



# In The Supreme Court of Bermuda

## CIVIL JURISDICTION

2021 No. 229

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW  
AND THE MATTER OF MARCUS UDDIN, PROBATIONARY OFFICER**

**BETWEEN:**

**MARCUS UDDIN**

**Applicant**

**-and-**

**THE COMMISSIONER OF POLICE**

**Respondent**

**Before: The Hon. Chief Justice Hargun**

**Representation: Miss Victoria Greening of Resolution Chambers Ltd. for the Applicant**

**Mr Brian Myrie, Attorney General's Chambers for the Respondent**

**Date of Hearing: 2 October 2023**

**Date of Judgment: 6 November 2023**

# JUDGMENT

(Damages)

## HARGUN CJ

### Introduction

1. As noted in the Judicial Review Judgement dated 23 March 2023 (the “**JR Judgment**”) Mr Marcus Uddin (“**the Applicant**”) commenced employment with the Bermuda Police Service (“**BPS**”) on 10 September 2018 with a probationary period of three years. As a probationary member of the BPS, the Applicant was subject to the Police Act 1974 (“**the Act**”) and the Police (Conditions of Service) Order 2002 (“**COSO**”).

2. Section 9 of the Act provides that:

***“Discharge from the Service***

*9. Without prejudice to the Public Service Superannuation Act 1981 [title 9 item 31] and the powers of the appropriate authority to remove or exercise disciplinary control over members of the Service in accordance with the Constitution and any regulations made thereunder, a member of the Service may be discharged from the Service by the appropriate authority if the appropriate authority is of the opinion that such discharge is necessary in the public interest.”*

3. Section 3.1 of the COSO provides that:

***“3. DISCHARGE***

*3.1 A member may be discharged at any time in accordance with existing legislation, for example for the following reasons–*

*...*

*(d) if during the course of, or at the end of the probationary period, the Commissioner of Police considers that he is unlikely to become an efficient member”*

4. Clause 4 of the Applicant’s Employment Contract provided that:

***“4. PROBATION PERIOD***

4.1 Your appointment is subject to a **probation period** as set out in Schedule 1. Your performance will be reviewed with a formal report submitted to the COP or the COP's delegate as necessary. Subject to satisfactory performance and conduct, you will be confirmed in post at the end of probation period.

4.2 You may decide to terminate this Contract during the probation period immediately in writing.

5. Clause 1.1 of the Applicant's Employment Contract provided that:

*"This Contract shall be effective from the Contract start date as set out in the Schedule 1 and shall continue (subject to any other termination provisions set out in this Contract) until terminated by either party giving the other not less than the written notice set out in Schedule. Your employment under the terms and condition of this Contract is the "Appointment"."*

5. Clause 18 of the Applicant's Employment Contract deals with Termination of Service and provided that:

***"18. TERMINATION OF SERVICE***

*18.1 Notwithstanding clause 1.1, the BPS may, subject to the terms and conditions of this Contract and the Policies, terminate the Appointment at any time and with immediate effect by notifying you that the BPS is exercising its right under this clause and that it will make a payment in lieu within 60 days, with the exception of pension payments."*

6. Schedule 1 to the Applicant's Employment Contract required notice to be given by the BPS and the Applicant in order to terminate the contract of employment and it provided that:

***"Contract Termination Notice Period:***

*Employee provides 1-month prior written notice  
BPS provides 3 months prior written notice"*

7. In the JR Judgment the Court concluded at [25] that the Respondent did not act fairly in discharging the Applicant on 27 July 2021. The performance deficiencies which were noted in the correspondence from the Respondent had already been noted by the Applicant's supervisors and at the instructions of Superintendent Astwood, PS Jean Pierre had agreed with the Applicant that these performance issues would be the subject of a three month informal Management Action Plan ending on 27 August 2021. At the

end of the first monthly meeting on 27 June 2021 the Applicant was told by PS Jean Pierre that his performance was improving and he was “*on track*”. In the circumstances, the duty of fairness demanded that the Applicant’s employment would not be terminated on the same grounds which formed the basis of the informal Management Action Plan, until its expiry on 27 August 2021.

8. In coming to this conclusion, as noted in [26], the Court did not express any view as to the substantive grounds which formed the basis of the Respondent’s decision. The Court’s conclusion that the Respondent’s decision is unfair and therefore unlawful related to the procedural requirement that such a decision, in fairness to the Applicant, should not have been made during the period allowed for the implementation of the informal Management Action Plan. The Court expressly noted that it would have been open to the Respondent to take this action after the conclusion of the Management Action Plan on 27 August 2021, if he continued to take the view that the Applicant was “*unlikely to become an efficient member*” of the BPS.

