



# The Court of Appeal for Bermuda

**CIVIL APPEAL No. 6 of 2010**

**Between:**

**THE COMMISSIONER OF POLICE ET AL**

**Appellant**

**-V-**

**ROMEO ALLEN AND OTHERS**

**Respondent**

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**Before:** E. Zacca, President  
Anthony Evans, JA  
Scott Baker, JA

**Appearances:** Mr. Martin Johnson for Appellant  
Mr. Richard Horseman for Respondent

## **JUDGMENT**

Date of Hearing:  
Date of Judgment:

Friday, 4 March 2011  
Friday, 18 March 2011

## **SCOTT BAKER, JA**

1. The Commissioner of Police appeals against the decision of Kawaley J on 22 June 2010 (1) quashing his decisions in March 2010 not to renew the respondents' contracts of employment and grant them permanent and pensionable employment and (2) declaring that they should be treated as permanent and pensionable officers.

### *The Facts*

2. The respondents are five police officers who joined the Bermuda Police Service in about July 2000 from their homes in the Commonwealth Caribbean (Jamaica, St. Lucia, Trinidad and Tobago) where they had each previously served as police officers. In fact they were seconded as police officers to the Bermuda Police Force and remained on loan from their home forces. The initial agreement provided that they would be hired on a three year contract. The contract provided as to pension:

“In order to earn an entitlement to a pension upon retirement, you must contribute continuously to the scheme for a period of eight (8) years or more. As you will leave Government service prior to the period, the contributions made by you shall be refunded with the amount of interest earned on those contributions. If you leave Government having contributed continuously to the scheme for at least eight (8) years, you will be eligible for a pension deferred to normal retirement age.”

We were told that the period of eight years was subsequently increased to ten years.

3. Towards the end of the three year contract each of the respondents was approached and offered a five year contract of employment. It was a condition of acceptance that they resigned from their home forces. The contracts were in, effectively, identical terms. The fourth respondent's contract was contained in a letter dated 9 June 2003, from the Bermuda Police Force Human Resources Manager and it said that the Commissioner had approved his appointment with effect from 1 July 2003 to 30 June 2008 and at paragraph 21 that he would be hired on a five year contract.
4. The next event of significance occurred on 20 September 2007 when the then Commissioner of Police wrote the respondents in the following terms:

“RE: CONTRACTS/PERMANENT EMPLOYMENT

I write in relation to your current contractual terms of employment and to bring to your attention details of a decision of the Public Service Commission.

Your current contract expires 30 June 2008, at which time you would have completed eight (8) years of service with the Bermuda Police Service.

Officers hired on contract are appointed in accordance with the Conditions of Service Order (COSO) 2002 section 1.1.1 for a period of five (5) years. The Public Service Commission and the Minister of Public Safety and Housing have agreed to extend Officers a further contract for a period up to five (5) years. This contractual offer will be subject to performance reviews and the suitability of Officers, which will be based on recommendations from Divisional Commanders.

In accordance with the Public Service Superannuation Act 1981, all Government Employees make a contribution to the Pension Fund and, in the event you wish to accept these new contractual terms, your pension will be deferred until you reach the age of retirement as a result of your reaching ten (10) years of service. Please indicate your intentions with regards to remaining with the Bermuda Police Service as a pensionable officer on the completion of ten (10) years service as it relates to the above stated terms. Please respond no later than 28 September 2007.”

5. Also on 20 September 2007 the then Human Resources Manager, Michael Trott, sent the respondents an email in the same terms as the Commissioner’s letter. The offer was accepted by the respondents. For example, the second respondent emailed:

“I intend to stay on as a pensionable officer in the Bermuda Police Service and accept the further contract you have mentioned in the email below. There is one thing that I want to stress however. My lot of overseas officers will not have completed ten (10) years of service until 30 June 2010. Am I to understand that the deferral you mentioned in your last paragraph will be deferred until then?”

