



[2018] JMFC Full 6

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE FULL COURT**

**CLAIM NO. 2012 HCV 01524**

**BEFORE: THE HON. MS. JUSTICE C. LAWRENCE BESWICK**

**THE HON. MR. JUSTICE E. BROWN**

**THE HON. MR. JUSTICE C. STAMP**

**BETWEEN**

**DALE AUSTIN**

**CLAIMANT**

**AND**

**THE PUBLIC SERVICE COMMISSION**

**1<sup>st</sup> DEFENDANT**

**AND**

**THE ATTORNEY GENERAL OF JAMAICA**

**2<sup>nd</sup> DEFENDANT**

**IN OPEN COURT**

Mr. Dale Austin Claimant in person

Mr. Garth McBean, Q.C., Mr. Lorenzo Eccleston and Ms. Dian Johnson instructed by  
Garth McBean & Co. for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants

**Heard: 27<sup>th</sup> – 29<sup>th</sup> March, 2017 and 28<sup>th</sup> November, 2018**

**Judicial Review - Engagement and dismissal of crown servants - Public Service  
Commission - Public Service Regulations - Staff Orders**

LAWRENCE-BESWICK, J

## INTRODUCTION

[1] This is an application by Mr. Dale Austin (the claimant) for judicial review of a decision of the Public Service Commission (“the Commission”) (the 1<sup>st</sup> defendant) to terminate his employment from the position of Assistant Crown Counsel in the Attorney-General’s Chambers. The Attorney General (the 2<sup>nd</sup> defendant) is sued as an interested party.

[2] Mr. Austin seeks 29 reliefs including administrative and constitutional reliefs as well as damages. They are contained in his further further amended fixed date claim form dated the 27<sup>th</sup> November, 2014 as reproduced below;

- i. *“An order of Certiorari to quash the decision of the First Defendant and/ or the Chief Personnel Officer to terminate the appointment of the Claimant as Assistant Crown Counsel in the Attorney General’s Chambers via letter dated the 5<sup>th</sup> day of March, 2012;*
- ii. *An order of Mandamus directing the First Defendant and/ or the Chief Personnel Officer to reinstate the Applicant as Assistant Crown Counsel in the Attorney General’s Chambers as of the 5<sup>th</sup> day of March, 2012;*
- iii. *A Declaration that at all material times, the Claimant was acting in a substantive permanent established post and was not a temporary employee within the meaning of the Public Service Regulations; iv. A Declaration that the Claimant was denied a fair hearing;*
- v. *A Declaration that the First Defendant’s and / or the Chief Personnel Officer’s failure to give the Claimant a fair hearing was unlawful and in breach of the rules of natural justice;*
- vi. *A Declaration that the Claimant’s purported termination without notice in reliance on Schedule 2 Regulation 19 (b) of the Public Service Regulations was procedurally invalid and unlawful;*
- vii. *A Declaration that the Claimant had a legitimate expectation to an assessment after which, if successful, he would be appointed in the position of Assistant Crown Counsel;*
- viii. *A Declaration that the Claimant was deprived of a legitimate expectation that he would be subject to an assessment and, if successful , would be appointed permanently to the position of Assistant Crown Counsel;*

- ix. *A Declaration that by dismissing the Claimant as aforesaid the First Defendant and / or the Chief Personnel Officer deprived the Claimant of protection under section 125 of the Constitution and Regulation 43 of the Public Service Regulations;*
- x. *A Declaration that the dismissal of the Claimant was in breach of section 125 of the Constitution and Regulation 43 of the Public Service Regulations;*
- xi. *A Declaration that the Claimant was deprived of having the benefit of the principles of due process outlined in section 10 of the Staff Orders of the Public Service;*
- xii. *A Declaration that the Claimant has a legitimate expectation to be treated consistently and in the same manner that the Public Service Regulations stipulate that public officers are to be treated when adverse allegations are made against them;*
- xiii. *A Declaration that the Claimant's termination was in breach of natural justice;*
- xiv. *A Declaration that at the time the Claimant was dismissed the First Defendant was the lawful or proper authority to terminate the Claimant's employment and it was not constituted or, alternatively, not properly constituted;*
- xv. *A Declaration that the purported termination of the Claimant's employment was null and void or, alternatively, ineffective or did not come into effect as the Claimant was not given proper notice or payment in lieu of the relevant notice period;*
- xvi. *A Declaration that the Claimant's right to equitable and humane treatment by a public authority under section 13(3)(h) of Charter III of the Constitution of Jamaica has been breached;*
- xvii. *A Declaration that the Claimant's right to privacy under section 13(3) (j) (ii) and (iii) of Chapter III of the Constitution of Jamaica has been breached by the investigation by an agent of the State into personal affairs of the Claimant without reasonable cause;*
- xviii. *A Declaration that, in any event, the First Defendant's and / or the Chief Personnel Officer's letter dated March 21, 2012 to the Claimant reinstated the Claimant to his substantive position with all the attendant benefits, privileges and rights of his position;*
- xix. *A Declaration that the purported dismissal of the Claimant and the basis therefor by the First Defendant was Wednesbury unreasonable;*
- xx. *A Declaration that the First Defendant and/ or any of the individual members of the Public Service Commission and/or any of its administrative officers including the Chief Personnel Officer has no lawful authority to engage by way of contract on such terms and conditions as it sees fit public officers within the meaning of the Jamaican Constitution 1962 and the Civil Service Establishment Act*

*and that rather its advisory jurisdiction in respect of the engagement of public officers is confined to the making of appointments in the manner set out in the Constitution and the Public Service Regulations;*

- xxi. *An order that damages for the loss of salary and/ or emoluments by the Claimant resulting from the Defendants' failure to increase his salary on the basis of the salary increment scale linked to his post consequent upon any and all performance evaluations and assessments that he has successfully completed, along with interest thereon, are to be paid to the Claimant*
- xxii. *An Order that the infringing police report/ dossier (otherwise referred to as the confidential security report) into the Claimant's personal life and private and confidential affairs produced by invading the Claimant's privacy in breach of the Constitution of Jamaica 1962 and by engaging in acts contrary to statute as well as in breach of the common law rules of confidence, and any and all communications referring thereto, be remitted to the exclusive custody of the Claimant or destroyed or otherwise dealt with as this Honourable Court may direct;*
- xxiii. *An order for disclosure;*
- xxiv. *Damages;*
- xxv. *General damages and special damages on the claims that arise on the facts as particularised in the Affidavits sworn by the Claimant Mr Dale Austin; xxvi. Aggravated damages; xxvii. Exemplary damages; xxviii. Further or alternatively, constitutional damages; xxix. Costs"*

## **BACKGROUND**

**[3]** A letter from the Office of the Services Commissions<sup>1</sup> informed Mr. Austin, an Attorney-at-Law, that he was temporarily employed with effect from October 3, 2011 in the Attorney General's Chambers, Ministry of Justice. He was to commence work as an Assistant Crown Counsel.

**[4]** The conditions of engagement included provision for the termination of his "temporary employment" by one month's notice in writing by either side or by the payment of one month's salary in lieu of notice.

**[5]** Mr. Austin assumed duties on October 3, 2011, as directed, in the Attorney

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<sup>1</sup> Dated September 26, 2011

General's Chambers and worked there for approximately five months when he received a letter from the Office of the Services Commissions<sup>2</sup> terminating his employment with immediate effect .

### **Termination letter**

[6] The letter informed Mr. Austin that the Commission issued the termination notice in accordance with **Regulation 19 (b) of the 2<sup>nd</sup> Schedule of the Public Service Regulations**.<sup>3</sup> He would be paid one month's salary in lieu of notice and would be compensated for the vacation leave which he had earned.

