

**THE EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

SLUHCV2021/0295

BETWEEN:

DARYL ANTHONY VERNON LOUIS

Applicant

and

THE PUBLIC SERVICE COMMISSION

Respondent

Before:

The Hon. Mde. Justice Kimberly Cenac-Phulgence

High Court Judge

Appearances:

Mrs. Wauneen Louis-Harris of Counsel for the Applicant

Mrs. Grace Ward-Glasgow and Mr. Vilan Edward of Counsel for the Respondent

2021: August 6, 9.

DECISION

- [1] **CENAC-PHULGENCE J:** On 13th July 2021, the applicant, Mr. Daryl Anthony Vernon Louis, Customs Officer II (“Mr. Louis”) filed an application for leave to file a claim for judicial review against the decision of the Public Service Commission (“PSC”) (i) to prefer disciplinary charges against Mr. Louis and to proceed with the conduct of the hearing in relation to the said charges in the face of the delay in so doing and (ii) to proceed with the disciplinary hearing in the face of the PSC’s failure or refusal to disclose the pre-delivery register book and the computerised spreadsheet on pre-deliveries of the Department of Customs and Excise to Mr. Louis.

- [2] Mr. Louis seeks leave to file a claim for judicial review for the following relief:
- (a) An order of mandamus directing the PSC to deliver the pre-delivery register and computerised spreadsheet on pre-deliveries from the Customs and Excise Department to Mr. Louis forthwith to enable him to adequately put his case in the disciplinary hearing;
 - (b) Should the PSC not be able to disclose the pre-delivery register and computerised spreadsheet on pre-deliveries, a writ of certiorari be issued to quash the charges preferred by the PSC against Mr. Louis.
 - (c) A prohibition to restrain the PSC from proceeding with the hearing in relation to the disciplinary charges;
 - (d) That Mr. Louis be reinstated to his post as Customs Officer II within the Customs and Excise Department;
 - (e) A declaration that the actions of the PSC were made on the basis of illegality, irrationality and procedural impropriety;
 - (f) A declaration that the actions and decisions of the PSC are unlawful, arbitrary and must be reconsidered;
 - (g) A declaration that the actions and decisions of the PSC constitute breaches of the rules of natural justice which operate to deprive Mr. Louis of the right to a fair hearing at the disciplinary hearing and offends against the principles of fairness;
 - (h) A declaration that it would be unfair to proceed with the disciplinary hearing for the following reasons:
 - i. There has been excessive delay resulting in the abuse of power;
 - ii. The PSC's failure to disclose all relevant documents, to wit, the pre-delivery register book and the computerised spreadsheet from the Customs and Excise Department;
 - (i) A declaration that the PSC has acted in breach of section 11 of the Public Service (Disciplinary Proceedings) Regulations S.I. No. 37 of the Revised Laws of Saint Lucia;
 - (j) An interim injunction staying all proceedings including the hearing of the disciplinary charges scheduled for Thursday, 15th July 2021 until such time as the matter is concluded;
 - (k) An award of damages in respect of the above;
 - (l) Interest and (m) Costs.

- [3] The application is accompanied by an affidavit in support and several exhibits. The PSC filed an affidavit in reply from the Secretary of the PSC, Mrs. Lindy Baptiste-Daniel ("Mrs. Daniel") with several exhibits on 30th July 2021. The applicant filed a response to the affidavit of the PSC on 5th August 2021. Both Mr. Louis and the PSC filed written submissions with authorities which the Court has considered.
- [4] The evidence as put forward by Mr. Louis is that on 24th August 2016, he was informed verbally of his redeployment from the examination station at Shed 6 to the Export Verification Unit (VAT Unit) with effect from that date. On 13th January 2017, Mr. Louis received a letter from the Customs and Excise Department formally notifying him of his redeployment and restricted access to the Customs computerised system as a result of the fact that the Customs Department had commenced investigation into the circumstances regarding the unauthorised pre-delivery of a consignment of 30 cartons of shoes and wearing apparel by the importer Just Shoes on 23rd August 2016. Mr. Louis was required by the said letter to provide a written report within seven (7) days explaining his involvement in the delivery of the said consignment. By letter dated 1st February 2017, Mr. Louis requested an extension which was granted by the Comptroller of Customs by letter dated 6th February 2017.
- [5] Mr. Louis provided his report on 15th March 2017 and on 13th April 2017, the Comptroller of Customs issued a memorandum to Mr. Louis granting him access to the Customs computerised system while he remained stationed at the VAT Unit. On 4th April 2018, Mr. Louis was suspended from his duties as Customs Officer II effective 9th April 2018 pending the investigations in relation to a consignment of goods imported on 3rd August 2016.¹
- [6] Mr. Louis avers that the delay in hearing his matter for over 3 years after his suspension has caused him prejudice in that the pre-delivery book has mysteriously disappeared and this is very important to his case. Mr. Louis' contention is that the delay in preferring the charges from 3rd August 2016 to

¹ See affidavit of Mr. Louis filed 13th July 2021.

