

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

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

CLAIM NO. BVIHCV 2015/0083

**IN THE MATTER OF AN APPLICATION BY POLICE CONSTABLE NICHOLAS
TRANQUILLE FOR LEAVE TO APPLY FOR JUDICIAL REVIEW OF THE DECISION
THE COMMISSIONER OF POLICE DAVID MORRIS REFUSING TO EXERCISE HIS
POWER TO WAIVE THE REQUIREMENT THAT HE PASS THE PROFESSIONAL
EXAMINATION FOR PROMOTION TO THE RANK OF SERGEANT AND THEREBY
MAKE HIM ELIGIBLE FOR PROMOTION**

AND

**IN THE MATTER OF A DECISION OF THE EASTERN CARIBBEAN SUPREME COURT
ORDERING THE DEFENDANT TO CONSIDER A REQUEST FROM THE CLAIMANT TO
WAIVE THE REQUIREMENT THAT HE PASS THE PROFESSIONAL EXAMINATION
FOR PROMOTION TO THE RANK OF SERGEANT AND TO THEREBY MAKE HIM
ELIGIBLE FOR PROMOTION.**

BETWEEN:

NICHOLAS TRANQUILLE

Claimant

and

THE COMMISSIONER OF POLICE

Defendant

Appearances:

Mr. Ruggles Ferguson of Ciboney Chambers for the Claimant

Mrs. Giselle Jackman Lumy, Senior Crown Counsel of the Attorney General's Chambers for the Defendant

2016: March 22nd
April 22nd

JUDGMENT

[1] **BYER J.:** By Fixed Date Claim Form filed on the 13th October 2015 the Claimant sought the following relief:

- a. A declaration that the Defendant misdirected himself and erred in law when in considering the issue of exercise of his discretion under Force Standing Orders: M 7(4), he addressed his mind to the issue of whether the Claimant merits promotion rather than whether it was fair that the Claimant's name be sent forward to the Police Selection Board and/or Police Service Commission to determine whether he merits promotion.
- b. A declaration that the Defendant failed to take into account relevant matters and took into account irrelevant matters in arriving at his decision not to exercise his power under Force Standing Order M 7(4).
- c. A declaration that the decision of the Defendant not to exercise his power under Force Standing Order M 7(4) to waive the requirement that the Claimant sit and pass the examination for promotion to the rank of sergeant was in all the circumstances unreasonable and irrational.
- d. An order in the form of certiorari quashing the decision of the Defendant not to exercise his power under Force Standing Orders: M 7(4).
- e. Further and/or other relief
- f. Costs

- [2] Having considered the claims that were filed by the Claimant and all the arguments that were submitted to this Court and for the reasons that will be dealt with in more detail below, this Court dismisses the application of the Claimant herein with no order as to costs.

Introduction

- [3] The Claimant enlisted with the RVIPF in July 2002 and assumed the substantive post of constable upon having served 10 years with the Royal St. Lucia Police Force and 3 years with the Royal Turks & Caicos Islands Police Force.
- [4] In June 2011, the Claimant applied for and was successful in obtaining the post of Instructor at the Regional Police Training Center in Barbados. By way of correspondence dated the 19th July 2011, the Claimant was seconded to the Regional Training School for a period of 2 years and was given the acting appointment of Sergeant. It was an express term of the secondment, that upon completion of the posting, the Claimant was to revert to his substantive rank. That of Constable.
- [5] During the currency of the secondment of the Claimant in 2012, it was announced that the RVIPF was going to be offering promotions to suitably qualified persons and invited applications to be completed in accordance with the said Policy.
- [6] By way of a series of communications via electronic mail between the Claimant and the Human Resource Department of the RVIPF, the Claimant allegedly attempted to apply to participate in the offered promotions process. However, due to the fact that the Claimant at the time was physically located in Barbados, he

was unable to complete the process with the end result being that no application was entered on his behalf.

