COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

PUBLIC LAW DIVISION

2017/PUB/jrv/00023

IN THE MATTER of an application by **BERTRAM BAIN** for Leave to Apply for Judicial Review.

AND

IN THE MATTER of the Decision of the Commissioner of Police having approved that by reason of his Discharge from the Royal Bahamas Police Force, without completing the Appeal Process according to Police Act, Police Disciplinary Regulation, Police Service Commission Regulation and the Constitution.

AND

IN THE MATTER of a certain provisions of The Bahamas Independence Order 1973 ("the Constitution") and Articles 2, 15, 20(8), 26(2), 124 (2) and certain other provisions of the Constitution of the Commonwealth of The Bahamas.

AND

IN THE MATTER of the Police Act 1965 Chapter 205, Section 8, 21(a) (b), Section 48 of the Revised Statute Law of The Bahamas and certain other provisions of the Police Act.

AND

IN THE MATTER of the Police Service Commission Regulation 1970, Section 40, 41 and 42 and certain other provisions of the Police Service Commission Regulation.

AND

IN THE MATTER of the Police Disciplinary Regulations 1965, Section 15 and certain other provisions of the Police Disciplinary Regulations.

AND

IN THE MATTER of the Police Force Policy H2 and certain other provisions relating to disciplinary proceedings.

AND

IN THE MATTER of a joint application for interim Injunctive and declarative relief and redress pursuant to Article 28 of the Constitution.

AND

AND IN THE MATTER of an application for an Order of Mandamus and /or Certiorari pursuant to RSC Order 53 Rule 1(a).

BETWEEN:

BERTRAM BAIN

Applicant

AND

THE COMMISSIONER OF POLICE

Respondent

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Glendon Rolle and Ms. Maria Daxon for the Applicant
Ms. Aramantha Hepburn and Mr. Shaka Serville for the Respondent

Hearing Dates: 27 April 2018, 1 October 2018, 27 August 2019

Public Law - Judicial Review – Applicant discharged from duty – Extant Notice of Appeal to Governor-General –Leave to bring judicial review proceedings granted – Application to set aside - Prematurity of application for leave – 'Exceptional' circumstance - Remedy of last resort

The Applicant, a police constable was discharged from the Royal Bahamas Police Force by the Commissioner of Police ("the Respondent") Two days later, he filed a Notice of Appeal to the Governor-General. Less than two weeks later, he applied for leave to bring judicial review proceedings. At an *inter partes* hearing for leave, the Court granted leave and give directions for the hearing of the judicial review. At the hearing, the Respondent raised a preliminary issue that, having taken the correct course of action and appealed the Respondent's decision, leave should have been refused at the leave stage.

The Applicant argued that this case fell within the category of "exceptional" in that (i) even after eight months, the Governor-General has not appointed a Board to hear the appeal and (ii) the Respondent abused his power when he discharged the Applicant and suspended, withheld or denied him his salary, emoluments and other benefits.

HELD: The application to bring judicial review proceedings is dismissed with no order as to costs.

1. The application to bring judicial review proceedings is premature before the Court. The Applicant has explored the correct avenue by appealing the decision of the Respondent to the Governor-General.

2. The fact that the appeal had not been heard after eight months of its filing and the Respondent having discharged the Applicant from the police force and stopped payment of salary, emoluments and other benefits do not make this case "exceptional". In any event, the Court made an Unless Order directing the Governor-General to set up the Board to hear the appeal (the Order was dutifully complied with). After any employment contract has ended, the natural consequence resulting from such termination of contract is that salary, emoluments and other benefits also come to an end.

3. Regulation 11 of the Police Disciplinary Regulations does not apply to a case of termination of an employment contract. It speaks to "any appeal by a police officer …against **any conviction or punishment** imposed by the Commissioner… shall have the effect of suspending any such punishment until the case shall have been determined. The dismissal of the Applicant is not **any conviction or punishment**. In my considered opinion, this section connotes a criminal act.

4. There are no exceptional circumstances warranting the Court to exercise its discretion to permit judicial review proceedings when the Applicant has already engage the proper process by filing an appeal.

