

IN THE SUPREME COURT

TURKS AND CAICOS ISLANDS

IN THE MATTER OF AN APPLICATION BY ATHENEE HARVEY-BASDEN FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

IN THE MATTER OF PRELIMINARY CONSIDERATION FOR JUDICIAL REVIEW (ORD 53.r.3)

BETWEEN

THE QUEEN

Petitioner

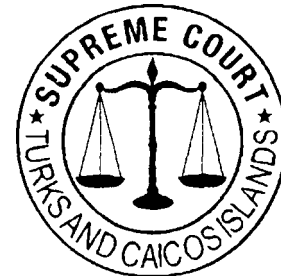
Ex parte Athenee Harvey-Basden

v

INTEGRITY COMMISSION

Respondent

RULING



Background

1. The Applicant, Athenee Harvey, is the Permanent Secretary in the Ministry of Finance. In 2014, she was on a cruise ship that docked in Grand Turk. It is alleged by the Integrity Commission that she disembarked the ship and secured the off-loading of some 25 pieces of luggage from the ship at the Carnival Cruise terminal, despite it's not being a designated Port of Entry, '*improperly and with threats.*'
2. It is also alleged that Ms. Harvey hindered the Collector of Customs from ensuring proper assessment and payment of import duties by failing to present the baggage to customs for duty assessment.
3. The incident was investigated by the Investigating Officer attached to the Integrity Commission: statements were collected and the Applicant interviewed. It appears from the evidence that she was arrested by the said officer pursuant to section 28 (1) of the **Integrity Commission Ordinance** ("the Ordinance") who then arranged for her to be charged by Inspector Sandy Williams with two counts of corruption.

4. The Director of the Integrity Commission, in correspondence with the Applicant's attorney asserted that the Commission made a decision to refer the matter to the DPP but it is unclear from the available evidence how that referral was made.
5. The Ordinance stipulates at section 80 that,

"(1) Where the Commission receives a complaint, the Commission on examination of the complaint may-
 - (a) reject the complaint...*
 - (b) hold an inquiry into the complaint giving an opportunity to the specified person in public life to be heard;*
 - (c) on conclusion of an inquiry, forward the complaint, and any documents and a report containing recommendations of the Commission to the Director of Public Prosecutions if it considers that a criminal offence may have been committed....."*
6. To "...hold an inquiry" is a forensic expression. The procedure to be adopted by the Commission is set out in Part III of the Ordinance. The expression does not refer to an investigation carried out by the investigative officer attached to the Commission anymore than "a trial" refers to the investigations carried out by the police in the course of gathering evidence. On the available evidence it is apparent that no inquiry was held.
7. What the facts recited by the Applicant show is that, the Investigating Officer having concluded his investigation, arrested Ms. Harvey and delivered her to Inspector Williams to be charged, which course of action was agreed by the Commission.
8. I agree with the submission on behalf of the Applicant that the procedure which the Commission adopted in this matter was not in accordance with the procedure set out at section 80 of the Ordinance. Having not dismissed the complaint as frivolous, the Commission was indeed bound to hold an inquiry before referring a matter to the DPP but it is a logical fallacy to suggest as the Applicant does, that because the matter was referred to the DPP that an inquiry had been conducted.¹
9. In 2015, the DPP entered a *nolle prosequi* in the proceedings against Ms. Harvey. He was trenchant in his criticism of the investigation conducted by the Commission's investigator but declined to investigate the matter further to cure the insufficiencies in the investigation that he had identified. I would note here that a *nolle prosequi* is not a bar to a renewed prosecution. If that had been intended on the ground that there was insufficient evidence to support any allegation of wrongdoing, it was open to the DPP to have offered no evidence against the Applicant at arraignment and have the Information dismissed.

¹¹ See paras 9 -12 of the Grounds

10. The upshot of all of this is that no formal inquiry into the allegation of corruption has been conducted by either the Commission under section 80 or by a Court nor has there been a formal inquiry into the question of a contravention of the Code of Conduct under section 84 of the Ordinance, such that the issues arising from the events of the August 2014 have not been resolved on the merits.
11. In October 2016, the Commission advised Ms. Harvey that it intended to hold a formal inquiry to determine whether her actions in August 2014 amounted to a breach of the Code of Conduct.

This Application

12. The Applicant now seeks permission to review that decision on the grounds that the Commission is:
 - (a) *functus officio*;
 - (b) alternatively, acting *ultra vires* as it is in breach of its obligation to exercise its discretion to conduct a formal inquiry into the allegations that the Applicant breached the code of conduct within a reasonable time;
 - (c) acting unfairly in that it is
 - (i) acting as a Judge in its own cause
 - (ii) is proposing to proceed after too long a period of delay.

