



[2022] JMSC Civ 133

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION
CLAIM NO. 2017 HCV00655**

BETWEEN	UDINE DOWNY	CLAIMANT
AND	THE POLICE SERVICE COMMISSION	1ST DEFENDANT
AND	HIS EXCELLENCY THE GOVERNOR GENERAL OF JAMAICA	2ND DEFENDANT

IN OPEN COURT

Miss Bianca Samuels instructed by Knight, Junor & Samuels for the Claimant

Mr. Ricardo Maddan instructed by the Director of State Proceedings for the Defendants

Heard: October 4, 5 and 6, 2021 and July 28, 2022

Judicial review – Retirement in the public interest – Police Services Commission – Role of Privy Council – Role of Governor General – Police Service Regulations – Regulations 26, 47 – The Jamaica (Constitution) Order in Council 1962– sections 2, 4, 32, 125, 130

WINT-BLAIR, J

[1] This matter concerns the judicial review of a decision by the second defendant to retire the claimant in the public interest. By way of a Fixed Date Claim Form filed on March 10, 2017 as amended by Wiltshire, J, the claimant seeks the following orders:

1. *A writ of certiorari to quash the decision of the respondents to retire the Claimant from the Jamaica Constabulary Force.*
2. *A declaration that the decision to retire the Claimant from the Jamaican Constabulary Force effective March 2, 2017 was made ultra vires.*
3. *Such and other orders that the Court deems fit.*
4. *Costs to be costs in the claim.*

[2] In this matter, leave was granted on February 28, 2017, by my learned brother Daye, J for judicial review of the decision of the second defendant. On September 28, 2021, an application to amend the fixed date claim form was filed and heard on the first day of trial. An oral ruling was given and its terms have been incorporated into the record in a note agreed by counsel for the parties.

[3] The orders of this court were that the amended fixed date claim form filed on September 28, 2021 was not allowed to stand as filed. The court would therefore proceed with the trial on the fixed date claim form filed on March 10, 2017 as amended by order of my learned sister Wiltshire, J on July 31, 2019, which was that there were to be only two defendants to the claim, the Police Service Commission (“the Commission”) and His Excellency, the Governor-General of Jamaica (“the Governor General”).

THE SUBMISSIONS

The claimant’s position

The right to a fair hearing

[4] It was submitted on behalf of the claimant that the defendants breached her right to a fair hearing at common law. She submitted that a number of the complaints, grounds and allegations that underpinned the decision to retire her in the public interest were insufficiently particularized and fairness demanded that she ought to have been provided with these particulars, and where possible, the evidence in support of the allegations, grounds and complaints. As a consequence, she

was unable to meaningfully and fulsomely meet the case brought against her. It is for this reason that the claimant did not respond to the Commission.

Irrelevant considerations

- [5] The claimant contended that the defendants took into consideration material which was prejudicial, false, and significantly contributed to the overall impropriety of the procedure that led to her removal from the Jamaica Constabulary Force (“JCF”). She argued that the consideration of prejudicial material in arriving at a decision that affected her livelihood was antithetical to a fair hearing.

Non-disclosure

- [6] The claimant submitted that the defendants failed to disclose the full Report of Deputy commissioner of Police (“DCP”) Delworth Heath DCP dated July 10, 2013 (“the Heath Report”) which formed a part of the material before the Commission and precipitated its recommendation. She asserted that the Heath Report also formed a part of the Governor General’s and the Privy Council’s considerations which ultimately lead to the decision to retire her in the public interest. This she argued is palpably unfair and amounts to an error of law and a failure of the Commission to take into account every relevant consideration.
- [7] Additionally, the claimant submitted that the defendants failed to disclose a report prepared by the Inspector General dated October 17, 2012. The defendants have also not indicated whether consideration was given to this report in arriving at their decision. Accordingly, she submitted that her right to due process has been infringed.

The order of Daye, J

- [8] The claimant stated that Daye, J, in his order dated February 28, 2017 granted leave only against the 3rd respondent who, at the time, was named in matter as the Governor General. She submitted therefore that the question for the court on the fixed date claim form despite the use of the plural “Respondents” therein, in

the context of the order of Daye, J is whether to grant a writ of certiorari to quash the decision of the Governor General to retire the claimant in the public interest.

- [9] Finally, she argued that the Commission took into consideration complaints that were not disclosed to her. In this regard, she contended that the genesis of the Governor General's decision was tainted and thus, the subsequent decision was also tainted.

Regulation 26

- [10] Firstly, the claimant agreed that Commission has the authority to determine whether to initiate proceedings under Regulation 26, 46 or 47 of the PSR. However, she argued that the power to do so must be exercised judiciously and fairly. In this regard, the Claimant contended that the reason given by the Commissioner of Police ("the Commissioner") for electing to proceed under Regulation 26 is insufficient. She further contended that his reason amounts to a speculation as to the likelihood of the validity of the unproven allegations instead of whether the allegations disclosed some other ground that necessitated her removal from the JCF.

- [11] Secondly, the claimant submitted that a portion of the Commissioner's report is an attempt to circumvent a more rigorous process merely because it may have inured to her benefit. To do so, she asserted would be a misuse of the power bestowed on him by the PSR. She contended that it is difficult to fathom how her alleged conduct thatspanned eight (8) years could have required her expeditious removal from the JCF under Regulations 26 instead of Regulations 46 or 47.

The role of the Governor General

- [12] It was submitted on the claimant's behalf that pursuant to section 125 (1) of the Jamaican Constitution ("the Constitution"), the Governor General is the only member of the government with the power to remove someone from public office. While he acts on advice, those who advise him cannot make the decision.

It is for this reason the claimant asserted that she could not have been retired in the public interest otherwise than by the decision of the Governor General.

- [13] Furthermore, the claimant avers that in accordance with section 13(2)(b) of the Charter of Fundamental Rights and Freedoms which includes the right to a fair hearing and due process under section 16 of the Constitution, the Governor General is prohibited from taking any action which abrogates a citizen's fundamental rights and freedoms. She submitted that the Governor General aided and abetted by the Commission and the Privy Council, breached her right to fairness/ a fair hearing. She argued that if the recommendations/advice to the Governor General is based on unfairness and procedural impropriety and he makes a decision acting on the said advice, then so too is his decision founded on unfairness and procedural irregularity.

The defendants' position

The procedure under Regulation 26 of the PCR and the role of the Governor General

- [14] Conversely, the defendants submitted that sections 125 and 130 of the Constitution grants the Governor General the power to remove or exercise disciplinary control over police officers above the rank of Inspector. The Governor General exercises this power acting on the advice of the PSC. The role of the Governor General does not include any deliberation or any form of review. He simply acts on the advice of the PSC and inform the respective parties of his decision. Regulation 26 of the PSR also highlights that it is the Governor General who is vested with the power to exercise disciplinary control over public bodies. Moreover, it was the Commissioner who recommended that the claimant be retired pursuant to Regulation 26 of the PSR. The defendants therefore submitted that the claimant has not provided any evidence that the Governor General, in making his decision, erred procedurally or acted outside the scope of his jurisdiction.
- [15] The defendants argue that the concept of retirement in the public interest is enshrined in Regulation 26 of the PSR. They further stated that under Regulation 26, charges are not required to be brought against the claimant.