- [7] The Claimant therefore did not participate in the promotions as offered in 2012.
- [8] In October 2013, the Claimant returned to the Territory. The day after his return, it was confirmed to him by correspondence from the Human Resource department of the RVIPF that he was to revert to the substantive rank of Constable.
- [9] By letter dated 14th October 2013 the Claimant basing his request on a myriad of reasons, wrote to the Defendant seeking that he invoke the powers conferred on him by Force Standing Order (FSO) M 7(4) which gave the Defendant personal authority to waive any professional examinations required for the promotions process.
- [10] The Respondent refused the application on the mistaken basis that he had no residuary discretion at the time to consider the waiver. The matter proceeded before this Court as presently constituted on the basis that the Force Standing Order M 7(4) was still in effect and that the Respondent had the discretion to consider a waiver of the examination process. On the 11th November 2014 judgment was entered for the Claimant on that claim and the Respondent was ordered to consider the application for waiver as at the time of the application, that being October 2013.
- [11] The Respondent duly considered the application by the Claimant and duly gave reasons for his refusal to grant the waiver by letter dated the 3rd December 2014.

- [12] Having received that determination by the Respondent, the Claimant sought and was given leave to issue judicial review against the Respondent and his decision by the Court of Appeal on the 2nd October 2015. The Claimant has therefore brought a claim on the basis of illegality, irrationality and unreasonableness in that the Respondent made an error in law and misdirected himself in arriving at his determination not to exercise his discretion and thereby refusing to grant the waiver sought.

The Issues

- [13] Despite the prayers as contained in the Fixed Date Claim Form filed on behalf of the Claimant identified four prayers that he sought from this Court, this Court has determined that these can be distilled to one main and succinct issue.
- [14] Therefore in this Court's mind the only issue that has to be determined is thus- *"whether the Respondent exercised his discretion under FSO M 7(4) properly in all the circumstances of the case in determining the Applicant was not eligible for the waiver"*
- [15] With that in mind, it is clear to this Court that this exercise can only be undertaken by conducting a review of what was said by the Respondent in his decision and an assessment undertaken whether that decision complained of fell within the meanings of the terms "illegal", "irrational" or "unreasonable" to warrant it being set aside.

Court's Consideration and Analysis

- [16] By Order of this Court dated the 11th November 2014, the Respondent herein was ordered to consider the application of the Applicant that he had submitted in October 2013 seeking the waiver of the examination stage of the Promotion Process. The Court in that previous claim, having examined the circumstances in which the application had been made to the Respondent, ordered the Respondent to consider the application for the waiver of the promotions examination process under the policy that the Court found existed at the time of the application, that is Force Standing Order M 7(4) ("FSO M 7(4)").

Having been so directed the Respondent issued his decision on the 3rd December 2014 in which he stated the following:

"Further to the correspondence of 20 November 2014, I now provide the reasons for my decision to deny your application, contained in your correspondence of 14 October 2013, for a waiver of the requirement that you pass the Professional Force (RVIPF) Promotion Policy 2012.

While it was determined that the Commissioner of Police had the discretion in October 2013 to waive the requirement concerning the examination, the overriding interest of ensuring that the process for promotions within the RVIPF is open, fair transparent must also be borne in mind. It was against this backdrop that your application was considered and determined.

Having carefully reviewed your application, I concluded that it does not contain any grounds which justify the granting of the waiver. I note the positive feedback you received in the performance appraisals referred to. However the need for improvement in certain key areas cannot be ignored. It must also be remembered that these appraisals speak to your ability as an Instructor in the Regional Police Training Centre [RPTC] in Barbados. This is distinct from your

capacity to perform as a supervisory Sergeant responsible for a team of officers of varying experience while on active operational duty. It remains necessary to ensure that you have the requisite policing skills to respond to real-life policing operations, incidents and crises when deployed as an operational supervisory Sergeant. It is also difficult, if not impossible, to gauge your knowledge, understanding and ability to manage junior officers who may have had more practical experience and exposure in the operational field.

I also acknowledge your successful completion of the Court Prosecutors and Senior Investigation Management courses and commend you for your continued interest in your personal professional development. However, as I am sure you are aware; participation in courses is not unique to any officer of the RVIPF. Force-wide training has been conducted on numerous occasions in the recent past for officers up to and including the rank of Superintendent. It would not be practical or prudent to grant the waiver sought merely because courses were completed, since there would be no end to the applications that could be received on this basis. I am also satisfied that your participation on these courses would be taken into consideration, along with all the other academic pursuits, during the promotion process.