RULING

Charles J:

Introduction

[1] On 26 August 2019, I delivered an oral ruling finding that Bertram Bain, a former police constable, ("the Applicant") has explored the correct avenue by appealing the decision of his employer, the Commissioner of Police ("the Respondent") to the Governor-General and therefore, the present application for judicial review is premature. I also found that leave to bring judicial review proceedings, which was granted on 26 September 2017, should not have been granted. Indeed, I indicated to the Respondent that it may be argued at the substantive hearing of the judicial review proceedings which the Respondent did. I promised to deliver a written judgment. I do so now.

The application

[2] On 11 August 2017, the Applicant filed an application for leave to bring judicial review proceedings against the Respondent. He sought the following Orders and Declaration namely:

1. An Order of Certiorari to remove into this Honourable Court and to quash the Decisions of the Respondent and/or his servants to dismiss the Applicant without giving him an opportunity to respond;

2. An Order of Certiorari to remove into this Honourable Court and quash the Decisions of the Respondent whereby he determined that the Applicant's

benefits payment be suspended, withheld or denied before the Applicant had the opportunity to exhaust the appeal process.

3. An Order of Mandamus directed to the Respondent directing them to update, adjust and correct the Applicant's benefits, restoring and paying to the Applicant all benefits and awards due and payable to him, as at the date of his discharge until the completion of the appeal process;

4. A Declaration that the purported decision of the Respondent to dismiss the Applicant without giving him an opportunity to respond according to the Rules of Natural Justice and the law is unlawful, illegal, void and of no effect;

5. A Declaration that the Respondent be restrained from treating as valid or acting upon the purported Discharge Certificate of termination of employment dated 2 August 2017 from his employment with the Respondent;

6. 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;

7. A Declaration that the Applicant's right to be treated fairly with due process and in accordance with The Police Act, Police Service Regulation, Police Disciplinary Regulation, the General Order and The Force Policy have been and are being breached;

8. A Declaration that the Respondent's said Decision(s)/Order(s) was/were so manifestly unreasonable that no reasonable tribunal, entrusted with its powers, could reasonably have come to those Decisions in all the circumstances of this case; and

9. A Declaration that the Respondent has acted unfairly, unlawful, unreasonable, arbitrarily, capriciously and abusive towards the Applicant.

[3] On 26 September 2017, the Applicant was granted leave to bring judicial review proceedings. Learned Counsel for the Respondent, Ms. Hepburn, although present, was unprepared since she had received the file at the eleventh hour. The Applicant was able to demonstrate to the Court that the Attorney General was given more than the requisite notice of 48 hours, in fact, about five clear days of notice. With some motivation by the Court that the issue of leave may be revisited at the substantive hearing, Ms. Hepburn did not object to leave being granted.

[4] The Court then proceeded to give directions and fixed a date for the hearing of the judicial review application.

Factual matrix

[5] The facts are not in dispute. On 4 July 2016, the Applicant appeared before the Police Tribunal presided over by Superintendent Maxine Leary-Rolle. He was found guilty of (i) in uniform being improperly dressed whilst on duty in a public place contrary to section 2(22) of the Police Disciplinary Regulations 1965 ("PDR 1965") and punishable under section 62(1) of the Police Force Act 2009 ("PFA 2009") and (ii) failing to comply immediately with a lawful order contrary to section 2 (4) of the PDR 1965 and punishable under section 62(1) of the PFA 2009. The Applicant was found guilty and was ordered to do eight extra hours of duty. The Applicant did not appeal this decision.

[6] On or about 2 August 2017, the Applicant again appeared before another Police Tribunal; this time presided over by Superintendent Craig A. Stubbs. He was charged with disobeying or without good and sufficient cause, omitting or neglecting to carry out a lawful order, written or otherwise contrary to section 3(7) of the PDR 1965 and punishable under section 62(2) of the PFA 2009.

[7] The Applicant was fined five days' pay and ordered to shave and present himself to the said Tribunal on 2 August 2017. The Applicant was also reprimanded. During this hearing, the Applicant did not give evidence or cross-examine witnesses.