### **Allegations**

[7] The termination letter contained no reasons for the termination, but the Commission subsequently informed Mr. Austin that it was based on allegations that he had been determined to be of unreliable and dishonest character by the National Intelligence Bureau, (NIB), a branch of the Jamaica Constabulary Force. According to the NIB it had investigated Mr. Austin and had found that he was indebted. The Commission regarded that report as being unfavourable and therefore dismissed him.

[8] Mr. Austin was not informed of the allegations made against him and was not given the opportunity to verify their accuracy or to respond to them before his employment was terminated. The evidence is that on 6 March 2012, Mr. Austin was called into the office of the then Solicitor General, Mr. Douglas Leys Q.C. who told him that he had received a disturbing and surprising letter from the Office of the Services Commissions the previous evening.

[9] The letter indicated that he, Mr. Austin, should be terminated with immediate effect. The Solicitor General had been informed by someone at the Office of the Services Commissions in a telephone conversation that the decision had been made following a routine "security vetting" which uncovered that he had several debt related issues.

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<sup>2</sup> Dated March 5, 2012

<sup>3</sup> Regulation 19(b) of the 2<sup>nd</sup> Schedule

### **The cancelled meeting**

[10] After receiving the termination letter, Mr. Austin retained Counsel to act on his behalf and requested a meeting with the Commission. Counsel being unable to attend the scheduled meeting<sup>4</sup> wrote, expressing concern about the circumstances of Mr. Austin's dismissal, highlighting the fact that he had not been given the opportunity to respond to the report.

[11] The Commission responded<sup>5</sup> and refused to meet about the concerns. It explained that where an individual is employed, a security vetting is done to assess the suitability of the applicant. The letter disclosed that such a vetting had been done on Mr. Austin and the report was adverse.

### **The Report**

[12] That report which resulted in his dismissal, was accessible by various entities including government departments and international bodies. However, it was not disclosed to Mr. Austin before the letter of termination.

[13] After the letter, the then Solicitor General, in whose Chambers Mr. Austin had been working, enquired as to the circumstances surrounding the dismissal. Mr. Austin was thereafter informally informed of the "essence" of the report.

[14] The results of the security vetting were eventually disclosed to him as part of these proceedings some three years after the letter of termination. By way of letter dated 16<sup>th</sup> February, 2012 from the NIB to the Office of the Services Commissions there was a report containing allegations of improper conduct by Mr. Austin in specified financial dealings and a conclusion as to the unsuitability of his character.

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<sup>4</sup> Scheduled for March 7, 2012

<sup>5</sup> Letter dated March 9, 2012

[15] Not only did Mr. Austin assert that the report was untrue, but he filed a suit, separate from this suit, seeking damages for defamation as a result of the publication of the report to the several bodies.

### **Judicial review**

[16] Mr. Austin contends that the Commission's decision making process resulting in the termination was flawed and breached his constitutional right to privacy and his right to equitable and humane treatment by a public authority.

[17] On March 16, 2012 Mr. Austin received leave to apply for judicial review of the Commission's decision. This also operated as a stay of execution of the decision to dismiss him and he has therefore continued to work at the Attorney-General's Chambers.

### **Performance Appraisals**

[18] The Attorney-General's Chambers reviewed Mr. Austin's performance on 3 separate occasions,<sup>6</sup> including periods after the purported termination of his employment. He was recommended for appointment as his performance was said to be outstanding and to exceed requirements.

### **DEFENCE**

[19] In September 2015, three years after the purported termination, the Attorney General filed a defence to this suit, with the Commission, stating that the Commission has the authority to dismiss Mr. Austin without providing reasons.

### **THE ISSUES**

#### **Nature and method of employment**

[20] The legislation describes methods of termination of employment which differ according to the category of employment to be terminated. Therefore, one of the main issues to be determined is the type of employee that Mr. Austin is. The employment letter

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<sup>6</sup> Oct. 2011 to June 2012, July 2012 to March 2013, April 2013 to July 2014 and a 4<sup>th</sup>

categorises him as a temporary employee stating that approval was given for him to be temporarily appointed at the level of Assistant Crown Counsel.

## **CLAIMANT'S SUBMISSIONS**

### **Employment**

#### *Ultra vires*

[21] Mr. Austin argues that the Commission acted ultra vires its powers in purporting to use a contract to employ him into the public service and by designating him to be a temporary employee instead of appointing him. He submits that the use of “temporary” in the letter does not determine the issue of what his employment status is. He regards himself as being a public officer, holding an “established office” and submits that the Commission applied the incorrect legislation in dealing with his employment status.

[22] According to Mr. Austin the law stipulates that his office requires that an appointment be made. He argues that the Commission has no power to enter into contract for a person to work as a public officer. No such power exists either in the **Constitution** or in the **Civil Service Establishment Act**. Rather, the power is expressly restricted to appointing persons.<sup>7</sup>

#### *Staff Orders*

[23] In further submissions as to the manner of his employment, Mr. Austin submits that although the **Staff Orders** and the **Public Service Regulations (PSR)** specify the manner in which persons are to be employed to the Government and the manner in which such employment is to be terminated, both pieces of legislation are inconsistent with each other.

[24] The claimant says that **Staff Order 1.4** provides that persons may be appointed temporarily or permanently unlike the **Public Service Regulations (PSR) 23(1)** which contemplates a permanent appointment preceded by a probationary period.

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<sup>7</sup> Endell Thomas v. Attorney-General of Trinidad and Tobago [1982] AC 113

[25] Mr. Austin submits that there is also divergence between the **PSR** and the **Staff Orders** in relation to the length of time given for probation. The latter refers to temporary appointments not to exceed six months in certain conditions. It also states that persons appointed to the public service for the first time may be required to serve a probationary period of six months which may be further extended for a period not exceeding six months. The **PSR** refers to a probationary period of one year on first appointment to the public service unless a shorter term is specified in the letter of appointment and does not contemplate a two tiered system.

[26] He argues that the **Staff Order 1.4** appears to contemplate that the type of engagement may be determined, not by statute or under the Constitution, but by the state agents i.e the Commission.

[27] He says further that the **Staff Order 1.4** uses “may” in referring to the discretion of the appointing authority to engage persons into the public service by making an appointment on a temporary or permanent basis whereas the **PSR** uses words making its provisions obligatory. Also the **Staff Orders** contemplate “employment” as opposed to “appointments” and imply in **1.4.2** that the appointing authority sets out the terms and conditions of the appointment, which conflicts with the principles of substantive law.

#### *Constitution*

[28] Mr. Austin also argues that Section 125(1) of the **Constitution** provides for yet another method of employment into the public service, that of the employment of a public officer.

#### *Public officer*

[29] Mr. Austin submits that he falls within the definition of a public officer according to the **Constitution** and also the **Public Service Regulations** and that he is thus entitled to a fair hearing before termination of his employment in accordance with the **Constitution**.

*Other Public Bodies*

[30] The claimant also directed the Court's attention to various pieces of legislation establishing public bodies which were permitted to employ persons by contract. He highlighted the **Betting Gaming and Lotteries Act**<sup>8</sup> and the **Contractor General's Act**<sup>9</sup> as expressly providing those subject authorities with the power to engage employees by way of contract. The claimant contrasted that power with the procedure for the employment of officers in the **Public Service Regulations**, in an effort to bolster his submission that the Commission had no power to enter into a contract to employ him, but instead must employ him in accordance with the provisions of legislation.

## **Termination of Employment**

### **Submissions**

[31] Mr. Austin submits that the method of termination of employment of an employee depends on the type of position that he holds, and the method of employment should be considered also in deciding on the correct termination method.

#### *Pensionable post*

[32] He argued that termination from a pensionable post must be in accordance with **s. 43** of the **Public Service Regulations** and that the Assistant Crown Counsel post which he holds is pensionable because it is a post in the establishment as stated in the Jamaica Gazette. Any termination in the manner in which it was purportedly done must therefore be unlawful and invalid.