6. On 27 September 2007 Mr. Trott held a forum with officers and their representatives to explain the process in the lead up to the officers reaching the ten-year mark. It was his view, rightly or wrongly, that when the officers had completed ten years service their conditions of service changed and they became non fixed term contract employees. This was his rationale for requiring the respondents first to enter a two year contract in which the expiration would coincide with the ten year point. I shall come to the relevant regulations in

a moment but they also seem to envision the possibility of a fixed term contract even after ten years' service.

7. The first respondent wrote on 20 November 2007:

“Sir,  
In relation to the attached letter, I am indicating to you that I do intend to accept the proposed contract offer of up to five (5) years and to become a Permanent and Pensionable Officer.”

The next thing that happened was that on 29 January 2008 an email was sent by Mr. Trott to the five respondents and twelve other officers as follows:

“My apologies for the delay in responding to you, as you have been made aware, the Public Service Commission and the Minister of Public Safety and Housing have agreed to extend you (the above officers) a further contract for a period of up to five (5) years and pensionable conditions of service. Contracts will have to be drafted for a two year period initially then once you (the above Officers) have reached ten (10) years of service your conditions of service change to that of permanent and pensionable (i.e. five-year re-entry permits). This contractual offer will be subject to performance reviews and recommendations from your Divisional Commanders as requested and instructed by the Commissioner of Police.

Once these recommendations have been forwarded to the Commissioner, contracts will be drafted for your review and signature.”

8. The second respondent's evidence is (and this is not disputed) that Mr. Trott explained that they had to enter the two year contract purely for administrative purposes but that they were being hired for five years. Once they had reached ten years' service separate contracts would have to be entered into as their status as officers in the Bermuda Police Service would change to permanent and pensionable. Contracts were duly entered into and provided inter alia:

Clause 4: That the period of service was for two years with effect from 1 July 2008 and expiring on 30 June 2010.

Clause 9: That they had the right to reside in Bermuda as long as employed but it was not a permanent appointment to the Bermuda Police Service.

Clause 12: In order to earn an entitlement to pension on retirement they had to contribute to the scheme for ten years or more. Departure from

Government service prior to this would result in the return of contributions.

Clause 21: They would be hired on a two-year contract.

9. The respondents were all sent work permits to expire in 2013. Mr. Trott says this was a mistake and that once the error was realized the remaining officers received two year work permits. However, we were told that all the respondents received five year permits. The granting of five year permits is, of course, entirely consistent with the representation that they were hired for five years and the granting of a two year contract was for administrative purposes.
10. On 17 July 2009 in response to a request to all the respondents to indicate their intentions, the second respondent sent an email to the Commissioner asking to be considered for continued employment on permanent and pensionable terms when his then current contract ended on 30 June 2010. He went on:

“By this time, I will have served as a police officer in the Bermuda Police Service for ten (10) years. I enlisted in the Bermuda Police Service on 1 July 2000, on a 3 year non-renewable contract. This was with the understanding that I was being seconded from my home police force for the period.

In 2003, I was offered an additional contract, a 5 year contract, which I accepted. I had to resign my post in Jamaica to take up that second contract of employment with the Bermuda Police Service. At the conclusion of the 5 year contract in 2008, I (along with other police officers from my group) was invited to a meeting with the current Human Resources Manager, Mr. Michael Trott. Mr. Trott explained to us that under normal circumstances, we would have been offered an additional 5 year contract, but as that would run counter to the Superannuation Act, we were being offered a 2 year contract which would take us to 2010 and that for those of us who so desired, we would automatically be offered permanent and pensionable terms at the end of said 2 year contract (*barring out any serious disciplinary breaches*).

My track record over the period that I have been serving the Bermuda Police Service speaks for itself and does not have to be embellished. In addition, I have no disciplinary issues. I am confident that I will continue to be an asset to the Bermuda Police Service. Grateful my application be favourably considered.”

He received no reply; nor has Mr. Trott refuted the contents of this email.

