

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

SUIT NO. M-156 OF 2002

IN THE MATTER of the Judicature (Civil
Procedure Code) (Amendment) (Judicial
Review) Rules, 1998

AND

IN THE MATTER of the dismissal of
Charles Ganga-Singh

AND

IN THE MATTER of the Betting Gaming
and Lotteries Act

BETWEEN CHARLES GANGA-SINGH APPLICANT

AND THE BETTING AND GAMING AND RESPONDENT
LOTTERIES COMMISSION

Mr. Bert Samuels instructed by Knight, Pickersgill, Dowding & Samuels for the
Applicant.

Mr. C. Dennis Morrison Q.C. and Mr. Courtney Bailey instructed by Dunn, Cox
for the Respondent.

October 19,20,21,28 ,2004and January 11,2005

MANGATAL J:

1. Charles Ganga-Singh is an Attorney-at-Law. He was offered the position as
Legal Officer in the service of the Betting Gaming and Lotteries Commission "the
Commission" initially on a probationary basis in November 2001. His
appointment to the position of Legal Officer was confirmed with effect from April
2002. On November 18, 2002 the Commission dismissed Mr. Ganga-Singh with

immediate effect. On the 16th of December 2002 Mr. Ganga-Singh obtained leave to apply for judicial review of the Commission's decision to dismiss him. The learned Judge who dealt with the application also ordered that the grant of leave should operate as a stay of Mr. Ganga-Singh's dismissal. Mr. Ganga-Singh is in paragraph three of his Statement seeking Writs of Certiorari and/or mandamus to quash the decision of the Commission, which he says, was arrived at in contravention of the rules of natural justice. He also contends that the decision contravenes the Public Service Regulations and the Staff Orders of the Civil Service. The point which arose for my consideration on the hearing dates is a preliminary point taken by the Respondent that judicial review is wholly inappropriate and that the continuation of the application for judicial review would be an abuse of the process of the Court.

2. On the 19th of October 2004 this matter first came on for hearing before me.

That morning Counsel for the Applicant made an application that I should recuse myself from hearing the matter. The first limb of the application was on the basis that I had at a particular time, prior to the filing of this matter, been a Partner in the firm of Dunn, Cox, Orrett and Ashenheim, now Dunn Cox, and that Dunn Cox represents the Commission. The second basis was that the Attorney General's Department gave its opinion on or about the 20th November 2002 by way of a letter in relation to a lawsuit against the Commission filed by another former employee Patrick Hall. The Attorney General's letter was offering advice to the Commission and this advice was rendered at a time when I was a Senior Member of the Attorney General's Department.

3. I considered the matter carefully and formed the view that there was no proper basis for recusing myself, as there was no real danger or likelihood of bias. There could also be no reasonable apprehension or suspicion on the part of a fair-minded member of the public that I would not discharge my duty impartially.

I completely ceased being a Partner in Dunn Cox Orrett and Ashenheim at the end of January 2000, more than four and a half years ago, long before Mr. Ganga-Singh became Legal Officer at the Commission. I do not recall ever doing any work whatsoever whilst at Dunn Cox on behalf of the Commission, whether regularly, or otherwise. As to the second limb of the application, whilst I was at the Attorney General's Department when the letter in question was written, to my knowledge I had no personal involvement whatsoever in the Patrick Hall matter, nor did I supervise or approve any advice in relation to it. I did not act for the Commission whilst at the Attorney General's Department. Further, the opinion was offered in a different matter from the instant case. I also had regard to the fact that this case was fixed for two days, there was no other judge available to hear it, and the next possible court date would have been months away. Judicial review matters must be dealt with expeditiously, though I appreciate not if there is any reasonable apprehension or suspicion of bias. However as I have already said there could be no such apprehension or suspicion here. I also had regard to Part 1 of the Civil Procedure Rules 2002 "the C.P.R." and the overriding objective of dealing with cases justly, in particular the need to deal with cases expeditiously and fairly. Dealing with a case justly also means that whilst one may be placed in a difficult personal position when a request to recuse is made, that does not mean

that recusal should take place lightly, or that the request itself should be automatically granted. I relied upon the Privy Council decision in Donald Panton and Janet Panton v. The Minister of Finance and the Attorney General Privy Council Appeal No. 20 of 2000, in particular paragraph 10. I also relied on the decision in Locabail (UK) LTD. v. Bayfield Properties Ltd. [2000] QB, 451, 480.

4. It was common ground on both sides that for the decision of the Commission to be amenable to judicial review **there has to be an issue of public law involved in this case**. That is the umbrella issue, but some subsidiary issues are:
- (a) Was the relationship between the Commission and Mr. Ganga-Singh that of master and servant prior to the decision to dismiss him or is Mr. Ganga-Singh the holder of a public office?
 - (b) Is the Applicant Mr. Ganga-Singh the holder of a permanent appointment? Does the concept of legitimate expectation apply to say that the Applicant as a permanent appointee would occupy the position for a very long time, and that he could not be terminated by three month's notice as the letter engaging his services on the face of it would suggest? If such an expectation arises, does that characterize the issue as being one of public law?
 - (c) If the relationship is that of Master and servant, and assuming that the Commission is a public authority, does that inject a public law element into the relationship of Master and Servant?
 - (d) How if at all is the question affected by the fact that Mr. Ganga-Singh was the recipient of a fiat from the Director of Public Prosecutions to prosecute offences under the Betting Gaming and Lotteries Act and that his job description required him to carry out certain prosecutorial functions?