While Regulations 25, 26, 46 and 47 all contain provisions for the member concerned to have a reasonable opportunity to present his or her case, the content of the procedures vary from an entitlement to make written representations (Regulations 25 and 26) to a right to an oral hearing akin to a trial in an ordinary court of law (Regulation 47).

- [16]** The defendants submitted that the report from the Commissioner to the Commission indicated that as certain evidence required for an enquiry would not be forthcoming, the grounds for removal were not suited for treatment under Regulation 47. The defendants contended that the grounds, notice and other exhibits all detail the attitude and conduct of the claimant which was unbecoming of a member of the JCF. It was also evident based on her conduct that she was no longer useful to the JCF and it was best to retire her in the public interest. Accordingly, Regulation 26 was appropriate in the circumstances.
- [17]** Further, that the grounds on which the claimant's retirement was contemplated under Regulation 26 contained sufficient particulars that afforded her a reasonable opportunity to present her case. She had been notified of the Commissioner's recommendation. The relevant documents on which the recommendation was being made had also been served on her and she was afforded the opportunity to respond, which she did. The claimant also availed herself of the opportunity to apply to the Governor General for her case to be referred to the Privy Council for its consideration and recommendation. This the defendants contended afforded her a fair hearing. Therefore, there was nothing unfair about the procedure employed under Regulation 26.
- [18]** Finally, the defendants submitted that the decision to retire the claimant in the public interest was not ultra vires. The ultimate decision to retire the claimant was made by the Governor General who is the proper person and ultimate authority by virtue of the Constitution. The decision to retire the claimant in the public interest was made on the recommendation of the Privy Council to the Governor General.

The reasonableness of the decision to retire the Claimant

- [19] It was submitted on behalf of the defendants that the claimant failed to specifically identify Wednesbury unreasonableness in the decision to retire her from the JCF. Consideration had been given to the conduct of the claimant based on reports from her seniors, juniors and citizens. Her conduct based on the reports had been found to be unbecoming of a senior member of the JCF and brought the JCF in disrepute. Additionally, her dishonest nature caused disharmony amongst her peers and her unwillingness to change, made it prudent that she be retired. In the circumstances, the defendants submitted that any reasonable tribunal addressing its mind to the facts, evidence and the JCF's orders and/or policies would have reached the same conclusion

Irrelevant considerations

- [20] The defendants contended that natural justice was observed. In the claimant was served with the material that was before the Commission. She was aware that the materials would have a bearing on the penalty that the Commission would recommend. She was also furnished with the full submission to the Privy Council.

The defendants asserted that there is no requirement that an oral hearing must be conducted to fulfil the requirements of natural justice. The referral to the Privy Council was in keeping with the provisions of the Constitution, the PSR and principles of natural justice. The fact that a finding adverse to the claimant was made does not in itself establish that she was not given a fair opportunity to be heard. In the circumstances, she has not demonstrated that she was denied a fair hearing.

The order of Daye, J

- [21] The defendants submitted that in accordance with rule 56.3(3)(b) of the Civil Procedure Rules, 2002 at the leave stage, an applicant for judicial review must satisfy the court that he has met the threshold test for leave in relation to the particular prerogative order(s) he seeks.

[22] Therefore, the application for leave must reflect the judicial review remedies being sought and the judge hearing an application for leave for judicial review must state in his order the particular judicial review remedy for which leave was granted. As a consequence, the defendants submitted that Daye J's order undoubtedly falls short. It was further submitted on the defendants' behalf that the remedies sought in the fixed date claim form do not accurately reflect the orders granted by Daye, J and are not in line with rule 56.3(3)(b) which requires that an application for leave for judicial review must state the relief sought.

[23] It is for these reasons that the defendants submitted as follows:

- 1) The court should refuse to exercise its discretion in granting the orders sought as no specific prerogative orders were granted and the claimant in pursuing an application on the "blanket order" given is inviting the court to act in error;
- 2) No leave was granted/obtained for a specific prerogative order, and the Court at this stage cannot fashion a remedy for the claimant;
- 3) The orders as granted by Daye, J are null, void and of no effect; and
- 4) On the face of it, the fixed date claim form is a nullity as it seeks the remedy of certiorari against all the respondents when no leave was granted for such a remedy.

THE LAW

The approach of the court

[24] The approach of the court in this claim is in the exercise of its supervisory jurisdiction as regards the Commission. The role of the court is to review the decision-making process of the Commission and not the correctness of the decision itself. Given that the role of the court is supervisory, in determining the matter before me, it is not for this court to substitute its own views on the matter.

The statutory and regulatory framework

[25] The Governor-General exercises functions pursuant to section 32 of the Constitution. The Constitution has to be read as a whole and it is settled that a broad, generous and purposive interpretation is to be given to its provisions (see **Julian Robinson v The Attorney General**.¹) With respect to this principle, sections 32(2), 125 and 130 have to be read together as they are the relevant constitutional provisions governing this matter. They are set out below:

“32.—(1) ...

(2) Where the Governor-General is directed to exercise any function on the recommendation of any person or authority, he shall exercise that function in accordance with such recommendation:

Provided that—

(a) before he acts in accordance therewith, he may, in his discretion, once refer that recommendation back for reconsideration by the person or authority concerned; and

(b) if that person or authority, having reconsidered the original recommendation under the preceding paragraph, substitutes therefor a different recommendation, the provisions of this subsection shall apply to that different recommendation as they apply to the original recommendation.”

Section 125 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 offices is hereby vested in the Governor-General acting on the advice of the Public Service Commission.

¹ [2019] JMFC Full 04

(2)...

(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.

(4) Where a reference is made to the Privy Council under the provisions of subsection (3) of this section, the Privy Council shall consider the case and shall advise the Governor-General what action should be taken in respect of the officer, and the Governor-General shall then act in accordance with such advice.” (Emphasis added)

[26] Section 125 is applicable to police officers by virtue of section 130 of the Constitution, which provides:

“Section 125 of this Constitution (with the substitution therein of the words “the Police Service Commission” for the words “the Public Service Commission” wherever the same occur and of the words “the Public Service Commission” for the words “the Police Service Commission” in subsection (2) thereof) shall apply in relation to police officers as it applies in relation to other public officers.”

[27] Section 125 of the Constitution prescribes that once a recommendation is received from the Commission, and before the imposition of a penalty, the Governor-General is required to inform the affected member of the recommendation. In the case at bar, the claimant was so informed. This measure is in place to afford the affected public officer the opportunity to request that her case be referred to the Privy Council for its consideration.

[28] The claimant was given an opportunity for the matter to be referred to the Privy Council for its consideration, she responded in the affirmative and her case was heard by the Privy Council. It was at the conclusion of this process that the decision to retire her in the public interest was imposed by the Governor-General based on the advice of the Privy Council.

