



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2011 No: 357

**IN THE MATTER OF SECTIONS 15 AND 6(8) OF THE BERMUDA
CONSTITUTION ORDER 1968**

**AND IN THE MATTER OF RULE 114 OF THE RULES OF THE
SUPREME COURT 1985**

**AND IN THE MATTER OF THE INHERENT JURISDICTION OF THE
COURT FOR AN ORDER DECLARING THAT THE PLAINTIFF IS A
GOVERNMENT EMPLOYEE AS A PUBLIC OFFICER IN THE
ESTABLISHED POST AS HEAD OF INFORMATION MANAGEMENT
SERVICES DEPARTMENT OF THE BERMUDA POLICE SERVICE**

BRENT FURBERT

Applicant

-v-

COMMISSIONER OF POLICE

First Respondent

THE HEAD OF THE CIVIL SERVICE

Second Respondent

EX TEMPORE JUDGMENT

(In Court)

Date of Hearing: October 5th, 2012

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

Mr. Alan Dunch, MJM Limited, for the First Respondent

Ms. Shakira Dill, Attorney General's Chambers, for the Second Respondent

Introduction

1. The Applicant, Brent Furbert, is a civil servant and the manager of the information management services department of the Bermuda Police Service. He is subject to disciplinary proceedings under the Public Service Commission Regulations 2001 ("the Regulations") for alleged gross misconduct. Mr. Furbert challenges these proceedings as unlawful and unconstitutional.
2. The challenge is contained in two documents: an originating summons dated 6th October 2011 and up-dating grounds on which relief is sought dated 25th June 2012.
3. By the originating summons, Mr. Furbert seeks a declaration that his constitutional rights have been breached by the denial of a fair hearing within a reasonable time in the disciplinary proceedings, as required by article 6(8) of the Bermuda Constitution Order 1968 ("the Constitution"), and consequential relief. At my invitation, Mr. James asked me to adjourn the hearing of this issue until after the final determination at first instance of the disciplinary proceedings. It is not until then that the full extent of the delay will be known, at which point the court will be best placed to form a judgment as to its reasonableness.
4. In the up-dating grounds Mr. Furbert alleges that the Respondents, and particularly the Second Respondent ("the HOCS"), have acted unlawfully

and in breach of natural justice, such that a fair hearing under the Regulations is no longer possible. If this ground were to succeed I could proceed forthwith to hear argument as to whether the delay was in breach of the Constitution.

The Regulations

5. It is helpful to set out the relevant provisions of the Regulations, as these form the context in which this matter falls to be decided.

6. Section 23(1) of the Regulations provides that:

“ ... an officer commits a disciplinary offence if – (a) he commits an act of ... gross misconduct described in the Code.”

7. Section 24(2) of the Regulations provides that:

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

8. The Second Schedule to the Regulations provides:

“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. ...

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) refer the case to the Head of the Civil Service.

.....

5 *Where a case has been referred to the Head of the Civil Service under paragraph 3(b) he shall conduct a hearing, after giving at least fourteen days' notice of the date, time and place of the hearing to the officer.*

6 *The officer shall appear before the Head of the Civil Service in person and may have a trade union representative or friend to assist him if he wishes.*

6A *The Head of the Civil Service shall invite the officer's job supervisor and Head of Department, and any other officers whom he considers relevant to the case, to appear before him.*

7 *The Head of the Civil Service shall give the officer full opportunity to be heard or to make representations and shall, after hearing both sides, determine the matter or dismiss the allegation.*

.....

9 *The Head of the Civil Service may designate an Assistant Cabinet Secretary to perform any of his functions under this Schedule."*

The Adjudicator's Decision

9. The HOCS designated the Deputy Head of the Civil Service, Mrs. Judith Hall-Bean ("the Adjudicator"), to hear the disciplinary proceedings against Mr. Furbert. Accordingly she convened a hearing on February 7th 2012 for this purpose. Mr. Furbert attended with his attorney, Mr. James, who made certain preliminary submissions on points of law.

10. These included the submission that, contrary to the principles of natural justice and section 6 of the Constitution, Mr. Furbert had not been presented with a summary of the particulars of the internal investigation of the allegations against him which was conducted by the Deputy Commissioner of Police, nor was he given an opportunity to respond to the conclusions reached prior to the letter of the First Respondent ("the Commissioner") to him dated 16th November 2011, in which the Commissioner informed Mr. Furbert that he would refer the allegation to the HOCS.

