



IN THE SUPREME COURT OF BERMUDA
CIVIL JURISDICTION
2010: No. 133

IN THE MATTER OF THE PUBLIC SERVICE COMMISSION REGULATIONS
2001

IN THE MATTER OF THE CONDITIONS OF EMPLOYMENT AND CODE OF
CONDUCT

IN THE MATTER OF THE RECOMMENDATION OF THE COMMISSIONER
OF POLICE DATED 27 JANUARY 2010 TO SUSPEND THE APPLICANT

IN THE MATTER OF THE SUSPENSION OF THE APPLICANT DATED 26
JANUARY 2010

BETWEEN

BRENT FURBERT

Applicant

-v-

THE COMMISSIONER OF POLICE

1st Respondent

-and-

KENNETH S. DILL
(in his capacity as Head of the Civil Service)

2nd Respondent

JUDGMENT

(Ex tempore)

Date of Hearing: December 6, 2010

Date of Judgment: December 6, 2010

Mr. Kenrick James, James & Associates, for the Applicant

Mr. Alan Dunch, Mello Jones & Martin, for the 1st Respondent

Ms. Shakira Dill, Attorney-General's Chambers, for the 2nd Respondent

Introductory

1. The Applicant, Mr. Brent Furbert, applies for judicial review by an application dated April 21, 2010. He applies on various grounds to challenge the validity of "*disciplinary proceedings instituted against the Applicant and the recommendation of the Commissioner of Police on or before 26 January 2010 that the Applicant be suspended for alleged misconduct in relation to an allegation made by a civilian officer within the Applicants department by the name of Robert MacLean...that he had been promised overtime by the Applicant during the course of hiring negotiations sometime between October 2007 and May 2008*". He complains that this action was wrong in law and seeks various forms of relief, most substantially, (a) an order of certiorari quashing the relevant suspension, and (b) by way of amendment of the application at the hearing, a declaration that the suspension is of no legal effect.

The relevant legal framework

2. The present application cannot be understood without considering the relevant legal framework. The Applicant is a public officer employed in the Information Management Services Department of the Bermuda Police Force. It is common ground that his employment is governed by the Public Service Commission Regulations 2001 as far as disciplinary matters are concerned. The starting point is Regulation 24 which provides as follows:

"Procedure for the adjudication of disciplinary offences

24 (1) The First Schedule to these Regulations states the procedure to be followed in the adjudication of disciplinary offences not involving gross misconduct.

(2) The Second Schedule to these Regulations states the procedure to be followed in the adjudication of disciplinary offences involving gross misconduct.

(3) The procedures set out in the Schedules referred to in this Regulation do not apply to officers during their probationary period.

(4) Disciplinary proceedings shall be commenced within 6 months of the last occurrence or incident giving rise to the proceedings, or, if criminal proceedings are instituted, within 6 months of the final decision in those proceedings taking into account any period within which an appeal may be taken."

3. Regulation 26 deals with suspensions and provides as follows:

“Procedure for the adjudication of disciplinary offences

24 (1) The First Schedule to these Regulations states the procedure to be followed in the adjudication of disciplinary offences not involving gross misconduct.

(2) The Second Schedule to these Regulations states the procedure to be followed in the adjudication of disciplinary offences involving gross misconduct.

(3) The procedures set out in the Schedules referred to in this Regulation do not apply to officers during their probationary period.

(4) Disciplinary proceedings shall be commenced within 6 months of the last occurrence or incident giving rise to the proceedings, or, if criminal proceedings are instituted, within 6 months of the final decision in those proceedings taking into account any period within which an appeal may be taken.”

4. The Second Schedule to the Regulations provides in material part as follows:

“SECOND SCHEDULE (Reg. 24(2))

PROCEDURE FOR HANDLING CASES OF ALLEGED GROSS MISCONDUCT

1. The Head of Department shall prepare a written statement of the alleged offence and give a copy to the officer in question.

2. The Head of Department shall afford the officer the opportunity to meet him to discuss the allegation and present the officer's side of the matter. A representative of the Director and also, where appropriate, the officer's job supervisor shall be present at any such meeting. The officer may have a trade union representative or a friend present to assist him if he so wishes.

3. After the meeting referred to in paragraph 2, the Head of Department shall—

(a) determine whether the allegation should be dismissed. If he so decides, he shall inform the officer by notice in writing accordingly; or

(b) send a report in writing to the Head of the Civil Service pursuant to section 7.4 of the Code and recommend a disciplinary penalty...”