Further, he argues, he holds a pensionable post also by virtue of the **Pensions Act Order 1981**

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<sup>8</sup> Section 25(1) of the Betting, Gaming and Lotteries Act

<sup>9</sup> Section 13 of The Contractor General's Act

*2<sup>nd</sup> Schedule of the PSR*

The submission is, contrary to that of the defendants, that the **2<sup>nd</sup> Schedule of the PSR** does not govern his circumstances because it applies to “nonpensionable office holders.” He is pensionable and further he does not fall into any of the other categories specified as being governed by the Schedule.

**[33]** He also notes that there is no condition for the claimant to complete a certain period of probationary service before enjoying pensionable status, as is the case for other civil servants.

**[34]** The defendants respond to Mr. Austin’s argument that he is in a pensionable post by arguing that he is not entitled to pension contributions because of the length of his service. The issue of him receiving a pension would not arise until he had served at least 10 years in the public service<sup>10</sup>.

**[35]** Further they emphasise that the **Pensions Regulations**<sup>11</sup> specify certain temporary and probationary periods which are not to be included in the years for computation. Counsel also relies on Part IV of the Regulations to define the actual periods to be considered as pensionable. Those do not include certain temporary assignments. Defence Counsel concludes that the method of termination of employment of pensionable workers would thus not apply to Mr. Austin.

*Probationary period*

**[36]** The claimant says that **section 23(3)** of the **PSR** which allows for the appointment on probation of any officer to be terminated on one month’s notice is unconstitutional. This was in response to the submission of the defendants that if it was accepted that the claimant was serving a probationary period he could be properly dismissed pursuant to the Regulation.

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<sup>10</sup> Regulation 6 A1 Pensions Act

<sup>11</sup> Regulation 15 (3) a-c

*Constitution*

[37] Mr. Austin directed the Court's attention to **section 125(3)** of the **Constitution** which he argued makes it clear that the power to remove public officers including those acting in offices, is vested in the Governor General acting on the advice of the Public Service Commission. Before an officer is removed the officer shall be informed of the advice of his removal.

*Legitimate expectation*

[38] Mr. Austin maintains that in the circumstances he had a legitimate expectation that he would be assessed by his superiors and if successful would be permanently appointed as Assistant Crown Counsel, and that he would not be dismissed without reasonable cause.

*Wednesbury unreasonableness*

[39] Mr. Austin contends that the fact that he was dismissed without being provided with reasons was a clear indication that the decision was unreasonable. Irrelevances were considered and relevant matters were not considered in deciding to terminate his employment. Wednesbury unreasonableness refers to a decision which is made in the absence of logic employed by the ordinary person.

**Other issues**

**Invasion of privacy**

[40] Counsel Mr. Austin argued that in publishing what he describes as a dossier on his private life, the Jamaica Constabulary Force had damaged him by breaching his constitutional right to privacy and the common law rules of confidence.

**Loss of earnings**

[41] Mr. Austin submits further that the Commission, in abusing its power purporting to terminate his employment, has caused him to lose salary and salary increments and emoluments and the opportunity to accrue pensionable entitlements.

## **Defendants' submissions**

The defendants maintain that Mr. Austin's employment was terminated properly under contractual arrangements and also under various pieces of legislation.

### *Termination by contract*

Counsel for the defendants argues that Mr. Austin's employment was by way of a contract which expressly provided for the manner of termination and that Mr. Austin's temporary employment was terminated in accordance with those express terms.

### *Termination by **2<sup>nd</sup> Schedule of the PSR Section 19(b)***

Further, according to the defendants, the termination of his employment is governed by **section 19(b)** of the **2<sup>nd</sup> Schedule of the PSR** which permits Mr. Austin's dismissal in the manner in which it occurred.

### *Termination by **section 43** of the **PSR***

**[42]** Mr. Austin relies on **Section 43** of the **PSR** to afford him protection from the type of termination which purportedly occurred. That section mandates that an officer is to be heard and represented where an investigation is being conducted with a view to his dismissal. Counsel for the defendants argues that section **43** upon which Mr. Austin relies is inapplicable to this case as he is a temporary employee. They argue that it is only if Mr. Austin were employed to a substantive public office that he would be entitled to have the termination of his employment by the process mandated in **regulation 43 of the PSR**. This he has failed to prove.

**[43]** In addition, the defendants' submission is that since he is a temporary employee, he is non-pensionable and is not afforded the protection of **regulation 43** of the **PSR** because **regulation 45** of the **PSR** expressly exempts the application of **section 43** of the **PSR** to holders of non-pensionable posts.

### *Termination by **section 23** of the **PSR***

*Probationary Period*

[44] **Section 23** of the **PSR** is directed to persons on probation. The defendants argue in the alternative that because **s. 23** of the **PSR** mandates a probationary period on first appointment to the public service, Mr. Austin was properly terminated pursuant to that section.

[45] He would have had to serve a probationary period of one year before being appointed. Mr. Austin could not therefore have security of tenure before that probationary period had expired during which time his performance and suitability for the post would have been assessed. They argue that the letter terminating Mr. Austin's employment accorded with the requirement for an employee on probation to get one months notice of his proposed termination, all in accordance with **section 23** of the **PRS**.

***Security of Tenure***

[46] At the same time Counsel for the defendants argues that the security of tenure which the constitution guarantees to certain employees would not apply to Mr. Austin because he did not satisfy the requirements for permanent entry into the service. They support their argument by the fact that various legislations distinguish between benefits for permanent appointees as distinct from those for temporary appointees

[47] The argument was that Mr. Austin was employed for only five months before his employment was terminated and therefore the notice of one month which he received was reasonable and was all to which he was entitled.

***Security Check***

[48] The defendants maintain that the security check of Mr. Austin done by the police is routine and is done prior to granting an extension of a contract or a permanent appointment. The check is in accordance with the **PSR** and the employee being checked would not be entitled to be involved in the investigations. It would be counterproductive to involve the employee in the independent investigation of himself.

[49] Further, contends the Commission, in seeking permanent employment Mr. Austin impliedly agreed to the conduct of the investigations which were also in furtherance of the public's interest and thus justified in a free and democratic society. This accorded with the provisions of **section 13(2)** of the **Constitution**.

*Publication of the security report*

[50] The defendants submit that the subsequent publication of the report was not by either defendant but in any event was on an occasion of qualified privilege, without malevolence, spite or intention to injure Mr. Austin's dignity or pride.

**DISCUSSION**

**Temporary Employment**

[51] The contract employing Mr. Austin describes him as a "temporary employee" but does not define "temporary employee" and the parties disagree fundamentally as to who is properly considered to be such an employee.

[52] The Commission has turned to the **2<sup>nd</sup> Schedule of the Public Service Regulations** for support of its argument that Mr. Austin is a temporary employee, and thus subject to dismissal in the manner in which it was purportedly done.

***2<sup>nd</sup> Schedule of the Public Service Regulations***

[53] **Section 19(b)** of the Public Service Regulations allows for the dismissal of a temporary employee after an informal enquiry or indeed without an enquiry being held at all, and without any reason being given for the dismissal. The Regulations would apply to Mr. Austin if he were a temporary employee within the context of the Regulations.

**Is Mr. Austin a temporary employee?**

[54] Here in the Regulations, as in the letter of employment, there is no definition of "temporary". **Section 19** of the 2<sup>nd</sup> Schedule, in describing the methods of termination of

employment, refers to daily paid or casual employees in the same section as is the reference to temporary employees.

