

EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO. BVIHCV 2013/0382

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 SECTION 6 OF THE POLICE FORCE ACT

AND

IN THE MATTER OF FORCE STANDING ORDERS M 7(4)

AND

IN THE MATTER OF THE ROYAL VIRGIN ISLANDS POLICE FORCE
PROMOTIONS POLICY

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 and Ms. Meglisa Cupid,
Crown Counsel of Attorney General's Chambers for the Defendant

2014: September 24th
2014: November 11th

JUDGMENT

[1] **BYER J.:** By Fixed Date Claim Form filed on the 18th March 2014 the Claimant sought the following relief:

- a. A declaration that the Defendant misdirected himself and erred in law in finding that the Force Promotion Policy supersedes Force Standing Orders: M 7(4) which gives him the power to waive the requirement that the Defendant sit and pass the examination for promotion to the rank of sergeant before he could be considered for promotion to the rank of sergeant.

Further or Alternatively

- b. A declaration that the Respondent made his decision to refuse to exercise his power under Force Standing Orders: M 7(4) without giving any or any proper consideration to the Claimant's application;
- c. A declaration that the Respondent failed to take into account relevant matters in arriving at his decision not to consider exercising his power under Force Standing Order: M 7(4);
- d. A declaration that the decision of the Respondent not to consider exercising his power under Force Standing Orders: M 7(4) to waive the requirement that the Applicant sit and pass the examination for promotion to the rank of sergeant was in all the circumstances unreasonable and irrational.
- e. An order in the form of certiorari quashing the decision of the Respondent not to exercise his power under Force Standing Orders: M 7(4).
- f. Cost
- g. Such further and/or other relief as this Honourable Court deems just.

[2] The basis of this claim is built on certain facts surrounding the employment of the Claimant as a constable in the Royal Virgin Islands Police Force (RVIPF). Those facts are essentially uncontroverted by the parties and are briefly set out below.

Factual Background

- [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 also an express term of the secondment that upon completion of the posting, the Claimant was to revert to his substantive rank.
- [5] While the Claimant was on secondment in Barbados, the Defendant herein published a document in 2012 entitled the "Promotions Policy" (the Policy). The purpose of this Policy according to the Defendant was to provide a guide to the process for promotions within the RVIPF which previously had been guided by what was considered favouritism and discretionary abuse.
- [6] Also, 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.
- [7] By way of a series of communications via electronic mail between the Claimant and the Human Resource Department of the RVIPF, the Claimant 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.

- [8] The Claimant therefore did not participate in the promotions as offered in 2012.
- [9] 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.
- [10] 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.
- [11] The Claimant sought to specifically rely on the provisions of FSO M 7(4) wherein it is stated that the Defendant has the authority to waive the requirement for an officer who has held an acting position in the next Senior rank for a period of six (6) months in the twelve (12) months preceding the date of the professional examination and having performed the duties of the next senior rank *"to the satisfaction of the Commissioner of Police"*.
- [12] By letter dated the 14th October 2013, the Defendant responded stating that his Promotions Policy of 2012 had superseded the workings of the FSO M 7 (4) and in particular any discretion that may have been reposed in him was now obsolete. The Defendant informed the Claimant that *"[he] cannot and will not promote [him] without successfully passing the Force promotion process to the rank of sergeant"*¹
- [13] It is as a result of this decision that the Claimant has sought judicial review on the basis of illegality in that the Defendant made an error in law and misdirected himself in arriving at his decision.

¹ Letter dated the 14th October 2013 from the Defendant to the Claimant and listed as exhibit "NT10" to the affidavit of the Claimant filed on the 18th March 2014

The Issues

- [14] At case management of this matter on the 21st May 2014 it was ordered *inter alia* that the parties were to file an Agreed List of Issues.
- [15] On the 18th June 2014 an Agreed List was filed which particularized the issues to be determined by the Court as follows:
- a. Whether Force Standing Order M: 7(4) was repealed by the Promotions Policy? and
 - b. Assuming that Force Standing Order M: 7(4) was repealed by the Promotions Policy, whether the Respondent retained a discretion under the Promotions Policy to waive the requirement for a written examination?
- [16] Having narrowed the issues, the parties presented their arguments to the Court on the 24th September 2014 and judgment was reserved.