The Submissions

Functus Officio

13. It is submitted on behalf of the Applicant that the Commission had determined, at the end of the investigation conducted by the Commission's investigating officer, that there was sufficient evidence to believe a criminal offence had been committed by the Applicant and caused her to be arrested by their Investigating Officer and charged by the police with corruption offences.
14. It is contended that at the end of their investigation, the Commission was under a duty to consider whether to hold an inquiry to determine whether the Applicant had breached the code of conduct and decided not to do so on the ground that the criminal proceedings were underway. The submission is that the Commission having exercised its discretion not to institute a formal inquiry into breach of the Code is now functus and/or bound by that decision.

Discussion

15. No authorities are relied on by the Applicant in making what I consider to be the startling proposition that the Commission is functus in the circumstances where the Commission, on the Applicants' own evidence, prematurely referred the complaint against her to the prosecuting authorities without holding an inquiry under section 80 and has not held an inquiry under section 84.
16. There was an investigation and statements were collected but no tribunal has heard and determined any question of whether Ms. Harvey was guilty of corruption or had contravened the

Code of Conduct. The Commission not having exercised its adjudicative function to hear and determine whether the Applicant breached the Code of Conduct cannot be said to be functus.

17. It appears to me that the real challenge to the Commission's decision to now hold an inquiry is that it is an abuse of process in the circumstances where it had elected to refer the matter for criminal prosecution the Commission. Under the heading **FACTS**, the opinion is rendered that,

"16. ...The respondent is using the process in a way that is significantly different from the ordinary and proper use of the process.

" 17. The ordinary use of the process in this instance is for the Respondent to decide in what manner they are going to deal with the complaint pursuant to the Ordinance. Either the matter is investigated as a breach of the code of conduct or it is investigated as an act of corruption. Once that decision is made, it is not open to the Respondent to revisit that decision and follow the alternate path due to an unsatisfactory conclusion to the chosen process, from the Respondent's perspective."

18. I cannot find any injunction in the Ordinance against the Commission holding an inquiry into any putative contravention of the Code of Conduct if criminal proceedings have been instituted or recommended. The only limitation in the Ordinance to conducting such an inquiry is that the public officer has been out of the public service for more than two years². At common law, I would suggest that, had the Commission given an undertaking to the Applicant that it would not pursue the question of whether or not she had breached the Code of Conduct, then it might be an abuse of process to now hold such an inquiry, but not otherwise. No such undertaking or promise was given to Ms. Harvey.

19. In my judgment, the Commission is entitled to revisit the complaint and make a final determination of the issues on the merits.

Ultra Vires

20. It is submitted on behalf of the Applicant that the Commission had a duty to exercise its discretion to hold a formal inquiry within a reasonable time of concluding its investigation. The Applicant contends that it is not open the Commission to assert, as it has done, that it only considered exercising its discretion after the collapse of the criminal proceedings and says further that, even if it were justifiable to do so, the resulting delay in proceeding is unjustifiable.

21. I do not understand the submission to raise an issue of *ultra vires* which goes to the jurisdiction of the Commission to hold an inquiry but, rather, an issue of fairness. I consider it appropriate then to deal with the submission under this head with the submissions made by the Applicant under the heading of **Delay (Unfairness)**.

Discussion

² Section 83(2)

22. The Applicant relies on the case of *R (Rycroft) v Royal Pharmaceutical Society of Great Britain* [2010] EWHC 2832 (Admin) in support of this submission. The facts are that, in 2006, the Respondent had cause to investigate a complaint against a pharmacist whose supervising pharmacist was the Applicant, Mr. Rycroft. The investigation was conducted by the Respondent's investigator. Two years and eight months after the investigation began, the Respondent's Registrar referred a Fitness to Practice allegation against the Claimant to the Respondent's Investigating Committee. Two months later, the Claimant was advised that the complaint had been referred. The Claimant sought to review the Registrar's decision on the ground that he was subject to an implied statutory duty to make a referral to the Investigating Committee within a reasonable period.

23. At paragraph 38 of the judgment, Wyn Williams J accepted that as a matter of principle that the Respondent's Registrar was under such an implicit obligation. The Learned Judge however, did not accept,

"... that a failure to make a referral within a reasonable time amounts to a reason to quash the referral and stay the proceedings unless it is also established that the failure to act within a reasonable time has caused prejudice to such an extent that no fair disciplinary process is possible or that it is unfair for the process to continue."

24. The issue then is not whether there has been delay but whether the effect of the delay is to deprive the subject of the proceedings of their right to a fair hearing. In the course of the judgment, the learned Judge considered the decision of the Court of Appeal in *Attorney General's Reference (No 1 of 1990)* [1992] 1 QB 630, which held,

"....that at common law, even where there were unjustifiable delays in criminal proceedings, a stay should not be imposed unless:

"The Defendant shows on the balance of probabilities that owing to the delay he will suffer serious prejudice to the extent that no fair trial can be held: in other words that the continuance of the prosecution amounts to a misuse of the process of the court." (Lord Lane CJ giving the judgment of the court at page 644 B).

