

CASE TYPE: (JUDICIAL REVIEW & ADMINISTRATIVE ORDER)

IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

COMMONWEALTH OF DOMINICA

CIVIL NO. DOMHCV2015/0222



BETWEEN:- PRESELY BOYD

Claimant

and

THE ATTORNEY GENERAL OF THE COMMONWELATH OF DOMINICA

1st Defendant

THE CHIEF OF POLICE

2nd Defendant

Before: Honourable Madam Justice M E Birnie Stephenson

Appearances:

J Gildon Richards for the Claimant

Jo-Anne Xavier Cuffy for the Defendants

2020: December 14; 22;

2021: October 29

[1] **Stephenson J.:** Before the court is a claim filed by Mr Presley Boyd seeking Judicial Review consequent upon the termination of his appointment as a Special Constable in the Dominica Police Force.

[2] "Judicial Review is both a power and a duty exercised by superior courts to review laws and the governmental action to ensure their consistency with the Constitution.¹" The Supreme Court also has the power in a judicial review application to declare as unconstitutional, law or governmental action which is inconsistent with the law.²

[3] . The relief sought is set out verbatim as follows:

- a. an order of certiorari to quash the decision of the Chief of Police;
- b. a declaration that the said decision was of a quasi-judicial or disciplinary nature;
- c. a declaration that the disciplinary procedure prescribed at part VIII of the Police Service Commission Regulations, Chap. 1:01 is applicable to all members of the Police force inclusive of the Claimant, excepting the Chief of Police and the Deputy Chief of Police.
- d. a declaration that the claimant was always and remains a constable in the Commonwealth of Dominica Police Force and continues to be entitled to the benefits of all emoluments, other rights, and privileges associated therewith;
- e. a declaration that section 5 (1) of the Police (Amendment) Act No. 1 of 1997 contravenes section 92 subsection (2) of the Commonwealth of Dominica Constitution and is therefore null and void in that, the said section of the said Act vests or purports to vest in the Chief of Police and the minister the power to discipline and remove special constables from the said police force- a power which by the said section of the said constitution is vested in the Police Service Commission only.
- f. a declaration that in making the said decision and or by it, the Chief of Police violated the provisions of section 8 subsection (8) of the Commonwealth of Dominica Constitution in relation to the claimant.
- g. a declaration that in making the said decision and or by it, the Chief of Police violated the rules of natural justice and the principles of basic fairness in that, the Chief of Police wrongfully failed or refused to give the claimant a fair

¹ Fundamentals of Caribbean Constitutional Law by Tracey Robinson, Arif Bulkan & Adrian Saunders at Paragraph 5:01 quoting from *Collymore -v- AG* (1967) 12 W.I.R. 5 (CA TT)

² Commonwealth Public Law by Albert Fiadjoe 3rd Edition at page 15

opportunity to be heard in relation to the facts therein and the Chief of Police was biased.

- h. a declaration that in making the said decision the Chief of Police acted unreasonably and thereby abused his power and authority.
- i. an order of mandamus compelling the Chief of Police in his exercise of his powers and authority in relation to the claimant to act according to law;
- j. an order of prohibition restraining the Chief of Police by himself or through his subordinates, from terminating the appointment of the claimant from the said police force except by due process of law;
- k. damages;
- l. costs; and
- m. any other relief as the Court deems just.

[4] The defendant vigorously defended the claim. The court heard evidence from the claimant in support of his claim and he was cross examined by State Counsel Mrs Xavier Cuffy on behalf of the defendants and from the Commissioner of Police ("the COP") and PC#96 Lawson Prosper. These witnesses were in turn cross examined by Mr Gildon Richards counsel for the claimant.

[5] In matters such as these it is well established that the court exercises a supervisory role. Judicial review is not an appeal procedure. The court cannot compel the public authority to exercise its power in a particular way nor can it compel it to make a decision which it believes to be the correct one.

[6] This court has given deliberate consideration to the helpful submissions with authorities filed by both counsel in this matter. Failure to mention or refer to any of the submissions made or authorities referred does not in any way mean that they were not reviewed and given due consideration.

Background facts

[7] The claimant Presley Boyd was appointed a special constable in the Commonwealth of Dominica Police Force ("The Police Force") in 2000. His appointment in this capacity continued until 26th June 2015 when he received a letter from the Chief of Police ("The COP") that his appointment as a Special Constable was terminated with immediate effect for "National Security Reasons".

[8] The Termination letter received by the claimant did not state any further reasons or particulars for his instant dismissal from the Police Force.

[9] Through his solicitors the claimant sought to obtain the particulars as to the reason for his termination and he also requested a fair hearing from the COP. He however, received no response to his letter.

[10] The Claimant presented the following grounds in support of his claim, that³:

- (1). The Chief of Police acted without jurisdiction or exceeded his jurisdiction under the Police (Amendment) Act No. 1 of 1997.
- (2). The Chief of police violated the provisions of section 8 subsection (8) of the Constitution in relation to the claimant because by the said decision the Chief of Police determined the extent of the claimant's right in his contract of employment; the extent of his right to enjoy the benefits of that contract and the extent of the claimant's obligations as a constable in the Police Force;
- (3). The Chief of Police violated the rules of natural justice and the principles of basic fairness because he made the said decision he failed or refused to give the claimant any opportunity to be heard before he made the said decision so that the claimant could confirm or deny any allegation made against him on which the Chief of Police made his said decision.
- (4). The Chief of Police unlawfully and unfairly denied and injured the Claimant's legitimate expectation-
 - a. That the Chief of Police would have acted fairly and lawfully in his exercise of his power and authority in relation to the claimant;
 - b. That the Chief of Police would have informed the claimant of the facts on which he based his said decision and would have

³ Extracted Verbatim from the closing submissions filed on behalf of the claimant.

given the claimant a fair opportunity to either confirm or deny them.

