

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**
2 **HOLDEN AT GEORGE TOWN, GRAND CAYMAN**
3

4 **CAUSE NO. 249 OF 2012**

5 **BETWEEN:**

6 **HERBERT MUSCHETTE**

7 **Plaintiff**

8
9 **- and -**

10 **THE ATTORNEY GENERAL OF THE CAYMAN ISLANDS**

11 **Defendant**

12
13 **Appearances:** **Mr. Jeffrey Ernest Jupp, Q.C. instructed by Mr. Nick Hoffman**
14 **of Priestleys**

15
16 **Ms. Dawn Lewis of the Legal Department, the Attorney**
17 **General's Chambers, for the Crown, the Defendant**

18
19
20 **Before:** **Hon Justice Henderson**

21
22
23 **Heard:** **August 20, 21, 22 & 26 of 2013**



24
25 **RULING**

- 26
27 1. For many years, the Plaintiff was a serving police officer in the Royal Cayman
28 Islands Police Service and consequently an office holder by virtue of the regime
29 established by the *Police Law*. Like all such officer holders, he could only be

1 dismissed from the Force for a discipline violation after a properly constituted
2 hearing before the Commissioner of Police. A police officer who is the subject of
3 such a hearing is entitled to due process, including a right of appeal to the
4 Governor. There is nothing in the *Police Law* which sanctions a delegation by the
5 Commissioner of his powers of discipline to any subordinate officer.

6 2. By a letter dated July 30th, 2010, Mr. Muschette resigned from the Force. He now
7 says that his resignation was forced from him under duress and was, in effect, the
8 result of a threat that he should resign or be dismissed. He says that the threat was
9 made to him by Deputy Commissioner Brougham in the course of a meeting
10 between the two men on June 8th, 2010. He says his circumstances are similar to
11 those of the police constable in the leading case of *Chief Constable v. Evans*
12 *[1982] 1 WLR 1155(HL)*. I accept that *Evans* represents the current state of the
13 law in the Cayman Islands.

14 3. If Mr. Muschette's contention is correct, the result in law is that he is still the
15 holder of his office and entitled to all of his salary and benefits since the date of
16 his purported resignation: See *Evans*, *supra*, and *McLaughlin v. Governor of the*
17 *Cayman Islands [2007] 1 WLR 2839(PC)*.

18 4. There are two issues of substance:

19 (1) Did what Deputy Commissioner Brougham say to Police
20 Constable Muschette amount to a threat that he would be dismissed
21 if he did not resign?

22 (2) If so, is that what caused his resignation?

23 I turn to the facts.



1 5. The disputed nature of the evidence requires that I make findings on credibility.
2 The evidence of Mr. Muschette about what was said to him at the meeting on June
3 8th differs markedly from the evidence of the Deputy Commissioner.

4 6. Mr. Muschette's evidence of the meeting is as follows:

5 *I attended DCP Brougham's office as required. DCP Brougham*
6 *began the meeting by asking whether I was back from sick leave. I*
7 *informed him that my current leave had not yet finished and that I*
8 *hoped to return thereafter. He then told me that he was aware that*
9 *I had applied for extended leave and that that application was with*
10 *the Commissioner, however, that I was to return to work*
11 *immediately, whatever sick leave may have already been agreed.*

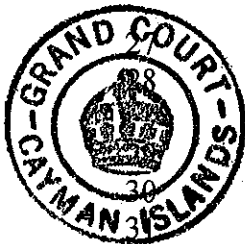
12 *He then said to me that he and DCP Ennis had come to the*
13 *conclusion that my time with the RCIPS had come to an end. I was*
14 *shocked. I said nothing in response. He said that he was in*
15 *possession of a large amount of evidence which demonstrated that*
16 *I was involved in dealing drugs, soliciting sex from female*
17 *motorists, and passing information to the criminal underworld.*
18 *Suffice it to say that I knew nothing of these allegations until DCP*
19 *Brougham uttered them. He provided me with no evidence for*
20 *these extremely serious accusations or even their source.*

21 *At this stage of the meeting, I was in disbelief. I could not*
22 *understand why anyone would make these kinds of accusations.*
23 *They were baseless, deeply hurtful and totally untrue. The idea that*
24 *an officer who had served for 16 years in two jurisdictions would*
25 *involve himself in drug dealing, conspiracy and soliciting sex*
26 *beggared belief. I was reeling.*

DCP Brougham then went on to make me an offer. He told me that
either "you resign or you will face imprisonment".