*“Temporary Employees, Daily-paid Employees and Casual Employees*

*19. The following procedure shall apply only to temporary employees, daily-paid and casual employees-*

*(a) the appropriate officer may, after such informal enquiry as he may think fit, forthwith dismiss a temporary employee if he is satisfied that such employee has been guilty of any misconduct;*

*(b) the appropriate authorized officer may, without an enquiry being held or without giving any reason, dismiss a temporary employee by giving him two weeks' notice (or such other notice as may be specified in the letter of appointment) or two weeks' salary in lieu of notice:*

*(c) every daily-paid or casual employee may be dismissed by the appropriate authorized officer without an enquiry being held and without reason or notice being given. (emphasis supplied)”*

[55] There must be some similarity between those groups. However, there is no obvious similarity in my mind between the duties and responsibilities of daily paid or casual employees and those of attorneys-at-law employed as Assistant Crown Counsel in the Attorney-General's Department. Indeed, there has been no argument by the Crown that the duties of an Assistant Crown Counsel should be viewed in the same context as those of daily paid or casual employees.

[56] In my view therefore where **Section 19(b)** of the **2<sup>nd</sup> Schedule** of the **Public Service Regulations** refers to “temporary employees”, the reference is to the category of employee referred to in the section bearing similarity to each other that is, “temporary employees, daily paid or casual employees”. The method of termination described in **Section 19** refers to those employees, not to an Assistant Crown Counsel. This legislation thus does not assist in determining the meaning of “temporary” as it applies to Mr. Austin nor in determining the appropriate method of termination of Mr. Austin's employment, described as he was as being “temporary”.

***Dictionary definition***

In the absence of a definition of “temporary” in the letter of employment and in the **2<sup>nd</sup> Schedule** of the **Public Service Regulations** or indeed in any pertinent legislation, I turn

to the dictionary to provide assistance as to the definition and find that the definition there of “temporary” is “lasting only for a limited period”<sup>12</sup>

### ***Conclusion re definition of “temporary”***

[57] In my view, in the absence of any definition in the letter of employment or in any pertinent legislation, the word “temporary” in the letter which stated the terms of Mr. Austin’s employment, must be interpreted to mean, lasting only for a limited period in the context of the employee not enjoying the expectation of being permanently employed without a further assessment. It does not have a special meaning within the law nor is it to be considered a term of art. What then is the correct method of terminating the employment of Mr. Austin in all the circumstances?

### **Termination under section 43 of the Public Service Regulations**

[58] Mr. Austin relies on **section 43** of the Public Service Regulations to argue that his “temporary” employment can only be terminated in accordance with it. This provides the procedure for the dismissal of an officer whose basic salary exceeds the prescribed salary rate. It provides that such an officer may be dismissed only in accordance with the procedure prescribed there<sup>13</sup>. The section provides:

*“43(1) Subject to the provisions of these Regulations an officer may be dismissed only in accordance with the procedure prescribed by this regulation.*

*(2) The following procedure shall apply to an investigation with a view to the dismissal of an officer whose basic annual salary (whether fixed or on a scale) exceeds the prescribed salary rate-*

*(a) the Commission (after consultation with the Attorney-General if necessary) shall cause the officer to be notified in writing of the charge and to be called upon to state in writing before a specified day (which day shall allow a reasonable interval for the purpose) any grounds upon which he relies to exculpate himself;*

*(b) if the officer does not furnish such a statement within the time so specified or if he fails to exculpate himself the Governor-General shall on the recommendation of the Commission appoint to enquire into the matter a Committee consisting of not less than three persons of whom the chairman shall be a Judge, Resident Magistrate, or legal officer, or some other person possessing legal qualification; the members of the Committee shall be selected with due regard*

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<sup>12</sup> Concise Oxford English Dictionary, Twelfth Edition

<sup>13</sup> Regulation 43 Public Service Regulations

*to the standing of the officer concerned, and to the nature of the charges made against him;*

*(c) the Committee shall inform the officer charged that on a day specified the Committee will enquire into the charges and that he will be permitted to appear before the Committee and defend himself;*

*(d) if witnesses are examined by the Committee the officer shall be given an opportunity of being present and of putting questions to the witnesses on his own behalf, and no documentary evidence shall be used against him unless he has previously been supplied with a copy thereof or given access thereto;*

*(e) an officer against whom charges are preferred shall be entitled to be represented before the Committee by-*

*(i) a public officer;*

*(ii) an attorney-at-law;*

*(ii) an accredited representative of a trade union or staff association recognized as representing the category of staff of which the officer is one,*

*and the person or authority preferring the charges shall be entitled to be represented by a public officer or an attorney-at-law;*

*(f) if during the course of the enquiry further grounds of dismissal are disclosed, and the Commission thinks fit to proceed against the officer upon such grounds, the Commission shall cause the officer to be furnished with the written charge and the same steps shall be taken as those prescribed by this regulation in respect of the original charge;*

*.....”*

[59] This shows that in the dismissal procedure of a particular category of officer, **s.43(2)(a) of the Regulations** mandates the Commission, after consultation with the Attorney-General if necessary, to cause such an officer to be notified in writing of the charge and to be called upon to state in writing before a specified day any grounds upon which he relies to exculpate himself. He is to be allowed a reasonable time for that response.

[60] The **Regulations** thereafter provide details of the manner in which an enquiry is to be held into the matter and how it must be concluded. It notes in particular that where a Committee is appointed to enquire, the members of the committee shall be selected with due regard to the standing of the officer concerned.

[61] It is of interest that the **Regulations** provide that where in the course of the enquiry further grounds of dismissal are disclosed, the Commission must provide the officer with the written charge and the same steps concerning the original enquiry must be taken.

[62] This emphasises to my mind, the importance of the officer being given the opportunity to know the details of any accusation being levelled against him, at whatever juncture in an investigation, and to be allowed to answer to it.

[63] However, this procedure for dismissal applies to employees whose salary exceeds the prescribed salary rate<sup>14</sup>. The Public Service Regulations define the prescribed salary rate as meaning the maximum rate of basic annual salary payable under the scale for the time being applicable to the salary grade QPS/CR V. The claimant being an Assistant Crown Counsel has a salary grade of LO2 which he submitted exceeds the prescribed salary rate.

#### **Termination under s.45 of the Public Service Regulations**

However, it is **section 45** of the **PSR** on which the defendants rely to justify the manner of termination of Mr. Austin's employment. This section provides,

*"The procedure in regard to the disciplinary control of officers holding nonpensionable posts and of weekly and daily-paid staff and casual employees shall be as specified in the Second Schedule."*

[64] This section clearly refers to matters concerning disciplinary control of only officers holding non-pensionable posts and also weekly and daily-paid staff as well as casual employees. It is thus only if he falls within any of these defined categories, that Mr. Austin's employment termination would be properly under the Second Schedule of the Regulations as mandated by **s.45** of the Regulations. It is therefore important to determine if he falls under any of the categories specified in **s. 45** of the Regulations.

[65] I have already stated that there is no obvious similarity in my mind between the duties and responsibilities of daily paid or casual employees and those of attorneys-atlaw

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<sup>14</sup> Section 43 of the Public Service Regulations

employed as Assistant Crown Counsel in the Attorney-General's Department<sup>15</sup> I readily extend that exclusion to include weekly paid staff which are another category specified in **s. 45** of the Regulations..

**[66]** The remaining question therefore is whether Mr. Austin holds a non-pensionable post, another category specified in the section, which would make him subject to the **2<sup>nd</sup> Schedule of the Regulations** as mandated by **s. 45** of the Regulations.

**Does Mr. Austin hold a non-pensionable post?**

The position of "Assistant Crown Counsel" is listed in the **Civil Service Establishment (General) Order, 2016** as an established and constituted office in the public service under the heading "Attorney General's Department". It is categorized as a pensionable office.

However, the defendants argue that the claimant having been employed in a temporary capacity and by extension not being permanently appointed in any such post, such period would not be considered as qualifying pensionable service for the purposes of the **Pensions Act**.