- c. That the claimant after giving fifteen years of unbroken loyal and creditable service, would continue in appointment as a special constable in the Police Force and would not be dismissed except on good and valid grounds and for good and sufficient reason.

[11] In the interest of conciseness, the issues arising in the case at bar are as follows:

- a. what is the claimant's status within the Dominica Police Force?
- b. whether the COP acted unlawfully that is whether or not he had the power or authority to dismiss the claimant;
- c. whether the COP acted irrationally or unreasonably in terminating the claimant's employment;
- d. whether the COP was under a duty to observe the rules of natural justice and procedural fairness; and
- e. whether the claimant legitimate expectation to continue in his appointment as a special constable of the Dominica Police Force.

[12] It is the defendants' case that claimant's employment was lawfully cancelled pursuant to section 24A of the Police Act⁴. The defendants also deny that the claimant is entitled to any of the reliefs as sought in his claim.

[13] Upon a review of the statement of case and the submissions filed it is this court's view that the first decision that has to be made by this court is, what was the status of the claimant within the Police Force?

[14] Part VII is the relevant part of the Police Amendment Act⁵ which falls to be considered makes provision for:

Section 24 - Appointment of special constables

⁴ Chapter 14:01 of the Revised Laws of The Commonwealth of Dominica

⁵ *ibid*

Section 24 (a) - Discharge of special constables

Section 25 - General powers, etc., of special constables

Section 26. - Arms of special constables

Section 27 - Direction of special constables

Section 28 - Offences by special constables

Section 29 - Remuneration of special constables

[15] The claimant in his affidavit in support of his claim for Judicial Review and Administrative Order stated that he was first appointed a special constable in the Police Force in the year 2000 and that he creditably performed and served the force and the state for 15 years continually in various sections of the police force, his last assignment being to the Special Services Unit "The SSU"⁶.

[16] In his closing submissions Counsel Mr Gildon Richards submitted that the claimant is a police officer and or a police constable within the context of the relevant provisions of the Police Act.⁷ Counsel further submitted that the claimant "fits the meanings applied to "police officer" and "constable" at subsection 2 of the Police Act which provides that **"police officer"** means a member of the police service"; **"constable"** means a police officer who is not a gazetted officer or a subordinate officer."

[17] Mr Richards submitted that the fact that the minister is empowered to appoint a special constable pursuant to section 24 of the Police Amendment Act does not diminish the essential nature of the position that the special constable holds and the functions that he performs. Counsel made reference to the provisions of section 25 which states:

25.(1) Every special constable shall, during his term of office, have all such powers, authorities, immunities and privileges, and be subject to all such duties, responsibilities and discipline as are

⁶ Affidavit of the Claimant filed on the 1st October 2015 at paragraph 2

⁷ Chapter 14:01 of the Laws of Dominica

conferred or imposed upon a member of the police service, and shall, on appointment, take and subscribe before a justice of the peace the oath here following..."

[18] Mr Richards further submitted that when one construes section 25(1) with the section 91, 92 and 117 of the Constitution of Dominica that the provision of section 25(1) is inconsistent with the said Constitutional provisions because section 25 purports to vest in the Commissioner of Police a competing disciplinary power which includes a power of removal which power is vested in the Police Service Commission only except in respect of the COP or the Deputy COP.

[19] Counsel cited **Kanda –v- Government of Malaya⁸** and **Joseph Jno Lewis –v- The Commissioner of Police et al⁹** in support of his argument in this regard.

[20] Counsel Mr Gildon Richards further cited and relied on the Court of Appeal decision of **Joseph Jno Lewis –v- The Commissioner of Police and others¹⁰** and **Kanda –v- The Government of Malaya¹¹** in support of his submission that the COP had no power to dismiss the claimant merely by virtue of his power to terminate the service of a police officer below the rank of Deputy Commissioner.

[21] Counsel submits that this authority vests solely in the Police Service Commission (The PSC) since the power to appoint a police officer resides specifically in the Commission.¹²

[22] The defendants disagree with Counsel Mr Richards and submit that the claimant is a special constable who was appointed pursuant to section 25 of the Police Act and not by the Police Service Commission. Counsel Xavier Cuffy on behalf of the defendants, further submitted that by virtue of a delegation dated June 29th 2000, pursuant to section 92(3) of the Constitution of the Commonwealth of Dominica the power to appoint and discipline police officers below the rank of sergeant was delegated to the COP by the Police Service Commission. It was therefore submitted on behalf of the defendants that although special constables are not in the strict sense police officers, based on this delegation a special constable

⁸ [1962] UKPC 10

⁹ Civil Appeal no 23 of 2004

¹⁰ Civil Appeal number 11 of 2003 (Dominica)

¹¹

¹² Re: Article 92(2) of the Constitution of the Commonwealth of Dominica

is subject to the discipline and control of the COP just as the police officers below the rank of sergeant are.

[23] Counsel Mr Richards also went on to submit that the appointment of a special constable is no longer treated as a temporary position and that the terms of appointment in the Police Force has been significantly modified. Counsel referred to and relied on section 25(1)¹³ of the Police Amendment Act in support of this submission.

