution and Section 45 of the *Interpretation Act* Chap. 3:01. I accept this.

The Defendant's Submissions

The Defendant further submits that the power to amend includes reducing the standard of proof on the basis that an inability to do so would make a mockery of the provisions of Section 129. Consequently, the amendment having been made it must be applied. The Defendant refers first to the decision in *O'Connell v. Palmer* 53 FCR 429 where it was held that the correct standard of proof to be applied in disciplinary proceedings was the civil standard, the Australian Federal Police (Discipline) Regulations 1979 having been amended to the same effect as Regulation 101. The Defendant also refers to the decision in *Butt v. HM Customs and Excise* [2001] EWHC 1066 (Admin) which held that where the standard of proof is prescribed it must be applied.

As to the PSC acting as "prosecutor and judge", the Defendant submits that the Regulations are explicit in separating between different persons the different functions in the disciplinary process.

First, the investigating officer is appointed by the Permanent Secretary or the Head of Department (Regulation 90 (1)). Second, the investigating officer's function is to investigate the allegation of misconduct (see again, Regulation 90). The investigating officer is required to make enquires of persons having direct knowledge of the alleged indiscipline or misconduct and to have them make written statements for the information of the PSC. Those statements, together with all relevant documents and the report of the investigating officer, are forwarded to the PSC.

The Commission considers the report of the investigating officer as well as any explanation given by the person against whom the allegation is made, and decides whether that person should be charged with an offence. If a decision is made to do so, the Commission is to so inform him in writing giving particulars of the charge. If the person against whom the allegation has been made admits guilt to the investigating officer the PSC may determine the penalty to be awarded without further enquiry.

If there has been no admission of guilt and a person is charged with an offence, then the PSC may appoint a disciplinary tribunal to hear the evidence and find the facts (Regulation 95 (1)). The disciplinary tribunal is to hear the evidence, find the facts and make a report to the PSC containing its findings of fact and an expression of its opinion as to the meaning and value of the facts found, together with the record of the proceedings (see Regulations 96 and 102). Regulation 98 sets out the procedure for hearings before the disciplinary tribunal. Those provisions afford the person charged with the offence the opportunity to be heard fully and fairly.

While proceedings thereafter might continue in alternative forms, the report of the findings of fact by a disciplinary tribunal is ultimately laid before the PSC so that the latter can consider the report and, having done so, either exonerate the person; dismiss the person; or impose some other penalty specified in Regulation 110(1) (see Regulation 107). If an adverse finding is made against the person he is to be informed of his right to apply for a review in accordance with the provisions of Regulations 115 and following.

It is to be noted that by the provisions of Regulations 111-114 the disciplinary proceedings are expressly distinguished from criminal proceedings.

The Standard of Proof

The Claimant submits that the required standard is the criminal standard on two bases. The first is that in the absence of any prescribed standard the decisions in *Campbell v. Hamlet* and *In re: A Solicitor* set out that it is to be the criminal standard. The second is that the amendment to Regulation 101 (replacing the criminal standard with the civil standard) contravenes his constitutional rights.

As to the first of these bases the Defendant refers me to *R v. Hampshire County Council Ex parte Ellerton* [1985] 1AER 599; *R v. The Securities and Futures Authority Limited & Ors. Ex parte Bertrand Fleurose* [2001] EWHC 292 (Admin) and *Wickramsinghe v. United Kingdom* [1998] EHRLR 338 in support of its submission that the standard of proof is that in civil cases. The Defendant seeks to distinguish the decisions in *Campbell v. Hamlet* and *In re: A Solicitor* on the basis that there was no prescribed standard of proof in either case, unlike the present claim.

In re: A Solicitor it was said (at page 82C) that "It would be anomalous if the two branches of the profession were to apply different standards in their disciplinary proceedings", the Code of Conduct of the Bar of England and Wales prescribing the criminal standard. This decision was applied by the Privy Council in deciding *Campbell v. Hamlet*, an appeal from this jurisdiction where no standard of proof is prescribed in disciplinary proceedings against Attorneys-at-Law.

The development of the law as to the standard of proof was described by Mitting J. as "tortuous" in *R. v. Hayman* [2008] EWHC 2191 (Admin), referring to previous decisions on this issue. He traces briefly the development of the law from *In re H* [1996] AC 563; *In re: B* [2008] UKHL 35; to *In re: Doherty* [2008] UKHL 33 to notes that the present position appears to be as set out by Carswell LJ at paras. 27 and 28 of *In re: Doherty*. In brief, the present position appears to be that "Although there is a single civil *standard* of proof on the balance of

probabilities, it is flexible in its *application*. In particular, the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a Court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities". Carswell LJ adds one small qualification to this which is that the standard is itself finite and unvarying. Individual situations "... do not require a different standard of proof or a specially cogent standard of evidence, merely appropriately careful consideration by the tribunal before it is satisfied of the matter which has to be established".