### **The claim for reinstatement**

9. In her written submissions, Miss Greening for the Applicant contends that the Applicant was unfairly dismissed and in the first instance, seeks the relief of reinstatement. Miss Greening says that case law demonstrates that the Court has discretion as to whether or not to order reinstatement and in this case the discretion should be exercised in the Applicant’s favour and reinstatement should be ordered. She says that there is nothing to indicate that the Applicant would not have qualified to become an efficient full-time officer at the completion of his probation, as indicated in the meeting notes of the informal action plan. In his Fourth Affidavit the Applicant reiterates that he is seeking reinstatement and in the event that the Court does not reinstate him, in the alternative, he is applying for reasonable damages for unlawful dismissal.

10. In considering the claim for reinstatement and/or damages the Court bears in mind that public law remedies are, for the most part, discretionary and in exercising that discretion the Court is bound to take into account the grounds pertaining to the facts of the particular case.
11. In relation to the claim for reinstatement it is to be noted that during the *inter-partes* hearing for leave to issue the Judicial Review proceedings, the Applicant's claim for reinstatement was considered and refused by Subair-Williams J. In other words, the Applicant was refused leave to pursue the remedy of reinstatement by Subair-Williams J and the Applicant elected not to appeal that decision. Accordingly, this fact alone would militate strongly against the grant of the remedy of reinstatement.
12. The issue of whether it is appropriate to grant the remedy of reinstatement in similar circumstances as the present case was considered by the House of Lords in *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER 141. In that case the respondent was a probationer constable undergoing training with a police force. He received good reports on his progress from his instructors who stated that there was no reason to doubt his becoming a reliable and competent constable. However, during his probationary period, certain rumours started concerning his private life. The Chief Constable believed them to be true and decided to dispense with the services of the respondent. The Chief Constable did not disclose the facts upon which he based his decision nor offer the respondent an opportunity to offer any explanation, but he informed him that if he did not resign, he would be discharged. The respondent resigned and began proceedings against the Chief Constable seeking an order of certiorari to quash the Chief Constable's decision that the respondent should resign or be discharged. The House of Lords held that the Chief Constable's decision to force the resignation of the respondent was vitiated by his erroneous assumption that he had an absolute discretion and by his total failure to observe the rules of natural justice in not giving the respondent the opportunity to refute the allegations on which the Chief Constable relied.

13. On the question of the appropriate remedy, the House of Lords held that the respondent was entitled at least for a declaration that the Chief Constable had acted unlawfully and in breach of his duty under the relevant regulations. However, in relation to the claim for reinstatement, whilst that was the only satisfactory remedy in consequence of the breach of duty by the Chief Constable, to make such an order would be impractical and would border on usurpation of the powers of the Chief Constable by the court and therefore the court declined to grant the relief. Lord Brightman held at 156:

*“I feel that the choice of remedy is a difficult one. It is a matter of discretion. From the point of view of the respondent who has been wronged in a matter so vital to his life, in order of mandamus is the only satisfactory remedy. I have been much tempted to suggest to your Lordships that it would be in the circumstances be a remedy proper to be granted. But it is unusual, in a case such as the present, for the court to make an order of mandamus, and I think that in practice it might border on usurpation of the powers of the Chief Constable, which is to be avoided. With some reluctance and hesitation, I feel that the respondent will have to content himself with the less satisfactory declaration that I have outlined.”*

14. Lord Bridge also referred to the potential difficulties in ordering reinstatement. At page 148 Lord Bridge held:

*“... I appreciate the weight of the objections to it. Great practical problems would arise in relation to his training and perhaps other matters from the fact that the service has been interrupted for nearly four years. Moreover, human nature being what it is, if the North Wales Police Force had the respondent forced on them by order of your Lordships’ House as the culmination of this lengthy litigation, there would be an obvious danger that an undercurrent of ill feeling would affect his future relations with his superiors in the force.”*

15. In this case, the Court is bound to take into account the very strong objections made by the Commissioner of Police in relation to an order of reinstatement of the Applicant. The Commissioner’s strong objections are set out in his Second Affidavit dated 22 August 2024. In the affidavit the Commissioner states:

*“14. From my review, it became clear that the Applicant’s attitude and behaviour toward his duties and following lawful instructions, is not consistent. Policing does not work that way. We do not get to choose when we are going to do our job well, or produce good work. The community we serve, demand, expect more from us, as they should, and so do/did the colleagues of the Applicant.*

*15. As regards working for the Police, what should not be and is not acceptable, is police officers not following instructions or completing work to acceptable standards. Not just policing standards, but the community we serve, the victims of offences. While, not every day in policing is the same and some are more exciting than others, as an officer, we took an oath to serve, not sometimes, but all the time.*

...