11. On 17 March 2010 Mr. DeSilva, the Commissioner of Police who had taken up office the previous December, wrote to the second respondent as follows:

“I write to acknowledge that your contractual period of engagement with the Bermuda Police Service ends on 28 June 2010. I have reviewed your application to be considered for another period of engagement but regrettably, I am not able to offer you further employment.

Your contribution to the police service and the wider Bermuda community over the past ten years is acknowledged and greatly appreciated. Thank you for your service, and I wish you well in your future endeavours.

Please make contact with our Human Resources Manager, Mr. Michael Trott, to arrange all the necessary administrative details in advance of your last working day.”

The following day the first respondent emailed the other respondents wondering why they were “in this predicament when the deal was already sealed from 2008.”

12. The letter of 17 March 2010 came out of the blue and was a considerable shock to all the respondents. Putting it at its very lowest it was a very poor exercise in employment relations. It is pointed out that the letter contains an error as to the end date of the second respondent’s contract. His contract ended on 30 June 2010 and not, as the Commissioner had said, 28 June 2010. An end date of 30 June 2010 means ten years completed services with the pension implications that that carries. An end date of 28 June 2010 means that the employment falls two days short of ten years. The change may have been deliberate and intended to enable the respondents to repatriate their accumulated pension contributions if they wished to do so.
13. The Acting Commissioner, writing on behalf of the Bermuda Police Service, says in a letter dated 31 March 2010 that the end date for the contract was changed at the request of some of the respondents expressed at a meeting earlier in the month because they did not want their pension contributions to be locked in on reaching ten years’ service, which would have been the case with contracts expiring on 30 June 2010. The appellant offered to change the end date back if the respondents so wished. There is no evidence of the meeting said to have taken place earlier in the month and in the result it is unnecessary to resolve the reason why the end date of the contract was changed by the appellant. The previous day, 30 March

2010 Mr. Trott signed a letter to the second respondent correctly stating his contract expired on 30 June 2010 but also saying that he was on a five year contract. This he says was an error. All the recipients had, of course, five-year work permits.

14. Mr. Jackson, the Commissioner of Police who signed the letter of 20 September 2007 says in a sworn statement:

“All the Applicants received the appropriate recommendations and the offer of further five-year contracts and pensionable and permanent employment was extended to the Applicants. They each accepted those offers.

We were faced with a conundrum in that the Applicants would in 2010 reach their 10 years of service in the Service and at this point they would become permanent and pensionable officers. It was decided that the best way forward was to draft two year contracts which would bring the officers up to the ten-year mark and at that point, new agreements would be entered into to reflect their change of status as being permanent and pensionable.

I understood, as did the Applicants, that after the two-year contracts, they would be made permanent and pensionable officers with the Bermuda Police Service. There was no requirement for a further review as all the applicants received the appropriate recommendations. Of course, the officers would still be subject to the Discipline Orders if there were any serious breaches, but as far as I was concerned the Applicants were offered and accepted permanent and pensionable employment with the Bermuda Police Service.”

15. It is correct that all the respondents received appropriate recommendations from Divisional Commanders as required in the letter of 20 September 2007. The respondents have exhibited a number of documents to that effect.

*The Reasons for not Offering Further Service*

16. It is necessary next to look at the evidence to see why the five respondents were not offered new contracts after 30 June 2010. The only evidence is to be found in the affidavit of Mr. DeSilva sworn on 2 June 2010. In short he says that it was decided that the existing method of appraisal was inadequate and that a new and more rigorous method replaced it. Superintendants were asked to report under eight criteria in order to assess officers. In respect of four of the five respondents’ the conclusion was that:

“In our view, his work performance has been poor and not deserving of a new contract.”

Only the barest of reasons were given for the conclusion of poor work performance and in no case was the respondent given any opportunity of answering the points taken into account against him. There could not be a plainer breach of natural justice. In respect of the other respondent, no reason was given at all for not offering a new contract. For completeness, I should add that in one instance that of the fifth respondent it was recorded that initially he had indicated that he was not seeking continued employment but later changed his mind. However, it has not been suggested that his case should be approached any differently from those of the other respondents. Their cases stand or fall together.