[29] In this claim, the Governor-General has been named as a party to the action and is the second defendant to the claim. I would therefore bear in mind section 32(4) of the Constitution which provides:

“Where the Governor-General is directed to exercise any function in accordance with the recommendation or advice of, or with the concurrence of, or after consultation with, or on the representation of, any person or authority, the question whether he has so exercised that function shall not be enquired into in any court.”

[30] In order to resolve this issue, I will of course have to reference a number of additional relevant constitutional provisions in addition to the provisions previously cited.

[31] The Jamaica (Constitution) Order in Council 1962 (“the Order in Council”) has the Constitution of Jamaica as its Second Schedule. Section 2 of the Order in Council is as follows:

“2. -(1) The Orders in Council specified in the First Schedule to this Order (hereinafter referred to as “the existing Orders”) are hereby revoked.

(2) Notwithstanding the revocation of the existing Orders the following Regulations –

a) The Public Service Regulations 1961,

b) The Judicial Service Regulations 1961,

c) The Police Service Regulations 1961 and

d) The Jamaica (Constitution) (Retirement of Entitled Officers) Regulations 1961,

made thereunder and all amendments thereto shall continue in force subject to such adaptations or modifications as may be made thereto by or under section 4 of this Order and subject to amendment or repeal by the authority having power to amend or revoke the same.

(3)

[32] Section 4 of the Order in Council reads as follows:

4.-(1) All laws which are in force in Jamaica immediately before the appointed day shall (subject to amendment or repeal by the authority having power to amend or repeal any such law) continue in force on and after that day, and all laws which have been made before that day but have not previously been brought into operation may (subject as aforesaid) be brought into force, in accordance with any provision in that behalf, on or after that day, but all such laws shall, subject to the provisions of this section, be construed, in relation to any period beginning on or after the appointed day, with such adaptations and modifications as may be necessary to bring them into conformity with the provisions of this Order.

(2) Without prejudice to the generality of the preceding subsection, in any law which continues in force on and after the appointed day or which, having been made before that day is brought into force on or after that day, unless the context otherwise requires

(a) Reference to the Governor, shall in relation to any period beginning on or after the appointed day, be construed as references to the Governor General;

...

(f) References to the Privy Council shall, in relation to any such period as aforesaid be construed as references to the Privy Council established by the Constitution;

(g) References to the Judicial Service Commission, the Public Service Commission or the Police Service Commission shall, in relation to any such period as aforesaid, be construed as references respectively to the Judicial Service Commission, the Public Service Commission or the Police Service Commission established by the Constitution;

...”

DISCUSSION

The relationship between Regulations 26, 46 and 47 of the PSR

- [33] In the case of **Kenyouth Handel Smith v The Police Service Commission and Another**², the claimant who was a Detective Sergeant of police was retired in the public interest by a decision of the Governor General under section 26 of the PSR. Mr. Smith applied for judicial review, the judicial review court refused to quash the decision.
- [34] Mr. Smith appealed. The appeal to the Court of Appeal concerned section 31(5) of the regulations which sets out the procedure for the initiation of disciplinary proceedings against a member of the JCF. Regulations 46 and 47 deal with the procedure after the disciplinary proceedings have commenced. Regulation 46 is concerned with proceedings for misconduct not warranting dismissal, while 47 is relevant to proceedings for dismissal.
- [35] Cooke, JA stated that the relationship between Regulations 26, 46 and 47 had been discussed in **Nyoka Segree v Police Service Commission**³. Therefore, the submission that the appellant had been prejudiced since Regulations 46 and 47 had not been employed was rejected as was the submission that recourse to Regulation 26 was clearly inappropriate having regard to all the circumstances of the appellant’s case.
- [36] Cooke, JA went on to say:

² SCCA No. 60/2005, (unreported) delivered November 10, 2006

³ SCCA 14/2001 (unreported) delivered March 11, 2005

“Here was a member of the Jamaica Constabulary Force whose behaviour was wholly reprehensible – confidence in his ability to discharge his duty as a police officer in an honest and professional manner had been lost.”

“... The focus of Regulation 26 is the retirement in the public interest. Proceedings under Regulation 47 which may lead to dismissal, requires a more elaborate procedure in comparison with proceedings pursuant to Regulation 26. This is readily understandable since retirement in the public interest calls for expedition. The sooner an unworthy member of the Jamaica Constabulary Force is properly retired in the public interest, the better it is for our society. It would be unwise to attempt to exhaustively categorise “the grounds which cannot suitably be dealt with ...or regulation 47.... the issue of retirement can be put forward by representation to the Commission.”

[37] In the case of **The Police Service Commission, The Commissioner of Police, The Services Commission v Donovan O’Connor**⁴, the Court of Appeal made it clear that:

*“It is a matter for the Commission to determine in a particular case whether to initiate disciplinary proceedings under regulations 31 and 46-47, or to seek to retire a member of the force in the public interest, under regulation 26. The Commission is not required to demonstrate, as a precondition to proceeding under regulation 26, that the allegations against the member cannot suitably be dealt with under regulations 46 – 47; nor is the Commission required to give reasons for adopting one course in preference to the other. And, as Cooke, JA also observed in *Kenyouth Handel Smith* (at para. 7), “[i]t would be unwise to attempt to exhaustively categorise” the grounds which the Commission might consider unsuitable to be dealt with under the procedure laid down by regulations 46 – 47*

⁴ [2014] JMCA Civ 35

(though, as the learned judge also went on to say, “the need for expedition would be a consideration.”)⁵

[38] In the instant claim, the claimant’s submission that she has the right to determine the procedure to be adopted in respect of the proceedings before the Commission is not supported by the authorities cited or any other and therefore fails.

The role of the Privy Council

[39] Miss Samuels has submitted that even if not formally considered by His Excellency, his decision would have adopted the Commission’s reliance on the report of Delworth Heath in that, the decision was based on the recommendation of the Commission which itself had relied on the said report. His Excellency would have sanctioned the unfair process before the Commission which led up to the ultimate decision. The Privy Council too having had that material before them would have deliberated upon it and advised his Excellency accordingly. The decision of the Privy Council was therefore ultra vires.

[40] In the affidavit evidence of Miss Downy with respect to the proceedings before the Privy Council.⁶ She stated that the communication from the Commission contained unsubstantiated, ‘unparticularized’, arbitrary allegations as well of allegations of misconduct which were dated, going back approximately eight (8) years which made it unfair for her to properly respond.

[41] In the affidavit evidence of Mr. Gordon Shirley, Chairman of the Commission, he said that by letter dated November 6, 2014, the Notice of Grounds was sent to the claimant by the Office of the Services Commission and the claimant was given fourteen (14) days to reply.

[42] By letter dated December 3, 2014, the claimant responded to the Commission indicating an intention to challenge the Notice of Grounds and requesting

⁵ Para 31

⁶ Filed on March 10, 2017 at paragraphs 29 to 36 and affidavit filed December 4, 2019

disclosure of all supporting documentation. The claimant said that the grounds were insufficiently particularized to allow her to reply.

[43] By letter dated February 2, 2015, Mrs. Judith Cheese-Morris of the Office of the Services Commission replied to the claimant stating that the Commission had noted that the Notice of Grounds was ‘sufficiently particularized to allow her an appropriate and fulsome response’.