[8] Immediately after the hearing on the same day, the Applicant voluntarily went to the Respondent who asked him whether he was there to appeal his conviction to which the Applicant answered in the negative. The Respondent then informed the Applicant that he was exercising his statutory authority under section 7 (c) of the PDR 1965 to review the punishment imposed by the Tribunal. The Respondent, in the exercise of his powers under section 21(1)(c) of the PA 2009, then served the Applicant with a Discharge from Duty Certificate thereby formally discharging him from the Royal Bahamas Police Force ("RBPF"). The Respondent then informed the Applicant that he has a right to appeal his decision within seven days to the Governor-General.

[9] On or about 4 August 2017, the Applicant served a Notice of Appeal indicating that an appeal has been forwarded to the Governor-General for his consideration.

[10] While the Notice of Appeal was still extant, the Applicant sought leave to bring judicial review proceedings.

Discussion: Is the application for judicial review premature/ are there "exceptional" circumstances?

[11] The issue of whether leave should have been given to bring judicial review proceedings surfaced again as a preliminary issue at the substantive hearing. Learned Counsel Ms. Hepburn for the Respondent submitted that the Applicant has explored the correct avenue by appealing the Respondent's decision to the Governor-General and therefore, the present application for judicial review is premature. She next submitted that at this juncture the authority constituted to decide the Applicant's matter in question, is the Governor-General. Therefore, to apply for judicial review would be asking the Court to substitute its opinion which, according to her, if made, would interfere with the appeal process.

[12] Ms. Hepburn further submitted that the Applicant has not exhausted all remedies before making the application for judicial review and to accommodate this application at this time would be to circumvent the appeal process.

[13] Ms. Hepburn also argued that the Governor-General was not given sufficient time to conclude this matter. According to learned Counsel, the Applicant has 'jumped the gun'. She cited the case of **Damian Morris v The Comptroller of Customs and Excise** CV2016-00485 (unreported) High Court of Trinidad & Tobago where something similar occurred. The Applicant, a Customs and Excise Officer was not pleased with a transfer made by the Comptroller. He then wrote to the Comptroller requesting that the transfer be rescinded. The Applicant did not receive any response from the Comptroller and subsequently, his counsel wrote to the Comptroller requesting that the transfer be rescinded failing which an application would be made to the High Court for leave to apply for judicial review. A state counsel in the office of the Comptroller responded to counsel stating that the letter was receiving the attention of the Comptroller. In the meantime, the Applicant applied for leave to bring judicial review proceedings. At paras 17-18 of the judgment, Boodoosingh J said:

> **"17. However, this is a remedy by way of review available to a transferred officer. For that remedy to be effective, the Commission would be expected to act within the shortest reasonable time. The applicant asserts that to date he has not received a response from either the Comptroller or the Commission and as such has decided to seek leave to apply for judicial review. In my view, however, the Applicant has also jumped the gun. It cannot be said that he gave sufficient time for consideration of his request.**
>
> **18. This is therefore not an appropriate circumstance in which leave should be granted. First, there has been no conclusion on the matter as the Commission had not yet communicated their decision in writing."**

[14] Learned Counsel Ms. Daxon submitted that the case of **Damian Morris** (supra) is distinguishable from the present case because Mr. Morris was applying for judicial review regarding the actual decision to transfer him while, in this case, the Applicant is appealing specific breaches of the procedure in relation to his dismissal, namely Regulation 11 of the Police Disciplinary Regulations ("Reg.11") which provides that:

> **"Any appeal by a police officer under the provisions of sections 50, 51 and 101 of the Police Act <u>against any conviction or punishment imposed by the Commissioner</u> or by any other officer, shall have the effect of suspending any such punishment until the case shall have been determined."**[Emphasis added]

[15] Ms. Daxon conceded that it would be an abuse of process to seek judicial review to overturn the decision to dismiss the Applicant if there are other bodies before which to lodge appeals against his dismissal. However, according to Counsel, the Applicant is not asking the Court to vary his dismissal but simply to effect judicial review in relation to breaches of the procedure by which he was dismissed and particularly in relation to whether there is a continuing breach of Reg.11.