Given the nature of the allegation, I was equally shocked by the
idea that he, as a senior police officer, would be prepared to
overlook a police officer committing such serious offences simply
by resigning.

He went on, "I will let you go without coming after you, but if you
refuse to resign, you will be arrested and taken to court where you
will be found guilty by the judge and sent to prison".



1 *At this stage, I replied by saying that I had been a police officer for*
2 *16 years and I had never been involved in the consumption or*
3 *supply of drugs, neither would I ever contemplate doing so. DCP*
4 *Brougham responded by saying, "I've sent police officers with 30*
5 *years' service to prison, so you will just be another one. If I were*
6 *you, I would resign."*

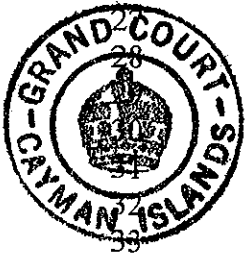
7 *At this stage, I appreciated that what he was doing was entirely*
8 *inappropriate. I was being threatened with prison by a senior*
9 *officer who was prepared to provide me with the impression that*
10 *he had formed the view, without hearing from me or anyone at all,*
11 *that I was guilty of numerous serious criminal offences. In effect,*
12 *resign or else. I reached for my notebook and began to take down*
13 *what he was saying. He became aware of this and said to me that*
14 *he had ordered my attendance to listen to him, not to take notes.*
15 *He then opened his drawer, retrieved a business card and threw it*
16 *at me. He then said that I was to call him when I had made up my*
17 *mind. He completed his tirade by telling me that I might also be*
18 *charged with assault, by which I understood him to be referring to*
19 *the allegation made by Police Constable Gilzeane. I then left his*
20 *office.*

21 Mr. Muschette made no note of the conversation after the meeting ended. DC

22 Brougham did so. His note, which matches his evidence, is as follows:

23 *1400 hours. Now engaged PC Muschette. Asked him about his*
24 *current status re sickness and attendance at work. He said he has a*
25 *sick note which was due to run out on Monday. He says that if the*
26 *CoP doesn't allow him comp time he will return to work on*
27 *Monday. I then told him that I was aware of the current complaints*
28 *against him. I also told him I was aware there were allegations*
29 *against him of a corrupt nature. I told him it was alleged he was*
30 *associating with criminals and passing information to them, that*
31 *he was involved in the supply of drugs, and that he was soliciting*
32 *sexual favours from female motorists in order for them to avoid*
33 *prosecution.*

34 *I told him if these allegations were true that he was not a fit person*
35 *to remain in the RCIP. I told him that these were criminal issues*
36 *and, if substantiated, could result in prosecution. He stated he was*
37 *a good officer with 18 years' service and no one had ever*
38 *questioned his ability or his association. I told him he should*
39 *consider whether the RCIP was still the role he wanted to continue*
40 *with. I told him that the current PSU investigations will be*



1 *concluded if he felt that the time was right for him to resign from*
2 *the service.*

3 *He said he was being picked on in relation to the allegation of*
4 *assault. He said he would speak to his attorney and his wife and*
5 *consider his position. I gave him my contact number and asked him*
6 *to contact me if he wished to discuss anything further. 1415*
7 *concluded.*

8 7. There is abundant evidence that Mr. Muschette was suffering from considerable
9 stress by the time of his meeting with DC Brougham and continuing through to
10 the date of his resignation. He had experienced some severe family problems and,
11 I infer, was also suffering from stress generated by his job. Throughout the
12 relevant period, a variety of doctors certified to the RCIPS that Mr. Muschette
13 was unfit for duty and needed to take sick leave. Dr. von Kirchenheim, a
14 psychologist, diagnosed Mr. Muschette as having an adjustment disorder with
15 mixed anxiety and depressed mood on July 2nd, 2010.

16 8. Mr. Muschette was cross-examined before me. My impression is that he was
17 attempting to tell the truth according to the best of his recollection. However, the
18 accuracy of his recollection must be questioned.

19 9. Mr. Muschette said that on Friday, June 11th, 2010 he met with Sergeant Stone.
20 She told him that she had received a phone call from a police officer in Jamaica
 who had told her that Mr. Muschette had been dismissed from the RCIPS.

