

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No: CV 2018-00495

BETWEEN

DEAN O'NEIL

Intended Claimant/Applicant

AND

THE AIRPORTS AUTHORITY OF TRINIDAD AND TOBAGO

Intended Defendant/Respondent

Before the Honourable Mme Justice Jacqueline Wilson

Appearances:

Ms. Leandrea Lutchman and Ms. Sherisse Walker for the Intended Claimant/ Applicant

Mr. Stefan Fabien for the Intended Defendant/Respondent

JUDGMENT

1. The Applicant seeks leave to apply for judicial review of the refusal by the Airports Authority of Trinidad and Tobago (the Authority) to reinstate him to his position as Estate Constable in circumstances where the conviction that gave rise to the termination of his employment has been set aside.
2. On 1 May 2018, the court dismissed the Applicant's application and gave oral reasons for the decision. The written reasons are now provided.

3. The Applicant was first employed as an Estate Constable with the Authority on 2 March 1998 under a two-year contract. The contract was renewed for successive periods until it was terminated in February 2007 due to the Applicant's conviction for assault occasioning actual bodily harm. The Applicant was found guilty of the offence on 29 January 2007 and was fined \$3000.00 and ordered to pay \$2000.00 as compensation. On 2 February 2007 he was suspended from duty as a result of the conviction and by letter dated 12 February 2007 his employment was terminated with effect from 3 February 2007.
4. On 17 July 2007 the Applicant's Attorneys wrote to the Authority advising that the conviction was subject to appeal. They alleged that the Authority had acted precipitately and unfairly in terminating the Applicant's employment while an appeal was pending and sought his immediate reinstatement. Contrary to the assertions in the letter, however, no appeal against the Applicant's conviction was in fact lodged until several years later in 2014.¹
5. On 19 November 2014 the Court of Appeal allowed the Applicant's appeal, set aside his conviction and sentence and ordered a retrial. The retrial took place on 23 February 2016 when the charges were dismissed.
6. On 15 March 2016 the Applicant's Attorneys issued a pre-action protocol letter to the Authority advising of the dismissal of the charges and asserting that the Applicant's summary dismissal while an appeal was pending was premature, illegal and unfair. Among other things, the Applicant sought damages for wrongful dismissal, loss of earnings and immediate reinstatement, failing which legal proceedings were threatened. The assertion that the Applicant was dismissed while an appeal against his conviction was pending was, once again, inaccurate.²
7. On 21 April 2016 the Authority responded to the pre-action protocol letter. The Authority stated that the Applicant's employment was terminated as a result of his

¹ See para. 10 of the Applicant's affidavit sworn on 7 February 2018.

² *Ibid.*, at para. 10

criminal conviction on 29 January 2007 and maintained that it was entitled to dismiss the Applicant “for cause” under the terms of his contract of employment. The Authority denied any prior knowledge of an appeal against the Applicant’s conviction.

8. The Applicant’s Attorneys issued further correspondence to the Authority on 16 August 2016, 7 March 2017 and 13 November 2017. The letters of 7 March and 13 November 2017 repeated the assertion that the Applicant’s employment was terminated pending the hearing of his appeal, while the letter of 13 November 2017 was also stated to be a pre-action protocol letter.
9. On 7 February 2018, the Applicant filed the present application for leave to apply for judicial review of the Authority’s refusal to reinstate him. The Applicant seeks the following relief:
 - i. An order of certiorari to quash the decision of the Authority to fail to reinstate the Applicant’s employment with the Authority;
 - ii. A declaration that the decision of the Authority was not in accordance with the principles of natural justice and/ or fairness;
 - iii. A declaration that the decision of the Authority was unreasonable, irregular and an improper exercise of discretion;
 - iv. An order of mandamus directing the Authority to reinstate the Applicant to his employment with the Authority;
 - v. An order remitting the matter to the Authority for re-consideration of the reinstatement of the Applicant to his employment with the Authority in accordance with the findings of this Court; and
 - vi. Damages for breach of the Applicant’s employment contract with the Authority.
10. The requirements for the grant of leave to apply for judicial review are well established. An Applicant must demonstrate that he has an arguable case with a realistic prospect of

success that is not subject to a discretionary bar such as delay or an alternative remedy: *Sharma v Browne Antoine* [2006] UKPC 57.