[16] The Applicant argued that it has been almost eight months and the appeal has not been heard. According to her, this is a case that falls within the category of "exceptional circumstances." She submitted that notwithstanding that there are appeal processes available under a specific statute, judicial review may nonetheless be an appropriate remedy by which an applicant can seek relief particularly if there are exceptional circumstances.

[17] Learned Counsel contended that the circumstances of this case are exceptional because while the appeal against dismissal is pending before the Governor General, the Respondent failed to comply with Reg.11 which sets out the requirement that the punishment of dismissal should be suspended in relation to the Applicant while the appeal is pending. Counsel further contended that removing the salary, benefits and emoluments of the Applicant is an abuse of power as these emoluments ought to be uninterrupted until the appeal has been heard and determined. This is an unattractive argument since the Applicant was discharged or relieved from his duties as a police constable. Reg.11 speaks to "*<u>any conviction or punishment imposed by the Commissioner"</u>* so the dismissal of a police officer by the Commissioner does not fall in the category of "conviction or punishment" imposed by the Commissioner. In my considered opinion, Reg.11 connotes a criminal act; for example, if a police officer is charged with rape, he

may be interdicted by the Commissioner of Police and may be paid one-half of his salary or any such like emoluments.

[18] In my view, it is illogical to suggest that a police officer who is discharged from his duty could pray in aid of Reg. 11. Indeed, it would make a mockery of the law. That said, I am not considering the merits of the case but whether there is anything in this case falling within the category of "exceptional" to warrant the Court exercising its discretion to permit judicial review proceedings.

[19] Learned Counsel Ms. Daxon relied on number of cases including **Re Preston** [1985] AC 835 and **Lacroix v Stipendiary & Circuit Magistrate Derrance Rolle-Davis and another** [2013] 3 BHS J. No. 68 to demonstrate that, in exceptional cases, the court could exercise its discretion to entertain judicial review proceedings even if the applicant has not exhausted the statutory right of appeal.

[20] She quoted extensively from Lord Templeman's judgment in **Re Preston** particularly at pages 10 and 11 (Bailii.org version) to demonstrate that, in the present case, the Respondent abused his powers when he stopped the salary, benefits and emoluments of the Applicant whilst an appeal was pending. She relied on Reg.11.

[21] She also referred to the case of **Lacroix v Stipendiary & Circuit Magistrate Derrance Rolle-Davis and another** [2013] 3 BHS J. No. 68. In this case, the Respondent complained that the Applicant did not utilize the judicial review procedure as a remedy of last resort before launching judicial review proceedings. Specifically, the Respondents say that the Applicant ought to have appealed the decision of the Magistrate rather than pursue judicial review.

[22] In recognizing the well-settled principle of administrative law that an intended applicant should first exhaust any right of appeal or other means provided for challenging the decision before making an application for judicial review, Winder J had this to say, at paragraphs 26 to 28 of the Judgment:

"26 The existence of an appeal process is not the end of the matter. In Sargent v. Knowles et al CL1334 of 1993, Sawyer J. (as she then was), relying on the English Court of Appeal decision of R. v. Chief Constable of the Merseyside Police ex parte Calveley and others [1986] 1 All E.R. 251 held that in exceptional circumstances the Court could, in its discretion, entertain judicial review proceedings even where the Applicants had neither exhausted nor pursued their alternative statutory right of appeal. [Emphasis added]

27 Sawyer J. went on to identify circumstances where to the Courts have asserted the existence of this discretion:

(1) In R v. Paddington Valuation Officer, ex p Peachey Property Corp Ltd [1965] 2 All E.R. 836 at 840, [1966] 1 QB 380 at 400, Lord Denning MR, with the agreement of Danckwerts and Salmon LJJ, held that certiorari and mandamus were available where the alternative statutory remedy was 'nowhere near so convenient, beneficial and effectual'.