The Claimant's submissions

- [17] The Claimant submitted to the Court that the Defendant under Section 6 (2)(a) of the Police Act Cap. 165 had the power to "***make standing and routine orders for the general administration of the Force as he considers necessary.***"
- [18] The Claimant further submitted that the FSOs and in particular FSO M 7(4) was therefore made pursuant to the "*personal authority of the Commissioner of Police in accordance with powers vested in him by law [and] are binding on all police officers...*". ²Therefore he submitted that the FSO had the express authority of law while the Promotion Policy (the Policy) which was not made expressly pursuant to any such power, did not and had as its only aim "***to create a fair transparent and efficient process for promoting individuals...***"

² Rubric to the FSO

- [19] The Claimant therefore submitted that the Promotions Policy could not take effect as a FSO and that it did not have the power or standing as ascribed to a FSO.
- [20] The Claimant submitted that in looking at the Policy therefore, it must be seen as expanding what was already provided for by the FSO and in particular M 7(4) which speaks to the process for promotions. To the Claimant the policy was the widening of what was provided for under the FSO. The Policy could therefore not; the Claimant argued, be repugnant to the terms of the FSO but must be read in conjunction with it.
- [21] The Claimant submitted that this being the case, that the Policy having not been made pursuant to the Defendant's lawful authority as provided for by the Police Act, could not have purported to repeal or replace the terms of FSO M7(4) and as such the Defendant's discretion provided for under the FSO remained intact.
- [22] The Claimant further argued that this position must be clearly so when as of February 2014 the Policy was amended and now states that it is made pursuant to Section 6 (2)(a) of the Police Act and that it supersedes any related powers or standing orders.
- [23] It was submitted by the Claimant that it is only as of 2014 when the Policy was amended that it became a lawfully enacted document and only then could it have repealed the FSO.
- [24] Thus, having not so repealed FSO M 7(4) previously, the Claimant submitted that it must be logical that the Defendant therefore retained his discretion provided for by FSO M 7(4) to consider whether he would or could waive the requirement of the sitting of the professional exams by a worthy applicant.

- [25] The Claimant took pains to submit that all that was being asked of the Defendant was to utilize the discretion whether he would be prepared to grant the waiver or not for the actual taking of the exams, not whether the Claimant should either have the discretion exercised in his favour or that he should be entitled to the promotion itself.
- [26] The Claimant further argued that having not accepted that the FSO was repealed by the Policy as their main argument, they were willing to however consider for the sake of argument and completeness the second issue – that even if the FSO had been repealed, whether the Defendant still retain a discretion to waive the same requirement regarding written examinations.
- [27] On this issue, the Claimant submitted that in making the Policy, it could not have been meant to tie the hands of the decision maker so that he was incapable of retaining any measure of discretion at all.
- [28] It was argued on behalf of the Claimant that the Defendant having made a determination that the Policy upon which he sought to rely gave him no avenue for flexibility could only, they argue, render any decisions taken with that in mind, unlawful. *"Where a decision maker has been given a statutory discretion he is not precluded from developing and applying a policy containing a general approach to be taken in dealing with cases requiring the exercise or non exercise of his discretion. What he cannot do is to decide that there shall be no exception to the general policy. Such inflexibility and rigid application of the policy would render both the policy and the decisions taken pursuant to it unlawful"*³
- [29] The Claimant argued that it was therefore illegal for the Defendant to fetter his discretion which he must have in all the circumstances retained.

³ Paragraph 29 of the Claimant's submissions filed 23rd September 2014.

[30] Thus, the Claimant argued, even if the FSO had been repealed by the Policy which he did not agree had in fact occurred, the Defendant in any event retained a discretion under the Policy and the Defendant's decision to not consider its usage was clearly wrong resulting in the Claimant being entitled to his prayers for certiorari of the decision of the Defendant herein.

The Defendant's Submissions

[31] The Defendant submitted that the Claimant was wrong on every limb of their arguments as proffered.

[32] The Defendant by Counsel submitted that even if there was no express repeal of FSO M 7(4) by the Policy the tenets of implied repeal must operate in these circumstances.

[33] It was submitted that upon a thorough forensic analysis of the two documents being undertaken, which documents the Defendant's counsel argued were synonymous to legislation, it was clear that the Policy was so fundamentally different and repugnant to the provisions of FSO M 7(4) that it was without a doubt that the very clear result meant that the later Policy had repealed the earlier FSO M7(4).

[34] The Defendant submitted that it was impossible to read the two documents together to form one document on the subject matter of promotions. The Defendant submitted that this was so as the provisions of the Policy were so inconsistent on every level with the FSO that the two regimes were completely at odds with each other.⁴

[35] Therefore the Defendant submitted that the operation of the Policy resulted in substitution of and not addition to the FSO.