5. Mr. James, for the Applicant, passionately argued that the facts of the present case fell within the subsequent provisions of the Second Schedule (which set out the procedure to

be followed when a disciplinary matter is remitted to the Head of the Civil Service (“HOCS”) for substantive hearing). In my judgment it is clear beyond sensible argument that paragraphs 4 *et seq* of the Second Schedule only apply to guarantee the fairness of disciplinary proceedings which have been referred to the HOCS after the Head of Department has met with the public officer concerned under paragraph 3. It is common ground evidentially that the Schedule 2 paragraph 3 meeting in the present case never occurred. While the reasons for this are not central, it must be noted that the evidence is unequivocally clear in indicating that the Applicant himself elected to commence the present proceedings rather than attend the meeting extended to him by the Commissioner of Police (“COP”).

The evidence

6. The crucial evidence in this case can be found in a few documents. Firstly, paragraph 18 of the COP’s Affidavit, which is not in controversy to any material extent if at all, provides as follows:

“18. On 27th January 2010 I invited the Applicant to a meeting in my office. At the meeting I gave the Applicant the Letter and a letter dated 26th January 2010 from the Head of the Civil Service... notifying the Applicant that he had been suspended. At that meeting I advised the Applicant that it was our intention to schedule a further meeting at which time would be able to present his defence. I also informed the Applicant that the Regulations provided that he was entitled to be accompanied by a trade union representative or a friend.”

7. The suspension was seemingly triggered by a letter sent by the COP to the HOCS dated January 25, 2010. Complaint was made that this letter was not initially disclosed but this has no bearing on the validity of the decision which is impugned in the present proceedings. This letter set out various matters and concluded by stating as follows:

“Under the provisions of Section [sic] 26 of the Regulations, I respectfully request that you direct Mr. Furbert be suspended from duty pending the outcome of the discipline proceedings, and I submit the following considerations to assist your deliberation:

- *A potential recommended penalty if the allegation is proved is dismissal.*
- *Mr. Furbert’s continued presence in the IMS Department is likely to provoke further confrontations, as evidence by the continuation and escalation of this incident from the start.*
- *Mr. Furbert seems to be spending an inordinate amount of work time preparing lengthy statements of complaint and his productivity is being reduced.*
- *The BPS cannot afford to risk key IT projects being stymied and delayed by a department manager who is demonstrating obstructive behaviour.”*

8. Before turning to the grounds for impugning the suspension decision, brief reference must first be made to the suspension decision itself. The HOCS wrote to Mr. Brent Furbert a letter dated January 26, 2010 which stated in material terms as follows:

“... I have been informed by the Commissioner of Police that disciplinary proceedings have been instituted against you for alleged Gross Misconduct.

In accordance with section [sic] 26 of the Public Service Commission Regulations, I advise you that pending the outcome of the disciplinary proceedings, you are being suspended from the public service effective 27 January 2010. You are being suspended on two thirds pay...”

The grounds on which the Applicant relies

9. The grounds on which this decision was said to be unlawful are set out in the Notice of Application itself. There are seven substantive grounds. The first complaint was the COP failed to have regard to the provisions of regulation 24(4) of the Regulations, which requires disciplinary proceedings to be commenced “*within six months of the last incident or occurrence giving rise to the proceedings*”. This point appeared to have some merit to it. If one looks solely within the four corners of the COPs January 27, 2010 letter, it is unclear precisely when the last act complained of occurred for the purposes of regulation 24(4). On the other hand, when one looks at the position in light of the letter the COP wrote on January 25, 2010 to the HOCS, it appears that conduct in question may have been continuing and fell well within the six months period¹.
10. The Applicant, shortly before the present hearing, applied for leave to cross-examine one or more of the Respondents’ witnesses. That application was refused by the Learned Chief Justice, no doubt in part because as a matter of principle judicial review proceedings are intended to deal with matters which are not very fact specific but which deal mainly with points of law. The issue of a time-bar is, save in very clear cases, usually a fact-sensitive one. In my judgment this question of whether or not the claim is time-barred is more appropriately resolved within the disciplinary proceedings themselves when witnesses should be available for cross-examination and the best available evidence will be before the relevant adjudicator². So the evidence before this Court is incomplete and it cannot be properly determined that the disciplinary proceedings are so clearly time-barred that the decision of the HOCS to impose a suspension is unlawful and should be quashed on that ground.
11. The second ground on which the Applicant relies must be read together with grounds three and four, all of which grounds complain of the unfairness of the investigation. Mr.

¹ It was the COP’s case that time did not start running until he knew of the relevant allegations in the autumn of 2009.

² As submitted in the Second Respondent’s Skeleton Argument: “*It is the duty of the court to leave decisions about the existence or non-existence of facts to the decision maker so empowered (R v. Hillingdon LBC ex p. Puhlhofer [1986] AC 484)*”.