[44] By letter dated February 9, 2015, Mr. Howard Duncan, Industrial Relations Consultant advised the Commission that he was acting on behalf of the claimant and that he had received the letter from Mrs. Cheese-Morris⁷ with its enclosures. He stated that the claimant’s responses to ‘*prior accusations*’ made against her were not included in the documents that had been sent to her. He added that the claimant was not able to respond to most of the grounds as they related to alleged conduct occurring since 2007 of which she had no recollection. He said that it was the claimant’s desire to “*meet with the Commission with a view to appealing its ‘contemplation’*” to retire her in the public interest.

[45] By letter dated March 9, 2015, Mrs. Cheese-Morris replied to Mr. Duncan on behalf of the Commission. She enclosed in that letter, the claimant’s responses to ‘*prior accusations*’ made against her as well as the Police Commissioner’s report dated July 17, 2013 and its supporting documents. Mr. Duncan was advised that before the Commission considered the claimant’s responses to the Notice of Grounds, she was being provided with the further opportunity to submit any additional responses she wished to make within fourteen (14) days of the receipt of the said letter.

[46] Mr. Shirley said that there was no response from the claimant, Mr. Duncan or anyone acting on behalf of the claimant. However, that is not the case as Mr. Duncan had responded on behalf of the claimant in a letter dated March 16, 2015.

⁷ Secretary to the Public Service Commission

- [47] Mr. Shirley stated that the Commission met and considered the Commissioner's report further.⁸ The Commission reviewed and considered all the attachments to the Commissioner's report, the Notice of Grounds, the supporting documentation in relation to the previous accusations made against the claimant, her responses to those allegations, her letter of December 3, 2014, and Mr. Duncan's letter of February 9, 2015. The Commission carefully considered the claimant's history of service in the JCF, the comments of all her superiors in the Force, her work and worth and ultimately was satisfied that it was desirable in the public interest that the claimant be retired, and that a recommendation to that effect be made to the Governor General. Further, the Commission made its recommendation to the Governor General and submitted all the documents it had considered that had been provided by both the claimant and the Commissioner.
- [48] Miss Downy does not deny (in her affidavit in response to that of Gordon Shirley) the specific assertion that she failed to respond to the letter dated March 9, 2015 from Mrs. Cheese-Morris. She also does not mention that Mr Duncan had responded on her behalf.
- [49] The claimant applied for her matter be referred the Privy Council. She was provided with the submission to the Privy Council annexed to the affidavit of Miss Shountae Boothe⁹, Deputy Secretary and Registrar to the Privy Council in the Office of the Governor General. At the time of writing, Ms. Boothe was assigned as the Secretary to the Governor General and Clerk to the Privy Council. The forty-one (41) page submission to the Privy Council from the Commission addressed the issues of non-disclosure and stated that copies of documents requested by the claimant were forwarded to her, for which she had signed in receipt thereof on February 7, 2015.
- [50] The submission states that further disclosure was made to the claimant by the Commission on February 22, 2015. Correspondence from Mr Duncan was included in the submission and the claimant's responses to '*prior accusations*' made against her were submitted as a part of the bundle. There was also a

⁸ Affidavit of Gordon Shirley filed on September 30, 2019

⁹ Filed on September 30, 2019

response from Mr Duncan by letter dated March 16, 2016 in which he had set out his disagreement with the Commission for its refusal to meet with Miss Downy based on Regulation 26 of the PSR. Mr. Duncan's letter said that the claimant would be standing by his initial letter of February 9, 2015 which was set out in the submission in extenso.

- [51] The reasons provided on behalf of the claimant in respect of the insufficiency of particulars, the breach of natural justice, the inability to recall the older allegations, procedural impropriety and the denial of her request to meet with the Commission were all set out in full detail as well. I note that Miss Downy responded to all of the grounds save ground eleven stating that she was never aware of the request or the basis upon which that particular ground was made.
- [52] The submission placed before the Privy Council details all of the communication between Mr. Duncan and the Commission and included extensive representations submitted by Miss Downy in her own defence.
- [53] The claimant was given the right of audience at the stage of the Privy Council before the decision was made by the Governor-General, to retire her in the public interest. In light of all the circumstances, and the information that had been made available to the claimant, at the time of the hearing by the Privy Council, she had been, afforded the opportunity to make representations before a decision was made by the Governor-General and she availed herself of that opportunity.
- [54] Sections 125(3) and (4) of the Constitution provide that the Governor-General was not permitted by the Constitution to act on the Commission's recommendation without reference to the claimant. This is so because Miss Downy has a constitutional right, to request that the matter be referred to the Privy Council for its consideration. The Governor-General was no longer entitled by law to act on the Commission's recommendation, once the referral to the Privy Council was made as once the referral had been made, the recommendation of the Commission "*shall cease to have effect*".
- [55] Section 125(4) of the Constitution states that the Privy Council "*shall consider the case*" and "*shall advise the Governor-General what action should be taken in*

respect of the officer". The Governor-General "**shall**" then act in accordance with such advice" (emphasis added). The Privy Council was, therefore, not exercising a function of review of the Commission's decision to see whether it was right or wrong. The Privy Council was obliged to "consider the case" in its own right, in order to make its own independent decision on the material before it. The advice of the Privy Council therefore, replaced the recommendation of the Commission which had ceased to have effect once the referral was made.

[56] The Privy Council was obliged to consider the case before it and to advise the Governor-General on what should happen to Miss Downy (not what should happen to the decision of the Commission). The proceedings would, therefore, have been in the nature of a rehearing, not a review.

[57] Miss Samuels has indirectly raised the issue as to whether there is a casual nexus between the recommendation of the Commission and the decision made by His Excellency. In determining whether to quash an advisory decision, when the final determination rests with another body, it is open to the court to examine the degree of proximity between the act or decision that is directly adverse to the interests of the affected person. She has cited no authority for the proposition. However, this issue is discussed in the case of **Linton C. Allen v His Excellency the Right Hon Sir Patrick Allen v. The Police Service Commission**,¹⁰ where the role of the Privy Council and Governor General under the Constitution are clearly and extensively set out by McDonald-Bishop, JA. This court recognizes that while the facts and procedure under review are dissimilar, the role and function of the Privy Council and Governor General is the same as in the case at bar.

[58] The background as reproduced from the judgment of McDonald-Bishop, JA is set out below:

"[1] Up to May 2014, the appellant, Sergeant Linton C Allen ("Sergeant Allen"), was, at all material times, a member of the Jamaica Constabulary Force ("the JCF") serving at the rank of Inspector. In July 2013, disciplinary proceedings were initiated

¹⁰ [2020] JMCA Civ 63

against him by the 2nd respondent, the Police Service Commission (“the Commission”). At the end of those proceedings, Sergeant Allen was found guilty of the charges levelled against him and the Commission recommended to the 1st respondent, His Excellency, the [Most] Honourable Sir Patrick Allen (“the Governor-General”), that Sergeant Allen’s rank should be reduced from Inspector to Sergeant. Following a referral of the case to the Privy Council, the Governor-General, acting on the advice of the Privy Council, imposed on Sergeant Allen, the same penalty that was recommended by the Commission.

