

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Public Law Division

BETWEEN

2017/PUB/jrv/0008

POLICE CONSTABLE THEO SMITH

Applicant

AND

**PRESIDENT OF THE POLICE TRIBUNAL
CHIEF SUPERINTENDENT ISMELLA DAVIS (1)**

AND

THE COMMISSIONER OF POLICE (2)

Respondents

Before Hon. Mr Justice Ian Winder

Appearances: Maria Daxon for the Plaintiff
 Auderio Sears for the Respondents

7 February 2019 and 15 January 2020

RULING

WINDER, J

This is an application for judicial review of the decision.

1. The Applicant (Smith) brings this application for judicial review in the prescribed form as follows:

Judgment Order, Description or other relief sought

1. The decision of the Deputy Commissioner of Police Anthony Ferguson to lay charges against Constable 3472 Theo Smith on two (2) charges pursuant to Section 3(36) of the Police Disciplinary Regulations 1965, which is punishable under Section 62(2) of the Police Force Act 2009.
2. The decision of the Deputy Commissioner of Police acting for the Commissioner of Police and the President of the Police Tribunal Chief Superintendent Ismella Davis-Delancy to proceed to proffer a complaint against Constable 3472 Theo Smith contrary to Sections 78 to 81 of the Police Force Act 2009 and Sections 40 and 42 of the Police Service Commission Regulations 1970.

The grounds for this application are:-

1. Procedural Impropriety:
 - i) The Commissioner of Police breached the Fundamental rules of natural justice when he failed to follow procedure laid down by Statute to institute charges against the Applicant.
 - ii) The Commissioner of Police through his agents and/or servants breached the rules of natural justice when he failed to follow procedure to investigate procedure in complaints made against a police officer as laid by Statutes.
2. Irrationality:
 - i) The President of the Police Tribunal irrationally exercised her powers when she deliberately and/or failed to relevantly address the issue of complaints procedure in her ruling.
 - ii) The President of the Police Tribunal failed to address the provision of the Police Service Commission Regulations 1970 as it relates to the Applicant's right to respond to the Secretary of the Cabinet.

Order sought

1. An Order of certiorari to remove into this Honourable Court and quash the decisions of the Commissioner of Police and/or his servants to proffer complaint charges against the Applicant;
2. A Declaration that the purported Royal Bahamas Police Force laying of charges against the Applicant is unlawful, void, illegal and of no effect.
3. A Declaration that the Applicant's right to be treated fairly with due process and in accordance with the Constitution and the Rules of Natural Justice have been, and are being breached;

4. A Declaration that the Respondents have acted unfairly, arbitrarily, capriciously and abusive towards the Applicant;
5. An Order directing the Respondents to utilize the provisions of the 40(1) and 41 of the Police Service Commission Regulations 1970 and Sections 78 to 81 of the Police Force Act 2009;
6. An Order that there be a stay of proceedings in this matter affecting the Applicant.
7. Damages
8. Cost;
9. Such further or other relief as the Court deems just.

2. The application is supported by the affidavit of Smith, which is settled in part, as follows:

2. Between 5th September, 2016 and 14th October, 2016, two recruits informed me that they were forced to make reports of the incident against me by W/Sgt. 2305 Sweeting.
3. That sometime on the 14th October 2016, I went to see Inspector James and I received a CD4 and was formally informed that a complaint was made against me which was forwarded to the Complaints and Corruption Unit by the Dean of the Police College.
4. Inspector James then read the particulars of the charge and then I was interviewed. During the course of the interview, I answered the questions that I remembered, but refused to sign the interview form afterwards.
5. Inspector James informed me that if charges were going to be made, I will hear from them soon, but if not I won't hear from them; I don't need to worry about anything.
6. I did not hear anything about this matter until I received a summons at the Grove Police Station from Sgt. Clarke on the 14th of February 2017 I received a dispatched form from W/Ch. Supt. Davis, the Presiding Officer in my case, who informed me that she would see on the morning 16th of February 2017 at 10:00 a.m.
7. I thought that the matter was concluded as no charges were laid against me as of 24th December, 2016, which was six (6) months since the complaint was made.
- ...
11. According to Section 2(7) of the Police Disciplinary Regulations "using obscene, abusive, or insulting language towards any other member of the Police Force" is listed as a minor offense and not a major offense as listed on the charge sheet.
12. Further, according to Section 40(1) of the Police Service Commission Regulations 1970, the Director of Public Personnel or the Secretary to the Cabinet should have informed me in writing that my discharge was being recommended.

13. That I was supposed to be given an opportunity to reply to the said charges, but I was never given an opportunity to reply to these said charges.