[24] In the Dominica Police force based on the provisions of the Police Act there are four categories of police officers, that is:

- a. Police officers who are members of the police force and who are appointed by the Commission¹⁴;
- b. Rural Constables who are appointed by the Minister¹⁵;
- c. Special or additional constables appointed by the Minister;¹⁶ and
- d. Additional Constables ¹⁷

[25] A perusal of the Police Act clearly shows that a special constable is considered separate and apart from a regular police officer or member of the police force as there is specific provision for the special constable to carry out the duties of a police officer.¹⁸ The Police Act does not state that the special constable is considered to be a police officer or member of the police force. In fact, it is noted that there are specific and separate provisions for the special constable to be provided with his or her kit, that is, uniform and all necessary accoutrements to carry out his or her duties and for the issue of arms. There are also

¹³ It is noted that in the submissions filed by counsel it reads at paragraph 6.11. "Section 5(1)" however a review of the legislation it is clear to the court that this must be typographical error seeing that section 5(1) of the Act does not relate to the services or terms of engagement of a special constable"

¹⁴ Re: Interpretation section of the Police Act "Police Force" or "Force" means the whole body of men appointed by the Commission for the purposes of this Act;"

¹⁵ Re: Section 23 (1) of the Police Act

¹⁶ Re: Section 24 of the Police Act as amended by Act Number 12 of 1990: "The Law Revision Miscellaneous Amendments Act"

¹⁷ Re: Section 30(1) "30.(1) The Minister may, if he thinks fit, on the application of any person or persons showing the necessity thereof, authorise the Commissioner to appoint additional constables within the State ..."

¹⁸ Section 25 (1) of the Police Act states "Every special constable shall, during his term of office, have all such powers, authorities, immunities and privileges, and be subject to all such duties, responsibilities and discipline as are conferred or imposed upon a member of the police service ..."

specific provisions as to whose direction he or she is to be under, offences which he or she can commit and for their remuneration. There is also specific provision for the dismissal of the special constable.¹⁹

[26] It is interesting to note that the contents of section 8(2) of the Police Regulations regarding the contents of a police officer's personal records its states "The personal record of members of the Force shall contain— ... (g) a record of his service (if any) in any other Police Force or as a special constable; "This to mind shows yet again that the intendment of the Police Act is that a special constable is to be considered separate and distinct from a police officer.

[27] I therefore do not agree with the submissions of Counsel Mr Richards that the Claimant was a member of the Police Force who was to be appointed and dismissed by the Police Service Commission. The Police Act by its amendment which was after the promulgation of the Constitution makes specific provision for the appointment of the Special Constable by the Minister. This court therefore declines to declare that the claimant is a police constable with the Police force and will say that the claimant at all material times was and will be considered a special constable.

[28] I also do not agree with Counsel Mr Richards that the **Jno Lewis**²⁰ and the **Kanda** Cases²¹ are applicable to say that the COP had no authority to dismiss the claimant as he did. These two cases are to be distinguished from the case at bar as in both of those cases the claimants were enlisted or substantive members of the police force, particularly in the Kanda Case where the claimant was a senior rank of the force that being that of Inspector.

[29] In the event that I am wrong in regarding the claimant as a special constable and that he is to be considered a full police officer so to speak that is a member of the police force the dicta of Saunders JA in the Jno Lewis case is instructive when he pointed out that the

¹⁹ 24A.(1) The Commissioner shall, after consultation with the Minister, cancel the appointment of any special constable and discharge the special constable accordingly.

(2) Any discharge of a special constable shall be for reasonable cause or for national security reasons.
(Inserted by Act 1 of 1997)

²⁰ **Joseph Jno Lewis –v- The Commissioner of Police** Civil Appeal No. 11 of 2013 (Dominica)

²¹ **B Surinder Singh Kanda –v- The Government of the Federation of Malaya** Privy Council Appeal No. 9 of 1991

“Constitution permits the Police Service Commission to delegate the power of dismissal to the Commissioner. If properly delegated therefore, the Commissioner may validly exercise the power to terminate but when the Commissioner does so, the Commissioner is exercising not a power the Commissioner has by virtue of his office but rather a power of the Police Service Commission that has been delegated to the Commissioner. ... There can hardly be any doubt that the Police Service Commissioner here did delegate to the Commissioner or Chief of Police the power to remove police officers below the rank of Sergeant” ...²²

[30] In the case at bar the defendants out of an abundance of caution have tendered the delegation made by the Police Service Commission to the COP. It is clear that the claimant was at all times below the rank of Sergeant and therefore I can only humbly adopt the reasoning and the words of Justice of Appeal Saunders and hold that the COP was duly empowered to dismiss the claimant.

[31] The claimant's claim fails in so far as his contention that The COP acted without jurisdiction or exceeded his jurisdiction under the Police (Amendment) Act No. 1 of 1997 and that the Chief of police violated the provisions of section 8 subsection (8) of the Constitution in relation to the claimant because by the said decision the Chief of Police determined the extent of the claimant's right in his contract of employment; the extent of his right to enjoy the benefits of that contract and the extent of the claimant's obligations as a constable in the Police Force;

The evidence

[32] As in the **Jno Lewis Case** as cited by Counsel Mr Richards, the questions which arise for consideration in the case at bar is whether in dismissing the claimant did the COP act within the spirit and the content of the Police Act or the Police Service Regulations. Was the claimant given an opportunity to be heard, was the claimant denied his right to natural justice?

