



# In The Supreme Court of Bermuda

CIVIL JURISDICTION  
2012: 397

**IN THE MATTER OF THE RULES OF THE SUPREME COURT 1985 ORDER 53  
RULE 3**

**AND IN THE MATTER OF A DECISION OF THE COMMISSIONER OF POLICE  
MADE ON 23 JUNE 2012 TO DISCIPLINE THE APPLICANT AND/OR  
TERMINATE THE APPLICANT'S OFFICE**

**AND IN THE MATTER OF THE POLICE ACT**

**AND IN THE MATTER OF THE POLICE (DISCIPLINARY) ORDER 1975**

**AND IN THE MATTER OF SPECIAL INSTRUCTIONS "CODE OF CONDUCT"  
2010**

**AND IN THE MATTER OF THE BERMUDA POLICE ASSOCIATION  
REGULATIONS 1968**

**BETWEEN:**

**CEBELLE DAWSON**

**Applicant**

**-v-**

**THE COMMISSIONER OF POLICE**

**1<sup>st</sup> Respondent**

**-and-**

**BERMUDA POLICE ASSOCIATION**

**2nd Respondent**

**REASONS FOR DECISION**

(in Chambers)

Date of Decision: February 7, 2013  
Date of Reasons: February 13, 2013

Mr Lawrence Scott, Scott & Scott, for the Applicant  
Mr. Kyle Masters, Trott & Duncan, for the 2<sup>nd</sup> Respondent  
Ms Shakira Dill, Attorney-General's Chambers, for the 1<sup>st</sup> Respondent

## Introductory

1. By a Notice of Application dated October 29, 2012, the Applicant sought leave to seek judicial review of the June 23, 2012 decision of the Commissioner of Police, the 1<sup>st</sup> Respondent ("COP"), which resulted in the termination of her employment as a Police Officer. Although no "decision" made by the 2<sup>nd</sup> Respondent, the Bermuda Police Association ("BPA"), was expressly challenged, the following relief was sought against the BPA:

*"4. An order of mandamus requiring the 2<sup>nd</sup> Respondent to comply with the provisions of its Rules to protect the welfare of the Applicant."*

2. On November 15, 2012, without a hearing, I made the following decision which was communicated to the Applicant's counsel by email:

*"The Applicant applied pursuant to Order 53 rule 5 for leave to seek judicial review on October 29, 2012 at 11.43 am. For administrative reasons which are unclear, the application only reached my desk today, over two weeks after it was filed.*

*The Applicant complains that she was constructively dismissed on June 23, 2012 when she was pressured to resign when accused of a disciplinary offence in breach of the statutory procedure laid down by the Police (Discipline) Orders 1976. She seeks, inter alia, an order of certiorari quashing the purported termination of her employment and a declaration that it was invalidly terminated in breach of her statutory procedural rights.*

*The claim against the 1<sup>st</sup> Respondent appears arguable based on the material presently before the Court and I grant leave accordingly. Leave is for practical purposes granted as against both Respondents at this stage although the claim against the 2<sup>nd</sup> Respondent seems tenuous in the extreme." [emphasis added]*

3. By Summons dated January 21, 2013, the BPA applied to set aside the grant of leave. This Summons was listed for hearing before me on February 7, 2013 and the BPA's counsel and the Applicant's counsel both filed skeleton arguments in support of in opposition to the application to set aside the grant of leave. In these circumstances I decided to hear the application substantively on the first return date of the Summons.

4. After hearing counsel for the parties affected by the January 21, 2013 Summons, I set aside the grant of leave against the BPA and awarded the costs of the successful application to the BPA as against the Applicant, to be taxed if not agreed. I now give reasons for that decision.

### **The Applicant's case against the BPA**

5. The Applicant's primary complaint was that the procedure adopted by the COP at a meeting on June 23, 2012 when she was persuaded to resign was unlawful and as a result her resignation was of no legal effect. However, woven onto the outer edge of the main fabric of her case was the following subsidiary complaint. In reliance upon section 28(2) of the Police Act 1974 and paragraph 2(1) Bermuda Police Association Regulations 1968 (Grounds, paragraph 8) and the assertion that the BPA was bound to adhere to the disciplinary protections provided by the Police (Disciplinary) Orders 1976 (Ground 10), the following substantive case was asserted against the BPA:

*"13. Such failure by the Second Respondent to look after the welfare of the Applicant aided the First Respondent in making a decision to breach the Applicant's legitimate expectation of a fair hearing as set out in paragraph 12 above.*