...

18. I would like the Royal Bahamas Police Force to allow me to fulfil the requirements of Sections 78-81 of the Police Act 2009 and Sections 40-41 of the Police Service Commission Regulations 1970; and write to the Secretary to the Cabinet and the Director of Public Personnel in response to these charges.

3. The Respondent's evidential response is found in the affidavit of the 2nd Respondent Ismella Davis-Delancey, which provides in part as follows:

6. Upon receipt of a complaint, the aforesaid Branch investigates such complaint and advises the Commissioner of Police of any preliminary finding. Should preliminary investigations prove that the offence complained of is of a major nature in accordance with the provisions of the Police Disciplinary Regulations, the aforesaid Branch may charge the Officer with a major offence relative to the complaint. Upon charging an Officer with a major offence, the aforesaid Branch shall advise the Commissioner of Police of such charge.

7. During the course of the Complaints and Corruption Branch's investigation, the officer in question is called into the Branch and served with a CD4 Form containing the particulars of the complaint against him.

8. Upon service of the CD4 Form, the particulars of the complaint are read over to the Officer, and the officer is formally interviewed in relation to the same.

9. By virtue of the Police Force Act, 2009, the aforesaid Branch is mandated to complete every investigation of a complaint against a Police Officer within six (6) months from time when the matter of such complaint arose or within such greater period not exceeding one (1).

10. Once the Complaints and Corruption Branch lays a charge of a major offence against an Officer, the Commissioner of Police appoints either one or more Gazetted Police Officers (of or above the rank of Assistant Superintendent of Police) to form a Court of Enquiry to determine the charge laid against the Officer.

11. The charged Officer is then summoned to appear before the Court of Enquiry to answer to the charge laid against him.

12. At the start of the initial Hearing of the Officer's charge before the Court of Enquiry, the charges are read over to the Officer and a plea is solicited and recorded. The Officer is also furnished with a copy of any complaints and reports made against him in connection with the charges for determination.

...

17. The particulars of the charges against Constable 3472 Theo Smith were:

- I. That [he] on Friday 24th June, 2016, at about 8:00pm at the Police College Compound, Oaks (sic) Field, New Providence, did use obscene, abusive and insulting language towards a number of police recruits.
 - II. That [he] on Friday 24th June, 2016, at about 8:00pm at the Police College Compound, Oaks (sic) Field, New Providence, did drive a 1999 silver Honda vehicle in a reckless and dangerous manner in the area of the male dormitories, which is contrary to discipline, good order and guidance of the Force.
18. On or before Thursday, 16th February, 2017, Constable 3472 Theo Smith was aware of the charges laid against him, in addition to the informants of such information to which the charges referred.
4. Smith's case is that the Respondent failed to follow procedure relative discipline by which the police force is governed, including: The Constitution (Articles 119, 120, 121); Police Act 2009 (Sections 78 to 81) and Police Service Commission Regulations 1970 (Sections 40 to 43).
5. Smith's submissions, as outlined in his written submissions, are as follows:
21. In the instant case, the investigators are employed under the Respondent, the Police Tribunal are officers appointed by the Respondent, and the Police Services Commission are appointed by the Respondent meaning that all are answerable to the Respondent and thus the Applicant was unable to receive a fair assessment during the decision to institute charges and is unlikely to receive a fair trial.
 - ...
 25. The charges instituted against the Applicant was unlawful and the Deputy Commissioner of Police acted in excess of his authority by laying charges against the Applicant, which should have been ratified by the Secretary to the Cabinet, the Police Service Commission and the Governor General.
 26. The First Respondent through its agents and/or servants acted with extreme bias when it deliberately failed to do a thorough investigation in the complaint against the Applicant. Section 79-81 of the Police Act 2009 and Sections 40(1) and 41 of the Police Service Regulations 1970 was breached when the First Respondent exercised its duty failing to ensure the investigation was conducted impartially.
 27. The Second Respondent failed to follow procedure as laid down by the Police Act 2009 and the Police Service Commission Regulations 1970 for review of the Inspectorate and its determination.
6. Smith's complaints may be narrowed as follows:

- a) whether there was full procedural compliance of the law in the investigation; and
- b) whether the investigation was fair and impartial.