[33] It is the defendants' contention that the claimant was dismissed for 'National Security Reasons'. Section 24A. of the police act provides

²² Paragraphs 7 & 8 of the

"(1) The Commissioner shall, after consultation with the Minister, cancel the appointment of any special constable and discharge the special constable accordingly.

(2) Any discharge of a special constable shall be for reasonable cause or for national security reasons. "

[34] In his evidence before this court the COP under cross examination stated that he terminated the appointment of the claimant after he consulted with the Minister of National Security. (The Police Service falls within the portfolio of the Minister of National Security). The COP maintained that the claimant's appointment as a special constable was terminated for National Security Reasons as is provided for in the Police Act.

[35] It is to be noted that Counsel for the Defendant sought to cross examine the COP as to his understanding of reasonable cause but the court ruled that the stated ground for termination was for national security reasons and in the circumstances, it was not necessary for counsel to question the COP as to what he understood to be reasonable cause.

[36] COP Carbon spoke to the delegation of the powers to the COP from the PSC and through him the delegation was entered into evidence.

[37] Under cross examination Mr Carbon agreed that if you are going to terminate for national security reasons there must be facts to support the reasons.

[38] What evidence was adduced to support the reason which purportedly caused the claimant's appointment to be terminated?

[39] The defendants adduced evidence in this regard through Officer Lawson Prosper PC#96 of the Commonwealth of Dominica Police Force. This officer is attached the Special Service Unit of the Force (the SSU). It was his evidence that on the 23rd May 2015 he was detailed to work at the Chinese Embassy in Morne Daniel where he relieved the claimant who was on duty at that location. After the location was handed over to him and he was debriefed by the claimant Officer Prosper said that he initially monitored the live feed on the security cameras on the compound and that when he was about to leave the security

booth which housed the said cameras and their monitors to patrol the compound, he noticed a black cell phone in the booth.

[40] The witness said he proceeded to scroll through the phone in an effort to see if a name or picture would come up on the phone that would indicate the owner of the phone. Officer Prosper said that as he began to scroll through the phone it lit up and the first thing, he saw on the screen was a sent message that read *"Matt dem fellas up Morne Bruce get equipment and they not even trained to use it" (sic)*. He went on to say that he was unable to ascertain the owner of the phone and he proceeded to pocket the phone. The officer went on to say that he subsequently received a phone call on his personal phone from a number he did not recognise and he none the less answered it. He realised it was the claimant as he immediately identified himself and that the claimant asked him whether he found his cell phone.

[41] Mr Prosper told this court that he asked the claimant to describe the phone which he did and the description matched the phone he found and had in his possession. He stated that he told the claimant he had the phone and agreed to secure it for him.

[42] This witness said that when he got back to the base (SSU Headquarters) at the end of his duty he reported his discovery and the content of the text on the phone to his supervising officer and he handed the phone over to him. That he later wrote a report to the COP detailing his discovery of the phone and the text he found it. It is noted that in his report he mistakenly stated the date to be April instead of May and made the correction thereto and exhibited the constable duty book for the 24th May 2015 verifying the date of the incident. He also exhibited a copy of the report he wrote to the COP.

[43] Officer Prosper said he was prompted to inform his supervisor as he felt that this was confidential information that was being leaked to the media about the movement and activity of the police force more specifically the SSU. Further, that based on a recent experience of the SSU of a report being made to the media that the *"the Police are now heading to Salisbury"* shortly after they left their Base at Morne Bruce on duty to deal with the Salisbury Riot earlier that month he felt that this was a leak of confidential information and a breach of national security.

[44] Counsel Mr Richards in cross examining Mr Prosper sought to challenge the witness as to what he actually saw on the phone and that what he was telling the court he saw on the phone was what he thought he saw on the phone and not what was actually on the phone. Counsel Mr Richards sought to challenge the veracity of the witness's evidence by challenging him based on the time lapse between his actually seeing the text and when he wrote his report. Counsel also sought to challenge the witness's memory on the grounds that he did not make an immediate note of what he saw on the phone. Counsel also sought to challenge the witness's loyalty as a friend of the claimant because he did not tell him what about the text that he saw on the phone.

[45] Having carefully observed the Officer Prosper as he gave his evidence, I found him to be an honest and very credible witness. His demeanor on the witness stand was such that I got the distinct impression that he was being frank and honest. In the face of probing and aggressive cross examination he remained consistent in his testimony. Throughout the cross examination by Counsel for the claimant this witness's evidence remained the same and he struck this court as a witness of truth. He never deviated from his statement and what it is he saw on the phone.

[46] The claimant Peter Presely Boyd gave evidence on his own behalf. He spoke to working as a Special Constable in the Dominica Police Force for some fifteen years and that every year he would receive a letter confirming his appointment for another year and that during his tour of duty he worked in various departments of the force and finally at the SSU. Mr Boyd adamantly denied leaving his phone at the Chinese Embassy on the day in question and that he ever sent the text message as contended by the defendant. Mr Boyd stuck with his denial even through vigorous cross examination.

[47] It was Mr Boyd's evidence that he did not know why his services were terminated that he got the letter from the COP. He received the letter whilst he was on vacation. He also said he had done nothing to warrant his termination neither had he omitted to do anything that would warrant his dismissal.

[48] He said that through his Solicitor he sought to get a reason for his dismissal and was unsuccessful. That his letter said he was terminated for National Security reasons and he knows that the letter was copied to other persons and that in so doing the defendant branded him as a person and character who stood as a threat to national security.