[2] Aggrieved by the outcome of those proceedings, Sergeant Allen applied to the Supreme Court for leave to bring a claim for judicial review of the decision of the respondents. He was successful in that application. On 14 December 2015, he commenced his claim for judicial review by way of fixed date claim form in which he sought, among other things, the following reliefs [sic]:

- i. an order of certiorari to quash the decision of the Commission which found him guilty of misconduct and which resulted in him being reduced in rank from that of an Inspector to a Sergeant;
- ii. an order of certiorari to quash the decision of the Governor-General, who, acting on the advice of the Privy Council, refused to overturn the Commission’s decision;
- iii. an order of certiorari quashing the finding of the Governor-General, who, acting on the advice of the Privy Council, concluded that a statement by Corporal Frazer was not material to his case and, therefore, would not have affected His decision as to penalty; or
- iv. in the alternative, a declaration that the penalty which had been imposed, was unreasonable in all the circumstances; and
- v. a declaration that he is still the lawful holder of the rank of Inspector.

...

[71] *In ex parte Brough*, the applicant made an application for judicial review, challenging the report of the Agricultural Dwelling-House Advisory Committee for Bedfordshire, Cambridgeshire and Northamptonshire (“the advisory committee”). The Advisory Committee had submitted an advice to the South Bedfordshire District Council (“the Council”) against his application for vacant possession of a cottage which was occupied by the applicant's former employee, the respondent in the proceedings. The Council had the duty under the statute to take full account of any advice tendered to it by the advisory committee as well as a statutory duty to give reasons for its decision if it found against the applicant. The competing parties were heard in the absence of each other. The applicant also contended that allegations were made against him without him having been afforded the opportunity to contest them. Consequently, the court decided to quash the advisory committee's report.

[74] On the basis of this principle extrapolated from *ex parte Brough*, it was open to the learned judge to examine the degree of proximity between the Commission's recommendation and the final decision of the Governor-General, acting on the advice of the Privy Council...

[72] Hodgson J's reasons, in granting the order for certiorari to quash the advisory committee's decision, are of relevance to this case. At page 108, he stated:

“In my judgment, particularly when one is considering the procedural impropriety or otherwise by which a decision of this nature — that is, one which is not finally determined — can be subject to judicial review, one has to pay great regard to a consideration which appears in a sentence of de Smith at p 234:

The degree of proximity between the investigation and an act or decision directly adverse to the interests of the person claiming entitlement to be heard may be important.

I think that is right. Merely because a decision to give advice, or the advice itself, is not finally determinative of a question is not in my view the determining factor. I think it is important to look at all the facts and see in general terms what part that subdecision, if I can coin a phrase, plays in the making of the decision as a whole.

If it is only a decision to give evidence one way or the other, then plainly it would not be subject to judicial review. But where that advice is sought by the determining authority from a committee of whose decision the authority is required by statute to take full account, and where there is some evidence that in practice the advice is — to put it no higher — highly likely to be followed, then I think it would be wrong to allow the proceedings to go further and require the applicant to wait until the decision of the local authority is made against him, if it is, before attacking that decision on the basis that the material upon which it was based is flawed.

That would seem to be a wholly unnecessary requirement, and I have no doubt on the facts of this case and within the context of this legislation that the court has power to interfere at this stage and that it is a power which it ought to exercise if it is satisfied that there has been a procedural impropriety. I am satisfied that there has been that procedural impropriety. I think that in my discretion I ought not to refuse the relief sought at this stage and the consequence of that is that this decision of the committee must be brought up to this court and quashed.” (Emphasis added)

[73] This reasoning of Hodgson J highlights that one factor that may be considered in determining whether to quash an advisory decision, when the final determination rests with another body, is the degree of proximity between the investigation and the act or decision that is directly adverse to the interests of the affected person.

[74] On the basis of this principle extrapolated from ex parte Brough, it was open to the learned judge to examine the degree of proximity between the Commission's recommendation and the final decision of the Governor-General, acting on the advice of the Privy Council. There is every indication that she did so as reflected in her examination of the role of the Commission from paragraphs [100] to [114] of her judgment and her conclusion that the Commission's recommendation was suspended once the referral was made and the Governor-General "would have then been constrained to act on the advice of the Privy Council".

[75] In ex parte Brough, the evidence indicated that the Council was required by statute to take full account of the advice from the advisory committee, and there was evidence that established that the Council usually accepted that advice (for emphasis). Consequently, in such circumstances, the preliminary advice would have been closely connected to, and directly influential in, the final decision of the Council that could have adversely affected the interests of the applicant.

[76] In this case, the degree of proximity between the advice of the Commission on penalty and the decision of the Governor-General to impose the penalty he did, is far less than in ex parte Brough. This renders the case readily distinguishable. It is obvious, as was noted by the learned judge, that in this case, subsections 125(3) and (4) of the Constitution stipulate that the Governor-General was not permitted by the Constitution to act on the Commission's recommendation regarding penalty, when it was received. This is so because Sergeant Allen had a constitutional right, which he did exercise, to request that the matter be referred to the Privy Council for its consideration. The learned judge correctly noted that once this referral had been made, any recommendations from the Commission would have been in a suspended state. In fact, at paragraph [113] of the judgment, she stated that the penalty recommended by the Commission "remained in the vein of an unactivated recommendation until Sergeant Allen could exercise his constitutional right to refer the matter to the Privy Council".

[77] In my view, although the learned judge regarded the recommendation as 'suspended', it was more than a suspension, once the referral to the Privy Council was invoked and pursued. The recommendation was no longer operable in the scheme of things as the views of the Privy Council would supersede and replace the views of the Commission in the decision making process. The advice of the Privy Council would have had to follow its independent consideration of the matter, because nowhere in the Constitution is it expressly stated (and there is nothing indicating an implication) that it should come to a decision, having regard to the recommendation of the Commission. On the wording of the constitutional provisions, it was not an appeal for the Privy Council to determine whether the Commission was right or wrong.