The Applicant's Submissions

11. In written submissions filed pursuant to directions of the court, Counsel for the Applicant contended that the termination of the Applicant's employment as a result of his conviction was in breach of the principles of natural justice as the Applicant was not afforded a genuine opportunity to address his conviction or to answer the case made out against him.
12. Counsel submitted that the Authority's refusal to reinstate the Applicant upon the dismissal of the criminal charges was unreasonable as the Authority's failed to take the relevant considerations for the proper exercise of its discretion into account.
13. Counsel argued that there was no alternative remedy available to the Applicant as he was not a precepted Estate Constable and was thereby not entitled to representation by the Estate Police Association and could not report a trade dispute to the Minister pursuant to section 51 of the Industrial Relations Act, Chapter 88:01.
14. Counsel contended that there was no issue as to delay, as the judicial review proceedings were instituted on 7 February 2018, within three (3) months of the pre-action protocol letter of 13 November 2017.

The Respondent's Submissions

15. The Authority was served with the proceedings and filed written submissions pursuant to directions of the court.
16. Counsel for the Authority objected to the grant of leave, asserting that there was an alternative remedy available to the Applicant and that there was undue delay in bringing the proceedings.

17. Counsel submitted that the Applicant's status as an unprecepted officer was not a bar to the reporting of a trade dispute by the Estate Police Association on behalf of the Applicant as the collective agreement between the Association and the Authority made no distinction between precepted and unprecepted estate police officers.
18. Counsel submitted that grounds for bringing the judicial review application first arose on 3 February 2007 when the Applicant was dismissed and that there was an eleven year delay by the Applicant in instituting the proceedings. Counsel argued that the Authority's refusal to reinstate the Applicant flowed from the decision to terminate his employment but did not alter the date on which the grounds for bringing judicial review proceedings first arose.
19. Counsel relied on the decision of the Court of Appeal in *Texaco Trinidad Inc v Oilfield Workers Trade Union Civ App No. 42 of 1969* where the issue for consideration was whether a trade dispute brought by the Oilfield Workers Trade Union on behalf of a worker employed with Texaco Trinidad Inc (the Company) was time-barred under the former Industrial Stabilisation Act, No. 8 of 1965 (the Act). The worker was charged with larceny and was dismissed on account of his unauthorized possession of company property. The criminal charges against him were subsequently dismissed and the Union sought to invoke the grievance procedure under the industrial agreement between the parties. The Company alleged that the grievance was time barred under section 16(2) of the Act, which provided that:

“A trade dispute may not be reported to the Minister if more than six months have elapsed since the issue giving rise to the dispute first arose, save that the Minister may, in any case where he considers it just, extend the time during which a dispute may be so reported to him.”

20. The Court of Appeal reasoned that:

“...In interpreting section 16(2) of the Act one must seek the “issue giving rise to the dispute” and note when it “first arose.”³

“...On the facts of this case the dispute would be the difference between (the worker) and the Company regarding the lawfulness of his dismissal. The issue out of which this dispute first arose would be the dismissal itself...On this interpretation of the word the original issue can never change...what can change is the nature of the dispute over the issue.”⁴

21. The Court of Appeal provided the following example to illustrate the point:

“An employer dismisses a workman in circumstances which the worker considers wrongful. He reports the matter to the union which takes it up with the employer. The employer denies that the dismissal is wrongful and negotiations begin under the prescribed grievance procedures. The dispute is then as to whether the dismissal was wrongful or not and this arises out of the dismissal. In the course of negotiations the employer concedes that the worker was wrongfully dismissed but resists reinstatement for which the union presses. The dispute then changes to one over reinstatement or compensation but the issue out of which it first arose remains the same – the worker’s dismissal. If the union gives way and agrees to accept compensation the dispute will then be as to the amount to be paid. If no agreement can be reached the dispute could be referred to the Minister. The issue out of which the dispute first arose still remains the dismissal of the workman. That is the issue out of which it first arose and it remains unchangeable. This interpretation also gives real meaning to the word “first” which was obviously intended to denote the very source of difference between the worker and the employer although the nature of the difference may have altered in the course of negotiation.”⁵