[49] The claimant in his witness statement said that he never saw any text message of the nature as stated by the defendant on his phone and that he never called or sent the text message as alleged to Q95 radio station. He said he did not know Matt personally but knew him as someone on the radio and as Matt.

[50] Under cross examination Mr Boyd said he never spoke to Mr Lawson on the phone as stated by him and that he did not have Mr Lawson's number to call him. He also said that since then Mr Lawson has not spoken to him. Later in his cross examination Mr Boyd said that he and Mr Lawson were friends and coworkers and that they were still friends that whenever he met him, they would greet each other because they live in the same community of Kings Hill.

[51] Mr Boyd is seeking the following orders from the court:

- a. To quash the decision to terminate his services;
- b. A declaration that the decision made by the COP was a quasi-judicial one and or was disciplinary in nature and that the disciplinary procedure prescribed by Part VIII of the Police Service Commission Regulations is applicable to him and all members of the Police Service except the COP and the deputy Commissioner of Police;
- c. A declaration that he always and still remains a constable of the Dominica Police Force and continues to be entitled to the benefit of emoluments, other rights and benefits associated therewith;
- d. A declaration that section 5(1) of the Police Amendment Act no 1 of 1997 contravenes section 92 of the Constitution of the Commonwealth of Dominica and is therfor null and void on the grounds that the said section seeks to vest in the COP and the Minister the power to discipline and remove special constables from the police force which power is vested solely in the Police Service Commission;
- e. A declaration that the decision made by the COP violated section 8(8) of the Constitution of the Commonwealth of Dominica and violated the rules of natural justice and the principles of basic fairness in that the COP failed and or refused to give him a fair hearing in relation to the allegations made against him and that he was biased in making his decision;
- f. A declaration that the COP acted unreasonably and thereby abused his power and authority;
- g. Compelling the COP to act according to law in relation to him;

- h. Prohibiting the COP whether by himself, subordinates from terminating his appointment from the police force by due process of law;
- i. Damages and costs.

Considering the COP's Decision

[52] It was the COP's evidence which was accepted by this court that during the period December 2014 to June 2015, there were events taking place that were of serious concern regarding national security. The COP made reference to the burning of the tower (cell site) at the Douglas Charles Airport which facilitated information with aircrafts, the riots which took place Salisbury and the blocking of the roads in in Salisbury and also in Marigot.

[53] Mr Carbon said that of special concern was the fact that the riots and these events were carried live on Q95 radio station and that he felt that this was a serious risk to National Security. This court understood the COP to be saying that against this back ground he believed and found that the text message allegedly sent to Matt Peltier (who is a well-known talk show host of "Matt in the Morning" on the said Q95) relating to equipment the fellows (the SSU) had in Morne Bruce and they were not trained to use it came from the phone of SC Boyd. The COP said that this was sensitive information that should not have been forwarded by the Special Constable.

[54] The COP said this was the reason why the claimant's services were terminated. He said the claimant's actions as were reported to him which he accepted and believed amounted to a breach of confidentiality in that the claimant ought not to have communicated with the press without my permission. Mr Carbon under vigorous cross examination by Mr Gildon Richards said that he was of the view that the issue with the claimant and the text message was a very sensitive matter and that "*given the situation that existed in the country at the time I believe with that the matter had to be dealt with swiftly for national security reasons*²³."

²³ Quoted from the viva voce evidence of the COP

[55] From his evidence it is clear that the COP acted based on the reports he received from the claimant's colleague and his supervising officer which reports he referred to the Minister of National security and after consultation with the minister the claimant's services were terminated.

[56] Under reexamination the COP stated that "At that time that Mr Boyd was alleged to have forwarded the text messaged ... Mr Boyd was attached to the SSU. That unit is responsible to civil unrest I believe that text message put the police officers at the SSU at risk, it put the national security and it put the citizens of this country at risk.²⁴"

[57] From the COP's evidence this court got the clear and distinct impression that the Claimant was never interviewed or interrogated about the issue of the text message sent from his phone, in fact the COP relied on and acted solely on the reports presented to him by officers who reviewed that situation and that those reports were passed on to the Minister for National Security and after consultation with the said minister the claimant was dismissed summarily. It is clear from the COP's evidence that in his judgment this was a situation of a breach of national security which had to be dealt with in the way it was dealt with. It is also clear from the COP's evidence that as a special Constable the Claimant's employment could have been terminated by and through him by reason of the delegation held by him.

[58] It is the court's considered view that in the case at bar the COP was empowered to dismiss the claimant as he did based on the aforementioned sections of the Police Act. Having said that, we must remind ourselves that this court is not required to decide whether or not the COP's decision was proper or fair or justifiable on its merits. These matters are not for the Court to determine. The sole issue is whether or not the manner in which the decision was reached was by a process that was fair to the claimant.

[59] The COP's powers and authorities are subject to fundamental and basic common law principles governing the exercise of his public functions. He is required to act in a manner that is compatible with the fundamental rights of all persons within the Commonwealth of Dominica which includes ensuring and respecting a person's rights to due process of law as guaranteed by the Constitution. Every person is therefore entitled to be protected and insulated from any irrational, unreasonable and fundamentally unfair and the arbitrary exercise of his power.

²⁴ ibid

[60] The case at bar requires consideration to be given to the principles of natural justice. Natural Justice can be described as rules which have been laid down by the court as a form of minimum protection of the rights of individuals against arbitrary actions and procedure adopted and undertaken by judicial, quasi-judicial and administrative authorities who are empowered to make decisions affecting the rights of individuals. When considering the issue of natural justice, one has to consider the issue of whether the procedural requirements of fairness were met.