7. Smith's case is that there was an absence of procedural compliance in that Regulation 40 of the Police Service Regulations have not been complied with in his case. Regulation 40 provides:

40. (1) When the Commissioner considers it necessary to institute disciplinary proceedings against an officer to whom this regulation applies on the ground of misconduct which, if proved, would justify his dismissal from the Police Force, he shall, after such preliminary investigation as he considers necessary, report the facts to the Governor-General, the Prime Minister and the Commission through the Secretary to the Cabinet, together with a recommendation as to whether the officer should be interdicted from the exercise of the powers and functions of his office. On receipt of such a report the Secretary to the Cabinet shall report the facts to the Director of Public Personnel. On receipt of such a report the Director of Public Personnel shall, after consulting with the Attorney-General as to the terms of the charge or charges, forward to the officer through the Secretary to the Cabinet a statement of the charge or charges framed against him together with a brief statement of the allegations, insofar as they are not clear from the charges themselves, on which each charge is based; and shall call on the officer to state in writing, within such time as shall be specified, whether he admits the charges and, if so, any mitigating circumstances he may wish to submit, or if he denies the charges, any grounds on which he relies to exculpate himself.

(2) On receipt of a reply to any charge forwarded under paragraph (1) of this regulation through the Secretary to the Cabinet, the Director of Public Personnel may, if he thinks fit, refer the matter back to the Commissioner for further consideration and report, or shall forward the Commissioner's report together with the officer's reply to the Commission.

(3) If after considering the Commissioner's report and the officer's reply and any mitigating circumstances, if any, the Commission considers that if the offence is proved some penalty other than dismissal is likely to be appropriate, it shall act in accordance with the procedure prescribed in regulation 41(1) (d) or 42, as the case may be, of these Regulations.

...

8. Respectfully, Smith's case, with respect to Regulation 40 is misconceived, as it clearly does not apply to him as a Police Constable. Regulation 33 of the Police Service Regulations provides a complete answer to the issue. It provides:

33. An offence against discipline or any other misconduct by a police officer of or above the rank of inspector shall be dealt with under the provisions of regulations 40-43 inclusive of these Regulations:

Provided that nothing in this Part of these Regulations shall apply to proceedings against the Commissioner or Deputy Commissioner or any person acting in either of those offices.

In fact, the Constitution of The Bahamas places the exclusive responsibility for discipline of contracted officers (police officers below the rank of Inspector), such as Smith, in the hands of the Commissioner of Police. *Article 121(3) (c)* provides as follows:

(3) The following powers are vested in the Commissioner of Police –

...

(c) in respect of officers below the rank of Inspector, the power to exercise disciplinary control including the power of removal."

Article 121(4) of the *Constitution* does enable the Commissioner to delegate the power to discipline, other than the power of removal from the Royal Bahamas Police Force. *Article 121(4)* provides:

The Commissioner of Police may, by direction in writing, and subject to such conditions as he thinks fit, delegate to any officer of the Police Force of or above the rank of Inspector any of his powers under subparagraph (3)(c) of this Article other than the power of removal; but an appeal from any award of punishment by such officer shall lie to the Commissioner.

9. On the question of fairness, Smith complains that: (a) the Police Complaints Inspectorate established by section 78 of the Police Force Act 2009 has not been populated; and (2) the system, he says, permits the Commissioner to be judge jury and executioner in respect of the charges levied against him.

10. It is not disputed that the members of the Police Complaints Inspectorate have not been appointed. The functions of the Inspectorate as provided for in Section 79 of the Police Force Act, 2009 are to:

- (a) review the investigation and determination of the Complaints and Corruption Branch, so as to ensure that the investigation is conducted impartially;
- (b) report to the Minister from time to time, or at his request; and
- (c) review reports from the Complaints and Corruption Branch.

The role of the Inspectorate appears to be one of oversight of the functioning of the Complaints and Corruption Branch and to make reports to the Minister. On the whole, whilst it is regrettable that this institution which is mandated to ensure the proper and orderly functioning of the Complaints and Corruption Branch, it cannot, in my view, be said that its absence is something that can be actionable, by Smith. In fact Smith has not demonstrated how this absence of an Inspectorate has affected his case or may be likely to affect his case. He pleads merely that the absence of the Inspectorate is inherently unfair.

11. Smith complains that he was denied a fair or impartial hearing as, according to him, the party initiating the complaint against him is the same party that is also investigating the complaint. He relies on Article 20(8) of the Constitution which provides:

Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.