⁴ See paragraph 21 of the Defendant's submissions filed 12 September 2014

- [36] For the Defendant it was therefore clear that the Policy had repealed the FSO and sought to submit that this could be the only practical effect where it was clearly intended to remove the discretion reposed in the Commissioner of Police to ensure that the previously complained about promotions process was fair and unbiased.
- [37] The Defendant therefore argued that it was clear that the intention of the Policy was to repeal the FSO to bring an end to the perceived history of abuse of the discretion which has reposed in the Commissioner of Police. Thus, the Defendant maintained that the only process which was operative in 2013 for promotions when the Claimant made his request in 2013, was the Policy and **not** the FSO.
- [38] Having so argued the Defendant submitted on Issue No. 2 that there could therefore have been no discretion reposed with the Commissioner of Police.
- [39] The Defendant argued that it was illogical to state that there having been a repeal of the provision which gave the said discretion that there could still somehow be the retention of that same discretion.
- [40] Further the Defendant sought to argue that if it was at all possible for the discretion to have been retained, it was clear that the discretion had to have been exercised under specific conditions. The person had to have been acting in the post of the next Senior Rank twelve (12) months preceding the professional examination. The Defendant therefore further submitted that in October 2013 the twelve months preceding were not referable to any professional examinations in so far as any such examination had taken place in August 2012, effectively more than twelve months. In that event, it was therefore clear that even if the Defendant still had the discretion (which was strongly disputed) he was not in any position to utilize the same and exercise the discretion the grounding for so doing being absent.

[41] In any event the Defendant submitted by their case that the Policy repealed the FSO M 7(4), even though there was no express repeal, the repeal was clearly by implication and as such, since that was the **only** document that contained a provision regarding discretion there could be **no** retention of a discretion in the Defendant at the time that the request of the Claimant was made in October 2013 and the Claimant must be denied his prayers as claimed.

Court's Consideration and Analysis

[42] It is very clear to this Court that the entirety of this case and its determination surround FSO M 7(4) and the Promotion Policy of 2012.

[43] It is also very clear that the Court must determine what has transpired in relation to these two documents.

[44] By Section 6(2)(a) of the Police Act the Commissioner of Police was given the express power to "*make standing and routine orders for the general administration of the Force as he considers necessary*".

[45] It was specifically in reference to this legislative provision that Force Standing Orders (FSO) were made which covered a wide range of administrative matters from duty posts and responsibilities to duties of drivers, to guard of honour procedures and included promotion qualifications by M 7. In particular M :7(4) provided as follows:

"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]."

- [46] Thus, it was clear that there was a discretion in the Defendant to waive the requirements of a written examination in particular circumstances once the person had met the itemized criteria, namely acting in the next senior rank for a period of six months in the twelve months preceding the promotion examinations and doing so to the satisfaction of the position holder of the Defendant.
- [47] Upon a perusal of the promotions process provided for in the FSO that process was simple and it was alleged provided fertile ground for abuse due to the very lack of particularity contained therein.
- [48] In 2012 the Defendant therefore from all indications made a decision to replace that process with a detailed and comprehensive policy dealing with promotions within the RVIPF.
- [49] It is clear and it is agreed by parties that this was a document that emanated from the Defendant and he is described on the face of the document as the "Policy holder".⁵
- [50] The Policy clearly stated as its aim to create a *"fair, transparent and efficient process for promoting individuals into the specified ranks"*.⁶
- [51] What was blatantly missing however was any mention as to the legal underpinning of the Policy.
- [52] Nowhere in the body of this extensive document did this Court find any reference to the provision or provisions to which the Policy was made pursuant. The only indication that we have for that is from the mouth of the Defendant who sought in his affidavit filed in response to the Claim to state that it was his intention upon

⁵ Promotions Policy of RVIPF

⁶ Version 5.0.0 of Promotions Policy

publication to have repealed the formerly operating Promotions Policy under the FSO.⁷

- [53] This Court is unable to agree that this is all that would have been required by a policy maker to repeal an otherwise lawful provision- a simple intention.
- [54] What is even more telling in this regard is that this obvious deficiency was noted by the amendment that took place subsequently in February 2014 which then made specific mention as to the underpinning legal authority for making the Policy and the specific results of the Policy that is, repeal of any provisions regarding promotions.
- [55] Counsel for the Defendant sought to take this Court into lengthy and detailed comparison of the FSO M 7(4) and the Policy in an attempt to convince the Court that despite there not being any express repeal as of October 2013 when the Claimant made his request, that the two documents were so inconsistent and repugnant with each other that it was apparent there had been a repeal in any event, by implication.
- [56] The Court had sight of the authorities relied upon by the Defendant in this regard and there is no disagreement that indeed where provisions – an earlier and a later - are so inconsistent that one cannot be read with the other, the later must repeal the earlier. However for this Court it is also apparent that all of these authorities referred to pieces of legislative acts which in all respects were equal to each other. That is, both were either formally enacted legislation or having equal statutory underpinnings.