The defendants relied on **section 15(3) (a) – (c)** of the Regulations to the **Pensions Act** which states;

*"Unless the Governor-General in any particular case, on such terms and conditions as the Governor-General thinks fit, otherwise directs, the following shall not be taken into account as service for the purposes of paragraph (2)(b)- (a) Any period of temporary service which was not immediately followed by a permanent appointment in which the officer was confirmed.;*

*(b) Any period of service during which the officer was by virtue of the terms of his appointment, on probation if either the officer was not confirmed in the appointment or the service was not immediately followed by a permanent appointment in which the officer was confirmed;*

*(c) Any period of service during which the officer contributed to the Provident Fund established under the Provident Fund Act and by such contribution became eligible for any payment under section 22 or 23 of that Act.*

**[67]** They also relied on **section 26(2)** of the Regulations which states:

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<sup>15</sup> See paragraph 55 supra

*“26. Save as otherwise provided in these Regulations there shall not be taken into account as pensionable service-*

.....

*(2) Any period of service while he was on probation or agreement, unless without a break of service he is confirmed in a pensionable office in the public service.”* [68] The letter purporting to employ Mr. Austin in a temporary position stated that he should commence work at the Attorney-General’s department as an Assistant Crown Counsel. It does not describe in any further details what the job entails or the benefits.

### **Pensionable post**

[69] The arguments of Counsel for the Commission as it concerns the post being nonpensionable, do not find favour with me. In my view the definition of “pensionable” cannot be based on whether or not Mr. Austin is in fact due to be paid a pension immediately. The important issue must be whether the category of his job now would entitle him to be considered as being eligible for pension when the appropriate time for payments of pension arrives.

### **2<sup>nd</sup> Schedule of the Public Service Regulations**

[70] Mr. Austin held a position which was gazetted as being pensionable, and he would have become pensionable if he were confirmed permanently in the post. In my view therefore, the conditions of his employment must be considered to be those of a pensionable post. Any method of termination of a non-pensionable post would not apply to him.

### **Method of Appointment**

[71] I have found no authority for the Commission to enter into a contract for temporary employment of an Assistant Crown Counsel which it purported to do. Where then does that leave the appointment and employment of Mr. Austin? The purported contract would therefore be void and the method of termination of employment detailed there would be of no effect. That is important because it is the type of employment that determines the type of termination.

*Public Service Regulations*

[72] The evidence is clear that Mr. Austin's letter of employment did not accord with the method of employment prescribed in the Public Service Regulations which stipulates that on first appointment to the public service an officer is required to serve a probationary period of one year unless a shorter period is specified in the letter of appointment. There was no such stipulation in the letter.

[73] The **Regulations** contain a form to be used as a letter of appointment of an employee on the established staff. Since the Assistant Crown Counsel position is on the establishment it seems to me that Mr. Austin's letter of appointment should have been in conformity with it. The contract purportedly engaging Mr. Austin makes no specific reference to a period for probation. Neither does it refer to any assessment period unlike **Regulation 23** which stipulates that:

*"(2) At intervals of six months and nine months during the probationary period Permanent Secretaries and Heads of Departments shall submit to the Chief Personnel Officer a report on every officer so promoted or appointed on probation in their Ministries or Departments. One month before the end of the probationary period Permanent Secretaries and Heads of Departments shall submit a further report and a recommendation-*

*(a) that the officer be confirmed in the appointment; or*

*(b) that the probationary period be extended; or*

*(c) that the officer's services be terminated; or*

*(d) that the officer revert to his former post."*

According to **regulation 23** therefore, the first appointment should be on probation for one year. This was not stated in the letter and thus Mr. Austin's appointment was not in accordance with that public service regulation.

*Staff orders*

[74] It is the Staff Orders on which the Commission relies as authority to contract to employ the claimant temporarily.

**Staff Orders 1.1 and 1.9.2** provide;

*1.1 HOW THEY ARE MADE*

*“All appointments into and within the Central Government Service are made in accordance with the provisions of the Public Service Regulations.”*

**[75]** However, the earlier paragraphs of this judgment show that in my view Mr. Austin’s employment was not in accordance with the Public Service Regulations, and it follows that it would not be in accordance with Staff Orders.

*Constitution*

**[76]** The Constitution details the method of appointment of a public officer. Mr. Austin argues that he is a public officer. **Section 1** of the Constitution provides that public officer means the holder of any public office and includes any person appointed to act in any such office. The constitution also provides that public office means any office of emolument in the public service.

**[77]** The position of Assistant Crown Counsel is listed in the **Civil Service Establishment Order** as an established office to which an emolument is attached, so that Mr. Austin at the pertinent time, must be regarded as being a public officer.

The defendants opposed the argument of Mr. Austin being a public officer. They relied heavily on the definition of public service in the **Civil Service Establishment Act, 1976**. There public service is defined as meaning:

*“service of the Crown in a civil capacity, permanent in nature, in respect of the government of Jamaica, so, however, that the Minister may, by order, deem service with any statutory or other body specified in the order to be public service for the purposes of this Act.”*

**[78]** The sole purpose of the **Civil Service Establishment Act** is to create the power to constitute and abolish offices in the public service. The definition of public service must be read within the context of the Act. To my mind, “service of the Crown in a civil capacity, permanent in nature” attaches to the nature of the posts created under Orders made by virtue of the Act. These posts when created would be described as part of the Establishment, and would have to be permanent in nature before being considered to be

in the public service and properly on the civil service establishment. The post itself, whilst being permanent must be independent of the holder who can hold it permanently or on probation.

**[79]** It must be noted that Orders made under the **Civil Service Establishment Act** do not provide for posts temporary in nature and therefore engagement to a temporary position in specified posts and in appropriate circumstances would be done by way of contract.

**[80]** Mr. Austin argues further that the method of appointment to public offices is prescribed in the constitution which provides:

*“125.(1) Subject to the provisions of this Constitution, power to make appointments to public offices and to remove and to exercise disciplinary control over persons holding or acting in any such office is hereby vested in the Governor-General acting on the advice of the Public Service Commission.”*

Here the letter of his purported appointment did not refer to the Governor General himself or to anyone being delegated by him.

### **Inconsistencies re Appointment**

**[81]** It is clear that the methods of appointment into the Public Service prescribed under the **Constitution**, the **Public Service Regulations**, and the **Staff Orders** differ.

1. The **Constitution** provides for the appointment of persons into public office by the Governor General acting under the advice of the Public Service Commission (s125).
2. The **Regulations** provide for a probationary period then permanent appointment. The period of probation provided in the Regulations is one year unless a shorter term is specified in the letter of appointment<sup>16</sup>. The Regulations provide further at s. 23(2) that a report on the probationer must be submitted after 6 months and 9 months.

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<sup>16</sup> Regulation 23(1)

3. The **Staff Orders** provide that the appointment may be temporary or permanent. The period of probation in the Staff Orders is 6 months.

[82] The procedure for appointment to the Civil Service is thus different in these pieces of legislation and it is clear that there is urgent need for legislative changes to allow for consistency in interpreting the law.

[83] In none of these pieces of legislation is there reference to appointment by a simple contract. This is in sharp distinction from other statutes, as accurately argued by Mr. Austin. The **Betting Gaming and Lotteries Act**<sup>17</sup> and the **Contractor General's Act**<sup>18</sup> expressly provide the subject authority with the power to engage persons by way of contract. This contrasts with the procedure for the employment of officers in the Public Service Regulations where there is no provision in the legislation for a simple contractual method of employment by the Public Service Commission. The method of engagement of Mr. Austin therefore accords with neither the **Constitution** nor the **Public Sector Regulations** which required specification of a probationary period nor the **Staff Orders**. Mr. Austin was thus engaged into the public service in a manner outside of the ambit of the legislation. Nonetheless, he is the holder of the public office of Assistant Crown Counsel albeit temporarily. In these circumstances, where the method of employment was incorrect, how can such employment be properly terminated?

[84] Equity regards as done what ought to have been done and so the irregularities in Mr. Austin's engagement should not preclude him from being entitled to the process of termination attached to his office under the legislation and/ or common law.