(2) In R v. Hillingdon London Borough, ex p Royco Homes Ltd [1974] 2 All E.R. 643 at 648, [1974] 1 QB 720 at 728 Widgery CJ said: '...It has always been a principle that certiorari will go only where there is no other equally effective and convenient remedy'.

(3) In R v. Hallstrom, ex p W [1958] 3 All E.R. 775 at 789 790, C19851 3 WLR 1090 at 1108 per Glidewell LJ, :'Whether the alternative 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 way of judicial review when an alternative remedy is available.'[Emphasis added]

(4) In Preston v. IRC [1985] 2 All E.R. 237 at 337 338, [1985] AC 835 at 862, per Lord Templeman: 'Judicial review process should not be allowed to supplant the normal statutory appeal procedure [but] present circumstances are exceptional in that the appeal procedure provided by s 462 cannot begin to operate if the conduct of the commissioners in initiating proceedings under s 460 was unlawful.'

28 In Sargent, Sawyer J., in finding an exceptional circumstance took into account the fact that judicial review was far less cumbersome than an appeal under the Magistrates Act. She also relied on the fact

that it was slower and more costly to obtain a result having regard to the entering into of a surety and recognizance."

[23] Ms. Daxon also relied on **Re Preston**. Briefly, the facts of **Re Preston** are that the applicant was assured by the Inland Revenue that it would not raise further inquiries on certain tax affairs if he agreed to waive interest relief which he had claimed and to pay a certain sum in capital gains tax. It was held that judicial review may be granted in exceptional circumstances, where the challenges to the decisions include assertions that there has been an abuse of power and unreasonableness. The House of Lords considered the availability of judicial review alongside a statutory right of appeal. It was held that the court can only intervene by judicial review to direct the Commissioners to abstain from performing their statutory duties or from exercising their statutory powers if the court is satisfied that 'the unfairness' of which the applicant complains renders the insistence by the Commissioners on performing their duties or exercising their powers an abuse of power by the Commissioners.

[24] At page 13 of his judgment (Bailii.org version), Lord Templeman stated:

"In the present case, the appellant does not allege that the commissioners invoked section 460 for improper purposes or motives or that the commissioners misconstrued their powers and duties. However, the H.T.V. case and the authorities there cited suggest that the commissioners are guilty of "unfairness" amounting to an abuse of power if by taking action under section 460 their conduct would, in the case of an authority other than Crown authority, entitle the appellant to an injunction or damages based on breach of contract or estoppel by representation. In principle I see no reason why the appellant should not be entitled to judicial review of a decision taken by the commissioners if that decision is unfair to the appellant because the conduct of the commissioners is equivalent to a breach of contract or a breach of representation. Such a decision falls within the ambit of an abuse of power for which in the present case judicial review is the sole remedy and an appropriate remedy. There may be cases in which conduct which savours of breach of conduct or breach of representation does not constitute an abuse of power; there may be circumstances in which the court in its discretion might not grant relief by judicial review notwithstanding that conduct which savours of breach of contract or breach of representation. In the present case, however, I consider that the appellant is entitled to relief by way of judicial review for 'unfairness"

> **amounting to abuse of power if the commissioners have been guilty of conduct equivalent to a breach of contract or breach of representations on their part."**[Emphasis added]

[25] Ms. Daxon submitted that by removing the salary, benefits and emoluments of the Applicant, the Respondent abused his powers because by Reg.11, he is precluded from doing so. As earlier stated, in my reading of Reg. 11, the discharge of a police officer by the Respondent (the Commissioner of Police) does not fall within the ambit of that regulation.

[26] Counsel also submitted that the appeal process is in no way as convenient, beneficial or effectual as the remedies afforded in the judicial review process and it is a far slower process than that afforded under judicial review. Therefore, the appeal procedure provided by the law would not operate as effectively as judicial review if the decision-making process of the Respondent was unlawful, unfair and unjust.

[27] Counsel finally submitted that this case is one of exceptional circumstance and the Court should exercise its discretion to entertain the judicial review proceedings even though the Applicant has filed an appeal to the Governor-General.