*The Police (Conditions of Service) Order 2002*

17. The Police (Conditions of Service) Order 2002 (“the 2002 Order”) is made under section 32 of the Police Act 1974. Paragraph 1 of the schedule to the Order deals with conditions of service and is relevant to the present case. Paragraph 1.1 covers overseas recruits as were the respondents in the present case. It provides:

“1.1.1 An overseas recruit will be appointed for an initial period of five years commencing from the date of arrival in Bermuda. The first three years will be a probationary period. On satisfactory completion of the probationary period the member may be confirmed in his post.

1.1.2 On completion of the initial five year contract, or any subsequent contract a member may—

- (a) be appointed as a pensionable member, at which time all contract service will be taken into account for pension purposes; or
- (b) be re-appointed as a contract member for any period up to five years without the requirement of a further period of probation.”

A Bermudian is distinguished in paragraph 1.2 as being pensionable from the date of enrollment.

18. As regards the respondents, therefore, there was an option under paragraph 1.1.2 either to appoint as a pensionable member or to reappoint as a contract member, in the latter instance for a period up to five years. The Commissioner’s letter of 20 September 2007, whilst on the one hand headed ‘Contracts/Permanent Employment’ and asking the respondents to say whether they intended to stay on as pensionable officers, on the other refers to a contract of, in consecutive sentences, five years and up to five years i.e. in the latter instance the



language of paragraph 1.1.2 (b) rather than 1.1.2 (a). Any confusion is clarified by Mr. Trott's email of 29 January 2008 in which he makes express reference to the conditions of service changing at the ten year point to "that of permanent and pensionable (i.e. 5 year re-entry Permits.)"

#### *Discussion*

19. In the latter part of 2007 and early 2008 the question that was under consideration was the respondents' employment after their existing contracts expired at the end of June 2008. By that time they would have served 8 years. The Commissioner of Police was faced with an option under the 2002 Order either to approve as a pensionable member under paragraph 1.1.2(a) which would be pensionable employment i.e. without limit of time, or to re-appoint for a period of up to 5 years. There seems to have been an element of confusion on the part of the Bermuda Police Service and Mr. Trott when they wrote the letter of 20 September 2007 and sent the email of 29 January 2008 because, rather than offering either a fixed term contract of up to 5 years of pensionable employment which would be without limit of time, they appear to be offering a 5 year contract and pensionable employment. The reason they did so may have been because at the 10 year point the respondents would become locked in to the pension provisions. However, we have not been shown the relevant pension regulations and it has not been necessary to explore this.

Mr. Trott's email of 29 January 2008 explains the proposed mechanics a little more explicitly. First there was to be a 2 year contract (i.e. a Clause 1.1.2(b) contract) and then the respondents would be appointed as pensionable members (Clause 1.1.2(a)) i.e. employees without limit of time. Once in that category they could, as Mr. Horseman pointed out in his letter of 30 March 2010, only be discharged from service in accordance with paragraph 3 of the 2002 Order.

In my judgment each of the respondents entered into the 2 year contracts in 2008 in the expectation that they would be offered permanent employment when they had completed the 2 year term.

#### *The Judge's Findings*

20. The judge found an express promise (a) that subject to satisfactory performance appraisals being obtained prior to June 2008, the appellant would employ the respondents for up to

five more years from June 2008 so that they would become pensionable in June 2010 and (b) that the respondents' contractual rights would be limited to being employed under an initial two-year contract that would expire at the end of June 2010. He found that this promise was based on the Commissioner's letter of 20 September 2007 and Mr. Trott's email of 29 January 2008 plus the recommendations made in respect of the respondents prior to concluding the two-year contracts in June 2008.

