



# In The Supreme Court of Bermuda

CIVIL JURISDICTION  
2012: 397

**IN THE MATTER OF ORDER 53 OF THE RULES OF THE SUPREME COURT OF BERMUDA**

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

**IN THE MATTER OF THE POLICE ACT 1974**

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

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

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

**BETWEEN:**

**CEBELLE DAWSON**

**Applicant**

**-v-**

**THE COMMISSIONER OF POLICE**

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

**-and-**

**BERMUDA POLICE ASSOCIATION**

**2<sup>nd</sup> Respondent**

**RULING**  
(in Court)<sup>1</sup>

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<sup>1</sup> This Ruling was circulated to counsel to save the costs of a purely formal hearing.

Date of Hearing: July 16, 2013

Date of Ruling: July 19, 2013

Mr. Lawrence Scott, Scott & Scott, for the Applicant

Ms. Shakira Dill, Attorney-General's Chambers, for the Respondents

## **Introductory**

1. The Applicant seeks judicial review of the decision of the 1<sup>st</sup> Respondent to terminate her employment of approximately 5 years as a member of the Bermuda Police Service on or about June 23, 2013. She alleges that she was pressured to hand in her resignation on that date when she was first accused of contravening the Code of Conduct by having an intimate relationship with a member of the criminal fraternity.
2. The Applicant's complaint against the 2<sup>nd</sup> Respondent, whose President was in attendance at the relevant meeting but took no part in it, was effectively struck-out on February 7, 2013 on the grounds that the Bermuda Police Association ("BPA") has no statutory power to involve itself with disciplinary proceedings.
3. There is a factual dispute as to precisely what took place at the meeting between the Assistant Commissioner and a Superintendent which culminated in the Applicant tendering her resignation. The extent of the dispute only became apparent at the effective hearing of the present application and it was clear that leave to cross-examine the Applicant and the two senior Police Officers would have to be granted to resolve those disputes.
4. Of the Court's own motion, I decided to determine as a preliminary issue whether, based on certain agreed facts, the acceptance of the Applicant's resignation was unlawful in the sense that it contravened the special statutory protections for the employment of Police Officers found in, *inter alia*, the Police (Discipline) Orders 1975.
5. I took this case management step for two reasons. Firstly, I did not want the costs of preparing for a hearing which could not be concluded in the one day originally assigned to be thrown away. Secondly, I hoped that the need for the controversial factual issues to be resolved might be obviated although I fully appreciated that the possibility of this matters being settled as a result was somewhat speculative. This is particularly because the form of relief to be granted to the Applicant even if she was successful in establishing procedural impropriety is likely to depend on whether or not the Court finds that she did or did not freely admit the misconduct alleged in the course of the crucial meeting.
6. Ms. Dill suggested that the true nature of the Applicant's case was not apparent until her counsel's oral submissions. However, it was or ought to have been obvious from the primary relief sought in the Notice of Application as read with the Applicant's First Affidavit, that the substance of her complaint was that her purported resignation

was procured by procedural unfairness and should accordingly be declared to have been legally ineffective. To the extent that the termination of her employment is set aside and the 1<sup>st</sup> Respondent elects to lay disciplinary charges against her, she also seeks an order of mandamus compelling him to comply with the statutory disciplinary code.

### **The agreed facts**

7. The following facts were substantially agreed:

- (1) the Applicant became a Police Officer in 2008 and had no material blemishes in her disciplinary record;
- (2) on or about June 23, 2013, the Applicant was summoned to a meeting with the Assistant Commissioner and a Superintendent at which she was told for the first time that it was believed based on credible evidence that she was having an intimate relationship with a senior gang leader;
- (3) although the Applicant initially denied this allegation, at the end of the meeting she tendered her resignation;
- (4) before tendering her resignation, the Applicant was not offered the opportunity to seek advice;
- (5) the allegation, if true, was potentially serious enough to justify her dismissal (whether following a disciplinary hearing or under section 9 of the Police Act 1974 in the public interest<sup>2</sup>).

### **The statutory framework**

8. I find that the following provisions of the Police (Disciplinary) Orders 1975 were engaged when the Applicant was asked to attend a meeting at which she was accused of conduct which, if proved, would likely result in her dismissal from the Bermuda Police Service:

***“Investigation of charges***

*3 (1) Whenever a Divisional Officer receives a report, complaint or allegation as to the conduct of a police officer in his Division which tends to disclose the commission of an offence against discipline, he shall appoint an Investigating Officer of the rank of Sergeant or above to investigate and report to him upon the facts.*

*(2) The Investigating Officer appointed in any particular case shall not be of lesser rank or seniority than the police officer in respect of whom the report, complaint or allegation has been made.*

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<sup>2</sup> Assuming the undertaking only to use section 9 for ill health, which is still seemingly set out in the Schedule to the Police (Conditions of Service) Order 2002, has now lapsed.