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<sup>17</sup> Section 25(1) of the Betting, Gaming and Lotteries Act

<sup>18</sup> Section 13 of The Contractor General's Act

## Method of termination

### *During the probationary period*

[85] Counsel for the defendants argued in the alternative that in the event the Court finds that the claimant was offered employment to act in the post of Assistant Crown Counsel, a pensionable post, he could have been terminated at any time, without any reason being given during the one-year probationary period.

[86] Indeed, it is true that **Regulation 23 of the PSR** provides for termination of employment during a probationary period. It states:

*“23 (3) Subject to the provisions of these Regulations. the appointment on probation of an officer may, at any time during the period of probation and without any reason being given, be terminated by the Governor-General acting on the recommendation of the Commission upon one month’s notice in writing or payment of one month’s salary in lieu thereof.”*

[87] The unchallenged evidence is that the letter of purported appointment made no reference to Mr. Austin being placed on probation. In any event even if it were to be construed that Mr. Austin was on probation, there was no evidence of the termination of Mr. Austin’s employment by the Governor General which is required in **Regulation 23**. In the same way that the method of appointment referred to in par 81 above showed that there should be reference to the Governor General, I would expect a similar reference to his knowledge of the termination of employment. Instead the letter read,

*“I am to inform you that your temporary employment in the Attorney General’s Chambers will be terminated with immediate effect in accordance with Regulations 19 (b) of the Schedule to the Public Service Regulations, 1961.*

*You will be paid one (1) month’s salary in lieu of notice and the vacation leave for which you are eligible.”*

[88] It was signed by Ms. Lois Parkes the Chief Personnel Officer of the 1<sup>st</sup> defendant. Ms. Parkes maintains that she has been delegated functions by the Honourable Governor General to appoint and dismiss temporary employees by virtue of item 9 of the **Schedule to the Delegation of Functions (Public Service) Order 1963**.

Mr. Austin’s evidence is that the Chief Personnel Officer has delegated authority only in relation to acting appointments, in respect of promotions and appointment and termination

in respect of public officers to posts at the level of SEG1 and below, a category that he does not fall within. Ms. Parkes was thus without authority to sign on behalf of the Governor General.

**Regulation 23** could not therefore properly apply to the termination of Mr. Austin's employment according to Mr. Austin's submissions.

### *Dismissibility of Crown Servants*

[89] Mr. Austin's submission is correct that in any event the authorities can no longer dismiss Crown servants at will who hold public office. The method of dismissal found at **s.23 (3) of the Regulations** which permits such recourse on the part of the Crown was considered in **Endell Thomas v Attorney General of Trinidad and Tobago** and in **Alfred McPherson v The Minister of Land and Environment** and was found to be unconstitutional.

[90] In **Thomas** a similar section was found to be in contravention of the right of the individual to equality of treatment from any public authority in the exercise of any functions. The Board interpreted the power to dismiss at will as meaning to remove for reasonable cause.

[91] Similarly, in **McPherson** the Court of Appeal held that on the authority of **Thomas** the doctrine of dismissibility of Crown servants at pleasure does not apply to persons who hold a public office pursuant to section 125 of the Constitution.

### *Constitution*

[92] Does the Constitution allow for the termination of Mr. Austin's employment in the manner in which it was purportedly done?

The Constitution mandates the manner of removal from office of a public officer, providing that

*"125 (3) Before the Governor-General acts in accordance with the advice of the Public Service Commission that any public officer should be removed or that any penalty should be imposed on him by way of disciplinary control, he **shall inform the officer of that advice** and if the officer then applies for the case to be referred*

*to the Privy Council, the Governor-General shall not act in accordance with the advice but shall refer the case to the Privy Council accordingly:*

*Provided that the Governor-General, acting on the advice of the Commission, may nevertheless suspend that officer from the exercise of his office pending the determination of the reference to the Privy Council.”(emphasis supplied)*

The termination of Mr. Austin’s employment as a public officer did not accord with the manner of termination stipulated in the Constitution, there being no information to him of the allegations which led to the said termination.

### **Different methods of termination of employment**

[93] The above paragraphs show that the manner of termination of employment differs according to the legislation being considered. Yet Public Services Commissions must act in conformity with governing legislation.

In **Ramoutar v Commissioner of Prisons and another** <sup>19</sup> the Judicial Committee of the Privy Council stated that;

*“The courts do not sit as a court of appeal from the decisions of the Commissioner of Prisons or the Public Service Commission, and are in no way concerned with the merits of candidates for promotion or the micro-management of personnel decisions in the prison service. The courts are, however, concerned to ensure that public bodies carry out the functions that the relevant legislation assigns to them”*

[94] The defendants have not in fact sought to elevate the Staff Orders to the level of being statutes but they have referred to them in arguing that they are empowered to hire Mr. Austin temporarily and dismiss him at will. I do not agree with that approach which shows blatant disregard for the provisions of the Constitution.

### **Void appointment**

[95] The defendants assert that if the purported appointment were deemed to be void Mr. Austin could be regarded as being employed by a general contract of employment and his employment would be terminable by one month’s notice which he had received.

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<sup>19</sup> [2012] UKPC 29

[96] Mr. Austin on the other hand correctly maintains that the category of employment created under the contract, that is, temporary employment of a public officer, does not exist because no legislation permits it. The central issue remains therefore, the manner of his termination, in the particular circumstances of his employment.

### **Employment and termination**

[97] Ms. Lois Parkes posited as to the correct method of employment and termination of employment in the public service when, in her affidavit[ she stated:

*“The office responsible for employment and termination of employment in the public service is His Excellency the Most Honourable Governor General who may by law delegate this responsibility. At all material times the Chief Personnel Officer has been delegated to appoint and terminate the claimant’s employment herein.”*

[98] However, no person or body has the power to create its own terms of engagement or termination of employment of the office holders in the public sector. The Legislation stands supreme. The importance of the role of the Governor General in the employment procedures in the public service is reflected in the form letters annexed to the Public Service Regulations, each of which makes reference to the Governor General. The Form 1 is reproduced below.

ANNEX

FORM 1

*Letter of Appointment of an Employee on the Established Staff*

*Sir, I am directed by the (Permanent Secretary/Head of Department) to inform you that, **in accordance with powers delegated to him by His Excellency the Governor-General. he has appointed you** to the post of \_\_\_\_\_ on the following conditions emphasis supplied*

- (a) your appointment takes effect from the \_\_\_\_\_ day of \_\_\_\_\_ and will be on [one] years' probation and during the probationary period your appointment may be terminated at any time without any reason being assigned;*
- (b) .....*
- (c) .....*
- (d) .....*

(e) *you will be subject to the provisions of the Public Service Regulations, 1961, governing the discipline and conditions of service of employees, and, so far as they are applicable, the Staff Orders, financial regulations and other instructions from time to time in force;*

*Yours truly, for (Permanent Secretary/Head of Department) (emphasis supplied)*

**[99]** In my view a letter of termination under the Regulations should be similar to that of appointment insofar as possible, with appropriate amendments. If there is termination under the Regulations, there must be some reference to the knowledge of the Governor General of the termination.

**[100]** Mr. Austin's employment should be under the Constitution because he is the holder of a public office. Therefore, he must be told of the advice that he be terminated and be given the opportunity for the advice to be reviewed.

**[101]** I will however consider the position in the event that I am wrong in considering Mr. Austin to be a public officer. In my view, without being designated to any particular type of employee category, Mr. Austin's treatment must nonetheless accord with the Constitution and indeed the laws of natural justice.

In the absence of a clear path to termination, it seems to me that natural justice must lead the way to a just resolution.

### *Constitution*

**[102]** Outside of the provisions for termination of employment of a public officer, the Constitution provides for a just resolution of contentious issues where it provides for a fair hearing within a reasonable time by an independent and impartial court or authority established by law.