30th November 2020 and the scheduling of the hearing to 15th July 2021 is excessive and is compounded by the fact that the pre-delivery book has mysteriously disappeared.

[7] He also says that he believes that he has been unfairly targeted, and the documents have been deliberately withheld because they will show that he is not guilty of any of the disciplinary charges laid against him. He is of the view that the whole process is a personal vendetta against him.

[8] Mr. Louis further avers that from the time he was suspended until now he has lost the opportunity to be promoted and he knows about ten Customs Officers who were junior to him who were at some time over the three years promoted and are now superior to him. He says the pre-delivery book would show that the pre-deliveries were authorised.

[9] In its response, the PSC avers that it has no knowledge of any of the matters referred to in Mr. Louis' affidavit in support of his application at paragraphs 4(2) to (9) except for the fact that Mr. Louis was suspended from duties on full salary as Customs Officer II effective 9th April 2018. The matters referred to in Mr. Louis' affidavit at paragraphs 4(2) to (9) would have occurred prior to Mr. Louis' suspension by the PSC.

[10] The PSC states that any genuine and honest belief that Mr. Louis had the documents would have been disclosed to him were unreasonable and unfounded as the Comptroller of Customs had from inception maintained that the predelivery book had mysteriously disappeared from Shed 6 during the investigation of the matter and that none of the examination officers or supervisor at Shed 6 knew of the existence of a spreadsheet for entering predelivery information. This information was repeatedly communicated to Mr. Louis. However, despite this, the PSC was obligated to make the request of the Comptroller once Mr. Louis continued to request the said documents.

[11] The PSC avers that the delay has not caused prejudice to Mr. Louis since whether or not a hearing took place immediately after his suspension, the pre-

deliveries book which he requested and which he alleges is very important to his case was not available even then. Mr. Louis has not shown how he has been unfairly targeted by the PSC or that the PSC has deliberately withheld documents from him. On the contrary, the PSC has made every effort to obtain the documents for Mr. Louis. The hearing of the matter against Mr. Louis did not commence three (3) years after his suspension but commenced in 2020 when the PSC instituted disciplinary proceedings against him by letter dated 30th November 2020. Mr. Louis has also not shown how the process to exercise disciplinary control over him is a personal vendetta against him.

- [12] The PSC in its reply states that Mr. Louis does not have a right to be promoted but merely a right to be considered for promotion and even so he did not show which ten officers who were junior to him at the time of his suspension have been promoted and are now superior to him. Further, the PSC says it is of the opinion that the issue of whether Mr. Louis had authorisation to grant pre-deliveries is a matter which can be determined by the oral evidence of the witnesses. The PSC avers that at the disciplinary hearing Mr. Louis will have an opportunity to question all the witnesses who gave evidence. The PSC states that it is of the view that the oral evidence of the witnesses including Mr. Louis' witnesses can address the issue of whether other officers other than 'proper officers' were granting pre-deliveries contrary to the procedures in the circulars.
- [13] The PSC avers that the delay in dealing with the matter was not excessive and it can only deal with a matter when it is referred to it. Mr. Louis' matter was referred to the PSC on 7th April 2018 and charges could not have been preferred prior to that. Further, the hearing of the matter commenced when disciplinary charges were instituted against Mr. Louis on 30th November 2020.
- [14] The PSC states that Mr. Louis is not entitled to the relief claimed and prays that the application be dismissed with costs.

Discussion

- [15] The test on an application for leave is as stated in the case of **Sharma v Browne Antoine**² cited by both counsel for Mr. Louis and the PSC where the court said:

“The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy; *R v Legal Aid Board, ex parte Hughes* (1992) 5 Admin LR 623 at 628, and Fordham, *Judicial Review Handbook* (4th Edn, 2004), p 426. But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application. As the English Court of Appeal recently said with reference to the civil standard of proof in *R (on the application of N) v Mental Health Review Tribunal (Northern Region)* [2005] EWCA Civ 1605, [2006] QB 468, at para [62], in a passage applicable mutatis mutandis to arguability:

'... the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities.'

It is not enough that a case is potentially arguable; an applicant cannot plead potential arguability to 'justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory processes of the court may strengthen'; *Matalulu v Director of Public Prosecutions* [2003] 4 LRC 712 at 733.”

- [16] As was said at paragraph 23 of **Julian Wilcock v The Attorney General et al**:³

“The Court is not required to embark upon an in-depth study of the case in order to determine whether there is an arguable case. It is satisfied if on a quick perusal of the papers there is evidence that there is an arguable case, that is, that there is a case fit for further investigation at a full “with notice” hearing of a substantive claim for judicial review.”

- [17] At this stage in the proceedings, the role of the court is to determine whether an arguable case has been made out. While the Court cannot proceed to try the

² (2006) 69 WIR 379 at 387-388.

