



# In The Supreme Court of Bermuda

CIVIL JURISDICTION

2021: No. 229

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

**BETWEEN:**

**MARCUS UDDIN**

**Applicant**

**-and-**

**THE COMMISSIONER OF POLICE**

**Respondent**

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

**Representation:       Ms Victoria Greening of Resolution Chambers for the  
Applicant**

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

**Date of Hearing: 18 January 2023**

**Date of Judgment: 23 March 2023**

**JUDGMENT**

*Whether a probationary police officer is entitled to seek judicial review of the decision of the Commissioner of Police to dismiss him during the probationary period; whether the decision of the Commissioner of Police complied with the requirement of fairness*

**HARGUN CJ**

**Introduction**

1. 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. The Applicant’s employment contract states that he has 3 years’ probation period from 10 September 2018. The Applicant’s probationary period formally ended on 9 September 2021. The Applicant was discharged from the BPS by the Commissioner of Police (“**the Respondent**”) on 27 July 2021.
6. On 3 August 2021 the Applicant filed his application for leave to apply for judicial review and in support of that application the Applicant relied upon the following facts and circumstances:

- (1) The Applicant commenced his employment as a Police Constable with the BPS and on 27 May 2021 he was placed on an “Informal Action Plan” (“**Action Plan**”) by his supervisor Police Sergeant Jean Pierre to improve his performance in relation to certain deficiencies in his performance.
- (2) As part of the Action Plan it was suggested by PS Jean Pierre and agreed by the Applicant that there would be monthly meetings held on 27 June 2021, 27 July 2021 and 27 August 2021, to monitor the Applicant’s improvement in the areas identified.
- (3) On 19 May 2021 Superintendent Astwood, referring to the deficiencies in the Applicant’s performance, stated that: *“This matter has been assessed by OIC PSD [Performance Standards Department] and is deemed to be performance matter, to be dealt with via Management Action.”*
- (4) During the Action Plan period, the Applicant received a letter from the Respondent on 17 June 2021 (which was dated 9 June 2021) on the identical allegations being dealt with by the Action Plan. The latter advised the Applicant that he had 72 hours to reply to the Respondent.
- (5) On 17 June 2021, the Applicant replied to the Respondent by way of two emails, setting out the basis of the judicial review application. The Applicant stated that;

*“8... I was put on an informal action plan on Thursday, 27 May 2021 by PS Jn Pierre to improve my performance in relation to the allegations listed in your “Potential Discharge Letter”. As part of the action plan PS Jn Pierre would have monthly meetings with me until 27 August 2021 to correctly set performance. PS Jn Pierre sent a follow-up email to me and others stating that he would have a documented monthly meeting with me with the first point 27 June 2021, the second being 27 July 2021 and the last meeting with the again 27<sup>th</sup> of August 2021...*

*9. This instruction came from Supt. Astwood on 19 May 2021, where she reported the following: "This matter has been assessed by OIC PSD and is deemed to be a performance matter, to be dealt with via Management Action." As such it would seem prejudicial and extremely unfair to turnaround now and use the same information that I received management action for and try and discharged me from the service."*

- (6) On 1 July 2021 the Applicant's attorney responded formally to the Respondent on the Applicant's behalf contending that given the Applicant has been placed on an informal action plan by PS Jn Pierre it was unfair and unlawful to use the same information to discharge the Applicant from the BPS.
  - (7) On 6 July 2021, the Attorney General's Chambers responded on behalf of the Respondent to say that the Applicant's attorney's reply was not satisfactory and that the Respondent was giving the Applicant a further seven after days to reply to the substantive allegations.
  - (8) On 27 July 2021, which was the date scheduled for the second informal action plan meeting, the Applicant received a letter from the Respondent dismissing him from the BPS. The latter instructed the Applicant to attend the Hamilton Police Station following day, to return all police property and report to his supervisors to discuss all outstanding work matters with them. The Latter advised the Applicant that his last date of employment shall be 31 August 2021.
7. Following an *inter partes* hearing on 1 December 2021, Subair-Williams J granted the Applicant leave to pursue judicial review proceedings in relation to the following:
- (1) An Order for a declaration that the decision of the Respondent to dismiss the Applicant was unlawful;

- (2) An Order for a declaration that the decision of the Respondent to dismiss the Applicant was unreasonable;
  - (3) An Order for a declaration that the decision by the Respondent to dismiss the Applicant was in breach of natural justice;
  - (4) An Order for a declaration that the Respondent fettered his discretion when making the decision to dismiss the Applicant.
8. Subair-Williams J also permitted the Applicant to argue that he should be entitled to damages if any of the above grounds are successful.
9. The essential issue raised in these proceedings is whether having regard to (i) section 9 of the Act; (ii) clause 3.1 (d) of the COSO; and (iii) clause 4.1 of the Contract of Employment, the Respondent's decision to terminate the Applicant's employment during the probationary period is capable of being subject to judicial review proceedings; and if so, whether in the circumstances of this case the decision of the Respondent was wrongful.