It is for all these reasons that I have concluded, as indicated in my correspondence of 20th November 2014, that I am not satisfied that your performance as an Acting Sergeant while at RPTC justifies the grant of the waiver sought.

Separate and apart from the above, it may also be wise for you to consider whether it may not be in your best interest to sit the relevant written examination. This is based on the fact that should Force Standing order M: 7 (4) be applied, the candidate is only awarded a pass mark in the written examination which translates into the minimum points that can be earned in relation to the examination stage of the promotions process. However, should you take the written examination, there is a possibility that you would attain a percentage which is higher than the pass mark and thus

increase the points awarded to you for this stage of the process. Since promotion within the RVIPF is based on a points-system, you therefore stand to gain a competitive edge in the promotions process by actually sitting the written examinations.

I am pleased to note that you have submitted an application for promotion and sincerely wish you the best of luck in this and all your future endeavors."

- [17] It is this determination and the reasons that were proffered by the Respondent, to which the Claimant herein complains. The pith and substance of the arguments of the Claimant are that the Respondent having come to that determination misdirected himself as to what he had to consider and failed to take into account the very reason for the waiver being sought and therefore in all the circumstances this determination should be set aside.
- [18] The Respondent's counsel on the other hand, has argued quite ardently that the Respondent's only point of reference was FSO M 7(4). This they argued was quite clear in its terms and that the determination was quite rightly made based as it was squarely within the parameters of what was required of the Respondent in considering the request as made by the Claimant.
- [19] It is therefore without question that the wording of the FSO M 7(4) must be looked at in some detail.

The terms of this FSO are as follows in its entirety:

"EXPERIENCE IN ACTING RANK

4. The requirement to pass any of the Professional Examinations may be waived on the personal authority of the CP [Commissioner of Police] in the case of any member who has held an acting appointment in the next senior rank for a period of six (6) months in the twelve (12) months preceding the date of a Professional Examination and having performed the duties, etc, of the next senior rank to the satisfaction of the CP [Commissioner of Police]."
(my emphasis added)

- [20] What is clear to this Court upon a careful reading of this governing policy is that this process is merely for the consideration of the Respondent as to whether any applicant had done two things: 1) had acted in the next senior rank for a period of six months in the twelve months preceding the examination date and 2) had performed the duties of the next senior rank to the satisfaction of the Respondent.
- [21] In the case at bar, the Claimant on secondment to the Regional Training school, had been promoted to the rank of acting Sergeant for the purposes of administrative logic, simply put, that a trainer should certainly be above the rank of those persons who were being trained. It was also clear that this appointment to this post was limited to the period of the secondment, a fact made clear to the Claimant upon his being appointed to the post at the Training school.¹
- [22] Thus the only period of reference for the Respondent to have assessed the Claimant would have been that limited period that he acted in that capacity at the Training school. As unfortunate as that may be and indeed in agreement with the submissions by the Counsel for the Claimant, the Claimant may well have not been on a frolic of his own during this period but this was the period that the Respondent was entitled to consider.

¹ Exhibit DM6 to affidavit of David Morris filed 8th April 2014 in Civil Suit 382/2013 and attached to the affidavit of Isis Potter filed 23rd November 2015 in the present suit

- [23] Having this as the only point of reference, it is unclear to this Court how the determination that he made, when he said *"it is also to be remembered that these appraisals speak to your ability as an instructor in the Regional Police Training Centre [RPTC] in Barbados. This is distinct from your capacity to perform as a supervisory sergeant responsible for a team of officers of varying experience while on active operational duty"* was one that he was not entitled to form.
- [24] It is clear that the Respondent had to make a determination of the person who acted in the next senior rank and performed the duties to the satisfaction of the Commissioner of Police of "that rank". As was submitted to this Court by Counsel for the Respondent and which this Court accepts, this must have by necessity meant an assessment based on the entirety of the responsibilities attendant to the substantive post of Sergeant. To have any other interpretation given to the same, in this Court's mind would have made a mockery of the intention of the provision which existed at the time of the application.
- [25] Thus, those duties could only have been what the Respondent was to consider and when those duties are examined in detail² it is crystal clear that the Claimant