[61] Those requirements may vary according the contextual situations. The principles of natural justice recognised by the courts are to ensure that the public's rights are protected against arbitrary decisions being made by the administrative authority. It is to ensure that the concept of fairness remains in existence and that there is fair dealing. Professor Fiadjo in his book **Commonwealth Caribbean Public Law** said “...the principles of natural justice represent nothing more than the imposition of certain procedural safeguards on a body or a person whose decision may affect the rights, interests and legitimate expectations of others. To that extent, natural justice is based on a notion of fairness”²⁵

[62] The main purpose of The Constitution is to protect individuals whether solely or collectively against arbitrary action by the public authorities. It is well established that the High Court is considered to be the gate keeper of those rights and obligations. The Constitutional safeguards include a person whose civil rights or obligations are being determined are entitled to a fair hearing by an independent and impartial court or tribunal, a body free from bias as required by the rules of natural justice. Persons are entitled to due process.

[63] According to the accepted principles of natural justice a person whose rights are being considered and determined by a decision maker has a fundamental right to be heard on the matter. It is a person's right to be told what is being alleged against him and he is entitled to an opportunity to answer each allegation being made.

[64] It is to be noted that this right to a fair hearing is subject to certain rights. It must be borne in mind the rules and principles of natural justice are not rigid but they are flexible and “the requirements of natural

²⁵ Page 235 to 236 of Commonwealth Caribbean Public Law by Albert Fiadjo 3rd Edition

justice must depend on the circumstances of each particular case and the subject matter under consideration."²⁶

[65] It is well established that these safeguards as enshrined in the constitution are not an absolute right for individuals; they do however impose certain obligations on the State. In considering breach of a person's fundamental rights and the rights of the State sometimes calls for the Court to proceed to balance two sets of competing interests, the fundamental rights and freedoms of individuals on one hand, and the interests of the State on the other.

[66] This exercise is not an easy one to carry out because it requires the Court, first, to assess **the nature of the interference** by the public authority and **its effect on the individual** and, second, **to give preference to one over the other in each particular case.**

[67] **In R v. Secretary of State for the Home Department**,²⁷ the words of Mustill LJ are to this court's mind appropriate and I can do no better than to be guided by them and to adopt them. He said²⁸

"... (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application of decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view of producing a favourable result: or after it is taken, with a view to procuring its modification; or both. (6) Since the person

²⁶ Funnell -v- Whangarei High Schools Board [973] 1 All E R 400 per Lord Morris of Borth-Y-Gest at page 412 quoting Tucker LJ in *Russell v Duke of Norfolk* ([1949] 1 All ER 109 at 118)

²⁷ ex. Parte Doody [1994] 1 A.C. 531

²⁸ At page 560 of his judgment

affected usually cannot make worthwhile representations without knowing what factors may weigh against his interest fairness will very often require that he is informed of the gist of the case which he has to answer."

[68] Our Apex Court, the Caribbean Court of Justice in the Constitutional Case emanating out of Belize **Maya Leaders Alliance and others v Attorney General**²⁹ Anderson J-CCJ had this to say ...

"...Where the citizen has been denied rights of access and the procedural fairness demanded by natural justice, or where the citizen's rights have otherwise been frustrated because of government action or omission, there may be ample grounds for finding a breach of the protection of the law for which damages may be an appropriate remedy."

[69] This view as stated by Anderson J-CCJ was endorsed by the Privy Council in the **Jamaicans for Justice v Police Service Commission and another**³⁰.

[70] Based on the evidence presented to this court, this court finds as a fact that no real opportunity was given to the claimant to comment or submit any response or make any representation regarding the allegations leveled against him.

[71] Ordinarily, it would have been necessary for him to have been confronted with the allegations, with the text, that was allegedly found on his phone. It is Mr Richards contention that what occurred was in breach of the principles of natural justice.

[72] The COP stated in his evidence that the decision to terminate the claimant's employment without a hearing was due to National Security Concerns. This was done on the advice and direction of the Minister responsible for National Security. That the failure to mount an inquiry where the claimant would have been informed of the allegations made against him and which would have allowed him to respond to same was because of what was considered to be national security considerations.

²⁹ [2015] CCJ 15 (AJ)

³⁰ [2019] UKPC 12, [2019] All ER (D) 11 (Apr), [2019] 4 LRC 117

[73] What is therefore required of the court is to perform a balancing exercise in order to determine whether in the circumstances of this case whether there was an infringement of the claimant's right to due process before his services were terminated.

[74] It is well established law that the right to a fair hearing can be curtailed in the public interest and matters of national security which are clearly within the public interest. Section 5 of the Police Act provides for the dismissal of a special constable on the grounds of *inter alia* national security reasons.

[75] Justice of Appeal Blenman in the Grenada Case of **The Attorney General of Grenada –v- Muhammed Ehsan**³¹ in considering a decision taken in the interest of national security and the balance to be achieved regarding an individual's fundamental rights had this to say

“...The courts are required to protect those fundamental rights by closely reviewing the legislation in order to ensure that offending provisions are impugned. The court is not precluded by any prescription of constitutionality from examining the legislation which seeks to restrict those rights. It is imperative for the court to determine whether Parliament's response to the important matter of national security is proportionate, when viewed in the context of the curtailing of fundamental rights.

[72] The derogation from the adherence to due process of law on the basis of national security without attempting to give the person to be affected notice, nor any semblance of even a modified right to make enquiry, can only be justified as being reasonable and justifiable in a democratic society, in exceptional circumstances.