*[78] The Governor-General was constitutionally bound to act on the advice of the Privy Council and not that of the Commission. The involvement of the Privy Council in this case would, as a matter of law, have broken any causal nexus between the Commission's recommendation and the Governor-General's decision to impose the penalty in question. In such circumstances, the recommendation of the Commission was not sufficiently proximate, or indeed, proximate at all, to the final decision that was made regarding the penalty to be imposed because the Governor-General was not entitled to act on it. To borrow, the words of the learned judge, I would say that in such circumstances the Commission's recommendation, essentially, "remained in the vein of an unactivated recommendation". This is a fundamental difference between the procedure in *ex parte Brough* and the one followed in this case.*

[79] Therefore, even if one were to find that there was a breach of natural justice at the Commission stage of the proceedings (which is not the finding), the control or influence of the Commission over the punishment of Sergeant Allen would have been irrevocably broken by the referral to the Privy Council." (emphasis mine)

[59] This pronouncement from McDonald-Bishop, JA mirrors that of Downer, JA in respect of the binding nature of the decision of the Privy Council as the Court of

Appeal held in **Nyoka Segree v Police Service Commission**¹¹, a case relied upon by the claimant, wherein Downer, JA made the point that: *“Even if there had been no fair hearing by the Commission, so that the decision would have to be quashed, Inspector Segree still would have been bound by the decision of the Privy Council which accepted the advice of the Police Service Commission.”*

[60] It is not for this court to speculate as to whether the Privy Council has dishonoured its constitutional role and function and simply endorsed the recommendation of the Commission. There is simply no evidence that this was the case. This court must consider that the Privy Council acted in accordance with lawful authority and conducted an independent rehearing of the matter. That tribunal would have taken into account, the submissions made by both sides, to include the state of the disclosure made to Miss Downy and her posture towards the Commission; all the circumstances of the case; the personal circumstances of Miss Downy; her character and the prescribed penalties available to it, in order to arrive at its decision to be communicated to the Governor-General as it was legally obliged to do. The fact that both tribunals have made the same finding does not, without more, mean that the Privy Council conducted its proceedings in a manner which this court could construe as ultra vires.

[61] Miss Downy engaged her constitutional right to have the referral to the Privy Council pursued, therefore, the recommendation of the Commission could not have taken effect, as it was the advice of the Privy Council which displaced the recommendation of the Commission in the decision making process. There is no basis to find that there was a causal nexus between the Commission and the Governor General based on the foregoing. Similarly, there is no evidence upon which to find that either the Commission or the Governor-General (acting on the advice of the Privy Council) acted outside the scope of the Constitution or the PSR.

[62] It could be argued that as the Governor General and the Privy Council did not provide reasons, there is no way for the claimant to know what issues formed the basis of its advice and the process or reasoning to the decision reached. The

¹¹ Supreme Court Civil Appeal 142/2001, unreported, judgment delivered on March 11, 2005

failure to give reasons may give rise to submissions of illegality or irrationality. There is however, no indication in the evidence, that the claimant sought to obtain these reasons and was denied them. It is the constitutional duty of the Governor General to accept the advice of the Privy Council, therefore he cannot be said to have failed to provide reasons to the claimant.

- [63] However, the authorities state that it is incumbent upon the court in reviewing the decision to apply the principles of illegality, procedural impropriety, breach of natural justice or irrationality in the absence of reasons. This is so even if there is no statutory or common law basis to do so, such as in the case at bar on the part of the Privy Council. (See **R v Secretary of State for Trade and Industry, Ex parte Lonrho PLC**¹².)

The heads of judicial review

- [64] The grounds for judicial review were explained by Lord Diplock in **Council of Civil Service Unions v Minister for the Civil Services**¹³: At page 410 F-H, he discussed the principle of judicial review in relation to decision making powers and spoke to three heads -- illegality, irrationality and procedural impropriety:

“By illegality as a ground for judicial review, I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justifiable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

By ‘irrationality’ I mean what can now be succinctly referred to as — Wednesbury unreasonableness (Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223). It applies to a decision

¹² [1989] 1 WLR 525, at 539H–540A: “The absence of reasons for a decision where there is no duty to give them cannot of itself provide any support for the suggested irrationality of the decision. **The only significance of the absence of reasons is that if all other known facts and circumstances appear to point overwhelmingly in favour of a different decision, the decision-maker, who has given no reasons, cannot complain if the court draws the inference that he had no rational reason for his decision.**” (Emphasis added)

¹³ [1985] AC 374, 410 F - H

which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at it...

I have described the third head as — procedural impropriety rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.”

[65] Furthermore, in **Chief Constable of The North Wales Police v Evans**¹⁴ at page 1160 paragraphs F-G, Lord Hailsham of St. Marylebone L.C opined as follows:

“But it is important to remember in every case that the purpose of the remedies is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question. The function of the court is to see that lawful authority is not abused by unfair treatment and not to attempt itself the task entrusted to that authority by the law.”

Illegality

[66] An administrative decision is flawed if it is illegal. A decision is illegal if it:

- (a) contravenes or exceeds the terms of the power which authorises the making of the decision;
- (b) pursues an objective other than that for which the power to make the decision was conferred;

¹⁴ [1982] 1 WLR 1155

(c) is not authorised by any power; or

(d) contravenes or fails to implement a public duty.

[67] The task for the courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker.¹⁵

[68] Despite the absence of statutory or common-law requirements for reasons to be given for the Governor-General's decision, in determining whether the decision could be said to be illegal, there is no evidence that either the Privy Council, the Commission or the Governor-General acted outside of the Constitution or the Regulations when the process leading to the decision is examined in light of section 125 of the Constitution.

Irrationality

[69] In **Associated Provincial Houses Ltd v Wednesbury Corporation**¹⁶, at page 229, Lord Greene M.R. set out the well-trodden path :

"It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington L.J. in Short v. Poole Corporation (1) gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters.

¹⁵ DeSmith's, Judicial Review (6th edn), 5-002, 5-003

¹⁶ [1948] 1 KB 223

It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another.”

[70] The defendants relied on the case of **Regina v The Police Service Commission Ex parte John Luke Davis**¹⁷ which was cited by Straw J (as she then was) in **Linton C. Allen v His Excellency The Right Hon. Sir Patrick Allen and the Police Service Commission**¹⁸. The learned judge opined as follows:

“[60] In ex parte John Luke Davis, the applicant sought an order of certiorari to quash the advice of the Police Service Commission to recommend to the Governor-General that he be reduced in rank from Inspector consequent on disciplinary charges against him being established. The applicant argued that he had not been given a fair hearing by the Commission and that no reason was given by the Commission for its recommendation or advice. It was further claimed that the reduction in rank from that of Inspector to Sergeant was excessive, harsh and/or unreasonable in the circumstances of the case.

[61] The dicta of Harris J (as she then was) was referred to the Court wherein the legal position was stated as follows –

As a matter of law, the Commission is not empowered to make such orders touching disciplinary matters of persons of the Applicant’s rank and above. The Commission is endowed with power only to advise the Governor General and make recommendations. It has no power to make orders. It is the Applicant’s complaint that he was never given a fair hearing, or any hearing at all by the Police Service Commission and that no evidence was presented at the Enquiry to establish any misconduct on his part. The Commission never presided over the hearing. A sole Enquirer, the Honourable Mr. Justice C. Orr was appointed president of the Tribunal which heard the matter. There is no

¹⁷ (unreported) Supreme Court, Jamaica, Suit No. M82 of 2000, judgment delivered 10 November 2000

¹⁸ (supra)

evidence to establish that the Commission was in anyway instrumental in Mr. Justice Orr's appointment.

The Applicant was informed of the charges against him. He so asserts in paragraph 3 of his Affidavit. A full hearing was conducted as demonstrated by the Notes of Evidence. Evidence was presented by witnesses. The applicant was represented by counsel. His complaint therefore, is devoid of merit.

It was also declared by him that no reasons were given by the Police Service Commission for its Order and or advice. No order with respect to the Applicant was ever made by the Commission. The role of the Commission is exclusively advisory. In submitting recommendations to the Governor General it would not be enjoined to give reason. It had not participated in the trial process. It was under no obligation to give any reasons to the Applicant.