11. In a letter dated 8th February 2012, the Adjudicator referred the matter to the Ministry of Justice to seek advice on Mr. Furbert's submissions. In light of the advice that she received, she wrote to Mr. Furbert and the Commissioner on 29th March 2012. In the letter to the Commissioner she stated:

“You should therefore forward a written statement of the offences and invite Mr. Furbert to meet with you to discuss the allegations in accordance with Paragraph 2 of the Second Schedule.”

12. This was unfortunate, as the Adjudicator had invited the Commissioner to comply with a requirement of the Second Schedule that this Court, in a judgment of Kawaley J. (as he then was) dated 6th December 2010, had found he had already complied with. That was in the course of another application for judicial review, which was brought by Mr. Furbert earlier in the life of the disciplinary proceedings. Kawaley J. ruled at paragraph 12 of his judgment:

“The fifth ground was that [the Commissioner] ‘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 must also be rejected. The January 27, 2010 letter [in which the Commissioner advised Mr. Furbert of the commencement of disciplinary proceedings against him for gross misconduct] in my view substantially complies with the requirements of paragraph 1 of the Second Schedule to the Public Service Commission Regulations 2001.”

13. This ruling was binding on the Adjudicator. She therefore acted unlawfully, in the sense of acting ultra vires, by referring the matter to the Commissioner directing him to comply with paragraph 2 of the Second Schedule when, as this Court had determined, he had already done so. This is no reflection on the Adjudicator, who was acting on the advice that she had received. She should not at the hearing have been invited, in effect, to depart from the Court's ruling – still less so without even being referred to it. It is unfortunate that her advisors also appeared unaware of the ruling.

14. The consequences were these. The Commissioner obtained legal advice that having already complied with his duties under the Regulations it would be inappropriate and possibly unlawful for him to purport to comply with them again. Consequently he did not comply with the Adjudicator's direction.
15. It would have been helpful if the Commissioner had written to the Adjudicator, copying the letter to Mr. Furbert and his attorneys, explaining his position and enclosing a copy of Kawaley J.'s judgment. That would have enabled the Adjudicator to consider, in light of that judgment, how best the matter ought to move forward.
16. Mr. James, who dealt with my frequent interventions eloquently and patiently, submits, however, that the Adjudicator's decision is flawed in a deeper sense. He draws my attention to paragraph 2 of the Second Schedule and submits that, in light of that paragraph, the Adjudicator only had jurisdiction to determine or dismiss the allegation against Mr. Furbert, not to remit it to the Commissioner for a "second bite of the cherry".
17. Consequently, Mr. James submits, by so remitting the matter the Adjudicator acted unlawfully, in that her decision to do so was ultra vires, and also unfairly, in that she was acting as both prosecutor and judge.
18. Persuasively though these submissions are couched, I reject them. The provisions contained in the Second Schedule are very general. This gives the HOCS flexibility in dealing with procedural issues. Eg it permits him to refer the matter back to the relevant Head of Department if paragraphs 1 and/or 2 of the Second Schedule have not been complied with. Indeed it is arguable that in those circumstances the HOCS would be obliged to do so. For, if paragraphs 1 and 2 have not been complied with, the referral to the HOCS would be only purported and not actual.
19. I am satisfied that the Adjudicator was not acting as prosecutor. She took independent advice about the legal submissions made to her, as she is not a lawyer, and acted upon that advice. She did so to ensure that Mr. Furbert was afforded the procedural safeguards provided by paragraphs 1 and 2 of the Second Schedule.

20. I am therefore satisfied that the Adjudicator is able to provide Mr. Furbert with a fair hearing. The central requirements of such were set out by Lord Reid in the well known decision of Ridge v Baldwin [1964] A.C. 40 at page 64:

“The appellant’s case is that ... the watch committee were bound to observe what are commonly called the principles of natural justice. Before attempting to reach any decision they were bound to inform him of the grounds on which they proposed to act and give him a fair opportunity of being heard in his own defence.”

21. Mr. James made further submissions as to how and whether the requirements of natural justice could be complied with. He addressed me about Mr. Furbert’s right to know the case against him –ie not merely a written statement of case, but also the evidence relied upon in support of it – prior to the disciplinary hearing, and about the appropriate standard of proof, given the serious and possibly criminal nature of the allegations that Mr. Furbert faces.

22. I am satisfied that these legitimate concerns can be dealt with by appropriate directions from the Adjudicator, assisted, perhaps, by some observations that I shall make shortly.

Disposition

23. As I have found that the Adjudicator’s decision to remit the matter to the Commissioner was unlawful, I quash that decision. Consequently the matter is still before the Adjudicator and she is now able to make directions for its speedy resolution.

24.I shall give some further directions in a moment. Then I shall hear the parties as to costs.

Dated this 5th day of October, 2012 _____

Hellman J.