James again very vigorously contended that the rules of natural justice which apply generally to the hearing of disciplinary charges should be held to apply to the investigative phase as well. He was unable to cite any authority in support of that proposition³. In my judgment it is unprecedented and wholly untenable to suggest that an investigative process leading to a decision that an employee should be charged with an offence should be judged by the same standards of fairness which would apply to the hearing of the substantive complaint. There is some, albeit disputed, evidence that the Applicant was given an opportunity to be heard during the course of the investigative process. Without deciding that issue, I have no difficulty in concluding that grounds (ii)-(iv) inclusive of the application must also be rejected as they lack merit.

12. The fifth ground was that the COP “*failed to prepare a written statement of the alleged offence in accordance with Schedule II of the Public Service Commission Regulations 2001; instead he wrote a letter in which he wrongly concluded that the Applicant had committed the alleged offence*”. This complaint also must be rejected. The January 27, 2010 letter in my view substantially complies with the requirements of paragraph 1 of the Second Schedule to the Public Service Commission Regulations 2001. While it might be contended that the tone of the letter was overly enthusiastic, it is not inconsistent with the role of a decision-maker laying a serious charge for him/her to express strong views as to the merits of the complaint.
13. The sixth ground is that the COP “*wrongly concluded that the allegation of the promise of overtime which had been denied by the Applicant during the course of a grievance procedure involving Robert MacLean and the Applicant were examples of fraudulent and dishonest behaviour*”. This complaint goes to the merits of the underlying complaint and does not in my view support the present judicial review application. The relevant consideration facing the person making the suspension decision was not whether or not the disciplinary offence had been committed but whether it was evident that disciplinary proceedings had been commenced and that the Head of Department (in this case the COP) had stated that he believed that an offence of gross misconduct had occurred. This much was clearly signified by the January 25, 2010 letter from the COP to the HOCS upon which it is clear the January 26, 2010 letter from the HOCS to the Applicant was based⁴.
14. It was suggested by Mr. James that the HOCS had acted somewhat casually in simply accepting the representations made by the COP. In my judgment that criticism is not justified having regard to the senior constitutional role played by the COP. It would be surprising in my view if the HOCS were to have queried the *bona fides* of the COP’s January 25, 2010 letter. Had a different letter been written, it is possible to imagine circumstances where it would have been inappropriate for the HOCS to accept at face

³ He cited *Kanda-v- Government of the Federation of Malaya* [1962] A.C. 322 (H.L.), which involved the fairness of substantive disciplinary proceedings resulting in the public officer’s dismissal. I noted in the course of argument that there are contexts in which the fairness of a disciplinary investigation may be questioned, such as at the disciplinary hearing itself or when challenging the merits of a final disciplinary decision.

⁴ It was not contended in the formal application before the Court that any of the other preconditions for a valid suspension had not been met.

value the representations made to him. For instance, if it had been clear on the face of the letter that the relevant disciplinary matter was not a gross misconduct offence, that sort of defect would have required the HOCS to either decline to impose the suspension requested or to seek further clarification. But in my judgment there is no basis on the evidence to conclude that the HOCS in any way took into consideration irrelevant matters or failed to take into account relevant matters when he made the decision that he did.

15. The seventh and final ground for complaint was not pursued.
16. It appeared to me in the course of argument that perhaps the best criticism which could have been made of the HOCS' decision was that it failed to comply with the requirements of regulation 26 in that it appeared that the suspension decision was made before the proceedings were commenced. The statutory scheme is somewhat unclear in failing to expressly define when disciplinary proceedings are deemed to commence for the purposes of regulations 24 and 26. However, on the facts of the present case, as Mr. Dunch pointed out, with reference to paragraph 18 of the COP's Affidavit, what happened was that the suspension decision was not implemented until January 27, 2010, the same date on which the Head of Department prepared a copy of the statement of offence and gave a copy to the public officer in question. That date is the best and most sensible date to construe as the date when the disciplinary proceedings commenced, having regard to paragraph 1 of the Second Schedule to the 2001 Regulations.
17. If any doubt about when the suspension took effect existed, that doubt was eliminated altogether by Ms. Dill pointing out to the Court that by its terms the January 26, 2010 letter did not take effect until January 27, 2010.

Conclusion

18. So in there was no valid basis for impugning the decision of the HOCS to suspend the Applicant in all the circumstances of the present case. For these reasons, the application is dismissed.
19. [After hearing counsel, costs were reserved until after the determination of the disciplinary proceedings, subject to liberty to apply.]

Dated this 6th day of December 2010 _____
KAWALEY J