² These duties were as set out in the certificate of exhibits of Loren Ryan Rhymer filed 27th November 2015: Inspects and detail personnel at the commencement of duty to ensure that they are properly attired in keeping with the Force Standing orders and that they are informed of the duties to perform during the course of the day, ensure that constables dispatched on foot patrol duties provide a visible police presence to preserve peace, prevent crimes and other breaches of the law by conducting periodic checks throughout various beats, ensure that constables on duty as station orderly log all reports in the appropriate register or OTRICCS database immediately and review to ensure they are accurate and properly entered, monitors the manner in which constable on duty answer the telephone calls to ensure they answer in a timely manner in keeping with the Force service charter commitments, informs the Inspector immediately of all incidents reported to the station and ensures that they are entered into the OTRICCS database, dispatches officers to reports to ensure that prompt and professional first response is provided, monitors the case files being investigated by constables to ensure that they are properly investigated and submitted within two months of the report or time specified,

could not be properly assessed on those duties and that even with the glowing recommendations and appraisals that were obtained, the Claimant had not in fact performed the duties of the next senior rank.³

- [26] Therefore unfortunately, this Court does not find favour with the argument of Counsel for the Claimant where he sought to argue that the Respondent had considered factors which were not open to him when he was assessing the application for the waiver. Counsel sought to convince this Court that the only duties that the Respondent had to confine himself to considering on the application of the Claimant were those that he had performed at the Regional Training school. The argument submitted by Counsel for the Claimant, further sought to convince this Court that having determined that the Claimant did not have the "requisite policing skills to respond to real life policing operations,

submits case files for prosecution in a timely manner and within the statutory limitation framework to enable the prosecution department sufficient time to review case files and institute the necessary court proceedings, ensure that officers on patrol duties regulate the flow of traffic in the business districts and other locations of Road Town, prevent breach of traffic regulations and report offenders where necessary, carries out daily inspections of all registers to ensure that they are updated and well kept, supervises the security of all exhibits or prisoner's property and ensure that they are entered into the appropriate register and properly handed over that the conclusion of the tour of duty, conducts periodic checks on all prisoners in custody to ensure that the incident is entered in the custody record and that the prisoners are accounted for, reports immediately to the Inspector any injuries sustained by any prisoner or any illness of a prisoner reported and ensure that the incident is entered in the custody record and that the prisoner receives immediate medical attention, apprehends offenders, prepare case files and give evidence in Court to enable prosecution, ensures that personnel under their command who are assigned to perform duties at the Supreme Court as orderly during the Legislative council sittings are informed in time to ensure attendance, undertakes rescue operations for distressed persons during national disasters, befriend members of the public who require assistance particularly children and elderly persons and provide assistance where necessary, conducts annual performance assessments of all probationers under their command and submit reports to the Inspector at the end of each quarter, conducts annual performance assessments of all constables under their command and submit reports to the inspector at the end of each year and perform any other duties assigned by the Inspector or Chief Inspector i/c of Road Town to ensure the efficiency and effectiveness of the Royal Virgin Islands Police Force.

³ FSO M 7(4)

blatantly meant that the Respondent had considered matters that were in the province of the third and final stage of the promotions process into which he wrongfully had entered. However in making this argument, it seemed to have been forgotten by Counsel, that in making the application for the waiver, his client was asking for this waiver which would have been the equivalent of taking the actual exam.

- [27] Any examination would not have therefore tested the Claimant only on what he had done at the Regional Training school. It would have had to, by necessity, included a thorough testing of the knowledge of that rank. Therefore it is clear to this Court that any assessment seeking to take the place of this examination would have had to have been rightly based on a similar assessment. In that regard following the guidance given by our very own Court of Appeal in the case of **Quorum Island (BVI) Limited v Virgin Islands Environmental Council and the Minister of Planning**⁴ in order for the Claimant to have succeeded on the ground of illegality, that is that the Respondent had exceeded his remit in the consideration of the application for a waiver, he would have first had to show what the authorizing power was, determine its scope and purpose and “measure the decision or action against [that]”⁵. Once that exercise is done, it is however clear to this Court that 1) the authorizing power was the FSO M7(4) ; 2) the scope was what the terms of the FSO M7(4) required of the Respondent, that is a consideration of the Claimant in the next senior rank , that of Sergeant and 3) the decision having been within those parameters, that the Respondent had did exceeded his remit and therefore the first declaration as prayed is dismissed.