*[62] In relying on **ex parte John Luke Davis**, it was submitted that the Commission was not obliged to give reasons for its recommendation of the penalty. Furthermore section 136 (a) of the Constitution provides:*

The question whether –

(a) any Commission established by this Constitution has validly performed any function vested in it by or under this Constitution; shall not be enquired into in any court.

*[63] It was submitted that Harris J (as she then was) affirmed that unless it was shown that the Commission acted ultra vires, the court would not interfere with the exercise of its powers to make a recommendation of a penalty. Further, Harris J confirmed the principle that the remedy of certiorari does not operate to quash a recommendation or advice given by the Commission. In support of this reference was made to the English decision, **Regina v Statutory Visitors to St. Lawrence's Hospital Caterham, ex parte Pritchard** [1953] 2 All ER 766.*

[64] In **ex parte Pritchard**, the statutory visitors had submitted a report to the Board of Control recommending that the detention order in respect of an infant should be extended. The mother of the infant applied for an order of certiorari to quash the report of the visitors. Lord Goddard CJ construed the provisions of the Mental Deficiency Act and concluded that the power to make a decision of the detention of the infant rest with the Board of Control. The report of the visitors was prescribed by the Act, and was 'no more than material which was put before the Board to enable the Board to come to a decision.' He continued, at page 771, -

'It is impossible, looking at the whole of the section, to say that the visitors are to hold anything which can be called an inquiry in the sense that persons shall be allowed to be present at the inquiry or that they shall hear evidence. They have to form an opinion and report to the board, and to say that their report, which is nothing more than a report of their opinion, can be brought up to be quashed by this court by means of certiorari would be extending the doctrine relating to certiorari to an unlimited and an unfortunate extent.'

[65] With regards to the instant case, it was submitted that the recommendation of the Commission cannot be the subject of an order of certiorari. Further, the finding of the Court of Enquiry provided sufficient reasons for the imposition of the particular penalty. The Governor-General considered written representations from Sergeant Allen together with the findings of the Court of Enquiry before imposing the particular penalty. It was argued that Sergeant Allen has not shown that the decision was reached in a manner which betrayed substantive and procedural fairness in the circumstances.

[95]...In fact, in *ex parte John Luke Davis*, although the actual circumstances of that matter are not available to this court, the applicant, who had been the subject of four (4) disciplinary charges, was similarly reduced in rank from Inspector to Sergeant. Although no reasons have been given by the Privy Council for affirming the actual penalty, in relation

to the Commission, I note that Mrs. Reid –Jones has pointed the court to the affidavit of Mrs. Cheese-Morris where she stated as follows at paragraph 21:

These penalties were considered by the Police Service Commission. After extensive deliberations, reduction in rank was considered to be the most appropriate and was considered to be commensurate with the seriousness of the charges given the importance of command and control.

*[96] These same set of circumstances would have been before the Privy Council. In the round, when the court considers all of the above, it cannot be said that the penalty was harsh or oppressive so as to warrant a declaration that it was unreasonable in all the circumstances. Here also, the court bears in mind +the necessity of judicial restraint which is reinforced by the understanding that the primary decision maker is better - 34 - placed than the court to evaluate these matters falling within its area of expertise (Michael Fordham QC, **Judicial Review Handbook**, 6 th edn, page 148, paragraph 13.4)*

[114] I would therefore agree with my sister, Harris J (as she then was) in her decision in ex parte John Luke Davis as to the advisory role of the Commission and as such, fairness would not require that Sergeant Allen should be heard before the recommendation of the penalty by the Commission.”

[71] This court adopts the reasoning of my learned sister Straw, J (as she then was) and holds as it has not been shown that the Commission acted ultra vires, this court would not interfere with the exercise of its powers to make a recommendation of a penalty. This court would endorse the principle set down by Harris, J and affirmed by Straw J (as she then was), that the remedy of certiorari does not operate to quash a recommendation or advice given by the Commission where the recommendation of the Commission was not made ultra vires.

- [72] There are also what I would term behavioural and professional issues which are in dispute on the facts. The claimant admitted to Dr. Leveridge, during a psychological evaluation, that she could have handled the incidents put to her differently. The claimant did not provide details of those incidents to the court in her evidence so that the seriousness of these incidents could be assessed against her capacity for rehabilitation could have been weighed by the various tribunals. The evaluation would have been available to be weighed along with the other material provided to the Privy Council.
- [73] There were independent non-police witnesses who complained to the Commissioner and their complaints also formed a part of the submissions. They complained of the claimant's high-handed behaviour which could objectively be seen as abusing the office or alternatively self-righteous. There were complaints involving dishonesty in regards to work done for which payment was not forthcoming. The claimant answered those complaints in her submissions to the Privy Council.
- [74] There was a complaint involving dishonesty and unprofessional conduct from the owner of the famous Gloria's restaurant on September 13, 2013, which involved the claimant and her companion leaving having enjoyed two (2) lobsters and not being able to settle the bill as the credit card machine was non – functional. The owner offered to go with them to an ATM to collect payment. Along the way, the claimant and her companion were said to have stopped to take pictures, when the owner protested, the claimant denied knowing him. The owner stopped a passing police unit and reported the incident. The officers in that unit were a corporal and a constable, they were berated by the claimant and she “pulled rank” insisting that they make a report of their unprofessional behaviour towards her. Meanwhile, the owner called his staff and his wife to observe the incident. The bill was torn up and the owners elected not to convert the matter into court proceedings but complained to the Commissioner instead. The claimant answered this complaint in her submissions to the Privy Council.
- [75] There was an incident in which the claimant, while in a class with one Miss Richards, spoke to the latter of her mode of dress. Miss Richards responded by describing the choice Jamaican fabric of her outfit and the claimant reported the

matter to the police, causing Miss Richards to be summoned to court. The case was dismissed. Miss Downy answered this complaint in her submissions to the Privy Council.

- [76] The claimant was given a lengthy number of grounds alleging conduct which she refuted. In the interest of brevity, they have not been reproduced. The weighing exercise was done by the Privy Council afresh, inclusive of the submissions and representations Miss Downy placed before that body in her application for referral. There is no basis to find that the decision was unreasonable in the *Wednesbury* sense or made *ultra vires*.

Procedural Impropriety

- [77] It is here that I recall that the claimant pointed to the insufficient particulars as leading to her inability to answer the grounds. In support of this point, she relied on **The Police Service Commission, The Commissioner of Police v Donovan O'Connor**¹⁹. In **Donovan O'Connor**, the Court of Appeal said that the notice required to be given to a member pursuant to regulation 26 is one which affords a fair opportunity of meeting the case against him.

- [78] The Court of Appeal held that:

“In the context of regulation 26, the requirements of fairness demand that the grounds supplied to the member, must be sufficiently particularised and accompanied by a summary or some other indication of the evidence in support of it, so as to enable the member to respond meaningfully to them.”

