

BARBADOS
[Unreported]

IN THE SUPREME COURT OF JUDICATURE
HIGH COURT
CIVIL DIVISION

No. 1280 of 2012
1281 of 2012
1316 of 2012

BETWEEN:

RICHARD BOYCE
ANTONIO FORTE
ELPHENE MOORE
JOHN MAXWELL
VERNELLA WILTSHIRE
BARRY HUNTE
ELLIOTT BOVELL
TREVOR BLACKMAN
RODERICK WALCOTT
WINSTON HOLDER
VERNON MOORE
SONIA BOYCE
ANDREW MOORE

APPLICANTS/CLAIMANTS

AND

COMMISSIONER OF POLICE
POLICE SERVICE COMMISSION
ATTORNEY GENERAL

FIRST RESPONDENT/DEFENDANT
SECOND RESPONDENT/DEFENDANT
THIRD RESPONDENT/DEFENDANT

BETWEEN

JEDDER FERNEAUX ROBINSON

APPLICANT/CLAIMANT

AND

COMMISSIONER OF POLICE
POLICE SERVICE COMMISSION
ATTORNEY GENERAL

FIRST RESPONDENT/DEFENDANT
SECOND RESPONDENT/DEFENDANT
THIRD RESPONDENT/DEFENDANT

BETWEEN:

ERROL ELLIS

CLAIMANT

AND

**COMMISSIONER OF POLICE
POLICE SERVICE COMMISSION
ATTORNEY GENERAL**

**FIRST RESPONDENT/DEFENDANT
SECOND RESPONDENT/DEFENDANT
THIRD RESPONDENT/DEFENDANT**

Before the Honourable Madam Justice Margaret A. Reifer, Judge of the High Court

**Dates of Hearing 2015: July 3rd
September 28th**

Appearances:

**Mr. Ralph Thorne QC Attorney-at-Law for the Claimants (1280 and 1281/2012)
Mr. Alair Shepherd QC in association with Ms Jennivieve Maynard Attorneys-at-Law for
the Claimant Errol Ellis (#1316/2012)
Mr. Tariq Khan, Attorney-at-Law, for the Police Service Commission
Ms. Donna Brathwaite QC, Mr. Jared Richards and Ms. Joanne Murphy Attorneys-at-
Law for the Commissioner of Police, First Respondent and the Attorney General, Third
Respondent**

DECISION

[1] This application was made by counsel for the Claimant in suit #1316 of 2012 and is an application for discovery of documents in the following terms: That the Respondent/Police Service Commission produce the Minutes of the meetings held by the Police Service Commission (hereinafter called the PSC) on the 6th June 2012 with then Deputy Commissioner of Police Bertie Hinds and on the 19th June 2012 with the Promotions Advisory Board (hereinafter called the PAB). Later in his submissions, counsel added to this category any correspondence passing between the PSC and Mr. Hinds, and the PSC and the PAB as being necessary to a fair determination of the issues in this case (presumably 1316 of 2012).

[2] Counsel Mr. Shepherd makes two points in support of this Application.

[3] Firstly, it is his submission that this documentation/communication is not protected by the provisions of **section 9 of the Service Commissions Act, Cap. 34**. The constitutionality of this provision (and section 10) was the subject of a decision delivered by this Court in this matter in October 2014.

[4] This section reads as follows:

“9. A person shall not in any legal proceedings be permitted or compelled to produce or disclose any communication, whether written or oral, which has taken place between the Commission or any member of the Commission and the Government or the Governor-General or any member of the Governor-General’s personal staff, or the head of a department or any communication between any member of the Commission and the Chairman or between the members in the exercise, of, or in connection with the exercise of, the functions of the Commission, unless the Governor-General, after consultation with the Chairman, consents in writing to such production or disclosure.”

[5] It is his submission that Deputy Commissioner Bertie Hinds and the members of the PAB do not fall within the categories of persons and communications protected by section 9, these being, between the Commissioner and the Government, the Commission and any member of the Governor-General’s personal staff, the Commission and any head of department of government, the Chairman and members. Thus in his opinion and submission, these communications are not protected.

[6] Counsel also makes reference to that provision of the CPR which states that there is a continuing duty of disclosure on relevant documents.

[7] His second major submission is that the parties only became aware of the existence of these Minutes as a result of the cross-examination of Sir Trevor Carmichael on the 1st day of July 2015.

[8] Counsel argued that the Government (public authority) is obligated to put before the Court all documents and information that is relevant and therefore can assist the Court.

Counsel made reference to an extract from the Judicial Review Handbook by Michael Fordham, 6th ed. at page 125 under the rubric “Defendant/Interested party’s duty of candour” where it states as follows:

“A defendant public authority and its lawyers owe a vital duty to make full and fair disclosure of relevant material...”