*(3) The Investigating Officer shall, as soon as practicable, inform the police officer concerned of the nature of the allegation under investigation by written notice in a form approved for use by the Commissioner.*

*(4) The police officer concerned shall within 24 hours inform the Investigating Officer in writing whether he admits or denies the allegation and may make a statement in writing in reply to it and may state the names and addresses of any witnesses to relevant facts whose presence he wishes secured at any subsequent hearing.”*

9. Paragraph 3(3)-(4) of the Orders were to my mind the crucial statutory provisions governing notification of an allegation under investigation and communication by the officer under investigation of a response to the charge. Looked at overall, however, it is clear that the Orders create a framework designed to adjudicate any disciplinary offences which are formally laid in fair manner albeit adapted for the unique context of a disciplined force. Paragraph 7, for instance, provides:

*“(2) The accused shall be ordered to attend the hearing and may conduct his defence in person or by any police officer he selects.”*

10. The Orders are made by the Governor under section 32(1)(h) of the Police Act 1974.

### **Interpreting the statutory framework in the context of a judicial review application**

11. In *Pitcher-v-Minister of Corrections* [2011] Bda LR 68<sup>3</sup>, I observed:

*“74. To my mind, the starting point for any analysis of whether the impugned decision was reached lawfully, in terms of the decision-maker applying the law correctly and proceeding in a fair manner, is the identification of the main elements of the statutory power or powers pursuant to which the relevant decision has purportedly been made. This analysis is undertaken with a view to elucidating the interrelated factors of (a) how the power may lawfully be exercised, and (b) what essential aspects of fairness the statutory procedure requires. Sometimes this will be an exercise of pure statutory analysis; more often than not, the statutory analysis must be married to an analysis of the relevant facts. This is because ensuring that statutory powers have been properly exercised is not just germane to judicial review of specific instances of administrative action; this task is an incident of ensuring respect for the rule of law. As Lord Bingham, writing extra-judicially, has opined<sup>4</sup>:*

*‘Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred and not unreasonably. This rule recognizes, as did Magna Carter, that public power is held on trust, not as a privilege conferred on its possessor. So while we would readily accept that in a complex society such*

<sup>3</sup> [2011] SC (Bda) 52 Civ (25 November, 2011).

<sup>4</sup> *‘Lives of the Law: Selected Essays and Speeches 2000-2010’* (Oxford University Press: Oxford, 2011), page 11.

*as ours power must necessarily be conferred on many ministers, officials, administrators and judges, we do not give any of them, ever, a blank cheque to draw on as they choose. The power is given for a purpose, which must be honoured.”*

12. In my judgment, the statutory scheme envisages that the disciplinary procedure will be operated in a way that is fair in objective terms. Fair to the Bermuda Police Service in that disciplinary complaints are dealt with efficiently to avoid undermining the authority of the command structure which is essential to the operational integrity of any disciplined force. And fair to the accused police officer in terms of ensuring that she is able to defend herself effectively. However, even this dimension of fairness underpins not just the individual interests of the officer being investigated or charged; it also enhances the integrity of the disciplinary system as a whole and indirectly reinforces the authority of the Commissioner and his senior officers as well.

13. Aspects of fairness which are explicitly contained in the Orders may be found in the following provisions of paragraph 3:

(a)the investigating officer shall be at least of an equal rank to the subject of the investigation (paragraph 3(2));

(b)the officer subject to the investigation shall be given written notice of the nature of the allegation in a standard form approved by the Commissioner (paragraph 3(3));

(c)the officer subject to the investigation is given up to 24 hours to indicate in writing whether the charge is admitted or denied (a mandatory requirement) and may also (optionally) provide a written explanation within that same timeframe.

14. The investigation is required to follow a standard procedure and the requirement of writing is clearly designed to avoid the sort of dispute which has arisen in the present case as to whether or not the allegation was admitted. Prescribing 24 hours as the maximum time within which the officer must signify whether the allegation is admitted or contested seems obviously designed to aid a quick investigation process and a reasonable opportunity for the officer to consider how to respond to a possibly serious allegation.