12. Smith also relies on the Supreme Court decision in ***Rudolph Pratt (Re)* [1988] BHS J. No. 20**. Pratt was the Manager of the Ministry of Public Personnel's office in Freeport. Following an investigation it was revealed that Pratt, who was entitled to a rental subsidy, may have been claiming sums greater than his entitlement. He was charged with 3 counts of misconduct. He was interdicted and invited to state whether he admitted the charges and, if he did not, the grounds on which he sought to exculpate himself. By letter dated 19 November, 1986 Mr. Pratt stated his grounds of exculpation. By letter dated 18 December, 1986 the Director of Public Personnel replied stating that the matter had been considered in accordance with the Public Service Commission Regulations 1971 (the Regulations) and it had been decided that, instead of proceedings for his dismissal steps would be taken to have him compulsorily retired from the Public Service. On 13 March, 1987 Pratt was informed that the Governor-General, acting on the advice of the Public Service Commission, had ordered that he be retired from the Public Service in the public

interest by reason of misconduct. Pratt sought judicial review of the decision on the grounds, inter alia, that

(1) That the Applicant was, in breach of the Constitution, and in violation of his fundamental right, not given a fair hearing in the matter of the determination of his ordered retirement from the Public Service;

(2) That having regard to the provisions of the intituled Regulations, the Respondents proceeded in breach thereof in that:-(a) they denied the Applicant due process; and (b) they themselves failed to apply and to adhere to, and otherwise ignored the relevant provisions of the said Regulations in purporting to bring about the forced retirement of the Applicant from the Public Service.

13. **Georges CJ**, found at paragraph 18, 19 and 27 of the decision in **Pratt** as follows:

18In my view the Public Service Commission is such an adjudicating authority. Vested in it are the powers of disciplining public officers and removing them from office, powers which it appears to me must necessarily affect their civil rights. The Constitution itself contains provisions to ensure the independence and impartiality of members of the Commission. They are appointed for fixed terms by the Governor-General on the recommendation of the Prime Minister after consultation with the Leader of the Opposition (Article 107), a method identical with that for the appointment of the Chief Justice (Article 94). They cannot be removed during their terms once appointed except for inability to exercise the functions of their office or for misbehaviour and this can only be established by the findings of an independent commission composed of persons who hold or have held or are qualified to hold office as a Justice of the Supreme Court (Article 126). This process is analogous to the process for the removal from office of Justices of the Supreme Court (Article 102).

19It appears to me inconceivable that an adjudicating authority so appointed and so protected would not also be obligated to perform such functions as are vested in it under the Constitution in accordance with the provisions of that Constitution by affording a fair hearing to the persons whose civil rights may be affected. The jurisdiction of the Commission to exercise the powers vested in it under the Constitution is dependent on the constitutional exercise of such powers. Where such powers are not exercised in accordance with the provisions of the Constitution, then the Commission has no jurisdiction to exercise such powers. It is not vested with the power to act in contravention of the Constitution, particularly where such action may be an infringement of the fundamental rights and freedoms guaranteed by the Constitution.

...

27Whatever course is pursued, however, it is imperative that there should be a fair hearing. The unusual feature of this case is that the official who first considered it desirable in the public interest that Mr. Pratt should be requested to retire from the Public Service was the official on whom has

now devolved the duties of Establishment Secretary. Regulation 45 contemplates that some other official would first form the view that that measure should be taken. That official would then report the matter to the Establishment Secretary (now the Permanent Secretary in the Ministry of Public Personnel). The Permanent Secretary would not have been involved in the initiation of the proceedings. As an independent official he would conduct such enquiries as appeared appropriate, including submissions from the officer against whom action was contemplated. As an independent investigator the Establishment Secretary would be in a position to evaluate the case for mandatory retirement as made out by the official initiating the procedure and the case against mandatory requirement as made out by the person against whom that action was contemplated. From that position he would make a recommendation on an evaluation of the facts as he determined them to be.

14. Firstly, *Pratt* was concerned with a public officer and not a police officer and that case fell squarely within the remit of the Public Service Commission. That body has a constitutional and statutory procedure which is different from that which Smith is governed by. It is axiomatic that Smith cannot attach himself to procedures and practices to which he is not governed, albeit they may seem fairer, to him.

15. Secondly, in my view, the 2nd Respondent and her Court of Inquiry cannot be compared to the Public Service Commission. The Constitution places the decision relative to the discipline of contracted officers exclusively (subject to the power to delegate) in the hands of the Commissioner. Where the Commissioner delegates, the person(s) empowered under the delegation may not impose the sanction of dismissal. Section 4 of the Police Disciplinary Regulations provide:

4. (1) When any Inspector, subordinate police officer, or constable is charged with a major offence against police discipline the Commissioner shall appoint, in his discretion, either one or more gazetted police officers to form a Court of Enquiry: Provided that each such gazetted police officer is at least two substantive ranks senior to the police officer charged with the offence. If the Court of Enquiry consists of more than one gazetted police officer, the senior officer appointed shall preside.
- (2) Any such police officer to be charged with a major offence against police discipline shall be supplied as soon as practicable with a copy of the charge or charges and informed of the date on which the Court of Enquiry will be convened. Such charge or charges shall specify the time, date, place and particulars of the alleged offence. If the

defendant requests further time to prepare his defence he may be granted a maximum extension of seven days from the date originally determined for the enquiry. The presiding officer shall ask the defendant whether he pleads guilty or not guilty to the charge or charges. A separate plea shall be taken on each charge and each plea shall be recorded.