*20. No organization or workplace would accept this kind of behavior from an employee and in making my decision on behalf of what is best for the BPS, I made the decision the BPS will not accept this attitude and overall negative behaviour from an employee. A probationary officer displaying this kind of attitude could never be confirmed as a permanent member of the BPS. That would be contrary to the Standards of Professional Behavior.*

...

*22. The Applicant joined the BPS on the 10<sup>th</sup> September 2018. The following A45 reports are contained in Tab 3 of my exhibit. These A45 reports are non-exhaustive examples of the Applicant’s attitude, conduct and overall behaviour during his time as a probationary officer of the BPS:*

- (i) 13 September 2018: Applicant had to write a report explaining why he was due to report for duty at 07:45hrs and only arrived at 0927hrs. 1hour 45 minutes late.*
- (ii) 17 September 2018: Applicant had to write a report explaining that he was due to start work at 7:45hrs and only arrived at 8:30hrs. 45 mins late.*
- (iii) 24 September 2018: Applicant had to write a report explaining why he did not shave for duty.*
- (iv) 1 October 2018: Applicant had to write a report explaining why he did not shave for duty.*
- (v) 02 October 2018: Applicant was given an action around tardiness that ended on the 16th October.*
- (vi) 16 October 2018: Applicant had to write a report explaining why he was late for drill.*
- (vii) 23 October 2018: Applicant had to write a report explaining why he was late for duty.*
- (viii) 21 November 2018: Applicant had to write a report explaining why he forgot his gym clothes. Trainers comment that he needs work on his organisational skills.*
- (ix) 23 November 2018 - Applicant had to write a report explaining why he did not*

*hand in his pocket notebook and why entries are missing. The Applicant's Trainer comments that at this stage the Applicant should not be experiencing these type of issues as Pocket Notebooks are a daily process and the fact that entries are missing will have a negative impact on the service delivery of the BPS.*

*(x) 23 November 2018 - Applicant had to write a report explaining why he fell asleep in class.*

*(xi) 26 November 2018 - Applicant had to write a report explaining why he did not complete his Statement Writing Assessment on time. The Applicant indicated that he had to help his mother decorate the house for Christmas. The Applicant's Trainer posits that his explanation is totally unacceptable and that his written explanation was at odds with what he initially explained to training staff, that he had a family emergency.*

*(xii) 26 November 2018 - Applicant had to write a report explaining why he failed Phase 2-week one exam.*

*(xiii) 27 November 2018 - Applicant had to write a report explaining why he did not hand in his pocket notebook on time. The pocket notebook is due each day and at this point in the course should simply not be a problem for the Applicant. As previously stated, missing notebook entries presents a serious negative impact on the service delivery of the BPS.*

*(xiv) 27 November 2018 - Applicant had to write a report why he was late returning from lunch and why he sucked his teeth when confronted. The Applicant comments that he meant no ill will towards staff and the ill-will was an assumption on their part for which he thought he was being treated unfairly. The trainer commented that at no point in time did he apologise for his actions.*

*(xv) 27 November 2018 - Applicant had to write a report to explain why he did not submit a report on time.*

*(xvi) 27 November 2018 - Applicant had to write a report explaining why his pocket notebook was not completed in line with training.*

*(xvii) 27 November 2018 - Applicant had to write a report explaining why there were late entries in the course movement diary.*

*(xviii) 29 November 2018: Training School Inspector Thompson provides an extraordinary training report related to the Applicant entitled the RFC Report highlighting the Applicant's performance to Acting Deputy Commissioner Weekes highlighting a concerning pattern of behaviour. Paragraph 26 of the RFC Report states - "The actions since PC Uddin commenced RFC #79, viewed in isolation may not to some seem that's significant, however when they are viewed together, they give a clear indication of some behaviours which are not what we expect in person's looking to have a successful career in policing, and especially repetitive*



*behaviour that one has to be continuously spoken to about, after being on an action plan and advice given.”*