³ BVIHCV2010/0305A (delivered 3rd February 2011, unreported).

case on the basis of the affidavits in order to determine which party has presented the true situation, there can be no doubt that in considering arguability, the nature and gravity of the issues, the cogency of the evidence before the court, and the prospect of success are integral factors which would have to be considered by the court. It is not the Court's role to decide the substantive issues in the matter. It must also be remembered that judicial review is a consideration of the process not the correctness of the decision arrived at.

- [18] Essentially, Mr. Louis' contention relates to two things: (1) delay in instituting the disciplinary charges and (2) the unfairness to proceed with the disciplinary hearing in the absence of the pre-delivery book.
- [19] Counsel for the PSC, Mrs. Grace Ward-Glasgow ("Mrs. Glasgow") in written submissions contends that the evidence and grounds put forward by Mr. Louis do not justify the grant of leave to file a claim for judicial review.
- [20] The salient parts of the evidence for the purposes of this application reveals that:
- (i) The PSC suspended Mr. Louis on full salary effective 9th April 2018 pending investigations into a matter against him and any disciplinary charges which might have been instituted against him; (see letter dated 4th April 2018).
 - (ii) By letter dated 7th April 2018 from the Department of Public Service, the PSC received a request for initiation of disciplinary action against Mr. Louis. Attached to the memorandum was an unsigned letter from the Comptroller of Customs and a report addressed to the Supervisor Investigation with unsigned appended correspondence produced as exhibits.
 - (iii) The Chairman of the PSC who was a member of the PSC from 10th November 2017 advised that there are and were a large number of disciplinary matters and hearings to be dealt with from 2017 onwards. The term of office of the then Chairman and two other members of the PSC was coming to an end in or about April 2019 and the PSC endeavoured to expeditiously deal with and conclude numerous

matters prior to the expiration of the term of the then Chairman and the two members. In 2018, the PSC took a decision to attempt to resolve and bring to conclusion all matters that it commenced and were pending determination before starting new matters. Mr. Louis' matter was received in April 2018. This decision was taken to avert the possibility of matters not being concluded before the expiration of the Commissioners' term and having to be dealt with de novo.

- (iv) In or about May 2019, the PSC was reconstituted with new Commissioners being appointed to replace those whose term had expired in April 2019. After assuming office and before they embarked on the execution of their duties the new Commissioners attended numerous workshops and training exercises to understand their constitutional mandate. These Commissioners were persons in full time employment outside of the public service and their duties as Commissioners had to be undertaken along with their other duties.
- (v) In keeping with the constitutional power to regulate its own procedure the PSC opted to adopt an approach of having the Chairman and two Commissioners preside at disciplinary hearings in an attempt to expeditiously deal with the outstanding matters. Consequently, the Chairman and two other Commissioners, Hubert James and Thomas James were selected to preside over Mr. Louis' disciplinary matter.
- (vi) During 2019, the PSC began dealing with and hearing various disciplinary matters with the intention that Mr. Louis' matter would have been dealt with. However, due to the nature and complexity of some of the matters that the PSC had to deal with, it was impracticable for the PSC to have dealt with Mr. Louis' matter in 2019. Other factors such as requesting and awaiting information from various government departments and ministries and allowing sufficient time for parties to reply and provide correspondence and requested information, accommodating all parties and their legal representatives when scheduling a date or dates for a disciplinary hearing, affected the length of time that matters that were in process took.
- (vii) In 2020, the Coronavirus pandemic affected the PSC's ability to expeditiously deal with the disciplinary matters that were before it due

to the shutdowns which prevented the PSC from conducting disciplinary hearings. Other events such as the expiration of the term of Commissioner Hubert James and the illness of Commissioner Thomas James which led to his resignation as a commissioner affected the PSC's ability to deal with Mr. Louis' disciplinary matter sooner.

- (viii) The PSC formed the view that the documents it had received with the request to institute disciplinary charges did not constitute proper documents which it could use to enable it to initiate disciplinary action against Mr. Louis. By letter dated 24th April 2020, the PSC wrote to the Comptroller of Customs informing him that in order for it to proceed with the matter against Mr. Louis it required signed copies of the correspondence which had been submitted as exhibits, statements from other persons involved in the investigation and any other information which would assist the PSC. The deadline given was 8th May 2020.
- (ix) Another letter was sent to the Comptroller of Customs on 15th June 2020 reminding that the PSC had not received the requested information and a further deadline of 3rd July 2020 was given. On 6th July 2020, the Comptroller of Customs requested an extension to the 17th July 2020 which was granted by the PSC.
- (x) On 17th July 2020, the PSC received correspondence from the Comptroller of Customs but upon perusal it was noted that the information submitted was incomplete since only one statement from the lead investigator, Mr. Grantley Promesse ("Mr. Promesse") had been provided and there were no statements from the other officers who conducted the investigation notwithstanding that their names had been referenced in Mr. Promesse's statement. On the instruction of the PSC, the Secretary, Mrs. Daniel wrote to the Comptroller of Customs requesting statements from the other officers. Five additional statements were received on 16th October 2020.
- (xi) The PSC instituted disciplinary proceedings against Mr. Louis on 30th November 2020 for 28 allegations of misconduct. All statements, reports and documentation relevant to the matter received by the PSC were disclosed to Mr. Louis and he was asked to submit written

representations to the PSC on the allegations of misconduct and disciplinary charges by 21st December 2020 which he did.