[28] To reiterate some of the salient facts of this case, the Applicant appeared before two police tribunals in 2016 and 2017. Before the latter tribunal, he was charged with disobeying or without good and sufficient cause, omitting or neglecting to carry out a lawful order, namely, to shave his beard. He was fined five days pay and ordered to shave and present himself to the said Tribunal on 2 August 2017. Also, on 2 August 2017, the Applicant voluntarily went to the Respondent who asked him whether he was there to appeal his conviction to which the Applicant answered in the negative. The Respondent then informed the Applicant that he was exercising his statutory authority under section 7 (c) of the PDR 1965 to review the punishment imposed by the Tribunal. He subsequently, discharged the Applicant from the RBPF.

[29] Each case must turn on its own peculiar facts and circumstances. When the hearing of the substantive judicial review proceedings came up before me, there was already an eight months delay in the hearing of the appeal. It was revealed to me that the Board to hear the appeal was not even constituted. I was also informed that the change of Government decelerated the process. This should not be a concern of the Court.

[30] That said, the Respondent does have the power to discharge the Applicant. Whether he acted wrongly or unfairly is not for this Court to determine right now. The focal issue is whether this case fell in the category of "exceptional" to warrant an exercise of my discretion. In my considered opinion, it does not. The fact that the Respondent discharged the Applicant from the police force bringing an end to salary, emoluments and other benefits is the natural consequence of the termination of any employment contract. As I have already stated, Reg. 11 does not apply. The delay by the Governor General in establishing a Board to hear the appeal is a concern which I have addressed below.

[31] In my judgment, learned Counsel Ms. Hepburn is correct that the present case is somewhat similar to the case of **Damian Morris.** Like Boodoosingh J in **Damian Morris**, I am of the view that the Applicant, in the present case, has also jumped the gun. Therefore, leave to bring judicial review proceedings ought not to have been granted since the application was premature before the Court.

Conclusion

[32] In **R v Chief Constable of Meyerside Police, ex parte Calveley** [1986] QB 424, Lord Donaldson of Lymington MR states:

> **"I add only that I also agree that, where an application is made for judicial review but an alternative remedy, an applicant should normally be left to pursue that remedy. Judicial review in such a case should only be granted in exceptional circumstances."**

[33] In the present case, there are no exceptional circumstances warranting this Court to exercise its discretion to permit judicial review proceedings when the Applicant has already engage the proper process by filing an appeal.

[34] On 27 August 2019, when I delivered an Oral Ruling, I inquired again of Counsel for the Respondent as to whether the Board was duly constituted by the Governor-General to hear and determine the Applicant's appeal. Mr. Serville, who had recently taken over the carriage of this matter from Ms. Hepburn, was not in a position to confirm. I then ordered that he provides me with a report in two days whether the Board was constituted.

[35] On 29 August 2019, Mr. Serville advised the Court that the Board was still not yet constituted. Consequently, I made an Unless Order in the following terms:

> **"UNLESS the Police Service Commission hears that (sic) extant appeal filed on 4 August 2017 before it, in the matter of Bertram Bain against the Commissioner of Police, by or before the 15th October 2019, the Court will proceed to hear the matter as it sees it."**

[36] Subsequently, on 18 November 2019, learned Counsel for the Respondent, Mr. Serville informed the Court that the Unless Order was dutifully complied with. The Police Service Commission heard the Applicant's appeal and determined that (i) the decision of the Respondent be set aside as the Applicant's contract had expired and (ii) the Applicant is to be paid his gratuity and benefits for the 17 years of service to the RBPF.

[37] Learned Counsel Ms. Daxon submitted that the Applicant had applied for a renewal of his contract. Instead, he was dismissed. She is not happy with the decision of the Police Service Commission but that is another saga which does not concern this Court.

[38] In the premises, I will dismiss the Application's application to bring judicial review proceedings on the ground of its prematurity. There will be no order as to costs.

[39] Finally, I would like to thank Counsel for their patience for the protracted delivery of the written Ruling.

Dated this 30th day of June, A.D., 2020

Indra H. Charles
Justice