*(xix) Paragraph 31 of the RFC Report states: “PC Uddin has displayed and as documented in his reports that he has difficulty following orders/instructions in not just one area but in several areas and it comes across as he does not take instructions given seriously and he can do things according to his likeness or not.”*

*(xx) Paragraph 31 of the RFC Report states: “he has not demonstrated to the training staff after being in training school for three months that he will make an effective or efficient police officer. His behaviour has not improved since he commits training, it has declined.”*

*(xxi) Paragraph 38 of the RFC Report states: “I recommend PC Uddin be given the opportunity to resign or be dismissed from the Bermuda Police Service.”*

*(xxii) Phase I Report trainer comments: Action plans are continuing into second phase as the Applicant continued to have periods of lateness. The Trainer also makes mention that she does not believe that the Applicant will be an effective member of the BPS, but that the BPS continues to try to work with the Applicant, despite continued unsatisfactory reports regarding overall behaviour including tardiness.*

*(xxiii) Phase II at taken from the Trainer Comment Form: “Another area of concern is the number of sick days this officer has used since joining the RFC, he has had seven (7) certified and three (3) un-certified sick days. This will need to be monitored if he is successful on his course, and when he commences working on a Watch.” That same report, based on his performance in that phase, (I) recommended that PC Uddin be given the opportunity to resign or be dismissed from the BPS. I am still not convinced that PC Uddin will make an effective or efficient police officer. He has not demonstrated this thus far on his RFC. If PC Uddin remains on the course he will have to show noticeable improvement in his final phase. We can’t want this more for PC Uddin than he wants it for himself, he must put in the required effort if he wants to succeed and change the narrative of his reports.”*

*(xxiv) Phase II taken from the Trainer Comment Form: “As it relates to his assignments and tests more effort is needed in these areas as he is a very capable officer. PC Uddin still does not appear to be open to feedback. When spoken to, he shuts down and displays negative body language. Improvement has been noticed in his timekeeping as it relates to arriving at work however PC Uddin still needs to improve his timekeeping between breaks throughout the day. Moreover, PC Uddin has to understand that the BPS is a discipline organisation where instructions are given and not to be carried out in his own time.”*

*(xxv) Phase II Report Inspector Comments: “PC Uddin continues to give the appearance that he does not put much effort into his assignments (files etc.,) and preparing for test, more effort is needed from this officer as he does have the capability to do very well on this course. Another area of development for this officer, is that he appears to come across as not being open to feedback.”*

*“He needs to work on the negative body language he displays and the appearance of shutting down. PC Uddin also needs to understand that 'Orders and Instructions' are key to policing. Code of Ethics, under Orders and Instructions speaks of officers carrying out lawful orders, abiding by police regulations and following reasonable instructions. However, this officer appears to be under the impression at times, that he does not have to follow some reasonable instructions given by the staff and can do things his way and when questioned has excuses for his actions and sometimes the excuse is 'just because, or I thought.’”*

*(xxvi) Phase III conclusion: “This officer has indicated that a personal matter has caused him to experience psychological issues which has contributed to his performance, notwithstanding this, Inspector Thompson has previously indicated to this officer that he should consider resigning from the course and she would have recommended he re-joins the next available RFC, providing that his mental faculties are in balance. This offer was not accepted. There were no noted tardiness during this phase in comparison to the others.*

16. In all the circumstances, the Court has come to the clear view that it would not be appropriate to order that the Applicant be reinstated to his employment with the BPS. To do so would not only usurp the proper powers of the Commissioner of Police but also risks creating an environment where there is an undercurrent of ill feeling which would affect his future relations with his superiors in the BPS.

### **The claim for damages**

17. The claim for damages has proceeded on the common assumption that the Applicant was dismissed by the Commissioner of Police by his letter dated 27 July 2021. Miss Greening on behalf of the Applicant seeks, in the alternative to reinstatement, damages for unfair dismissal. In her written submissions it is submitted that the Applicant is entitled to substantial damages for the loss of opportunity of a career as a police officer. In support of that submission, it is said that the Applicant is 31 years old, had worked

for the BPS for three years and expected to work until he was 55 years old. In her oral submissions to the Court, Miss Greening submitted that the applicant should receive substantial damages and stated that his earnings for a period of five years and other employment benefits for the same period would be an appropriate measure.