21. The judge might have added that the significance to the respondents of becoming pensionable in 2010 was the permanence of their service thereafter as pointed out by Mr. Trott in his email of 29 January 2008. In my judgment his finding is unassailable for at least the following reasons:

- It is the natural meaning of the two documents and what Mr. Trott says he told the respondents at the forum on 27 September 2007.
- The then Commissioner's letter of 20 September 2007 is headed Contracts/Permanent Employment.
- The then Commissioner says in evidence that he understood that after the two-year contracts the respondents would be made permanent and pensionable police officers within the Bermuda Police Service without a further review as they all received appropriate recommendations.
- In July 2008 the respondents were all given 5 year work and re-entry permits.
- Several of the Divisional Commander's recommendations spoke of the respondents becoming "permanent and pensionable officers" albeit the Divisional Commander in respect of the fifth respondent spoke of an additional contract for his continued service.

22. The next question is whether the appellant's promise amounted in law to a legitimate expectation. The judge held that it did. He concluded the respondents had a legitimate expectation of having their employment continued beyond June 2010 unless they were guilty of conduct entitling the appellant to terminate their employment or that their re-employment was inconsistent with some other overriding public interest. No such case has been advanced by the Commissioner. In my view he was correct so to hold. A legitimate expectation may arise from an express promise given on behalf of a public authority (see *Council of Civil Service Unions v Minister for the Civil Service* [1985] A.C. 374, 401B). As is said in the 6<sup>th</sup> Edition of De Smith's Judicial Review 12-016, an obvious example is where an express undertaking is given which induces expectation of a specific benefit or advantage. That is what happened here. The form of the express representation is

unimportant as long as it appears to be a considered assurance, undertaking or promise of a benefit, advantage or course of action which the authority will follow.

23. The email of 29 January 2008 from Mr. Trott refers to a service change to that of permanent and pensionable. Of the two aspects, it seems to me that the pensionable aspect kicks in at the conclusion of the tenth year, i.e. at the end of June 2010. But I think the matter of real significance is that what was on offer was permanent employment i.e. employment without the limit of time rather than for a fixed term. That was the matter of the greatest importance to the respondents and their families. Work permits would follow their employment and they would be able to continue to work and live in Bermuda.
24. The next question is whether the appellant was able to disappoint the respondents' legitimate expectation. The judge held that the evidence filed on the appellant's behalf failed to show either (a) that their conduct and/or performance had since 2008 been so deficient that the appellant was justified in not renewing their contracts or (b) that any other identifiable public interest factors justified departing from the express promise. Again, the judge's finding seems to me to be unassailable.

*Grounds of Appeal*

25. There are three grounds of appeal. The first is that the judge took into account immaterial considerations. The thrust of this is that Mr. Trott had no authority to determine personnel matters within the Bermuda Police Service and that therefore his email of 29 January 2008 about permanent and pensionable employment should be disregarded. In my view there is nothing in this point. He had at the very least ostensible authority. I note for example he had signed the letter dated 30 May 2008 reappointing the second respondent.
26. The second ground is that there was no public law issue and the third that the judge wrongly substituted his decision for that of the Commissioner of Police.
27. Mr. Martin Johnson, who appeared for the Attorney General on behalf of the Commissioner of Police, filed submissions running to a hundred and twenty-four paragraphs and sixty-three pages. More realistically before us he concentrated on what he described as the two main issues. The first was that the case was not amenable to judicial review; it was a private law matter, and the second was that of legitimate expectation. The case, he submitted, was

not made out; the Court should not usurp the power of the decision maker and any relief should leave the Commissioner's powers unfettered. No case was advanced by the appellant in the Court below that the respondents should have pursued any claim in private law rather than by judicial review but that is what Mr. Johnson now submits.

28. Police officers are office holders rather than employees under contract. As I pointed out in the English Court of Appeal in *R (Tucker) v Director General of the National Crime Squad* [2003] EWCA civ 2 at paragraph 27:

“A police officer is in a different position from other employees. On becoming an officer he forfeits certain advantages, for example the right to strike or bring proceedings for unfair dismissal. He is subject to the discipline of his force and has, by and large, to go where and do what he is told. On the other hand he gains certain advantages for example the right to remain in service, health permitting, and to ill health and injury pensions. Dismissal and other disciplinary punishment is governed by statutory procedures that are amenable to judicial review in the event of any breach of public law principles such as fairness.”