- (xii) In Mr. Louis' written representations there was a request for production of a book in which pre-deliveries were entered. Pursuant to this request and in light of Mr. Louis' written representations, the PSC wrote to the Comptroller of Customs on 29th January 2021 requesting (i) that the Customs Department provide comments on or a response to Mr. Louis' written representations and (ii) production of the said pre-deliveries book by 19th February 2021.
- (xiii) On 29th January 2021, the PSC responded to the letter and written representations received from Mr. Louis indicating that the request was made for the pre-delivery book from the Customs and Excise Department and once received it would be disclosed to Mr. Louis.
- (xiv) On 18th February 2021, the Comptroller of Customs wrote to the PSC and requested an additional two weeks to respond which the PSC agreed to. On 12th March 2021, the Comptroller of Customs submitted a statement in response to Mr. Louis' written representations. He also informed that the book to enter the pre-deliveries had mysteriously disappeared from Shed 6 in 2016 during the investigation and that Mr. Louis had never mentioned before that he had entered the information in a pre-delivery register or spreadsheet. He went further to indicate that none of the examination officers or the supervisor at Shed 6 in 2016 knew of the existence of a spreadsheet for entering pre-delivery information.
- (xv) On 19th March 2021, Mr. Louis' lawyer received a letter dated 17th March 2021 from the PSC requiring Mr. Louis to provide further written representations in response to a statement from the Comptroller of Customs dated 12th March 2021. Mr. Louis was also informed that the Comptroller of Customs had indicated that the book to enter pre-deliveries had 'mysteriously' disappeared during the investigation of the matter.
- (xvi) On 1st April 2021, Mr. Louis' lawyer wrote to the PSC indicating that the disclosure of the book of pre-deliveries was necessary to resolve the issues in a fair manner. The further written representations which had

been requested by the PSC were submitted on 6th April 2021 together with a cover letter which again made a request for disclosure of the book of pre-deliveries. On 12th April 2021, the PSC responded indicating that they would make the request for the said book of pre-deliveries to the Comptroller of Customs again.

- (xvii) Notwithstanding the Comptroller's previous indications, the PSC again requested the said pre-deliveries book and the computerised spreadsheet from the Comptroller of Customs by letter dated 15th April 2021.
- (xviii) The Comptroller of Customs responded by letter dated 30th April 2021 reiterating that the pre-delivery book to which Mr. Louis referred had mysteriously disappeared from Shed 6 during the investigation in 2016 and subsequent searches for same have proved futile. With respect to the computerised spreadsheet, he appended a statement from Ms. Ava Marius.
- (xix) On 10th May 2021, the PSC issued a further letter to Mr. Louis' lawyer appending a memorandum from the Comptroller of Customs indicating that the book of pre-deliveries had mysteriously disappeared during the investigations into the matter in August 2016 and annexing the memorandum from Ms. Ava Marius.
- (xx) The PSC wrote to Mr. Louis' lawyer on 7th June 2021 with two suggested dates for the conduct of the hearing in July 2021. The PSC in that letter again stated its attempts to obtain the documents requested by Mr. Louis and that the documents would be forwarded once received. Mr. Louis was also informed of his right to call witnesses on his behalf and that any such statements were to be furnished within seven (7) days of the hearing date.
- (xxi) On 14th June 2021, Mr. Louis' lawyer informed the PSC of her availability on 15th July 2021. That letter also contained another request for the pre-deliveries book and the computerised spreadsheet. On 16th June 2021, another letter was written by the PSC to the Comptroller of Customs requesting the pre-deliveries book and spreadsheet.
- (xxii) On 7th July 2021, the PSC issued further correspondence to Mr. Louis' lawyer with an attached memorandum from the Comptroller of Customs

stating the same information which had previously been communicated with respect to the book of pre-deliveries. On that same day, Mr. Louis submitted the statement of his witness, Mr. Shem Joseph.

The Legal Underpinnings of the PSC

[21] Section 85(13) of the **Constitution of Saint Lucia**⁴ (“the Constitution”) provides:

“The Commission may by regulation or otherwise regulate its own procedure and, with the consent of the Prime Minister, may confer powers or impose duties on any public officer or on any authority of the Government for the purpose of the exercise of its functions.”

[22] The **Public Service Commission (Disciplinary Proceedings) Regulations** (“the PSC Disciplinary Regulations”)⁵ are made by the PSC in exercise of the powers conferred under section 85(13) of the Constitution.

[23] Regulation 7(1) of the PSC Disciplinary Regulations provide that the Commission may institute disciplinary proceedings against a public officer on an allegation of an act of misconduct.