[76] The Learned Justice of Appeal went on to state “... Concerns about national security are a legitimate interest of the State and restrictions on citizens' fundamental right are permissible, however they must be proportionate. When viewed in the context of the curtailing of fundamental rights. ...”³² The question therefore to be asked in the case at bar is, whether or not the actions of the COP was a proportionate response to the accusation leveled against the claimant thereby allowing a decision to be made and action to be taken without allowing the claimant to be informed of the report made against him.

³¹ GDAHC VAP2019/0020 at paragraph 71 and 72

³² Ibid at paragraph 77 Per Blenman JA

[77] It is to be noted that this right to a fair hearing is subject to certain rights. It must be borne in mind the rules and principles of natural justice are not rigid but they are flexible and *"the requirements of natural justice must depend on the circumstances of each particular case and the subject matter under consideration."*³³

[78] This exercise is not an easy one to carry out because it requires the Court, first, to assess **the nature of the interference** by the public authority and **its effect on the individual** and, second, **to give preference to one over the other in each particular case.**

[79] Blenman J in the **Clive Oliveira –v- The Attorney General of Antigua**³⁴ in deciding whether a challenge mounted against a decision of the Cabinet of Antigua and Barbuda was amenable to judicial review and in discussing the court's approach to the issue of reviewing a public authority's decision which was made based on national security said

*"...even in cases of national security the Court has a duty to consider the circumstances and context of the case. See Council of Civil Service Unions v Minister for the Civil Service *ibid*. I am of the view that if the question arises, as in the case at bar, in reviewing the exercise of a discretionary power, evidence is also needed so that the Court may determine whether it should intervene to correct any allege excesses or abuse of power or irrationality."*

[80] In the case at bar unlike the **Oliveira matter**³⁵ the court heard evidence from the COP who the court finds is a person capable of giving the evidence required and a witness regarding the actual allegation made against the claimant. The sole issue for decision really is whether having not given the claimant a hearing are the defendants justified in the circumstances of this case to rely on their claim for national security interest to excuse them following the course of natural justice and allowing the claimant to know of the allegation made against him and giving him the opportunity to be heard.

³³ *Furnell –v- Whangarei High Shools Board* [973] 1 All E R 400 per Lord Morris of Borth-Y-Gest at page 412 quoting Tucker LJ in *Russell v Duke of Norfolk* ([1949] 1 All ER 109 at 118)

³⁴ [2009] ECSCJ No. 58

³⁵ *Ibid*

[81] It is the court's view that it is critical that justice demands that this claimant should have been informed of the allegations leveled against him and of any investigations conducted. The failure to do so, in the circumstances of this case, especially where the result was the claimant being dismissed to this court's mind could amount to a breach of the principles of fundamental fairness and natural justice;

[82] This kind of conduct by the defendants can be viewed as not being conducive to good public administration. Such conduct can also be held to only undermine public trust and confidence in the good administration of the police force and can operate to negatively affect the motivation of the officers of the force and to discourage them

[83] I hasten to say that it is true for all members of the Police Force regardless of the category that it is critically important and imperative that the highest standards confidentiality regarding the force's actions, plans exercises and so on are maintained—for here, what is at stake are the lives and limbs of the Nation's people.

[84] Generally speaking, this court is of the view that it is expected that a person has a right to participate fully in a hearing which may lead to adverse findings against him. When one looks at the circumstances of the case at bar and the facts as has been found by the court it is not recommended that a person accused of a wrong doing such as the claimant was to be denied the opportunity to admit or deny the allegation or charge.

[85] The procedure adopted and used in his case was not one which produced fairness to the claimant and was itself a breach of the rules of natural justice.

[86] Where there is a hearing, natural justice usually demands that parties to such a hearing must be warned as to whether they are in fact subjects of an accusation or allegation and the hearing and whether or not adverse findings may be made against them.

[87] Natural justice has been referred to as fair play in action. It is well established law that where a person's living, income, profession is at stake and allegations have been made against that person that person should have the opportunity to know of the allegations and be able to respond or defend him or herself.

[88] In this court's view the COP and by extension the Minister failed to apply the rules of natural justice.

NATIONAL SECURITY

[89] Should the court intervene in the case at bar to correct the breach of natural justice on the part of the defendants?

[90] Do the requirements of national security outweigh the duty of fairness or natural justice in the case at bar? **In the Civil Service Unions Case**³⁶ Lord Scarman had this to say

"... where a question as to the interest of national security arises in judicial proceedings the court has to act on evidence. In some cases, a judge or jury is required by law to be satisfied that the interest is proved to exist; in others, the interest is a factor to be considered in the review of the exercise of an executive discretionary power. Once the factual basis is established by evidence so that the court is satisfied that the interest of national security is a relevant factor to be considered in the determination of the case, the court will accept the opinion of the State or its responsible officer as to what is required to meet it, unless it is possible to show that the opinion was one which no reasonable minister advising the State could in the circumstances reasonably have held. ..."

[91] This court has considered the evidence adduced and the submissions of both learned Counsel, the principles stated in **Council of Civil Service Unions v Minister for the Civil Service** are very helpful in dealing with the issue of national security which have been referred to and applied by the Courts in our region.

[92] It is established law post the **Civil Service Case** that on issues of national security the court should:

- a. act on evidence before it;
- b. consider whether is there a national security interest in existence?
- c. If so, is it a relevant factor to be considered in the determination of this case?