³ See p. 4

⁴ Ibid. at p. 5

⁵ Ibid, at p. 5

22. Counsel referred to the analogous provisions of section 11(1) of the Judicial Review Act Chap. 7:08 which provide that “an application for judicial review shall be made promptly and in any event within three months from the date when the grounds for the application first arose” and contended that the grounds for bringing judicial review proceedings first arose when the Applicant’s employment was terminated on 3 February 2007 and that no satisfactory explanation had been given for the eleven-year delay.
23. Counsel argued that the reinstatement of the Applicant without loss of income, benefits, emoluments and promotions as sought by him would be prejudicial to the good administration of the Authority and would prejudice the rights of other serving officers who had advanced over the Applicant during the intervening eleven-year period.
24. Counsel contended that under the Applicant’s contract of employment, the Authority was entitled to dismiss the Applicant on the basis of his criminal conviction as the contract allowed the Authority to summarily terminate the Applicant’s employment at any time and for any cause which justified summary termination.

Discussion and Analysis

25. As indicated above, the Applicant challenges the unfairness and unreasonableness of the Authority’s refusal to reinstate him to his position as Estate Constable having regard to the dismissal of the criminal charges that led to his termination. The Applicant does not challenge the Authority’s decision to terminate his employment, notwithstanding his allegation that the termination was unfair as he was not given a genuine opportunity to address the question of his conviction. Had the Applicant sought to challenge his termination, he would have been confronted immediately with the hurdle of explaining a delay of more than eleven years in bringing the proceedings, the termination having taken effect in February 2007.
26. I accept the submissions of Counsel for the Authority that the refusal to reinstate the Applicant cannot be considered independently of the decision to terminate his employment as the objective of the reinstatement is clearly to address the perceived

unfairness or unreasonableness of the termination itself. It therefore follows that, in order to mount a successful challenge to the Authority's refusal to reinstate him, the Applicant must first establish the impropriety of his termination. However, the Applicant has avoided any challenge whatsoever to the Authority's decision to terminate his employment while focusing exclusively on the refusal of reinstatement. In this regard, the Applicant may have attempted to escape the consequences of explaining the inordinate delay in bringing these proceedings some eleven years after his employment was terminated.

27. Further, the Applicant's evidence establishes that "dismissal for cause" was a term of his contract of employment with the Authority and that his employment was terminated on the basis of his conviction. In the absence of any challenge by the Applicant to the Authority's decision to terminate his employment or any evidence to support the unfairness or unreasonableness of the said decision, there is no reasonable prospect of the Applicant succeeding on his application to challenge the Authority's refusal to reinstate him.
28. Therefore, the Applicant has not demonstrated that he has an arguable case with a realistic prospect of success and has not satisfied the threshold requirements for the grant of leave to apply for judicial review.

Delay

29. Even if the Applicant were able to demonstrate that he has an arguable case with a realistic prospect of success, the inordinate and unexplained delay in bringing the proceedings would be a discretionary bar to the grant of relief.
30. I am unable to accept the argument of Counsel for the Applicant that the grounds for bringing an application in judicial review first arose when the pre-action protocol letter of 13 November 2017 was issued. This approach ignores the principle that such grounds exist when there is a legal basis on which the decision of a public authority is open to

challenge having regard to its unreasonableness, excess of jurisdiction, breach of the principles of natural justice or any other appropriate reason.⁶

31. Such grounds may exist long before an Applicant takes steps to act on them - whether by engaging in discussions and negotiations with the public authority or by invoking the pre-action protocol process or otherwise. The submissions of Counsel for the Applicant that the grounds for bringing the present proceedings crystallised when the pre-action protocol process was deployed in November 2017 are entirely without merit.
32. In the circumstances, the relevant delay by the Applicant in bringing these proceedings is in excess of eleven years. The inordinate and unexplained delay would serve as a bar to the grant of leave to apply for judicial review even if the Applicant could demonstrate that he had an arguable case with a realistic prospect of success.
33. It was for the above reasons that the Applicant's application was dismissed.

Dated this 22nd day of June 2018

Jacqueline Wilson
Judge

⁶ A list of grounds is set out in section 5(3) of the Judicial Review Act