[24] Regulation 11 deals with the hearing and provides that a public officer against whom disciplinary proceedings have been instituted shall be given a reasonable opportunity to be heard in accordance with the principles of natural justice in a hearing before the Commission. The regulation provides that the hearing must be conducted (a) in private; and (b) with speed and efficiency and that in a hearing the Commission may make a decision, without regard to the rules of evidence specified in the Evidence Act, Cap. 4.15 or to other legal technicalities and form.

[25] Regulation 11 provides further that in an oral hearing where a witness gives evidence, the public officer against whom disciplinary proceedings have been instituted shall have the opportunity to question that witness or to respond to evidence that is in writing and that documentary evidence must not be used

⁴ Cap. 1.01, Revised Laws of Saint Lucia.

⁵ Statutory Instrument No. 37 of 2017.

against a public officer in a hearing unless the public officer has been supplied with a copy of, and has been given a reasonable opportunity to peruse the document before the hearing.

- [26] Mrs. Ward-Glasgow submits that there is no express rule of law which prescribes when disciplinary proceedings are to be instituted against an officer after an alleged act of misconduct. The PSC is guided by the provisions of the PSC Disciplinary Regulations. There is nothing in these regulations which stipulates a timeframe within which disciplinary charges are to be instituted after the alleged misconduct occurs or even after an officer has been suspended pending investigation.
- [27] Regulation 7(3) of the PSC Disciplinary Regulations provides that if the Commission institutes disciplinary proceedings it shall serve a notice in writing on the public officer and regulation 7(4) provides that that notice must state (a) the allegation of the act of misconduct and (b) the particulars of the allegation/s. In this case, disciplinary proceedings were therefore instituted by letter dated 30th November 2020 to Mr. Louis setting out the various allegations of misconduct and disciplinary charges.
- [28] Mr. Louis' contention is that there was excessive delay between his suspension in April 2018 and the institution of the charges against him in November 2020. Counsel for Mr. Louis, Mrs. Wauneen Louis-Harris ("Mrs. Harris") relies on the case of **Antonia Martial v Public Service Commission**⁶ in support of her submission on the issue of delay.
- [29] In the **Antonia Martial** case the claimant was suspended on 19th December 2003. By letter dated 10th January 2005 the Public Service Commission ("PSC") informed the claimant of forty-four (44) charges and summoned her to a disciplinary hearing to be held on 3rd March 2005 to answer to the allegations. The claimant raised objections. By letter dated 20th April 2005, the PSC

⁶ SLUHCv2005/0301 (delivered 29th July 2005, unreported).

indicated that notwithstanding the objections raised it would proceed with the hearing on 28th April 2005. The claimant filed judicial review proceedings.

[30] The claimant's case was that it would be unfair of the Commission to proceed with hearing for three reasons:

- (1) there had been excessive delay amounting to an abuse of power;
- (2) the PSC failed to disclose witness statements and all relevant documents;
- (3) the PSC had been prejudiced by a legal opinion from the Attorney General's Chambers.

[31] At paragraph 3 the Court said:

"The Commission must, however, only act for reasonable cause, not act whimsically or arbitrarily, apply the constitutional provisions and its own rules and act fairly in accordance with the principles of natural justice."

[32] In relation to the delay ground raised by the claimant, the Court said at paragraph 4:

"There is no express rule requiring the Commission to hold a disciplinary hearing within a certain time. **If the court is satisfied that there has been excessive delay in bringing disciplinary proceedings, such as to cause serious prejudice to the civil servant to the point where no fair hearing can be held,** or if the Commission and/or the Government are shown to have acted in such a way to render the continuation of the disciplinary proceedings unfair in the circumstances the court should restrain the abuse and prevent the proceedings from going ahead."
(my emphasis)

[33] The delay in **Antonia Martial** was about 15 months. The reason given by the Commission for the delay was that it took until 15th July 2004 for the Government to respond with evidence to substantiate the allegations. The number and complexity of the allegations meant that the Commission needed further evidence and clarification before the charges could be drawn up.

[34] At paragraph 8 of the judgment, the court posited that it was necessary for the applicant to show that he will suffer serious prejudice by reason of the delay such that he cannot receive a fair hearing before the court will stop the disciplinary procedure on the grounds of mere delay. The court said that without

specific evidence of prejudice, the passage of a few years cannot be said to be so long as to prevent a fair hearing.

[35] It is the PSC's submission that Mr. Louis has suffered no prejudice as contemplated in **Antonia Martial** and a fair hearing can still be held. Mrs. Glasgow argues that although there was a delay from the time the PSC received the request from the Department of the Public Service to the time the disciplinary proceedings were instituted, the delay was not unreasonable and was not excessive to cause serious prejudice to Mr. Louis. She explains that the PSC in its response has provided reasons for the delay in instituting disciplinary proceedings against Mr. Louis.⁷

[36] Let us examine the evidence. The PSC received a request for the institution of disciplinary charges in April 2018. No steps could have been taken by the PSC prior to that time. The PSC has provided an explanation for the delay between the request for the institution of the proceedings and the institution of the proceedings which I would opine is plausible. The explanation provided by the PSC in terms of its assessment of what documentation it had received and it requiring further and proper documentation shows that the PSC was working in the early part of 2020 to deal with the matter. I accept that the period of time between Mr. Louis' suspension and the institution of the charges cannot be said to be the most desirable, but one can appreciate the delay in the context of the explanation provided that the PSC. Also, if one examines what transpired once the matter was actually dealt with after the institution of the disciplinary charges in November 2020, it is clear that the PSC moved to get this matter dealt with. There were several pieces of correspondence exchanged between the PSC and Mr. Louis' lawyer. The hearing was convened within eight months thereafter. Having considered all the circumstances, it can in no way be said that the PSC was in a state of inertia after initiation of the disciplinary charges.