#### **Respective submissions of the parties**

10. The Applicant submits that it was unlawful, in breach of the principles of fairness and natural justice and unreasonable to dismiss the Applicant in circumstances where prior to and at the time of his dismissal and informal action plan was in place, and just prior to his dismissal, the Applicant was told that he was "*on track*" and improving and that his next meeting to monitor the situation would take place at the end of 27 July 2021.
11. The Applicant submits that notwithstanding that he was on probation, it is an abuse of process and amounts to procedural irregularity to give an officer the opportunity to improve over a specified time period and then take this opportunity away from him before the time has expired. The Applicant contends that even if it is the case that an employer can terminate an employee when they are on probation, if and when an employer takes steps to allow the employee to

improve whilst on probation, and does not allow them to complete the process, then the dismissal is unlawful.

12. The Applicant contends that he had a legitimate expectation that his informal action plan would be seen through to the end and that he would not be dismissed in the middle of it, particularly when it had just been confirmed to him that he was improving.. To dismiss the Applicant in the middle of the informal action plan, which appear to be succeeding, is a decision which is wholly unreasonable and unfair and therefore wrongful.
13. On behalf of the Respondent, it is said that the Respondent decided to discharge the Applicant during his probationary period, which the Respondent was lawfully entitled to do. The Respondent relies heavily on the statutory and contractual provisions which ordinarily would entitle the employer to discharge an employee during the probationary period even if there is no good reason to support such termination. Reliance was placed on the recent judgment of Mussen J in *Gorhams Limited v Robinson* [2022] SC Bda 39 [30]:

*“In my view, an employer is entitled to terminate the employment of an employee who is on probation pursuant to the termination clauses in the probation provisions, in this case Article 29 Probationary Period. In those circumstances the termination within the probationary period does not fall within the contractual disciplinary policy and the dismissal will not be a disciplinary matter.”*

14. Reliance was also placed on behalf of the Respondent on the decision of Meerabux J in *Corrine Elaine Swan v Onions, Bouchard & McCulloch (a firm)* [1999] Bda LR 44, where Meerabux J of the employer and the employee during the probationary period as follows:

***“What is a probationary period?”***

*‘A probationary period is a period within which the employer evaluates an employee's ability to perform his or her work and his or her ability to adapt. This period also benefits the employee, as he or she may resign at any time during the probationary period if he or she is not satisfied with his or her job, and he or she does not have to justify his or her decision. The purpose of a probationary period in an employment contract and in employment relations is to allow the parties, acting in good faith, to terminate their relationship without any penalty or residual obligation. As a result, the employer did not have to respect the fixed term of employment and had the right to dismiss the employee without notice during the probationary period, as there was no proof of bad faith on its part.’ Dieni v Sir Mortimer B. Davis Jewish General Hospital 9 C.C.E.L. 2d 293 at 294.”*

15. Mr. Myrie on behalf of the Respondent emphasises that the critical issue with which the Respondent is concerned is to determine whether an officer is “*unlikely to become an efficient member*” of the BPS. Mr. Myrie submits that this determination gives the Respondent a very wide discretion and, in that regard, relies upon the decision of the Outer House, Court of Session in *MC v Chief Constable of Strathclyde Police* [2013] CSOH 65, where Lord Drummond Young held:

*“... I should mention one further decision of Silber J, R (on the application of V) v Chief Constable of North Yorkshire Police [2009] EWHC 1879 (Admin)... In that case a probationary constable had been charged with certain sexual offences involving children but had been acquitted. As a result there were restrictions on how he could be deployed within the police. On that basis, the chief constable had determined that the probationer was not likely to become an efficient Constable and that he should accordingly be dismissed under regulation 13. It was held that the word “efficient” in regulation 13 should not be subject to artificial limitations, but should be given its ordinary meaning. That suggest that the width of the discretion*



*that is available to the chief Constable under this regulation is wide and is not restricted to matters such as proven misconduct.”*

16. Mr. Myrie submits that as a matter of contractual rights of the parties the Respondent was entitled to discharge the Applicant for no reason at all. However, in this case the Respondent had a statutory obligation to consider whether or not the Applicant was not likely to become an efficient officer. Mr Myrie contends that the Respondent had sufficient material before him to come to the view that it was not likely that the Applicant would become an efficient officer and that decision is amply supported by the employment history of the Applicant with the BPS.