*14. The decision of the First and Second Respondents to unduly influence the Applicant's decision to resign by failure to follow the proper rules and by shouting ("you're a liar") and remaining silent respectively thereby causing the Applicant to resign, resulting in the Applicant's los[s] of office is thereby void for breach of procedural irregularity and/or in breach of her legitimate expectation of a fair hearing and a full career in the Police Service."*

6. When the Grounds are read with the Applicant's October 29, 2012 Affidavit, it is clear that the essence of the complaint against the BPA is as follows. The BPA's President was present in a disciplinary meeting in the course of which the COP pressured her to resign in violation of her statutory fair hearing rights. The BPA's silence and omission to look after her welfare by assisting her to enforce her statutory rights was in breach of its own statutory obligations and contributed to the COP's invalid constructive dismissal decision.
7. This complaint seemed tenuous on its face primarily because the statutory obligations relied upon did not on their face appear to apply to the disciplinary context at all. Section 28(2) of the Police Act 1974 provides as follows:

*"(2) The objects of the Bermuda Police Association shall be to enable members of the Service of or below the rank of Chief Inspector to consider, and bring to the notice of the Governor, Commissioner or Government all matters affecting their welfare and efficiency including pay, pensions and conditions of service, other than questions of discipline and promotion affecting individual members of the Service." [emphasis added]*

8. Regulation 2(1) of the Bermuda Police Association Regulations 1968 also provides:

*“2 (1) There is hereby established a body, to be known as the Bermuda Police Association, the objects of which shall be to enable police officers to consider and bring to the notice of the Commissioner, the joint negotiating body, and the Governor all matters affecting their welfare and efficiency, including pay, pensions and conditions of service, other than questions of discipline and promotion affecting individual members of the Service.”*  
[emphasis added]

9. In addition, however, it was clear that the substantive complaint made was the failure of the Applicant’s employer to comply with a statutory disciplinary code governing relations between the statutory employer and his statutory employees. It was difficult to see under what legal theory the BPA, a third party to the employment relationship, could be found to be jointly liable as a matter of public law with the COP. Moreover, it was difficult to perceive why the primary relief sought against the COP would not afford sufficient relief in circumstances where it seemed untenable for the BPA to be amenable to free-standing judicial review relief in the event that no relief was available as against the COP.
10. As I indicated in the course of the hearing, I granted leave on the papers really to avoid the possibility that what might merely have been a poorly pleaded paper case could subsequently prove to be capable of further refinement. The application to set aside leave provided a convenient early opportunity to see whether the Applicant was able to fortify her case against the BPA to such an extent as to justify the initial grant of leave.

#### **The BPA’s application to set aside leave**

11. The BPA’s counsel accepted that the test for granting leave “*is not a high one*”: *Middleton-v-DPP* [2006] Bda LR 79 per Ground CJ (at paragraph 5). However, it was submitted that the following test approved by the Privy Council in *Sharma-v-Antoine* [2006] UKPC 57, [2007] 1 WLR 780 governed the approach to an application to set aside leave (at paragraph 14(6):

*“Where leave to move for judicial review has been granted, the court’s power to set aside the grant of leave will be exercised very sparingly: R v Secretary of State for the Home Department, Ex p Chinoy (1991) 4 Admin LR 457, 462. But it will do so if satisfied on inter partes argument that the leave is one that plainly should not have been granted: ibid. These passages were cited by Simon Brown J in R v Secretary of State for the Home Department, Ex p Sholola [1992] Imm AR 135 and we do not understand him, in his reference to delivering “a knockout blow” at p 139, to have been propounding a different test.*

12. These principles were not challenged and I am guided by them.
13. Mr Masters then proceeded in his Skeleton Argument On Behalf of the Second Respondent to make the following powerful submissions:

*“9. It is accepted that the power to set aside leave is one that should be exercised sparingly, however we say that there is plainly a basis for concluding that leave was wrongly granted in this case against the BPA for the following reasons;*

- a. The meeting on 23 June 2012 between Dawson was of a disciplinary nature.*
- b. Whether procedurally fair or not, the purpose and effect of the meeting was to allow the Police to deal with Dawson concerning a matter of discipline;*
- c. The matter affected Dawson alone and no other member of the Police Service;*
- d. Regulation 2 of the Regulations expressly prevents the BPA from considering and/or bringing to the notice of the Police Commissioner or the other relevant bodies, issues which are questions of discipline which affect individual members.*
- e. Dawson sought, and was granted leave to seek an Order which would have the effect of forcing the BPA to intervene in her matter of discipline despite the express limitation placed on the BPA under Regulation 2 not to.*