[37] As the court stated in **Antonia Martial**, an applicant relying on excessive delay must show that because of the delay he cannot receive a fair hearing. One of

⁷ See paragraphs 43-47 of the affidavit of the Secretary of the PSC filed on 30th July 2021.

Mr. Louis' main contentions is that he would be prejudiced because of the unavailability of this pre-delivery book or register which he says the delay contributed to. The Comptroller of Customs in one of his missives suggested that this book/register disappeared in 2016 during the course of the investigation and that would have been before the PSC would have got involved. The PSC has repeatedly requested the pre-delivery book and the spreadsheet containing pre-delivery information and has consistently received the same response. It is therefore not a case that the PSC is refusing to disclose something which it has.

[38] The matter in my view does not end there. Mr. Louis would have the opportunity to raise these matters at the disciplinary hearing, to question the Comptroller of Customs who says that the pre-delivery book mysteriously disappeared in 2016 and Mr. Grantley Promesse who says in his evidence that 'customs officers in transit sheds have, on their own volition, kept a record of all pre-delivery authorised by the respective authorising officers' and to make submissions as to the matter of this missing pre-delivery book/register and its impact on the outcome of the matter. There would also be an opportunity to question other witnesses in relation to the practice in relation to the pre-delivery book. It would be a matter of assessment of the evidence for the PSC and not for this Court.

[39] Mrs. Harris also relies on the case of **Felix Augustus Durity v The Attorney General of Trinidad and Tobago**,⁸ where the appellant had been suspended for nearly seven (7) years from 1989 to 1996. The incident which resulted in the suspension occurred in February 1989. On 10th August 1989, the Public Service Commission wrote to the Judicial and Legal Services Commission ("JLSC") informing that the Commission had taken a decision that the appellant who was a magistrate should be suspended from duty.

[40] The JLSC took no steps to investigate the matter or pursue it at all for the next two and half years. On 28th May 1992, the JLSC appointed someone to investigate the matter. The appellant responded to the allegations against him on 10th June 1992. The JLSC responded six (6) months later on 15th December

⁸ [2002] UKPC 20.

1992 and on 18th February 1993, the JLSC appointed a judge as a disciplinary tribunal to hear the evidence and find the facts.

[41] On 16th March 1993, the appellant sought leave to file a claim for judicial review against the JLSC's decision to prefer the disciplinary charges and to appoint a tribunal to hear the charge. Leave was refused at both the High Court and Court of Appeal. The appellant appealed to the Privy Council. The Board observed that in this case the delay was unexplained. At paragraph 38, the Board said that 'the continuation of a suspension from office, even if lawful at its origin, for an unreasonably long period may be an abuse of power'. The Board also found that the JLSC did nothing to investigate or charge the appellant for anything while he remained on indefinite suspension.

[42] Mrs. Glasgow accepts the learning in **Durity** but argues that although Mr. Louis' suspension was for a period of two years and seven months prior to the institution of disciplinary proceedings, his suspension was not unreasonable and unnecessarily long given the explanation given by the PSC. She submits that the court must have regard to the imposed local conditions and realities in determining whether the delay was unreasonable and unnecessarily long.

[43] I accept and agree with counsel, Mrs. Glasgow that this case can be distinguished from **Durity** where no reasons for the delay in instituting the disciplinary proceedings were proffered, the JLSC did nothing to investigate or charge the officer while he remained on indefinite suspension and action was only taken after the officer's counsel wrote to the Attorney General. This is not the case with Mr Louis. The PSC has offered reasons for the delay in instituting the disciplinary proceedings, the evidence shows that once the proceedings were instituted, they moved to convene a hearing within eight months. It is also noted that Mr. Louis in his evidence on the application at no point suggests that he made any enquiries of the PSC following his suspension as to the status of the matter. I find that the circumstances of this case do not raise any arguable grounds with a realistic prospect of success as regards the delay in the institution of the disciplinary charges against Mr. Louis.