[9] Also referenced were the dicta of Mr. Justice Ouseley in **R (AHK) v Secretary of State for the Home Department (No. 2) [2012] EWHC 1117** where he therein stated:

“referring to the duty on the defendant authority to explain full facts and reasoning underlying the decision challenged, and to disclose the relevant documents, unless in the particular circumstances of the case, other factors, including those which may fall short of requiring public interest immunity may exclude their disclosure...”

[10] And also the Privy Council in **Graham v Police Service Commission [2011] UKPC 46:**

“It is well established that a public authority, impleaded as respondent in judicial review proceedings, owes a duty of candour to disclose materials which are reasonably required for the court to arrive at an accurate decision.”

[11] These communications not being protected by section 9, and these documents being undeniably relevant, he therefore submits that they be produced to this Court at this time.

The Reply to these Submissions

[12] Counsel for the PSC was the first to reply to these submissions. His submission in brief was that counsel for the Claimant was in receipt of the Affidavit of Sir Trevor Carmichael since August 2012 and the knowledge of the existence of minutes of these meetings is not new evidence; it would have been known to counsel at the latest since August 2012. He directed the Court to page 283 of the Agreed bundle which spoke to the Proceedings of the Commission as follows:

“Record of Meetings and Decisions”

“5(1) Minutes of all meetings of the Commission should be duly recorded and shall be confirmed at a subsequent meeting of the Commission or by the individual members of the Commission in circulation thereof.”

- [13] A meeting with Mr. Hinds and with the PAB was within the exercise of his client’s functions and would have been minuted in accordance with 5(1) above. Counsel was given every opportunity at case management to make an application for discovery and he declined to make an application. Counsel argued that even if he were to give section 9 the interpretation given by counsel Mr. Shepherd (and he does not), he was in a position since August 2012 to make this application for disclosure and nothing can be gained by acceding to such an application which will simply delay the progress of this matter.
- [14] Counsel Mr. Thorne Q.C. adopted the arguments of counsel Mr. Shepherd Q.C. and submitted that it was only on the cross-examination of Sir Trevor that the first opportunity was presented for the Court to examine the nature of the communications between Sir Trevor, between the PSC and Mr. Hinds. He submits that those communications fall to the heart of this matter because it concerns the propriety of those promotions.
- [15] Counsel Mr. Richards responded for the First and Third Respondents. While observing that the disclosure of these documents in no way touches and concerns the case against his client the Attorney General (no reference being made to his client the office of the Commissioner of Police), his expressed view however is that the subject communications are protected by **section 9** of the **Service Commission Act**, that is, matters not to be disclosed.

[16] Mr. Richards reminded counsel that section 9 was not the only relevant section. No mention was made by counsel Mr. Shepherd Q.C. of section 10, which said section speaks directly to the present situation. It reads as follows:

“10 (1) No member of the commission or any other person shall, without the written permission of the Governor-General, publish or disclose to any unauthorized person or otherwise than in the course of duty, the contents or any part of the contents of any document, communication or information whatsoever, which has come to his knowledge in the course of his duties in respect of any matters relating to the functions of the Commission.

[17] He further submitted that Rule 28(12) of the CPR is not relevant to these circumstances as it speaks to an Order for disclosure having been made and no such Order has been made (this concession was made by Mr. Shepherd Q.C. in his submission).

[18] He also submits that the existence of Minutes is not new evidence as the Police Service Commission is directed by statute to keep Minutes of all their meetings.

Discussion

[19] In view of the fact that counsel’s entire submission is based on the major plank that knowledge of the existence of these “Minutes” only became known after evidence of same was elicited in the cross-examination of Sir Trevor, I shall first address that submission: Whether the evidence of Sir Trevor Carmichael ‘that there are Minutes of these meetings’ is new evidence.

[20] I cannot accept counsel’s submission that there was no awareness of the existence of these Minutes until Sir Trevor’s evidence. Not only does section 5(1) make it clear that the business of the Commission must be minuted, but at the very latest Sir Trevor’s Affidavits as long ago as August 2012 spoke to these meetings/communications.

[21] It is my view, however, that the mere existence of said Minutes is not justification for their disclosure. Counsel never addressed the issue of their relevance to his case: what

dispute of fact did they speak to and was that dispute of fact ‘relevant’ to the case for the Applicant/Claimant as pleaded. It bears mentioning at this stage that the main plank of the case for the Claimant in 1316 of 2012 is that having been satisfied that he was in the “Zone of Promotion” that he be notified of reasons preventing his promotion and an opportunity to be heard on the same. His legitimate expectation argument is fundamentally different from that of the Claimants in 1280 and 1281 in so far as he merely claims a Legitimate Expectation that any consideration of his application or promotion would be given fair and transparent adjudication.

[22] In the opinion of this Court counsel in his submission clearly was of the view that these Minutes were relevant, but this Court was not so persuaded.