**Section 16(1)** provides:

*"In the determination of a person's civil rights and obligations or of any legal proceedings which may result in a decision adverse to his interests, he shall be entitled to a fair hearing within a reasonable time by an independent and impartial court or authority established by law".*

*Fair hearing*

[103] Smith JA in the Court of Appeal of the United Kingdom commented on a matter before him involving the dismissal of a doctor from the Public Service without legal representation being afforded to him. There, in **Kulkarni v Milton Keynes NHS Foundation Trust and others**<sup>20</sup> he said that since the doctor had been employed by the National Health Service, he would be unemployable if he were dismissed by the Service since that was, to all intents and purposes the single employer in the Health Services in the whole country. Smith JA opined that in those circumstances there was an implied right to legal representation because otherwise the consequences could be very serious.

*Case at bar*

[104] Mr. Austin's employment was with the Attorney General's Department by way purportedly, of the Office of the Services Commissions. If, as an attorney-at-law, his employment were terminated because of what amounts to character flaws, the repercussions would likely be extensive. It is in my judgment fair to say that he should reasonably not expect to be employed by any other person or institution because an attorney-at-law's good character is fundamental to his profession. It is tantamount to being a tool of the trade. As in **Kulkarni**, Mr. Austin was purportedly employed, effectively by the single employer in the Civil Service, that is, by the Office of the Services Commissions.

[105] Mr. Austin ought to have been given the opportunity to deny, explain or accept the allegations made against him and also to be allowed to be assisted by a legal representative if he so chose. There was no acknowledgement or recognition by the Commission that the information on which it decided to terminate Mr. Austin's employment could be erroneous in part or in whole.

[106] There is no suggestion that there was an urgent situation requiring immediate termination of Mr. Austin's employment. Indeed, the contrary is true. The evidence is

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<sup>20</sup> [2009] EWCA Civ 789

that he had been assessed and the report was that he had worked well, and continued to work well, if not, excellently.

[107] There would be nothing lost by the Commission extending the opportunity to Mr. Austin to understand and respond to, the allegations being made against him by whom appeared to be persons unknown, and to be legally represented if he were so advised.

[108] This single act of termination based on an allegation of a purported serious character flaw had the potential to end his professional life and could reasonably be expected to affect his standing in society. It would also conceivably affect any non-legal job he sought in the Civil Service for which the Services Commission identifies new employees.

*Commission's entitlement to terminate*

[109] I do not accept the Commission's submission that it was entitled to terminate his employment at will and to deny him legal representation.

*Proper Approach*

[110] The proper approach to termination of employment in these circumstances where the employment commenced in a manner not contemplated by the legislation, must be either to allow a public officer to respond to the advice to the Governor General to terminate his employment or the approach detailed in **s. 16(1)** of the **Constitution** providing for the opportunity in contentious circumstances to have a fair hearing. Of course, fairness depends on the circumstances of the particular situation being considered

[111] The application of the laws of natural justice culminates in the same result as when the Constitution is applied to the termination process. Simply put, an employee should have the opportunity to know the allegations being levelled against him and to respond to them if so advised and additionally to have the option of assistance of a legal representative.

[112] The legislation shows that employees in different categories are treated differently as it concerns appointment and termination of employment. It is likely that there could be successful arguments about the constitutionality of that state of affairs. However, that was not being argued in this case because that was not an issue before this court.

***Right to be heard***

[113] Counsel for the Commission submits that there was no need to inform Mr. Austin of any allegations or to give him an opportunity to be heard because that was not required in the contract nor under the legislation on which they were relying.

[114] Mr. Austin on the other hand, argues that the decision to terminate his employment should be rendered void because he was not given the opportunity to be heard regarding the allegations and indeed not even notice of what the allegations were.

[115] In my judgment the principle that no one is to be condemned without a fair opportunity to be heard, is fundamental to our system of justice. Any contrary approach must be clearly provided for in legislation and may nonetheless be subsequently determined to be unconstitutional.

In the circumstances of this case, where the person being condemned was a public officer, holding a position which would be pensionable, the need for a fair hearing was patent. I make no comment as it concerns circumstances where persons hold nonpensionable posts and whose employment is stated to be subject to termination without being heard. That situation was not argued in this Court.

I am aware of no law which would allow an employee, of whatever standing, to be denied the opportunity to inform his employer that the allegation forming the basis for the termination of his employment is untrue.

[116] Mr. Austin should have been informed of the allegations before the letter of termination was dispatched to him. It is of interest that he has maintained his innocence and it appears that no effort has been made by the defendants to verify their information during the several years that have passed since litigation has commenced.

## **Legitimate Expectation**

[117] I do not agree that the claimant had a legitimate expectation that if he were successful in his assessment he would be permanently appointed to the position of Assistant Crown Counsel. A permanent appointment in the public service is not based solely on a performance assessment. The **Staff Orders** specify that employees entering the public service for the first time are required to pass a medical examination. Further, the position which Mr. Austin seeks to occupy must be one that is vacant on the Establishment. The **Civil Service Establishment Order** specifies the number of posts for Assistant Crown Counsel on the Establishment. Unless the post which the claimant occupies is vacant he cannot be permanently appointed to it. Section 4 of the **Civil Service Establishment (General) Order 2018** states;

*“(4) Without prejudice to the provisions of sections 36 and 37 of the Interpretation Act, regarding each Ministry or Department set out in Part I of the Schedule, the number of officers appointed to the established offices shall not, at any time, exceed the number specified in the first column of that Part.”* There is no evidence of the satisfaction of these prerequisites.

## **Breach of Constitutional Right to Privacy**

[118] Mr. Austin submits that the investigation of his private affairs was unlawful and unconstitutional. The report of the investigation contained matters which ought to be restricted from scrutiny because of his constitutional right to privacy.

Section 13(3) (j) of The **Charter of Fundamental Rights and Freedoms (Constitution Amendment) Act** guarantees the right of everyone to –

*(i) Protection from search of the person and property;*

*(ii) Respect for and protection of private and family life, and privacy of the home;*  
*and*

*(iii) Protection of privacy of other property and of communication*

[119] There lies a significant flaw in Mr. Austin’s submissions, in that they are not supported by evidence of how the investigations were conducted. Without evidence of the particular circumstances of the investigation that led to the adverse report I will not find in favour of Mr. Austin’s argument that the defendants have breached his constitutional right to privacy.

[120] In any event, it appears to me that where an attorney-at-law seeks a position at the Attorney-General's Chambers it is reasonable, and indeed should be expected, that his background, both professionally and personally, would be subject to the closest scrutiny. In this regard the prejudice and rights and freedoms of others must be balanced against the overall welfare of the public's interest.

[121] The position by its very nature would expose sensitive and private and indeed confidential matters to the attorney at law. His character must be beyond reproach so that the authorities can place full confidence in his ability to deal with matters with confidentiality and sensitivity as required. Therefore, I am of the view that there is insufficient evidence to show that the defendants, by conducting a background check on Mr. Austin have caused his constitutional right to privacy to be breached.

### **Confidentiality**

[122] Mr. Austin had a further concern about the disclosure of his finances. He argues in particular that the banker/client relationship is protected by confidence at common law and should be kept private within the meaning of **s. 13(3j)** of the **Charter of Fundamental Rights and Freedoms** which guarantees the rights as stated above..

[123] I agree with that argument. Mr. Austin's banking information is to remain private unless ordered otherwise by the Court. It ought not to be disseminated to the public without his consent.

However, in the absence of sufficient evidence of how the investigation took place and who provided information and to whom, it cannot be properly concluded that there is a breach of the banker/client relationship.

In relation to the tort of breach of confidence the cause of action could only be sustained against a person or entity with whom the confidential relationship existed. There is no evidence of that person or entity.

## The Constitution of the Commission

[124] Mr Austin argues further that the Commission which purported to terminate his employment was not properly constituted as its members had not been appointed.