- (3) Whenever any such police officer pleads not guilty, it shall be the duty of the Court of Enquiry to investigate the charge or charges and record the evidence of the witnesses on oath. The Court of Enquiry shall give the defendant the opportunity to question the witnesses, give evidence on his own behalf, and call witnesses for his defence. Should the evidence not satisfy the Court of Enquiry that such charge or charges have been proved, the charge shall be dismissed and the findings forwarded to the Commissioner.
- (4) If the Court of Enquiry is satisfied that the charge or charges have been proved, the Court of Enquiry shall record its findings and, after giving the defendant the opportunity to say anything he may wish in mitigation or in extenuation, it shall consider the defendant's record of service, any mitigating circumstances, and, if the defendant is a substantive police officer or constable, the Court may impose such punishment as it is empowered to impose under the provisions of section 51(2) of the Police Act and inform the defendant accordingly. If the Court considers that the offence merits a more severe punishment than it is empowered to impose under section 51 (2) of the Police Act, or if the defendant is an Inspector, it shall forward its findings and all the evidence recorded to the Commissioner for sentence. ...

16. It is not disputed that the Court of Inquiry, established pursuant to Regulation 4(1) above, was delegated the authority to consider the issue of whether to discipline Smith relative to the charges which were laid against him. The charges against Smith were laid by the Complaints and Corruption Branch following its investigation. The Complaints and Corruption Branch is empowered and mandated by the Police Force Act, 2009 to investigate complaints made against police officers. *Section 81(2)(a) of the Police Force Act, 2009* provides:

The Branch shall be charged with the responsibility for –

- (a) Investigating complaints made by members of the public against members of the (Police) Force

...

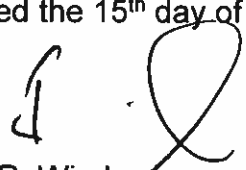
Smith's matter, before the Court of inquiry, has only just began and no evidence considered or any decision made, with respect the charges which the Complaints and Corruption Branch has laid against him. The Court of Inquiry (to whom discipline was delegated by the Commissioner) and not the Complaints and Corruption Branch, will take evidence in the course of the inquiry and make a decision with respect Smith. This is not the case, as in *Pratt*, where unusually, the official who first considered it desirable in the public interest that Pratt should be requested to retire from the Public Service was also the official who was to determine whether that decision ought to proceed. In this case the investigation was conducted by the Complaints and Corruption Unit who recommended the charges and not Chief Superintendent Davis and the Court or Inquiry. The evidence does not demonstrate any connection to the Court of Inquiry such that the process may be considered unfair, in the context of *Pratt*. Having been delegated with the authority to discipline (other than dismiss) as provided for in the Constitution and under the Regulation, there is nothing inherently unfair about the process. According to the evidence, Smith has received all of the reports and material before the Complaints and Corruption Branch and the investigative report made by the Branch. One would expect that as the matter before the Court of Inquiry proceeds Smith would be given the opportunity to make all necessary representations such that his case in defense of the allegations are adequately put.

17. Smith also relies on the Jamaican case of *Bent v The Commissioner of Police [2016] JMSC Civ 101*. In that case the applicant, an officer, was charged and heard before a Commission (operating in a similar nature as the Court of Inquiry) on charges that she misled a Resident Magistrate in Jamaica when she stated on oath that she served a Summons when in fact she did not. Bent subsequently admitted to the Magistrate that she did not serve the Summons. Smith has seized upon the fact that in *Brent* the report of the investigation conducted against officer Bent was sent to the DPP for a ruling. The DPP ruled that departmental action was to be taken against her. Smith asserts that this shows that even in the case of a

police constable some independent review is necessary. Respectfully, Bent is a different case from Smith's as it is clear from reading **Brent** that the matter was sent to the Jamaican DPP not for the purpose of considering disciplinary action but for the purpose of determining whether criminal prosecution of Bent would be proceeded with. Clearly this is the only decision the DPP would be concerned with.

18. In all the circumstances therefore I am not satisfied that grounds of procedural impropriety or irrationality have been made out. The application for judicial review is therefore dismissed with costs.

Dated the 15th day of January 2020



Ian R. Winder

Justice