25. His Lordship held that there was no warrant to distinguish between criminal cases and disciplinary proceedings and stated at paragraph 36 of the judgment,

"the observations of Lightman J in R (on the application of Toth) v General Medical Council [2001] 1 WLR 2209, that both the legitimate expectation of complainants and the public confidence in the regulation of the medical profession require that the complainant should, in the absence of some special and sufficient reason, be publicly investigated. It would undermine that important principle if mere unreasonable delay, absent prejudice, were to require a stay to be granted."

26. I would venture to say that public confidence in the regulation of persons in public life equally requires public investigation and absent any evidence from the Applicant to demonstrate that she could not have a fair hearing in consequence of the delay, there is nothing in this ground.

27. I think it is important to note before concluding this discussion on the question of delay that the Commission is not a disciplinary body, as was the Commission in *Durity v AG*. Its functions are limited to inquiring into a public official's conduct. It may, if it finds there has been a breach of the Code recommend a penalty but the imposition of any penalty is in the Deputy Governor in the case of a public officer.³
28. In the context of disciplinary action, the Ordinance imposes time limits on the Deputy Governor in the exercise of her power to impose any penalty on an official found to have contravened the Code of Conduct, in contradistinction to the provisions for investigating or holding an inquiry into possible breaches of the Code which set no time limits except the one referred to at paragraph 18 above.⁴ Section 85 (4) (a) and (b) provides

"4. A person who receives a report for the Commission under subsection (3) (b) in which the Commission has determined that the public official subject to the inquiry or investigation contravened the Code of Conduct shall,

- (a) decide **without delay** what measures shall be taken, if any, in response to the report and shall implement such measures without delay; and*
- (b) inform the Commission, as soon as practicable but not later than 30 days after receiving the report-*
- (i) of the follow-up actions or disciplinary measures that will be or have been taken against the public official in response to the report;*
 - (ii) that no further action is required to be taken against the public official in response to the report; or*
 - (iii) that no decision has been made as the measures (sic) to be taken in response to the report, **of the reasons for the delay**, and of the date by which a decision will be made and sent to the Commission." (emphasis added)*

The Commission a Judge in its own Cause

29. It is right that the Commission has both investigative and adjudicative functions but those functions are not carried out by the same persons. There was no inquiry by the Commission but a decision at the end of the investigative process to arrest Ms. Harvey and deliver her, and the investigator's file, to the police to be charged.
30. In any event, it would not be right to say that the conclusion, by the Investigative arm of the Commission, that there was a reasonable suspicion⁵ that Ms. Harvey may have committed a criminal offence or even a conclusion by the Commission that there were reasonable and probable

³ Section 85 (3)(a)

⁴ See footnote 2

⁵ Standard set out in section 28(1)

grounds to believe⁶ that Ms. Harvey had contravened the Code, means that Commission would be acting as a Judge in its own cause if it then proceeded to hold an inquiry. The legislative scheme requires the Commission to be so satisfied before it can hold a formal inquiry. It is a necessary precondition to such an inquiry and it is only when that condition is met that the Commission may require the public official to attend and respond to the allegations and present such witnesses as that public official may require.

31. It is not much different than in criminal proceedings where the Court must be satisfied that there is a *prima facie* case before calling upon the accused to answer. Absent reasonable grounds to believe that a public official has contravened the Code of Conduct, the Commission has no power to summon the official to attend an inquiry.
32. This ground of challenge also fails.

The Constitutional Challenge

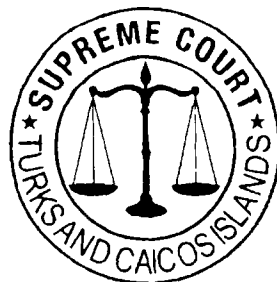
33. The Applicant does not require leave to bring a Constitutional motion. I would observe, however, that the Constitutional challenge is directed at the alleged failure of the Commission to give reasons for now proceeding to hold an inquiry some 2 1/2 years after the event. I would note that the Commission has given reasons - that the Commission has reason to believe that there was a contravention of the Code of Conduct and no formal inquiry had ever been conducted by the Commission into the allegations giving rise to that belief. This is to be gleaned from the correspondence. In the circumstances where the Court has found that there are no grounds on which to quash the Commission's decision to hold an inquiry into the question of whether or not the Applicant has contravened the Code of Conduct, there would seem to be little merit in pursuing this challenge.

ORDER:

34. The application for leave for judicial review of the Commission's decision to hold a formal inquiry into an allegation that the Applicant breached the Code of Conduct under section 84(1) of the Ordinance is refused.

DATED THE 13TH SEPTEMBER 2017


CHIEF JUSTICE



⁶ Standard set out in section 84 (1)