21 Sergeant Stone's evidence was that she was on vacation leave on that day. She
22 said she did not speak with Mr. Muschette while on vacation. When it was put to
23 her that the conversation may have occurred on some other date, she denied that.
24



1 She said she has no "connections" in Jamaica who know Mr. Muschette. In any
2 event, she said she would recall the conversation if it had occurred at any time,
3 and she has no such recollection.

4 11. Mr. Muschette said that on July 18th, 2010 Deputy Commissioner Ennis
5 approached him at the Agape Worship Centre and informed him that the RCIPS
6 had intelligence that Mr. Muschette had been involved in the importation of drugs
7 through Owen Roberts Airport.

8 12. DC Ennis recalls speaking to Mr. Muschette at the Worship Centre in July 2010
9 but does not recall the date. In his evidence, he denied saying anything to Mr.
10 Muschette about intelligence involving the importation of drugs and he angrily
11 refuted the suggestion that he would engage in such an egregious breach of
12 confidentiality by leaking intelligence information to the suspect concerned. DC
13 Ennis said that he actually advised Mr. Muschette during this conversation to
14 return to work rather than resign.

15 13. In his Statement of Claim Mr. Muschette alleges that Detective Sergeant Lewis
told him on June 14th, 2010 that Lewis had been told by Inspector Yearwood that
Mr. Muschette was involved with drugs and that Lewis should investigate.

18 14. Detective Sergeant Lewis denies that Inspector Yearwood said any such thing to
19 him. He also points out that he was not at work on June 14th, so it is very unlikely
20 he would have encountered Mr. Muschette that day.



1 15. Mr. Muschette says that on July 21st, 2010 he telephoned to 911 and requested
2 some information. The operator, Allan Bush, told him that Mr. Bush had been
3 instructed not to provide Mr. Muschette with information as Mr. Muschette had
4 been dismissed.

5 16. Mr. Leslie Vernon has listened to a tape recording of that call. He heard Mr. Bush
6 ask Mr. Muschette if he was still with the RCIPS. When Mr. Muschette said he
7 was, Mr. Bush said that he had heard different. Mr. Bush did not say he had heard
8 that Mr. Muschette had been dismissed.

9 17. Sergeant Stone, Deputy Commissioner Ennis, Detective Sergeant Lewis and
10 Deputy Commissioner Brougham were cross-examined at the trial. Nothing
11 emerged from the cross-examination of any of them which would cause me to
12 question their veracity. I am satisfied that each of these witnesses has given
13 truthful evidence.

14 18. As a consequence, when I consider the crucial question of the content of the
15 conversation between Mr. Muschette and DC Brougham on June 8th, 2010, I find
16 the weight of the evidence favours the version sworn to by the latter. It is more
probable than not that what DC Brougham said to Mr. Muschette is contained in
the contemporaneous note he made at the time. I consider that the stress from
which Mr. Muschette was suffering, combined with the fact that he took no
contemporaneous note, has magnified and distorted his recollection of what was
20 actually said.
21





1

2 19. I turn to the first of the two issues.

3 20. Having accepted DC Brougham's version of the conversation as accurate, I must
4 now decide whether it amounts to a threat of the sort which would render invalid
5 any subsequent purported resignation.

6 21. DC Brougham had on June 8th, 2010 no responsibilities in the area of discipline.
7 The Professional Standards Unit, or "PSU", which investigates discipline
8 complaints was subject to supervision by DC Ennis. Moreover, as I said earlier, a
9 discipline hearing involving Mr. Muschette should have been held before the
10 Commissioner of Police, not before DC Brougham.

11 22. An important element in the *Evans* case was the fact that the person making the
12 threat was the Chief Constable. He had the power to dismiss the officer but only
13 after allowing the officer a reasonable opportunity to respond to the allegations.
14 Because no such opportunity was offered, the requirement of fairness had not
15 been satisfied. In addition, the Chief Constable, by his own admission, had
16 prejudged the issue.