- (e) Are the Public Service Regulations applicable to the relationship between the Commission and Mr. Ganga-Singh?
- (f) Are the Staff orders of the Public Service, 1976 applicable to the relationship between the Commission and Mr. Ganga-Singh?
- (g) If it is found that no public law issue arises, what is the appropriate way to treat with this case?

5. **(a) Was the relationship between the Commission and Mr. Ganga-Singh one of Master and Servant prior to the dismissal or was the Applicant the holder of a public office?**

To some extent Mr. Ganga-Singh's position with regard to this aspect of the matter has been difficult to follow, from the point of view of the Statement, grounds and Affidavits filed on his behalf, as well as from the submissions advanced. For example, in his Affidavit sworn to on the 29th of November 2002, paragraph 2 Mr. Ganga-Singh stated that he has been an employee of the Commission since the 3rd of December 2001. However, in paragraphs 2 to 5 of his Third Affidavit sworn to on the 24th of November 2003 Mr. Ganga-Singh claims to be the holder of a public office within the meaning of the provisions of the Constitution of Jamaica, the Civil Service Establishment Act and the Corruption Prevention Act. In paragraphs 6, and 9 to 12 of his Third Affidavit Mr. Ganga-Singh denied that the relationship of master and servant existed between himself and the Commission. In his submissions on the 20th of October 2004, Mr. Samuels on behalf of Mr. Ganga-Singh submitted that the issue is not whether the Applicant is a public officer or not, but whether the nature of the Applicant's relationship, contract, or appointment with the Commission avails him of public law. He further submitted that the issue is not whether the Applicant's relationship with the respondent is called a contract or an appointment, but rather whether the contract of employment is one that goes beyond the ordinary master servant relationship. Whilst he was being cross-examined by Mr. Dennis Morrison Q.C. Mr. Ganga-Singh maintained that he was not at any time on a contract of employment, but rather he was on a letter of appointment. He said that the distinction is that a contract of employment has a

fixed time period whereas a letter of appointment is for an indefinite period. His position was that in signing the letter dated November 14 2001 as agreeing to the terms he did not enter into a contract of employment.

6. By letter dated 14th November 2001 Mr. Ganga-Singh was offered the position of Legal Officer. It is necessary to set out most of the contents of the letter.

Dear Mr. Ganga-Singh,

Further to your application and subsequent interview on November 12 2001, you are being offered employment as Legal Officer in the service of the... Commission, effective December 3, 2001.

Your employment is for a probationary period of three months in the first instance and if your performance is regarded as satisfactory at the expiration of this period, you will be considered for permanent appointment to the position.

You will be responsible to the Executive Chairman for the due performance of your duties. A copy of the relevant job description is enclosed for your guidance.

Your appointment will be subject to such rules and regulations as the Commission may determine from time to time and will be terminable by three month's notice in writing by either side or three months pay in lieu of notice by the Commission.

Your compensation package will be as follows:

Upon confirmation in the position you will be:-

Required to participate in the Commission's pension scheme.....

Eligible for Group Life Coverage.....

Enrolled in the Commission's Health Insurance Scheme.....

Your leave entitlement will be as follows:-

Normal working hours are.....

7. Please signify your acceptance of the appointment based on the foregoing terms

and conditions by signing and returning the attached copy of this letter.

Mr. Ganga-Singh signed the letter as requested.

8. By letter dated March 22, 2002 Mr. Ganga-Singh was confirmed in the position of legal officer. That letter so far as material reads:

Dear Mr. Ganga-Singh,

In accordance with the terms of our letter to you dated November 14 2001, your appointment to the position of Legal Officer, within the services of the ...Commission is confirmed with effect from April 1, 2002.

Kindly complete and return the attached cards for membership in the Group Life, Pension and the Blue Cross Health Schemes.....

9. Section 4(1)(2) of the **Betting, Gaming and Lotteries Act** reads:

The Commission shall be a body corporate to which the provisions of section 28 of the Interpretation Act shall apply.

10. Section 28(1) of the **Interpretation Act** reads:

Subject to subsection (2) where an Act passed after the 1st April 1968, contains words establishing or providing for the establishment of a body corporate and applying this section to that body those words shall operate-

(a) to vest in that body when established-

(v) the right to regulate its own procedure and business; and

(vi) the right to employ such staff as may be found necessary for the performance of its functions....

11. Section 4(3) of the **Betting, Gaming, and Lotteries Act** states:

The provisions of the 1st Schedule shall have effect as the constitution and operation of the Commission and otherwise in relation thereto.