⁴ HVCAP 2009/021

⁵ Op Cit para 30

[28] The Claimant has also argued before this Court that the Respondent failed to take into consideration the most important consideration why the Claimant had failed to take the examination in the first place, the fact that he was out of the Territory at the time of the scheduled examinations on business of the Territory.

[29] This argument is premised, it appears to this Court on the belief or understanding that the Respondent had an obligation under his remit to consider the *reason* for the application. By way of this argument, there was raised material on which this Court needs to make a slight detour to address. During the argument before this Court, the Claimant attempted to introduce a ground of complaint that the Respondent had not provided reasons for his decision and that additionally knowing that this matter was before the court he was obliged to do so. Counsel for the Respondent, rightfully in this Court's mind, asked the Court to disregard any such argument on the basis that any such ground or relief or argument was a substantial ground of judicial review. Therefore having not pleaded it or asked for it at the leave stage, more importantly, it was not now open to the Claimant to impugn the decision of the Respondent on this basis. I am in agreement with Counsel for the Respondent on this point, that not having raised the same in the application for leave that this was a ground of the relief sought, the Claimant cannot now raise it at the substantive hearing. Therefore the Claimant is restricted to arguing the case as pleaded in seeking to ask this Court to declare that the Respondent failed to take into account relevant matters and took in to account irrelevant matters in coming to his determination.

[30] In the authority from the Privy Council of *Sommatee Gokool and ors v The Permanent Secretary of the Ministry of Health and Quality of Life et al*⁶ the

⁶ [2008]UKPC 54 at para 18

Board in determining whether the complained of decision could amount to being irrational within the law, had this to say " ***the burden of establishing that a decision was unreasonable in the Wednesbury sense is notoriously heavy...***".

[31] That having been said, it was therefore on the Claimant to show to the satisfaction of this Court that the Respondent, in making his determination had come to a decision in which he had gotten it "***completely wrong***"⁷. What this Court therefore has to assess is whether the decision fell within the "***...range of reasonable views open to the decision maker...***"⁸. Therefore this Court only had to be satisfied that the decision that was rendered was one that any reasonable decision maker could have made.

[32] When the argument therefore of the Claimant is carefully examined, it is apparent that it hinges on two factors- one which I have already determined the Claimant cannot now not argue with regard to the reasons or sufficiency thereof and the other as to whether a relevant consideration, the reason for invoking the waiver were taken into consideration.

[33] As was stated in the case of ***Tesco Stores v Environment Secretary***⁹, "***it is for the courts, if the matter is brought before them, to decide what is a relevant consideration. If the decision maker wrongly takes the view that some consideration is not relevant and therefore has no regard to it, his decision***

⁷ Per Byer J in ***Digicel (BVI) Limited v The Telecommunications Regulatory Commission*** BVIHCV2012/0214

⁸ ***Secretary of State for Education and Science v Tameside Metropolitan Borough Council*** in the case of ***Jared Adams v Commissioner of Police*** AXAHCV 2009/0089 per Small-Davis J (Ag)

⁹ [1995]2ALL ER 636 at 642

cannot stand and he must be required to think again. But it is entirely for the decision maker to attribute to the relevant considerations such weight as he sees fit and the Courts will not interfere unless he has acted unreasonably in the Wednesbury sense."

[34] Thus taking the case at bar, the question must be asked whether the Respondent was entitled to take into consideration what the Claimant says would have been the main factor for invoking the waiver and if he in fact did. When one looks at the parameters of what the Respondent was mandated to do, his remit as this Court determined above was to look at the performance of the Applicant for the waiver, not the reason for the application. As was stated by the Respondent's Counsel in their submissions which I adopt wholeheartedly here, "the issue at the heart of whether the waiver should be granted pursuant to FSO M7(4) is the candidate's performance , not their availability."¹⁰

[35] Thus any other factor that may have been taken into account by the Respondent would not and could not have been considered relevant to the question that was at hand, simply whether the Claimant was entitled to his waiver. In any event this Court finds that the Respondent did in fact consider it and by the use of the words in his determination of the 3rd December 2014 he said quite clearly that "*having carefully reviewed your application...*" he concluded that the Claimant was not entitled to the waiver. What would have therefore been before the Respondent on that application would have been by necessity the reason for the request in the first place, the absence from the jurisdiction. I am therefore satisfied that the Respondent was not required to take that reason for the invocation of the waiver into consideration but that having done so he was entitled to determine the weight

¹⁰ Paragraph 44 of the Respondent's submissions filed on the 9th March 2016

he was prepared to ascribe to the same given the nature of the exercise itself. The declaration in this regard is therefore denied.