17 23. The follow passage from the speech of Lord Brightman explains that decision (at
18 page 1174):

19 *My Lords, for my part I emphatically reject the approach of the*
20 *chief constable to his duties under regulation 16. He made the*
21 *fundamental mistake, as appears from his affidavit, of assuming*

1 that he had an absolute discretion to discharge the respondent
2 under regulation 16, a right to dismiss him at pleasure. That was
3 not his right. His mistake coloured and indeed tainted the decision-
4 making process. His discretion to discharge was a qualified one,
5 exercisable only if he considered that the respondent was not fitted
6 to perform the duties of the office or was not likely to become an
7 efficient constable or a well conducted constable. It is implicit in
8 regulation 16 that there must be a fair consideration of the
9 constable's fitness to perform his duties and a fair consideration of
10 the likelihood of his becoming an efficient and well conducted
11 constable. The legality of the choice given to the respondent to
12 resign or be discharged must be judged by the same criteria as
13 applied to the legality of discharge without the alternative of
14 resignation; for clearly the chief constable could not use an invalid
15 threat of discharge to compel resignation, because that would be
16 an abuse of power.

17 As I have indicated, the chief constable forced the respondent's
18 discharge on account of three adverse factors which he believed to
19 exist: the allegedly undesirable marital circumstances, the alleged
20 hippy lifestyle and the alleged flouting of authority. It was the duty
21 of the chief constable to deal fairly with the respondent in relation
22 to the adverse factors upon which he was proposing to act. The
23 chief constable failed in his performance of that duty because these
24 supposedly adverse factors were never put to the respondent. He
25 was given no opportunity to offer one word of explanation. Your
26 Lordships will not doubt the honesty of the chief constable and that
27 he reached a decision which he truly believed was in the interests
28 of the North Wales Police on the information that had been laid
29 before him. But the inescapable fact is that he misunderstood the
30 extent of his discretion and the nature of his duty under regulation
31 16. The decision-making process was therefore defective.



- 32 24. The present case before me is different. DC Brougham took no step which
33 deprived Mr. Muschette of his right to be given notice of the allegations and to
34 respond. Those steps would, I assume, have been part of the discipline process but
35 that was a process over which DC Brougham exercised no control. I accept that
36 DC Brougham wanted Mr. Muschette to resign and arranged a meeting to
37 encourage that. However, in light of DC Brougham's actual responsibilities, I am
38 not satisfied that he could or would have caused Mr. Muschette to be dismissed if

1 a resignation had not been forthcoming. In short, it has not been shown that the
2 decision-making process was defective or likely to be defective as a result of the
3 actions of DC Brougham.

4 25. I am also of the view that what DC Brougham said to Mr. Muschette did not go
5 far enough to amount to a threat of "resign or be dismissed". Essentially, DC
6 Brougham was saying to Mr. Muschette that he should consider resigning because
7 that would put an end to any ongoing discipline investigations. He was offering an
8 inducement to Mr. Muschette to resign and intended to do so. I do not draw from
9 DC Brougham's evidence an inference that he intended to threaten Mr. Muschette
10 with dismissal.



11 26. I turn to the second issue.

12 27. Finally, I must address the question of whether the conversation on June 8th was
13 an effective cause of Mr. Muschette's decision to resign.

14 28. The day after the meeting Mr. Muschette sent an email to DC Brougham saying
15 "please note that it is not my intention to resign". However, the stress continued to
16 increase.

17 29. I accept the evidence that officers were gossiping about Mr. Muschette and
18 rumours which reflected adversely on his character and competence were
19 circulating. He said he intended to launch a civil action for defamation against
20 some fellow officers. Some, but not all, of his superior officers were unimpressed

1 with his performance. Eventually, some six weeks later, Mr. Muschette decided
2 that his position was untenable and he resigned.

3 30. I am satisfied that the conversation of June 8th was not the sole reason which
4 caused Mr. Muschette to resign, but it was a significant contributing factor. Is that
5 enough to render his subsequent resignation invalid? No authority has been cited
6 on this question. It seems to me that it is sufficient. The underlying principle in
7 cases like *Evans* is a desire to safeguard the right of an office holder to make a
8 considered response to allegations which could result in his dismissal and to
9 safeguard his right to a hearing before someone who has not prejudged the case.
10 Those are bedrock principles which should not be weakened by a rule that the
11 denial of a procedural right must be the sole cause of the resignation to render it
12 invalid.

13 31. On the question of causation I would have found in favour of the Plaintiff.

14 32. For these reasons the claim is dismissed.

15 Dated this 26th day of August, 2013

16 *Henderson, J.*

17 Henderson, J.
18 Judge of the Grand Court