[125] As the position of defendants is that the Chief Personnel Officer was empowered to appoint and dismiss Mr. Austin the constitution of the Commission is irrelevant as there is no evidence that he was dismissed on the advice of the Commission.

## Wednesbury Unreasonableness

### *Debts*

[126] Lord Diplock in **Council of Civil Service Unions v Minister of State for the Civil Service**<sup>21</sup> in referring to Wednesbury unreasonableness said,

*“By “irrationality” I mean what can now be succinctly referred to as “Wednesbury unreasonableness” (Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether the decision falls within this category is a question that judges by their training and experience should be well equipped to answer.”*

[127] In submitting that the decision was Wednesbury unreasonable Mr. Austin referred to the report which he said stated that he owed debts and which seemed to have formed the basis for the termination of his employment. Mr. Austin argued that even if that were true no reasonable decision maker would make that a basis on which to dismiss him.

[128] Counsel for the Commission, maintains simply that an adverse report was received in respect of Mr. Austin. It is their position in any event that Mr. Austin can be dismissed without an enquiry being held or without giving any reasons as in their view he is a temporary employee and is subject to the **Public Service Regulations**.

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<sup>21</sup> [1985] AC 374

[129] To my mind the presence of debts in and of itself, cannot be a bar to employment in the Chambers. If that were so, the Commission may be hard pressed to find any person to fill that position and indeed to fill any of the very many positions in the Establishment. Surely for debts to result in termination, they must be associated with some illegality or some other socially unacceptable behaviour, as for example, compulsive gambling which may leave the officer open to blackmail. Consequently, I am of the view that the actions of the 1<sup>st</sup> defendant are unreasonable in the Wednesbury sense.

### **Breach of right to equitable and humane treatment by a public authority**

[130] Mr. Austin alleges a breach of section 13 (3) (h) of the **Charter of Fundamental Rights and Freedoms**. Section 13 provides inter alia,

*“(2) Subject to sections 18 and 49, and to subsections (9) and (12) of this section, and save only as may be demonstrably justified in a free and democratic society-*

*This Chapter guarantees the rights and freedoms set out in subsections (3) . . . of this section . . . .*

*(3) The rights and freedoms referred to in subsection (2) are as follows-*

*. . . .*

*(h) the right to equitable and humane treatment by any public authority in the exercise of any function.”*

[131] To succeed in his submission Mr. Austin must show that he has been treated differently from some other similarly circumstanced person. This was the test outlined by the Privy Council in **Bhagwandeem v Attorney General of Trinidad and Tobago**<sup>22</sup>. In my view Mr. Austin has failed to meet this criterion.

[132] Mr. Austin has submitted that he has been denied the ability to access a motor vehicle at concessionary rates and has also been denied salary increments although he has successfully completed performance evaluations. He says that these benefits have been afforded to his colleagues.

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<sup>22</sup> [2004] UKPC 21

[133] At the time of the purported dismissal Mr. Austin had occupied his position for approximately five months. There is no evidence before me that at that time Mr. Austin would have been entitled to these benefits. There is no evidence of the circumstances of his colleagues who have benefitted, that is to say what criterion was applied to them and what was their status at the Chambers, that is to say whether or not they were permanently appointed.

The evidence of the circumstances surrounding the termination of Mr. Austin's employment fall short of a constitutional breach of his right to equitable and humane treatment by a public authority.

*Attorney-General's approach*

[134] The Attorney General in whose Chambers Mr. Austin was employed at the time of the purported termination of his employment appears to have shared my view that Mr. Austin should have been informed of his perceived transgressions and be given an opportunity to respond.

[135] In September 2012, the Attorney-General himself expressed his concern about the manner in which Mr. Austin's employment had been terminated without him having been given an opportunity to clarify any issue or respond to the allegations.

[136] The Attorney General, Mr. Patrick Atkinson Q.C. in a letter to Ms. Parkes of the Commission<sup>23</sup> stated:

*"I have discussed the matter with the senior management of the Chambers ("the Executive Committee") and now record our concerns and recommendations in respect of this matter."*

The Hon. Attorney General then referred to the allegations against Mr. Austin which had been made by the NIB. He then detailed his concerns and wrote:

*"We are concerned that this report was acted upon so as to lead to the termination of Mr. Austin's temporary engagement without Mr. Austin having been given the opportunity to seek clarification, respond to or rebut these allegations..."*

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<sup>23</sup> Letter dated 14 September 2012

[137] The obvious need to approach Mr. Austin's termination justly, is underscored by the undisputed evidence that his work had been consistently regarded as being of a high or excellent standard.

## **DAMAGES**

[138] Mr. Austin has claimed Damages. He asserts that the defendants abused their power and consequently he has suffered loss. He has been denied increments in his salary and has suffered an emotional, physical and mental toll. He has been humiliated, distressed and anguished. He believes that he was singled out for this treatment because of his assumption that he could not be the only legal officer in the Attorney General's Chambers or in the public service with hire purchase agreements, a mortgage in arrears or a credit card debt.

[139] I accept that he has suffered some loss as a result of the termination of his employment in these circumstances and would order damages to be assessed within the Hilary term of 2019 in this regard.

## **CONCLUSION**

[140] The decision making process of the Commission was not based on the **Staff Orders**, the **Public Service Regulations** or the **Constitution**. Nor did the principles of natural justice guide the process. It was flawed and resulted in damage to Mr. Austin. I would quash the decision to terminate his employment in that manner and would order an assessment of the damages he claims.

## **E. BROWN, J**

[141] I have had the benefit of reading the draft of my sister's judgment. There is nothing useful that I can add. I concur with her reasoning and conclusions.

## **STAMP, J**

[142] I too agree with the reasoning and conclusions of my sister and have nothing to add.

## Disposal

[143] **Judgment for the claimant. Damages to be assessed within the Hilary term of 2019.**

Orders made on Further Further Amended Fixed Date Claim Form filed 27 November, 2018 in the following terms.

*The following orders are granted:*

1. An Order of Certiorari to quash the decision to terminate the appointment of the claimant is granted.
2. An Order of Mandamus directing the first defendant to reinstate the claimant as of the 5<sup>th</sup> day of March, 2012 is granted.
3. A declaration that at all material times, the claimant was acting in a substantive post and was not a temporary employee within the meaning of the **Public Service Regulations** is granted.
4. A declaration that the claimant was denied a fair hearing is granted.
5. A declaration that the failure to give the claimant a fair hearing was unlawful and in breach of the rules of natural justice is granted.
6. A declaration that the claimant's purported termination in reliance on schedule 2 of regulation 19(b) of the **Public Service Regulations** was procedurally invalid and unlawful is granted.
7. A declaration that by his dismissal the claimant was deprived protection under section 125 of the **Constitution** and the **Public Sector Regulations** is granted.
8. A declaration that the claimant was deprived of having the benefit of the principles of due process is granted.
9. A declaration that the claimant has a legitimate expectation to be treated consistently and in the same manner that the **Public Sector Regulations** stipulate that public officers are to be treated when adverse allegations are made against them is granted.

10. A declaration that the claimant's termination was in breach of natural justice is granted.
11. A declaration that the purported termination of the claimant is null and void is granted.
12. A declaration that the purported dismissal of the claimant was Wednesbury unreasonable is granted.
13. A declaration that public officers occupying posts created under the **Civil Service Establishment Order** cannot be engaged by way of contract on such terms and on conditions as the Offices of the Services Commissions sees fit is granted.
14. An order that the police report be remitted into the custody of the claimant is granted.
15. Damages to be assessed on a date set by the Registrar within the Hilary term of 2019.

*The following orders are denied:*

17. A declaration that the claimant had a legitimate expectation that he would be subject to an assessment and, if successful, would be appointed permanently is denied.
18. A declaration that the claimant's right to privacy has been breached is denied.
19. A declaration that the claimant had been reinstated is denied. **[144]** The issue of costs is reserved