- [36] Following on from that argument of the Claimant, they also sought to have the Court make a declaration as to the unreasonableness of coming to the decision not to have granted the waiver at all. The Court having determined the remit of the Respondent previously and having examined the circumstances of the Claimant in particular, earlier in this judgment, the Court also refuses the declaration sought and refuses to set aside the determination of the Respondent not to grant the waiver.
- [37] For the sake of completeness, although having found on the substantive issues, due to the fact that there was substantial argument made by the Respondent in relation to the utility of these proceedings generally, I will now address the same in short form.
- [38] The Respondent argued strenuously that the application for the waiver by the Claimant had now been rendered academic in that any waiver could not now operate to assist the Claimant when there is no longer any procedure to accommodate the granting of that waiver that policy now having been finally and completely abandoned. Further this matter simply being of academic importance to the Claimant only, could not and would not have passed the threshold to have the Court determine the same as a point of public interest.
- [39] It is without dispute that the Courts must address their mind to real life questions that require real life answers. In fact the authorities make it clear that any such journey into the realm of hypothetical or academic questions must be seriously

frowned upon. Thus in the case of *R v Secretary of State for the Home Department ex p Wynne*¹¹ Lord Goff made it clear that “ *the courts- including the Administrative Court – exist to resolve real problems and not disputes merely academic in significance. Judges do not sit as umpires on controversies in the Academy, however intellectually interesting or jurisprudentially important the problem and however fierce the debate which may be raging in the ivory towers or amongst dreaming spires*” and again in *R (The Howard League for Penal Reform) v Secretary of State for the Home Department*¹² Munby J noted “*unlike academic textbook writers and examiners, the courts do not decide legal questions in a vacuum.*”

- [40] It is therefore abundantly evident, that any question to be determined by the Court must have some utility to the parties before the Court or at the very least for the public at large in the instance where the factual matrix is not unique to those parties before the Court.
- [41] The Claimant, in this Court's opinion, cannot point to either of these events being in his favour. It is clear that even if the declarations had been granted despite the Claimant's counsel cavalier answer to that question that what they do with the declarations would be up to them, this Court is of the view that in fact nothing could be done with them. From the evidence, the procedure that underlies the use of the waiver in the three stage process is now defunct. The possibility of creating a special tribunal just for the purposes of assessing the Claimant is without legal or policy basis. In effect the Court would be invited to act in vain. The Court therefore endorses the words of Hariprasad- Charles J in the case of *Mary Williams v*

¹¹ [1993] 1WLR 115

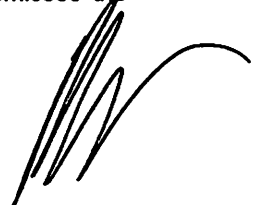
¹² [2003]1 F.L.R. 484 at para 140

Attorney General ¹³that “*there is no good reason in the public interest to embark on a hearing to decide hypothetically whether the relief which she had already been offered ought to be granted. To do so would result in a waste of judicial time and resources.*”

[42] Further, based on the factual matrix of this case which is specific to the Claimant, the avenue of this Court making a determination of general importance also does not arise. Sometimes events overtake the proceedings or the remedy being sought on a claim as filed. It is then that the Court should not entertain the claim and in this case this Court finds that there is no “*discrete point of statutory construction*”¹⁴ or otherwise which would have warranted the Court making a determination.

Conclusion

[43] For all the matters that I have therefore stated above, this Court dismisses the claim of the Claimant with no order as to costs.



Nicola Byer

High Court Judge

¹³BVIHCV2001/0048 at para 20

¹⁴**R v Secretary of State for the Home Dept ex parte Salem** [1999]2 ALL ER 42