- [79] In **Donovan O'Connor**, there were thirty-three (33) complaints to which the Commissioner of Police had referred in his report for which neither the particulars, nor the evidence in support of the complaints had been provided to the respondent or to the Commission. The Court of Appeal found that it was beyond dispute that it would have been “most difficult to respond’ to these further complaints.” The giving of notice required by Regulation 26 must be such

¹⁹ [2014] JMCA Civ 35

as to afford the respondent “a fair opportunity of meeting” the case against him. (See **Annamunthodo v Oilfields Workers’ Trade Union**²⁰)

- [80] **Donovan O’Connor** was a case in which the notice of grounds contained two (2) complaints, but the Commissioner’s report made reference to thirty-three (33) additional complaints without more. In the case at bar, there is disagreement as to whether the twelve (12) grounds were sufficiently particularised. On the face of record, the Commission and the Privy Council did not agree with the assertion that there were insufficient particulars in the notice of grounds. The evidence was that she received the Delworth Heath Report at a late stage and as it was in a large package of documents, she did not see it in time, every other page was missing and that it contained prejudicial material.
- [81] Insufficient particulars have been defined by the claimant as documents without titles or connection to the specific notice in the Notice of Grounds. It is unknown what weight was given to the Heath Report in the scheme of things. However, this was not the only report against the claimant as is evidenced by the length of the submission to the Privy Council. **Donovan O’Connor** is dissimilar from the case at bar on its facts.
- [82] It is open on the facts to find that the absence of a response to the Commission based on insufficient particulars and non-disclosure did not pose a difficulty in the claimant’s representations to the Privy Council.
- [83] There is no evidence before this court to suggest that any additional disclosure was made or that there were any other particulars provided to the claimant. Therefore, it was for the Privy Council to consider the effect of the claimant’s submissions, as well as the failure of the claimant to respond to the Commission. It was for the Privy Council to weigh the claimant’s submissions in the application for referral, using the same disclosure which had been made at the Commission stage.
- [84] The forty - one (41) page submission to the Privy Council contained the claimant’s responses to eleven (11) of the twelve (12) grounds and written

²⁰ (1961) 4 WIR 117, 120

representations in respect of her background, character, job performance, work ethic, work history, skills, abilities, talents and morals.

- [85] While it is true that there were incidents dating back to 2007, the claimant carefully set out her responses to the grounds and supported her assertions in response to the incidents cited, critically assessing the grounds as well as the report of the Commissioner.
- [86] It is the opportunity to be heard and to make representations to an independent and impartial tribunal which is the benchmark for the courts in terms of procedural fairness. In the light of the provisions of the PSR, the evidence before this court and the material that was available to it for the purpose, the Commission gave proper consideration to the Commissioner's recommendation.
- [87] On the face of the record, there is nothing which points "overwhelmingly in favour" of the Privy Council in a rehearing, arriving at a different conclusion than the Commission. Further, there is no evidence on the record that there was a failure by the Privy Council to observe the procedural rules that are expressly laid down in the Constitution by which its jurisdiction is conferred, nor any evidence of a denial of natural justice.
- [88] Having said that, the weighing up and balancing of relevant considerations and issues is primarily a matter for the tribunal and not the courts (per Lord Green MR in **Associated Provincial Picture Houses Limited v Wednesbury Corporation**²¹ at page 231; and per Lord Hailsham in **Chief Constable of the North Wales Police v Evans**²² at page 1160 H). There is no evidence on the record which could lead to a finding that there has been an improper exercise of power, or what could be described as a decision which is unreasonable, irrational or an abuse of process.

²¹ [1948] 1 K.B. 223

²² (supra)

Breach of natural justice

[89] Miss Downy has submitted that the Privy Council decision was made without reference to her. This submission is not based on the statutory framework, as Panton JA (as he then was) in **Nyoka Segree** opined that:

“It is surprising that at this stage of our jurisprudential development, it is being thought that to be heard means that evidence has to be taken viva voce. This Court has said on several occasions, for example in respect of disciplinary proceedings such as the instant matter as well as in relation to applications for licences, that the right to be heard is not confined or restricted to a viva voce hearing. The management of public affairs in this regard would be too hamstrung if all proceedings of this nature had to be done completely viva voce. The unbridled fact is that the appellant was given ample information as to what was being alleged, and was given generous opportunities to respond.”

[90] Miss Downy was, therefore, given an opportunity to be heard at the stage at which it would have mattered most, that is, before the tribunal on whose advice the Governor-General was obliged by law to act.

[91] At the stage of the Privy Council, the claimant has brought no authority that would have been binding on the court to hold that there was a legal obligation or duty on the Commission, Governor-General or Privy Council to allow for a change in the procedure as it was employed.

[92] I am satisfied that natural justice would have operated at the stage of the proceedings before the Privy Council, being the body whose decision the Governor-General was legally bound to accept. Therefore, at this final stage, it was the advice of the Privy Council that was valid and effectual for all intents and purposes and not that of the Commission which did not take effect.

[93] This court in the exercise of its supervisory jurisdiction examined the factual matrix to determine whether the entire process was objectively fair.

- [94] The claimant raised the issue of the right to a hearing, in that she had requested a meeting with the Commission. This was denied to her and Mr. Duncan on her behalf responded calling this denial a breach of natural justice. When the Commission denied the request for a meeting, the claimant did not respond further.
- [95] The Commission met to consider the report of the Commissioner without further input from the claimant who had been given an additional fourteen (14) days to participate in the proceedings. The claimant has not shown and there is no provision in the statute for an in person, oral meeting or oral hearing with the Commission. (**see Nyoka Segree**)
- [96] Having looked at the regulations, there is no right to a meeting with the Commission. The hearing before the Privy Council was afforded to Miss Downy in that the matter was considered on paper with her response to the Notice of Grounds and the representations in her own defence constituting the brief presented on her behalf. Her concerns for her ability to make answer in her own defence were conveyed to the Privy Council as part of her representations.
- [97] In all the circumstances of the case, it is for the court to consider whether the procedure, when taken as a whole, was “objectively fair”. even if the court were to find that the entire process was not objectively fair, (which is not being found) sections 125(3) and (4) of the Constitution expressly provide that the Governor-General is not permitted to act on the advice of the Commission at the time of the recommendation as the claimant has a constitutional right to have her matter referred to the Privy Council.
- [98] The proceedings against Miss Downy did not end with the decision of the Commission and no adverse result flowed from the recommendation of the Commission for while the Commission advises, it is the Governor-General who is vested with the power to exercise disciplinary control over public bodies under the Constitution.
- [99] The claimant has not adduced any evidence that the Governor General acted outside the scope of his powers. In light of the foregoing, this court finds that there was no procedural impropriety, irrationality or illegality at the stage of the

Governor General's consideration of the matter that would have warranted the intervention of the court.

[100] Counsel for the claimant submitted on the effect of the decision of the Governor General on the pension of the claimant. In the fixed date claim form there is no pleading on this aspect and counsel did not seek any further amendment as a result, it has not been addressed in this decision.

Disposition

[101] This court refuses the grant of orders for certiorari or declaration as sought by the claimant in the Fixed Date Claim Form as amended by order on March 10, 2017. No order for costs made.