³⁶ [1985] AC 374, [1984] 3 All ER 935,

[93] The issue of national security is one which is to be considered by the COP and the minister of National Security who is a member of Cabinet and logically by extension the Cabinet. It is important that the security of the country is not compromised by elements within or outside of the country. That this was a matter of national security a view as expressed by the COP in his evidence. I the circumstances of the case is this a view which could reasonably have been held? As if this is so, the right to which the claimant is entitled to as recognised by this court is of no moment.

[94] In the case at bar the COP told this court that the decision to terminate the services of the claimant was taken by the Minister and executed by him as the COP. (my words) and that the reason for the decision was that given the atmosphere that prevailed in the country at the time of the incident and the previous experience of the Police more particularly the SSU there was reason in the circumstances to view the allegations as actions which threatened national security.

[95] I am of the view that if the issue of national security was not in issue the decision to dismiss the claimant would have been manifestly unfair. The words of Lord Fraser of Tulleybutton in **The Council of Civil Service Unions Case** are of assistance when he said

"The question is one of evidence. The decision whether the requirements of national security outweigh the duty of fairness in any particular case is for the Government and not for the Courts; the Government alone has access to the necessary information, and in any event the judicial process is unsuitable for reaching decision on national security."³⁷

[96] I could do no better than to agree and apply the learned Judges words to the case at bar.

[97] In the case at bar the defendants are submitting that the actions taken in terminating the claimant's employment and in not informing him of the allegations made against him and not offering him the opportunity to deny, admit or in fact answer the claim were on the ground of considering and preserving issues of national security.

³⁷ Ibid

[98] It is important that the court calls on the defendants in situations such as these to adduce some evidence regarding the decision or regarding action which was in fact taken for reasons of national security. A mere assertion is not enough that just would not do. **Re: Clive Oliviera –v- Attorney General of Antigua and Barbuda**³⁸. In this case it was noted that the defendant failed to adduce evidence through a proper witness for due consideration by the court on the issue of national security.

[99] It helps the defendants (representatives of the government and /administrative body) to at least produce a credible statement of the circumstances that led to the decision and action.

[100] In the **Council of Civil Service Unions case**³⁹, which is a leading case in this area of the law. A decision was taken by the Government of the Day in the UK that any and all employees of the Government Communications Headquarters (GCHQ) were prohibited from joining any trade union without any consultation with the employees or the unions. This decision was justified by the Government as being based on the potential threat to national security, and enforced using an Order of Council which is an exercise of the Royal Prerogative Power.

[101] A challenge was mounted on behalf of the employees and it was submitted on their behalf that they had a "legitimate expectation" that they would be consulted about important alterations in the terms and conditions of employment of staff. This was an established practice. It was also argued on behalf of the employees that the decision made was invalid because the minister's actions were unfair in removing the employees' fundamental right to belong to a trade union without consultation.

[102] Affidavit evidence was filed on behalf of the Minister to the effect that, in her view, there had been a real risk that prior consultation would occasion a disruption at GCHQ⁴⁰ which threatened national security and which was the very thing the instruction was intended to avoid. The House of Lords upheld the Minister's decision.

³⁸ *supra*

³⁹ *supra*

⁴⁰ GCHQ refers to Government Communications Headquarters

[103] Lord Diplock's statement⁴¹ also offers guidance

"National Security is the responsibility of the executive government: what action is needed to protect its interests is, as the cases . . . establish and common sense itself dictates, a matter upon which those upon whom the responsibility rests, and not the courts of justice, must have the last word. It is par excellence a non-justiciable question".

[104] It was held that the question whether any decision or action was in fact necessitated by the requirements of national security was a matter for the executive alone. Only the executive is in a position to make that value judgment.

[105] Likewise in the case at bar this court will not seek to or attempt to make the value judgment as to whether the matter of a supposed leak of information or intelligence in relation to the Special Services Unit of the Dominica Police Force (the SSU) on a national and international radio station given the history of a previous related leak amounted to issue of national security. It is only the Cabinet represented by the Minister responsible for National Security and the Commissioner of Police who could make that judgment call.

[106] In the case at bar, it is the finding of this court that when the COP terminated the services of the claimant, he was acting within the powers duly and properly delegated to him under law. That the defendants have provided the court with the circumstances surrounding the situation which was duly considered to be a matter of national security. That the decision of the COP acting pursuant to a statutory power duly delegated to him can be judicially reviewable for legality save for national security reasons.

[107] Even though it is recognised that the claimant was denied the opportunity to know the allegations made against him and he was also denied to opportunity to respond and defend that said allegation prior to his dismissal which generally speaking was a denial of natural justice which could have made the decision to terminate his contract of employment reviewable and wrong in law. The evidence as adduced by the defendants which has been accepted by this court was that it was a question of national security

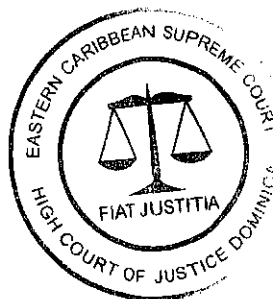
⁴¹ Ibid at page 412

which based on this court's understanding of the law is that decisions of national security are within the purview of the Minister of National Security and cannot be considered by this court.

[108] Applying these principles of law, I am unavoidably drawn to the conclusion that the claim cannot succeed and is hereby dismissed. There shall be no order as to costs.

[109] I wish to thank counsel for the helpful submissions given in this matter which was of great assistance to this court.

M E Birnie Stephenson
High Court Judge



BY THE COURT

REGISTRAR