⁷ Paragraph 16 of Affidavit of David Morris filed 8th April 2014

- [57] Indeed in the case of Eustace Browne v E Alex Benjamin Ltd. (In receivership)⁸ where the issue was to whether an Ordinary Act passed by a simple majority, could oust a provision founded upon a fundamental constitutional concept, Ferdinand J. had this to say *"[A] fundamental constitutional concept cannot be ousted by an Act passed by Parliament's ordinary law making process irrespective of how important or comprehensive such Act may declare itself to be"*.
- [58] In applying these words to the case at bar, it is abundantly clear that the FSO M 7 was part and parcel of an exercise created by the provisions of Section 6(2)(a) of the Police Act. There is no doubt that it was created with those statutory underpinnings and perhaps we can equate it for the purpose of this matter to the constitutional concept that applied in the Eustace Browne case. On the other hand, we have the Policy which had no express or implied Statutory underpinnings and as in the Eustace Browne scenario coming by way of a simple act by the Defendant.
- [59] In this Court's mind it is therefore clear that there could not have been any repeal of the FSO M 7(4) by the Policy where there is obviously no equality as between the two, the two being very different conceptually and legally.
- [60] It is clear to this Court that all the authorities speak to the inconsistencies between two acts and where they are inconsistent or repugnant the later must repeal the earlier but they all speak to legislative instruments of equal standing. I do not find that can hold in the case at bar. There was no repeal by the mere publication of the Policy and I am fortified in this view by the fact that a later amendment to the Policy earlier this year specifically dealt with the very matter of both authority and effect.

⁸ ANU HCV 2003/0440

[61] If I am however wrong in this regard as to the inability of the Policy *prima facie* to repeal the FSO based on the differing legal authority, I will also assess the purported inconsistencies upon which the Defendant rely to buttress their argument of there having been an implied repeal.

[62] The test for any court "*of whether there has been a repeal by implication by subsequent legislation has long been settled and is this: - Are the provisions of a later Act so inconsistent with or repugnant to the provisions of an earlier Act that the two cannot stand together*"⁹

[63] Despite the forensic exercise undertaken by the Defendant in an attempt to convince the Court as to the complete disparity between the two documents in aid of the submission that the two cannot stand, the Court is in agreement with Counsel for the Claimant upon his submission that the two provisions can in fact be read together. Counsel submitted succinctly on this point and I adopt his words here as follows:

*"So the Promotions Policy makes no provision regarding how officers on secondment would be accommodated to participate in the promotions process. It makes absolutely no provision for that but M:7(4) does. And therefore, when a stipulation applies where that officer could not sit the examination, what happens M:7(4) simply kicks in and that is just for the waiver of the examination requirement. It just says waive the exam...it is just a step. The applicant has to pass the other steps, journey through those steps on the way to promotion. And it is in that context...that we say M:7(4) is still relevant and can still operate to further the policy objective of fairness. ...that policy objective is met when you consider both the Promotions Policy and M:7(4) side by side, they complement each other. And as we say far from undermining... that policy, what it does it allows for appropriate flexibility within that policy."*¹⁰

⁹ per AL Smith J in **West Ham Church Warders and Overseas v Fourth City Central Building Society** [1892] 1 QB 654 at 658

¹⁰ Official Transcript – excerpts from submissions by the Claimant

- [64] There is no repugnancy, there is a cumulative effect of both of the provisions and as such there is no repeal.
- [65] I therefore find that there was no repeal of FSO M 7(4) by the Promotion Policy as put in place by the Defendant.
- [66] The Policy as at the date of its coming into operation up to the specific amendment of its terms in February 2014 allowed the Defendant in appropriate circumstances to refer to and be guided by the terms of the Policy **and** the terms of the M:7(4) FSO.
- [67] I therefore find that the Defendant in October 2013 retained the discretion to consider whether he should waive the provisions requiring the taking of the professional examinations in relation to the Claimant.
- [68] I also therefore find that the Claimant was entitled to have his request considered by the Defendant and he had thus misdirected himself when he made the decision that he was not in a position to do so.
- [69] I therefore quash his decision in so far as his determination that he had no discretion to exercise.
- [70] In relation to Issue #2 as to whether there was a discretion still reposed in the Defendant upon the FSO M:7(4) having been repealed, I will make no finding in relation to that having already determined above that there was in fact no repeal as of October 2013 of FSO M:7(4).

[71] I therefore order as follows:

1. It is declared that the Defendant misdirected himself and erred in law in finding that the Force Promotion Policy superseded the Force Standing Orders M 7(4).
2. That the decision of the Respondent not to exercise his power under Force Standing Orders M 7(4) is quashed.
3. That the matter is remitted to the Defendant to consider the request of the Claimant with regard to Force Standing Order M 7 (4) as at the date of the application, namely 11th October 2013.
4. Costs to the Claimant in the sum of \$2,000.00.

**Nicola Byer
High Court Judge**