### **Analysis**

17. In *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER 141, a decision cited by Mr. Myrie, 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. Those rumours were largely unfounded but, following inquiries made by the respondent's superiors, the Chief Constable believed them to be true and decided to dispense with the services of the respondent under reg 16(1) of the Police Regulations 1971, which provided for the discharge of a probationer constable if the Chief Constable considered '*that he [was] not fitted ... to perform the duties of his office or that he [was] not likely to become an efficient or well conducted constable*'. The Chief Constable did not put to the respondent the allegations and rumours on which he based his decision, nor did he 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, *inter alia*, a declaration that the Chief Constable's decision requiring the respondent to

resign or be discharged was illegal, ultra vires and void. The Chief Constable argued that in making the decision under reg 13(1) he had an absolute discretion and was not subject to the requirement of natural justice and/or fairness and as such, his decision was not subject to judicial review. This submission was rejected unanimously by the House of Lords and held that even as a probationer the Applicant had the right to be treated fairly. Lord Hailsham LC held at page 144:

*“In the instant case I have no doubt that **the respondent was not treated fairly by the chief constable. In the first place by his own affidavit the chief constable establishes that he asked himself the wrong question, and, once this has been established, for the purposes of judicial review, that by itself is surely enough to vitiate an impugned decision which is not otherwise self-evidently justified.** The relevant regulation enjoined the chief constable to consider whether the respondent was 'fitted physically or mentally to perform the duties of his office' or was likely to 'become an efficient or well-conducted constable' before dispensing with his services. In his affidavit the chief constable claimed that this regulation 'gives me an absolute discretion to dispense with a probationer's services'. In my opinion the discretion, although wide, is not absolute. The chief constable should have directed his mind to the criteria laid down in the regulation in accordance with the appropriate principles of natural justice. He did not do so, and I think it only too likely that it was precisely the belief that his discretion was absolute which led to the cavalier treatment to which, in the event, the respondent was subjected.”* (emphasis added)

18. Lord Bridge held at page 147:

*“The chief constable's decision to force the resignation of the respondent was vitiated both by his erroneous assumption that he had an absolute discretion and by his total failure to observe the rules of natural justice.”*

19. Lord Brightman held at page 153:

*“The motion came before Woolf J on 23 March 1981. The judge found in favour of the respondent to the extent that he held that the proper approach to this type of case was that **the chief constable was bound to act fairly in the course of exercising his statutory discretion under reg 16; and that the decision which was reached did not accord with the standards of fairness** because the respondent was not given an opportunity to answer the accusations which led the chief constable to the conclusion which he reached.*

...

*Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power.”* (at page 154, emphasis added)

20. Silber J, in *R (on the application of V) v Chief Constable of North Yorkshire Police* [2009] EWHC 1879 (Admin) held at [37]:

*“In my view, there is no specific procedure which the Chief Constable had to follow when making a determination under regulation 13. **It is noteworthy that regulation 13 itself contains the requirement of holding a hearing although of course, principles of fairness should apply first to enable a probationary Constable to know why regulation 13 is being invoked, second to understand what this case was against him; third to be able to make representations to the decision maker for any decision.**”* (emphasis added)

21. Accordingly, the Court holds that whilst the Respondent had a wide discretion in determining whether the Applicant was “*unlikely to become an efficient member*” of the BPS, that discretion was not absolute. Furthermore, in making that decision the Respondent was bound to act fairly towards the Applicant. The scope of the duty to act fairly of course depends upon the particular circumstances of each case.