*10. Plainly, the Court was wrong to grant leave to Dawson as against the BPA to seek the relief she seeks. It can be tested this way, if the Court upholds the decision to grant Dawson leave against the BPA, it must also believe that there is an arguable case that (a) the Regulations allow the BPA to intervene in matters of discipline affecting individual members of the police service; (b) the BPA failed to discharge its duty to Dawson under that Regulation; and (c) the BPA should be forced, by Order of mandamus to protect Dawson and, by extension other members of the BPS on matters of discipline. A plain and ordinary interpretation of Regulation 2 dispels any argument that these conclusions could be sound. ”*

14. In the Applicant’s Skeleton in Reply, it is conceded that the disciplinary function fell solely within the remit of the COP. Nevertheless Mr Scott submitted that:

- (a) Regulation 2(1) permitted the BPA to notify the COP about all matters affecting its members’ welfare;
- (b) since the BPA President was invited into a disciplinary meeting, *“they had a duty to act positively and not sit passively”* (paragraph 5);
- (c) the BPA was an interested party in any event and its participation was essential to provide evidence of what transpired at the meeting; alternatively
- (d) the COP might seek to defend the present application on the grounds that the relevant meeting was not a disciplinary one at all but governed by

section 9 of the Police Act (“Discharge from Service”). In that eventuality, the BPA would have had a statutory duty to take positive action to protect the Applicant under the Police (Conditions of Service) Order 2002 and the Grievance Policy.

15. Section 9 of the Police Act 1974 provides as follows:

*“9 (1) Without prejudice to the Public Service Superannuation Act 1981 and the powers of the appropriate authority to remove or exercise disciplinary control over members of the Service in accordance with the Constitution and any regulations made thereunder, a member of the Service may be discharged from the Service by the appropriate authority if the appropriate authority is of the opinion that such discharge is necessary in the public interest.”*

16. The notion that the COP could seek to justify the dismissal under section 9 of the Act in his response to the present proceedings seems fanciful. According to Exhibit “CD3” to the Applicant’s Affidavit sworn in support of her leave application, the COP’s initial written response to her complaint in paragraph 3 of his October 3, 2012 letter to her attorneys included the following unambiguous statement:

*“She was given the option to voluntarily resign from the Bermuda Police Service or to contest the allegation. She chose the former, which-given the nature of the evidence which was presented to her-is not surprising.”*

17. Paragraph 25 of the Police (Conditions of Service) Order 2002 provides in salient part as follows:

*“25.1.1 The objective of the Grievance Policy of the Bermuda Police Service is to allow an avenue of redress for those members of the Service feeling aggrieved by any decision, act or omission undertaken during the administration of the affairs of the Service, and for which no other process for redress is provided or has proven successful.*

*25.1.2 Any member of the BPS is entitled to present a grievance in writing, on the proper grievance form, at each of the levels identified in the grievance process, and will be assured that their grievance will be processed and dealt with expeditiously.*

*25.1.3 The purpose of a grievance process is to improve communications between employees in the Bermuda Police Service with respect to problems that may arise in the workplace...*

***25.2 Problem-Solving Before Applying for the Grievance Process***

*25.2.1 At any stage in the following process, the member may request the assistance of the Bermuda Police Association or another member. A representative may be assigned to assist the member during any or all steps in the process...”*

18. On the face of these provisions, the Grievance Policy does not appear to apply to disciplinary matters at all and, in any event, the BPA is only given an express statutory role before a member engages the Grievance Policy proper.
19. In his oral submissions Mr Scott was unable to embellish his written arguments to any material extent.

**Findings: is the Court satisfied that leave ought plainly not to have been granted?**

20. I was satisfied by the submissions of Mr Masters that plainly leave ought not to have been granted. My preliminary assessment of the Applicant's pleaded case against the BPA as "*tenuous in the extreme*" has only been confirmed by the *inter partes* hearing rather than being undermined by it. In deciding to set aside leave at this stage on the grounds that the case against the BPA is not arguable, I have been influenced by the following considerations.