15. Mr. Scott also drew an analogy with the requirements of section 4 of the Police (Conditions of Service) Order 2002 which requires officers to obtain the Commissioner’s permission for resignation, submitting that even the Commissioner was entitled to take time to consider a resignation request. It followed, he implied,

that an officer under investigation and faced with the dilemma of choosing resignation or risking dismissal ought logically to be afforded an opportunity to consider her position before giving a binding response to the relevant allegation. He also pointed out that the Applicant's alleged conduct might even have been criminal, and contrasted the extensive protections afforded to criminal suspects under the Police and Criminal Evidence Act with the circumstances in which the Applicant, an established police officer, was questioned.

16. In circumstances such as those which it is agreed existed in the present case, a junior officer being presented for the first time by two far more senior officers with an allegation which if true would likely result in her dismissal, the minimum statutory requirements of fairness included the following:

(a) the Applicant was entitled to be told that she had up to 24 hours to formally respond to the allegation; and/or

(b) the Applicant was entitled to be asked whether she wished to take some shorter period of time to obtain advice, before electing to pursue the resignation option.

17. These requirements could of course be modified by exceptional or special circumstances by virtue of which fairness was clearly not compromised. However, the Applicant is not required to meet the common law or statutory tests for establishing constructive dismissal in relation to allegedly forced resignations which would only apply to a claimant restricted to remedies available under private law. The whole purpose of public law remedies in the employment context is to enforce compliance with special statutory employment protections afforded to public officers which are more generous than the remedies available under employment law rules applicable to purely private contracts. As Sir John Donaldson observed in *R-v-East Berkshire Authority ex parte Walsh* [1985] 1 QB 152 at 165 (cited with approval by this Court in *Finn-Hendrickson-v-Minister of Education* [2009] Bda LR at paragraph 45):

*“The ordinary employer is free to act in breach of his contracts of employment and if he does so his employee will acquire certain private law rights and remedies in damages for wrongful dismissal, compensation for unfair dismissal, an order for reinstatement or re-engagement and so on. Parliament can underpin the position of public authority employees by directly restricting the freedom of the public authority to dismiss, thus giving the employee “public law” rights and at least making him a potential candidate for administrative law remedies....”*

### **Findings: did any procedural impropriety occur?**

18. I have carefully considered whether I should accede to Ms. Dill's submission that no meaningful findings can be made on the validity of the resignation purportedly tendered without resolving the factual disputes as to the surrounding circumstances. There is essentially one crucial dispute: the 1<sup>st</sup> Respondent contends that the Applicant freely and unambiguously admitted the allegation while the Applicant contends that she did not.
19. In the peculiar statutory context out of which the present application arises, it is fairly open to the 1<sup>st</sup> Respondent to argue that the allegation involved in the present case was so serious yet straightforward that an unambiguous and voluntary admission made by the Applicant when first confronted with the accusation amounted to an exceptional circumstance justifying a departure from the general fairness rules which would apply in most cases. Or, to put it another way, it is arguable that the needs of fairness were adequately met by accepting the Applicant's resignation on the spot without inviting her to take time to consider her response to the allegation. Accordingly, I find that no final determination of the legal status of the Applicant's resignation can properly be made at this stage.
20. While it appears to be necessary for this Court to determine whether or not the misconduct alleged was in fact freely admitted by the Applicant at the meeting, the underlying merits of the now disputed allegation (following traditional judicial review principles) seem to me to fall beyond the purview of the present proceedings. I should note that the 1<sup>st</sup> Respondent claims to have compelling evidence which incriminates the Applicant while she claims to have a coherent and ultimately straightforward response.

### **Conclusion**

21. It appears from the evidence presently before the Court that a breach of paragraph 3(4) of the Orders did occur based on the agreed facts. On the other hand, it is far from clear that the procedural irregularity was sufficiently serious to justify a formal finding that the purported resignation was of no legal effect. Accordingly, on balance, I find that justice requires this Court to:

- (a) grant leave to cross-examine all deponents<sup>5</sup> on their affidavits;

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<sup>5</sup> For the avoidance of doubt, this means all deponents who have filed evidence on behalf of the parties currently before the Court.

- (b) postpone any final determination of the legality of the 1<sup>st</sup> Respondent's conduct until after the disputed facts (primarily whether or not an admission was made) have been resolved; and
- (c) direct the parties to submit agreed dates with a time estimate for a continuation of the hearing (for the purposes of cross-examination) and closing submissions to the Registrar within seven (7) days.

Dated this 19<sup>th</sup> day of July, 2013

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IAN R.C. KAWALEY CJ