[44] One of the contentions or grounds of Mr. Louis' application is that the PSC has breached regulation 11 of the PSC Disciplinary Regulations in that the hearing has not been conducted with speed and efficiency. However, according to regulation 7, the disciplinary proceedings would have commenced in November 2020 when the disciplinary charges were brought. Regulation 11 sets out how the hearing may be conducted, in writing or orally. Throughout the period after the institution of the disciplinary proceedings, there was constant communication requiring the submission of documents and written representations by Mr. Louis and the Department of Customs. A fundamental feature of the principles of natural justice is that an opportunity to be heard must be given. The PSC contends that fairness required that any report or statement that was disclosed to and in the possession of the PSC be disclosed to Mr. Louis and the Department of Customs and each party be given an opportunity to respond to the other's representations. That this was done is quite evident from the various pieces of correspondence and I agree with Mrs. Glasgow's submissions in this regard.

[45] In his affidavit in reply filed on 5th August 2021, Mr. Louis for the first time introduces a new legal ground, that the PSC violated regulations 4 and 5 of the PSC Disciplinary Rules. That is not part of the application for leave and so would not have been addressed by the PSC in its response. The applicant is not permitted to simply augment the basis of his application in this manner and the Court declines to address this submission.

[46] The PSC says that it exercised its discretion to convene an oral hearing after it was satisfied that the issues raised in the written representations could now be ventilated at an oral hearing which it was entitled to do given that the PSC Disciplinary Regulations allow for oral or written hearings.

[47] Mr. Louis makes a bald allegation that he has been unfairly targeted, and the documents (the pre-delivery book and spreadsheet) have been deliberately withheld because they will show that he is not guilty of any of the disciplinary charges laid against him. He is of the view that the whole process is a personal vendetta against him. No evidence to support these bald assertions has been

provided. It is for Mr. Louis to provide the Court with cogent evidence to show that the decision of the PSC is unreasonable, unlawful or an abuse and that he has failed to do.

[48] Mr. Louis in his affidavit in support of the application said that the delay in hearing his matter for over 3 years after his suspension has caused him prejudice in that the pre-delivery book has mysteriously disappeared and this is very important to his case. Additionally, in his affidavit in reply filed on 5th August 2021, he cites the prejudice to him as being that he is not able to recall the names of the officers who authorised specific pre-deliveries due to the passage of almost three years before the charges were laid. I note though that the question of pre-deliveries being authorised by officers was first raised by Mr. Louis in his written representations to the PSC in December 2020.⁹ This is information which he would have known even when he first submitted his report to the Comptroller of Customs in 2016. There is no mention of him being authorised by any supervisor in the 2016 report.¹⁰ It cannot be that the delay by the PSC would cause him prejudice because he had the opportunity to have provided or flagged that information during the Customs investigation in 2016.

[49] I note paragraphs 47 and 48 of Mr. Louis' affidavit in reply where he states:

"47. ... I state I was not the one who gave authorization for pre-deliveries but it was the deputy comptroller Trevor Springer and Shem Joseph. That Trevor [Springer] is deceased and cannot corroborate my statements and I cannot recall whether it was Shem Joseph or Trevor Springer who had granted authorisation for the pre-deliveries which are the subject matter of the disciplinary charges and the question of whether other officers other than "proper officers" who granted authorisation for the pre-delivery in my case and in other cases generally will be categorically established with the pre-delivery book register and I truly believe that the register has mysteriously disappeared as a result of a deliberate and wilful act to hamper me in presenting my case as and in allowing me to have a fair hearing before the Respondent.

48. ... the actions of the respondent in proceeding with the disciplinary proceedings fall afoul of Regulation 11 of the Disciplinary Regulations which require that I be given a reasonable opportunity to

⁹ Certificate of Exhibits filed on 13th July 2021 at page 76, paragraph 14.

¹⁰ Certificate of Exhibits filed 13th July 2021 at pages 29-30.

be heard in accordance with the principles of natural justice in a hearing before the Respondent.”

[50] These paragraphs are very interesting as firstly; Shem Joseph is a witness for Mr. Louis and can definitely speak to whether he was one of the persons authorising pre-deliveries and authorised the pre-delivery/deliveries relevant to the proceedings against Mr. Louis and also to the existence of the pre-delivery book. Secondly, the very thing that Mr. Louis complains of, that the PSC runs afoul of in proceeding with the hearing and not giving him a reasonable opportunity to be heard in accordance with the rules of natural justice in a hearing, is the very thing which the PSC is attempting to convene and which he is now seeking to stay. It is my view that Mr. Louis has attempted on this application to ventilate and argue this matter before the Court which is without the benefit of cross-examination of the witnesses and that the matter is more suited for the disciplinary proceedings scheduled before the PSC. Should Mr. Louis be dissatisfied with the outcome, he is not without recourse and has a right of appeal to the Public Service Board of Appeal.

[51] Having reviewed the submissions and evidence on this application, I am of the view that Mr. Louis has not met the requirements for the grant of leave to file a claim for judicial review. He has failed to show any arguable grounds with any realistic prospect of success. He is to be afforded the right to be heard at a hearing which he has been afforded and it is for him to put his case to the PSC and raise any issues for their consideration. He cannot seek to ventilate the matter by having the Court determine whether the absence of the pre-delivery book and spreadsheet would render the rest of the evidence incapable of proving the case. These are matters for the hearing before the PSC.