The standard of proof in disciplinary proceedings is therefore to be the civil standard *i.e.* on a balance of probabilities and I come to this conclusion having kept in mind the difficulties expressed by Brown LJ at paras. 45-49 of *In re: Doherty* (it is to be noted that he gave the judgment in *Campbell v. Hamlet*) where he questions "...whether it would not have been more logical and appropriate to have decided that the making of the various orders calls for the criminal standard of proof to be satisfied in the first place...that there is no such thing as an intermediate standard of proof, [so that] logic surely demanded that one standard or the other be applied and common sense dictates the rest".

The upshot of all this is that as a general rule where disciplinary proceedings are concerned the standard of proof is that of a balance of probabilities. As an exception to this general rule the standard in disciplinary proceedings involving Solicitors and Barristers in England and Wales, as well as Attorneys-at-Law in Trinidad and Tobago, is that of being beyond a reasonable doubt.

As to the second of these bases the Claimant has not demonstrated, nor produced any authority to support his contention, that the amendment to Regulation 101 contravenes any of his rights under the Constitution. He has not demonstrated that his rights under Section 4(b) and/or 5(2)(e) of the Constitution have been contravened by the lowering of the standard of proof or, expressed differently, that he is entitled in some way to have the proceedings against him decided upon the basis of the standard of proof in criminal cases. His entitlement to equality before the law takes him no further than to be afforded the opportunity of having equally with all others the right of access to justice and to a fair hearing. Similarly, his right to the protection of the law is not met by him having the benefit of any particular standard of proof against him being satisfied. Neither the standard in civil cases nor the standard in criminal cases permit any matter involving him whether civil, quasi-criminal, or criminal, to be decided on the basis of tenuous evidence. In every instance the evidence against him must be satisfactory. Some might prefer to use the expression cogent, but it cannot be less than appropriate and satisfactory.

Further, there appears no doubt that the PSC can regulate its own procedure from time to time. No issue is raised that it cannot change the standard of proof required in disciplinary proceedings. The Defendant has put before me sufficient authority to persuade me that this can be done (see *O'Connell v. Palmer*) and that once there is a prescribed standard of proof, then that is the standard to be met (see *Butt v. HM Customs & Excise*).

I am therefore satisfied once again that the appropriate standard of proof is that applicable in civil cases.

The PSC as Prosecutor and Judge

I have set out the procedure to be adopted when an allegation is made against a public officer. There is no suggestion that the Regulations, and the procedures

they outline, have in some way been contravened. It is not argued that any of those Regulations (save for Regulation 101) are in any way a breach or infringement of the Claimant's constitutional rights. What is contended is that when taken collectively they result in a contravention of the rights afforded to an individual under Sections 4(b) and 5(2)(e) of the Constitution.

I do not agree. The duties and functions of the PSC, the disciplinary tribunal, and the investigating officer are separate and distinct from each other. It is correct to say that the PSC decides whether a person should be charged with an offence, but that decision is made on the basis of the independent investigation carried out by the investigating officer. It is also correct to say that the disciplinary tribunal is appointed by the PSC but, again, it is an independent tribunal that decides the issues of fact and reports to the PSC its findings of fact, as well as an expression of its opinion as to the meaning and value of the facts found. The PSC bases its decision on that report but none of this places the PSC in the dual roles of prosecutor and judge.

Further, the PSC was established by the Constitution and its authority and powers expressly set out there, as well as in the Regulations, include those of discipline. The Claimant has not demonstrated, nor produced any authority to support the contention, that either the establishment of the PSC or the Regulations of which he complains in this context, contravene his right to equality before the law and the protection of the law, nor how the Regulations deprive him of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of rights and obligations.

Consequently, the claim for a declaration that those rights have been contravened is dismissed.

Disposition

The claim is therefore dismissed. The Claimant will pay the Defendant's costs. Those costs are to be assessed on a detailed basis if not agreed by 15th December 2008. In the event that they are to be assessed, the detailed bill is to be filed together with supporting submissions and copies of authorities by 31st January 2009, and full written submissions in opposition together with copies of authorities are to be filed and served by 28th February 2009.

13th November 2008.

C.V.H. Stollmeyer
Judge