18. Mr Myrie, for the Respondent, contends that a finding by this Court that the dismissal of the Applicant was in breach of the rules of natural justice does not, by itself, entitle the Applicant to damages. Mr Myrie relies upon the decision of Simon Brown J in *R v Deputy Chief Constable of Thames Valley Police Force ex parte Cotton* [1988] Lexis Citation 1187, where the learned judge held:

*“In my judgment R v Chief Constable of North Wales Police ex p Evans [1982] 3All ER 141, is to be regarded as a case where it was recognised, in the light of the court’s conclusions as to the “outrageous” nature of the process that has been followed against the officer, that the only reasonable conduct by the Chief Constable thereafter would be to pay compensation as if there was in law a right to damages. Strictly, however, that compensation would fall to be paid on an ex gratia basis, there being no private law entitlement to it. I do not trade R v Chief Constable of North Wales Police ex p Evans...as an authority for the proposition that a private law right to damages for breach of statutory duty arises when a decision to dispense with the police officers services is held to have been unlawfully taken by reason of procedural improprieties.*

...

*That said, I wish to say nothing to discourage these authorities in appropriate cases of this character from making ex gratia payments of compensation to those whom they believe, or indeed the court rules, to have been unlawfully dismissed. The more obviously unfairly they dismissed, and the greater the possibility that but for the procedural irregularity their services might have been retained, the more obviously desirable is it, (irrespective that no claim for damages arises) that the police authority should make them appropriate compensation.”*

19. Ms Greening refers to the later decision in *R (on the application of Kay) v Chief Constable of Northumbria Police* [2010] EWHC 31 (Admin), another case of a probationary constable who was dismissed in breach of the rules of natural justice,

where Judge Behrens records in paragraph [1] that “*It is common ground between the parties that Ms Kay is entitled to compensation.*”

20. Mr Myrie states that in any event the Respondent has offered to pay the Applicant on an *ex gratia* basis, appropriate compensation which he could conceivably hope to receive even on the assumption that the dismissal of the Applicant was in breach of his contractual rights.
  
21. Given that the Respondent’s position that he has paid and/or is prepared to pay on an *extra gratia* basis the Applicant’s contractual entitlement, the Court will consider whether what the Respondent has offered to pay is appropriate in all circumstances of this case. In considering the Applicant’s contractual entitlement following the dismissal there are two important factors in this case which need to be taken into account.
  
22. First, as noted earlier, clause 18.1 of the Applicant’s Contract of Employment provides that his employment can be terminated by the BPS at any time and with immediate effect by notifying him that the BPS is exercising its right under this clause and that it will make a payment in lieu of notice within 60 days. The contractual notice period for the termination of the Applicants Contract of employment is specified in Schedule 1 as 3 months. It follows that under the Applicant’s Contract of Employment the Respondent could have lawfully terminated the Applicant’s employment by giving 3 months’ notice. In the circumstances, in the ordinary case the Respondent’s liability to pay compensation arising out of the Applicant’s dismissal could not exceed three months.
  
23. Second, the Applicant was on probation for a period of three years which was to expire on 9 September 2021. As noted earlier, section 3.1 of the COSO allowed the Respondent, during the course of the probationary period, to discharge the Applicant if the Respondent took the view that the Applicant was unlikely to become an efficient

member of the BPS. As noted in paragraph 26 of the JR Judgment, it would have been open to the Respondent to take this action after the conclusion of the Management Action Plan on 27 August 2021, if the Respondent continued to take the view that the applicant was unlikely to become an efficient member of the BPS. Given the strong objections expressed by the Respondent as set out at [15] above the Court would not have interfered with such a decision of the Respondent.

24. The Respondent has agreed to pay the Applicant's salary until the end of his three-year probationary period together with his salary and other benefits during the following three months' notice period. Having regard to (i) clause 18.1 of the Applicant's Contract of Employment providing for termination of his employment by giving three months' notice; and (ii) the Respondent's right to terminate the contract of employment during the period of 27 August 2021 to 7 September 2021 if the Respondent continued to believe that the Applicant was unlikely to become an efficient member of the BPS, the Court has come to the view that any compensation properly due to the Applicant cannot exceed the compensation already offered by the Respondent.
25. The Respondent has no objection that the offer made to the Applicant be made an order of this Court. Accordingly, the Court orders that the Respondent shall pay to the Applicant his unpaid salary and all other contractual benefits until the expiry of the three months' notice period following the 3 years probationary period, i.e., until 7 December 2021.

26. The Court provisionally orders that there be no order as to costs in relation to this hearing in relation to damages. However, if either party contends otherwise the Court will hear the parties if such an application is made within the next 14 days.

Dated this 6<sup>th</sup> day of November 2023.



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NARINDER K HARGUN  
CHIEF JUSTICE