**Unsustainability of Applicant's claim**

21. The argument that the BPA had a statutory duty to assist the Applicant defend herself against serious disciplinary charges flies in the face of the plain meaning of the relevant statutory provisions, principally section 28(2) of the Police Act 1974 and regulation 2(1) of the Bermuda Police Association Regulations 1968. When these pivotal provisions are read with the Police (Conditions of Service) Order 2002 and the Police (Discipline Orders) 1975, it is clear beyond sensible argument that the BPA had no express or implied statutory duty or power to participate in the meeting on the Applicant's behalf.
22. A clear view of the true legal position was perhaps clouded somewhat by the fact the COP apparently invited the BPA President to be present at the meeting. Why this invitation was extended or accepted is not entirely unclear. Mr Scott suggested in argument that there is an on-going policy debate about the desirability of expanding the BPA's existing role. Be that as it may, the mere fact that the BPA were invited to be present at the meeting (without being, on the Applicant's own case, invited to play an active role as her representative) cannot override the plain words of applicable statutory provisions.
23. In the employment context in particular, it is always necessary to determine whether the acts of the public authority complained of in a judicial review application properly engage public law or merely private law rights. Nevertheless the requirement to demonstrate that a breach of public law has arguably occurred is an essential ingredient in every judicial review application. An application which fails to disclose an arguable case that the public authority whose conduct is complained of acted in breach of statutory obligations is accordingly bound to fail. As Scott Baker JA opined in the Bermudian Court of Appeal decision of *Commissioner of Police-v-Allen* [2011] Bda LR 13 :

“33. 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:

i. Whether the defendant was a public body exercising statutory powers.

ii. Whether the function being performed in the exercise of those powers was a private or public one.

iii. Whether the defendant was performing a public duty owed to the claimant in the particular circumstances under consideration.

24. In the present case I was satisfied firstly that the Applicant had failed to demonstrate any arguable misuse of statutory powers by the BPA linked to its passive participation in the meeting which resulted in the Applicant tendering her resignation to the COP. Secondly, without deciding this point, the statutory functions which have been conferred on the BPA to advance the welfare of its members appear more like private powers than public ones. Thirdly, I was satisfied in any event that the BPA was not subject to “a public duty owed to the claimant in the particular circumstances under consideration”.

25. There are exceptional circumstances where a substantive legitimate expectation can arise based on the actions of public authorities which are based on a mistaken view of the law. In such a context judicial review may be obtained even though the applicant is unable to establish a misuse of statutory powers. The circumstances in which such atypical relief may be sought were considered by Meerabux J in *Simons and Hill Top Corporation Ltd-v-Accountant General* [1999] Bda LR 43. Such exceptional circumstances have no possible application to the present case.

### **Saving costs and furthering the overriding objective**

26. Mr Scott sought to justify the joinder of the BPA on two alternative grounds. Firstly, that they were an interested party and secondly that the President of the BPA is a very important witness. Neither of these arguments withstood scrutiny.

27. There is a fundamental distinction between an entity being a named respondent against whom specific relief is sought and a party affected being joined on a discretionary basis. The application to set aside leave is directed solely at the ending the BPA’s involvement in the present proceedings as a respondent. It is entitled to have its application considered on its merits. Nor was there any obviously plausible reason why the Applicant should be entitled to join the BPA as a party affected over the BPA’s objections. It is self-evident that the mere fact that a person or entity has relevant evidence to give cannot constitute grounds for joining them as a party to judicial review proceedings, as opposed to furnishing a basis for compelling the relevant witness to give evidence at trial.



28. The continued involvement of the BPA in the present proceedings would not only be unfair to the BPA; it would likely result in the Applicant being made subject to a wasted costs order at the end of the proceedings of a far greater magnitude than the costs incurred by the BPA. Furthermore, it was impossible to discern any legitimate benefit the Applicant could hope to achieve as against the BPA which she could not potentially recover from the COP. Acceding to the BPA application would not entail depriving the Applicant of the ability to pursue the entirety of her claim. Under Order 1A of the Rules, this Court is obliged to “*further the overriding objective by actively managing cases*” (Order 1A rule 4(1)). Order 1A rule 4(2) defines active case management as including:

“...*(b) identifying the issues at an early stage;*

*(c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others...*”

29. The fact that acceding to the BPA’s application to set aside leave was consistent with sensible case management was a further factor which I took into account in exercising my discretion to set aside the leave I granted (very tentatively) on November 15, 2012.

### **Conclusion**

30. For the above reasons on February 7, 2013 I set aside the leave I granted to the Applicant on November 15, 2012 to seek judicial review as against the 2<sup>nd</sup> Respondent and ordered the Applicant to pay the said Respondent’s costs.

Dated this 13<sup>th</sup> day of February, 2013 \_\_\_\_\_  
IAN RC KAWALEY CJ