[23] This speaks to a matter touched on in this Court’s decision of 2014, namely, the nature of Disclosure in Judicial Review Proceedings and explored in the case management of this matter and secondly, the role of cross-examination in Judicial Review Proceedings.

[24] These issues lead quite naturally to the next issue considered by this Court which is the significance of the lateness of this application.

The lateness of the Application

[25] In response to the Court’s query of counsel as to the effect of the lateness of the application counsel cited **Part 28 Rule 12** of the **CPR** which provides:

“The duty of disclosure in accordance with any order for disclosure continues until the proceedings are concluded.”

[26] As conceded by counsel Shepherd Q.C., this provision does not speak to the issue presently before us.

[27] He also reiterated his statement that he was not aware of the existence of these documents until Sir Trevor gave his evidence to the Court of these meetings. I have already stated that I do not accept this submission.

[28] In March 2014 this Court ruled on the constitutionality of sections 9 and 10 of the Service Commissions' Act, Cap. 34 and made clear at paragraph 94 of said decision its disagreement with Mr. Shepherd Q.C's submission "that the adjudication of his application will answer the question as to whether the documents are subject to disclosure". This Court went on to state as follows:

"... Discovery in judicial review proceedings is a matter for the Court and will be subject to considerations of public interest immunity/national security/privilege etc ...: see *Judicial Remedies in Public Law*, 2nd ed.; *De Smith's Judicial Review*, 6th ed."

[29] This Court is of the opinion that it made abundantly clear its view that Disclosure in Judicial Review Proceedings is a matter for Interlocutory application and not to be determined by an application to determine the constitutionality of a statutory provision. Counsel Mr. Shepherd Q.C., during the extensive case management of this matter, chose not to make any interlocutory applications for disclosure.

[30] These proceedings are governed by **Part 56.9** of the **CPR** which provides that:

"56.9 (1) At the pre-trial review, the judge or master may give any directions that may be required to ensure the expeditious and just final hearing of the application and the provisions of Parts 25 to 27 of these Rules apply.

(2) In particular, the judge or master may

(a) make an order for

- (i) witness statements or affidavits to be served;
- (ii) cross-examination of witnesses; and
- (iii) disclosure of documents."

[31] This is in effect a provision for specific disclosure. I disagree with counsel's submission that this application is in the nature of standard disclosure. I am re-enforced in this view by the Learned author Clive Lewis in his text *Judicial Remedies in Public Law*, where under the rubric Disclosure at 9-100 he states as follows:

“The courts are specifically empowered to make orders for disclosure of documents in judicial review proceedings ... Applications in judicial review proceedings are usually for specific disclosure and inspection of particular documents rather than standard disclosure.”

[32] And under the rubric “Circumstances when Disclosure may be ordered” he states further:

“The courts have adopted a relatively restrictive attitude to ordering the disclosure of documents in judicial review proceedings. They have emphasized that the nature of judicial review proceedings is different from private law litigation. Disclosure is therefore likely in practice to be ordered in far fewer cases and will be more circumscribed in its extent than would be the case in ordinary private law litigation. The court in judicial review proceedings is not usually concerned with making findings of fact. The court is largely performing a supervisory role. Facts will often be agreed or will appear in a documentary form and it will be the legal consequences attaching to those facts that are in issue ... An applicant will not be granted an order for disclosure in order to go behind an affidavit or witness statement of a respondent to ascertain whether it is correct unless there is some material outside that contained in the affidavit or witness statement which suggests that it is inaccurate, misleading or incomplete in some material particular ... The courts will not allow “fishing expeditions” where an applicant seeks disclosure of documents in the hope that something will emerge which might form the basis of a claim for review. The courts will not, for example, order disclosure where the applicant claims that a decision is so unreasonable that it might be flawed and seeks disclosure in the hope that it might turn up evidence to support that or another allegation.”

Disposal

[33] It appears to me that the said Minutes of the meetings with Deputy Commissioner Hinds and the PAB would fall within the category of excluded communications referenced by **section 10** of the **Service Commissions Act, Cap. 34**, as opposed to **section 9** which formed the basis of the submission by counsel Mr. Shepherd Q.C.

- [34] It is the opinion of this Court that it is reasonable to conclude on a reading of **section 5** of the **Service Commissions (Police Service) Regulations, 1964** that Minutes of all meetings would have been recorded. Meetings of the Commission with the Deputy Commission and the PAB would naturally fall within the purview of section 5.
- [35] But most importantly, in the opinion of this Court, the Claimant/Applicant has not persuaded this Court that these documents are relevant or central to the application before it. Stated differently, this Court is not persuaded that the requested disclosure is necessary for disposing fairly of this case or in the words of the Claimant/Applicant that it is in the interest of justice that I do so.
- [36] The Application is accordingly denied and the trial shall proceed.
- [37] The issue of the costs of this application is deferred.

MARGARET A. REIFER
Judge of the High Court