29. The Court always approaches judicial review applications in relation to police officers with caution. There is often a difficult boundary between those cases in which the Court will intervene and those in which it will not. For example, it will not intervene in operational decisions, but it will on occasion intervene in issues involving dismissal or discipline. *O'Leary v Chief Constable of Merseyside Police* [2001] EWHC admin 57 was a case in which a police officer was promised unrestricted employment following a disciplinary hearing in which he was found guilty of discreditable conduct. The Court applied the principle in *R v North and East Devon Health Authority ex parte Coughlan* [2000] 2WLR 622 in which Lord Woolf MR, giving the judgment of the Court of Appeal, formulated the principles applicable in cases where substantive legitimate expectation is in issue. He said at page 645:

“Where the Court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that here too the Court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimate expectation is established, the Court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy... the Court has when necessary to determine whether there is a sufficient overriding interest to justify a departure from what has been previously promised.”

The Court rejected the argument in *O'Leary* that the case was in the operational or management sphere rather than in the disciplinary context.

30. In *R (Hopley) v Liverpool Health Authority and another* (unreported) 3 July 2002 Pitchford J identified three matters to be considered when considering whether a public body with statutory powers was exercising a public function amenable to judicial review or a private function that was not namely:
- Whether the defendant was a public body exercising statutory powers.
  - Whether the function being performed in the exercise of those powers was a private or public one.
  - Whether the defendant was performing a public duty owed to the claimant in the particular circumstances under consideration.

It seems to me that all the criteria are met in the present case. What was involved was not one individual's contract but a group of officers who were promised permanent and pensionable employment at a fixed point in the future provided they obtained the necessary recommendations. The position appears to have been that there was a new policy adopted by the Commissioner, but that it did not take account of the promise made earlier. I have no doubt that the decision not to re-employ the officers on the terms previously promised is one that is amenable to review in public law.

31. Mr. Johnson's next attack on the judge's decision is on the basis that the officers had no legitimate expectation. I cannot accept this submission for the reasons that I have already set out. He goes on to say that the Court should not usurp the power of the Commissioner and that any relief should leave the Commissioner's power unfettered. It is at this point necessary to look at what actually occurred. The officers all entered the two-year contracts in 2008 following recommendations from Divisional Commanders. Neither the letter of 20 September 2007 nor the email of 29 January 2008 said that the service change to permanent and pensionable employment in 2010 would be subject to further performance reviews and recommendations from Divisional Commanders and the appellant's case has not been advanced on that basis. Rather, the new Commissioner says the previous method of appraisal was inadequate and a new method was instituted to establish whether an officer should be offered a new contract rather than why he should not. His conclusion was that some of the officers were not meeting the high demands required of them.

*Conclusion*

32. The procedure adopted by the Commissioner of Police was not only in breach of the express promise made by his predecessor, it was conspicuously unfair. The barest detail is given of why four of the five officers failed to meet his requirement, no supporting evidence was put before the Court, no opportunity was given to them to answer the criticisms and in one instance, that of the second respondent, he was simply not offered a new contract with no explanation at all and no suggestion his work was in any way substandard. The Commissioner's affidavit is inadequate and the onus was on him to explain why the respondents' legitimate expectation should not be met. He has failed to do so.
33. In my judgment the decision not to offer permanent and pensionable employment at the end of the two-year contract must be quashed. In the event the respondents have all continued to be employed as police officers since the commencement of the judicial review proceedings. I have considered whether there is anything that ought to be remitted to the Commissioner for re-determination but have concluded that there is not. The order of Kawaley J should stand. I would dismiss the appeal.

*Signed*

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Scott Baker, JA

I agree,

*Signed*

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Zacca, President

*Signed*

I agree,

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Anthony Evans, JA