Delay

[52] Mr. Louis contends that he was only informed that the hearing was going to be on 15th July 2021 by letter dated 24th June 2021. In its affidavit in reply, the PSC states that there was undue delay with Mr. Louis only making a move to have the decision of the PSC reviewed on the basis of delay, 7 months after disciplinary charges were instituted against him. In the letter of 21st December

2020, the question of the delay in preferring the charges and in the actions of the PSC had already been foreshadowed. Mr. Louis' lawyer stated that the written representations were submitted 'without prejudice to the right of my client to invoke the jurisdiction of the High Court to review the actions of the Public Service Commission in light of the excessive delay in this matter.'

[53] Similarly, in the letter dated 14th June 2021, Mr. Louis' lawyer while indicating availability for the proposed hearing on 15th July 2021 again stated that the indication was made 'without prejudice to rights of my client to invoke the jurisdiction of the High Court to intervene to determine the fairness of the proceedings in light of the extant delay in the hearing of this matter and the fairness of proceeding to hear this matter in the absence of the aforesaid documents which are vital to observance of the principles of natural justice, integrity and due process by the Commission.' Mr. Louis then took nineteen days after this to file an application for leave to file judicial review. The PSC continued to request the book of pre-deliveries from the Comptroller of Customs who continued to maintain that the book had mysteriously disappeared during the investigation in 2016. That information had first been communicated since March 2021 and the position did not change at any time. Nothing changed significantly in the landscape of this matter after March 2021.

[54] Counsel, Mrs. Glasgow submits that Mr. Louis cannot now allege that there is no delay in making the application for leave as his lawyer participated in the disciplinary process by not only selecting the date of 15th July 2021 and indicating their availability but also participating in the disciplinary proceedings from the date of institution of the disciplinary charges up to the date of hearing of 15th July 2021.

[55] While it is the case that there is no time limit prescribed in CPR 56 for the filing of applications for leave to file a claim for judicial review, it is the case that such applications are to be made promptly. In **Roland Browne v The Public Service Commission**,¹¹ it was made clear that the context of the particular case must

¹¹ SLUHCv2010/0023, (delivered 15th December 2010, unreported).

be the backdrop to a determination of whether delay in making an application is unreasonable. CPR 56.5(2) requires the Court to consider whether the granting of leave or relief would be likely to (a) be detrimental to good administration or (b) cause substantial hardship to or substantially prejudice the rights of any person.

- [56] Taking all the circumstances into account, I find that Mr. Louis' filing of this application two days before the hearing was to be convened in these circumstances constitutes inordinate delay. The disciplinary proceedings were instituted in November 2020. He knew from March 2021 that the pre-delivery register could not be found, he agreed to a hearing date yet filed this application for leave two days before the hearing date when the matters which he complains about existed way before 13th July 2021. It is also the case that as early as 7th June 2021, Mr. Louis would have known that the hearing would have taken place on one of two suggested dates in that letter yet he waited two days before the actual hearing to file this application. The Court will not countenance such when as far back as December 2020, Mr. Louis' lawyer would have at least flagged the issue of delay in relation to the decision to institute the charges. Even if the Court were to have found that there were arguable grounds, which I have not, the application would be defeated by the inordinate delay. It would certainly be detrimental to good administration if persons participate in disciplinary proceedings and then file an application to stay the proceedings two days before a scheduled hearing when they knew about the hearing in good time to have allowed them to make the necessary application. Counsel, Mrs. Harris suggested that there was no delay especially in light of the fact that the hearing on the 15th July 2021 was adjourned in any event but I do not agree. It is not the time frame but the circumstances of each case which must be considered.

Alternative Remedy

- [57] Mr. Louis submits that there is no alternative form of redress available to him. His contention is that the PSC Disciplinary Regulations make provision for an appeal of a decision of the PSC but no other procedure is available to challenge the manner in which the PSC is proceeding to hear the matter in the absence of

the requested documents and in light of the excessive delay in the hearing of the matter which facilitated the disappearance of the pre-delivery register except by way of judicial review.

- [58] However, the very hearing slated for 15th July 2021 is the alternative remedy available to Mr. Louis. That hearing is to afford him the opportunity to put his case before the PSC and to challenge and probe the evidence of the Department of Customs. He would have an opportunity to question the Comptroller and the other Customs Officers. He also has the opportunity to make submissions for the consideration of the PSC. In addition, he also has a right of appeal from a decision of the PSC to the Public Service Board of Appeal should he be dissatisfied with the outcome of the PSC hearing.

Conclusion

- [59] In light of the foregoing discussion, I am of the view that the applicant has provided no basis for the Court to exercise its discretion to grant leave to file a claim for judicial review in the circumstances of this case. The application for leave to file a claim for judicial review filed on 13th July 2021 is therefore refused with no order as to costs. Consequently, the application for a stay of the disciplinary hearing before the PSC is also refused.

**Kimberly Cenac-Phulgence
High Court Judge**

By The Court

Registrar