22. Here, the Applicant accepts that in the ordinary case the Respondent has the right to terminate the contract of employment during the probationary period if he forms the view that a police officer is “*unlikely to become an efficient member*” of the BPS. However, this was not an ordinary case. At the instructions of Superintendent Astwood, on 27 May 2021, the Applicant was placed on an Informal Management Action Plan by his supervisor PS Jean Pierre to improve performance in relation to certain performance deficiencies. The scope of the Management Action Plan was as follows:

- The Management Action Plan related to the following performance deficiencies on the part of the Applicant:
  1. Failing to initially comply with instructions to conduct an interview on behalf of D watch.
  2. Failing to create PDR and enter evidence therein prior to the six-monthly review date required for probationary constables.
  3. Failing to comply with instructions regarding the disposition of Event EEEV001545594.
  4. Failing to complete 2020 – 2021 PDR.
  5. 2021 – 2022 PDR Start Meeting.
  6. Failing to comply with instructions to update event EEEV00167311 (Affray) prior to going off duty.
  7. Failing to produce your Pocket Notebook when required by your supervisor.
- The Management Action Plan provided that the Applicant’s behaviour and compliance with instructions will be monitored closely by his supervisors.
- The Management Action Plan provided that the agreed timescales and measures for improvement as: “**The next three months, period ending 27-Aug-2021.**”
- The Management Action Plan provided that: “*The potential consequences if the Individual’s performance does not improve Formal UPP process.*” The reference to UPP process is a reference to the “*unsatisfactory performance procedures*” under the Police (Performance) Orders 2016. The

Management Action Plan therefore envisaged that in the event that the Applicant did not improve, at the end of the three-month period ending 27 of August 2021, the Applicant will be subject to the unsatisfactory policy procedures under the Police (Performance) Orders 2016.

- As part of the Management Action Plan, it was agreed between PS Jean Pierre and the Applicant that there would be monthly meetings to monitor the Applicant's performance on 27 June 2021, 27 July 2021 and 27 August 2021.
- The first monthly Management Action Plan meeting took place on 27 June 2021 between PS Jean Pierre and the Applicant and at this meeting PS Jean Pierre confirmed to the Applicant that his performance had improved, and he was "on track".

23. It is against this background that on 17 June 2021, the Applicant received a "Potential Discharge" letter based on the same allegations which were being dealt with by the Management Action Plan. The Letter advised the Applicant that he had 72 hours to reply to the Respondent. This letter from the Respondent made no mention of the fact that on 27 May 2021 PS Jean Pierre, at the instructions of Superintendent Astwood, had agreed with the Applicant that his performance deficiencies would be the subject matter of an informal Management Action Plan and that the Management Action Plan did not expire until 27 August 2021. The existence of the Management Action Plan was highlighted by the Applicant and his attorneys to the Respondent. Thus, by letter dated 1 July 2021, Resolution Chambers, acting on behalf of the Applicant, advised the Respondent that:

*"As you are aware on 27 May 2021, our client was placed on an "informal action plan" by PS Jn Pierre to improve his performance in relation to the identical allegations listed in your letter. As part of the action plan it was suggested by PS Jn Pierre and agreed by our client that they would be monthly meetings to monitor improvement in the areas identified until 27<sup>th</sup> August 2021 to improve his performance.*

...

*Indeed, one of the meetings took place last week on 27 June 2021 and was successful.*

*In light of the above, it is unfair and unlawful (of which no findings have been made) to discharge our client from the service.”*

24. In response to this letter from the Applicant’s attorneys, the Attorney General’s Chambers, in a letter dated 6 July 2021, took the position that the Applicant had not addressed “*the Substantive matters raised in the 9 June 2021 letter*” and gave the Applicant “*a further seven working days from the date of this letter to address the substantive matters*”. The letter from the Attorney General’s Chambers did not address the issue that the potential discharge letter from the Respondent was written during the period when the Applicant was in the middle of the informal Management Action Plan and his performance during this period was noted by PS Jean Pierre as improving. In the end the Applicant was dismissed by the Respondent in letter dated 27 July 2021 without again addressing the fact that he was at this time still subject to the informal Management Action Plan.

25. In the circumstances the Court has come to the clear view 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.

26. In coming to this conclusion, the Court is not expressing 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 relates 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. 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.

### **Conclusion**

27. The conclusion of the Court is that the Applicant's termination of employment by the Respondent, by letter dated 27 July 2021, was in breach of the duty of fairness and therefore unlawful. In accordance with the settled practice the matter is adjourned for further directions and hearing in relation to the assessment of damages claimed by the Applicant (See: *R (Kurdistan Workers Party) v Secretary of State for the Home Department* [2002] EWHC 644 (Admin), Richards J).

28. The Court will hear the parties in relation to the issue of costs, if required.

Dated this 23<sup>rd</sup> day of March 2023



NARINDER CHARGUN  
CHIEF JUSTICE