12. Regulation 25(1) of Part III of the 1st Schedule of the Betting Gaming and Lotteries Act provides as follows:

The Commission may appoint and employ at such remuneration and on such terms and conditions as it thinks fit a manager, a secretary and such officers, servants and agents as it thinks necessary for the proper carrying out of its functions: Provided that no salary exceeding seven thousand and five hundred dollars per annum shall be assigned to any post without the prior approval of the Minister.

13. It seems clear to me that the letter of November 12, 2001 which was signed by Mr. Ganga-Singh constituted a contract of employment between the Commission and the Applicant. He was an employee of the Commission and was not the holder of any public office. Persons holding public office are appointed by the Governor General acting on the advice of an independent body, in the case of civil servants, by the Public Services Commission and they enjoy certain constitutional protection of their post-see Section 125 of the Constitution and the Public Service Regulations, 1961. The Commission is a typical statutory corporation and is not a department of Government. I rely upon the case of **R. v. Dr. A. Binger, N.J.Vaughan, and Scientific Research Council, ex parte Bobo Squire** 21 J.L.R., 118. This was a decision of our Court of Appeal, and at page 125H, Carberry J.A. stated:

"The (Scientific Research) Council appears to me to be a fairly typical statutory corporation set up by Government, with the intent that, subject to a certain measure of overall control by Government, it is to carry out the functions set out in section 5 of the Act. It is not a department of Government but an entity with a life of its own intended to operate like any other corporation or company, liable to sue and to be sued like anyone else. Though it has public elements I would not regard it as being akin to a Government department or operating in the public law field. Such decisions as it might make would be akin to those made by any other corporation,

public or private, and so not seem to impinge on the citizen in the way that the decisions with regard to slum clearance, demolition orders, or control of building etc. do. It may from time to time get involved in the field of public law, but primarily it was intended to operate in the field of private law with the flexibility that that implies. In the course of the argument learned counsel for the appellant referred us to a decision of the High Court of Australia The Sydney Harbour Trust Commissioners v. Ryan (1913) 13 C.L.R. 358.....(page 126 I)...the case illustrates that a Statutory Corporation, once set up, enjoys all the liabilities and rights of ordinary corporations: and as regards its servants it operates in the field of private law, unless any special reason can be found, as in Ridge v. Baldwin for holding that the employment is a "public office".

Section 2 of the Corruption Prevention Act defines "public servant" so as to include persons in the service of a statutory body or authority or a government company.

In my view it makes no difference whether the Applicant Mr. Ganga-Singh falls within the definition of "public servant". The definition is for the purposes of that Act only, and in any event cannot convert the Applicant into the holder of a public office. Further, the Applicant does not fall within the definitions of officer or public service provided for under the Civil Service Establishment Act or any of the staff orders thereunder.

I also rely upon the decision of my learned sister Miss Justice Gloria Smith in the case of **Eugenie Ebanks v. Betting Gaming and Lotteries Commission** C.L. 2002/E20, decided November 10, 2003. Although an Appeal has been filed, unless the decision is overturned, I would be slow to differ. The clear and persuasive reasoning of Justice Smith commends itself to me. It is interesting to note that in the **Ebanks** case the Claimant was a Director of Administration

employed to the Commission. She claimed to be a public officer within the meaning of the Constitution. It is also interesting to note that the Affidavits of Mr. Goodison and Mr. Williams in this case, were specifically referred to in the **Ebanks** case. In her conclusions on pages 11-12 of the Judgment, Miss Justice Smith held that the definition of "the Public Service" in the Interpretation section of the Constitution demonstrates beyond doubt that the phrase is meant to cover persons employed in the "Civil service" in the strict sense of the words and not to persons employed to a statutory body. She also held that the Claimant's employment to the Commission was an ordinary contract of service and was therefore subject to the terms and conditions of that contract.

Although Mr. Samuels; who appeared as Counsel for Mr. Hall seems to have a different view as to what was actually decided, and there are no written reasons, I accept Mr. Morrison's submission that in the case of **Patrick Hall v. the Betting Gaming and Lotteries Commission** –Suit No. M.-107 OF 2002, an unreported decision of Mr. Justice Neville Clarke, of blessed memory, of 6th December 2002, Justice Clarke struck out the proceedings in respect of Mr. Hall, an Accountant, employed to the Commission as being an abuse of the process of the Court as the decision to terminate his employment was not amenable to judicial review. I accept that that was what was decided since it was indicated to me by Mr. Morrison that a substantially identical application to the application before me was made in the **Hall** case. The same Attorneys in this case appeared for the Applicant and the Commission in the **Hall** case. Mr. Samuels advises that an appeal from the decision has been filed. I find the decisions in **Ebanks** and **Hall** persuasive, but I have in any event come to the view that I have as a result of my own process of reasoning set out above which leads me to a determination that the Applicant is not without more a public officer.

I think that sub- sections 25(1)and (2) of the First Schedule of the Betting and Gaming and Lotteries Act are particularly telling. These provisions make a clear distinction between two categories of employees, i.e. general employees of the Commission and public officers who wish to gain employment with the Commission and still retain their public service entitlement. Those public officers

are regarded as continuing in the Government service by special arrangement. It is the Governor General who must approve the appointment of those public officers to any office of the Commission. The clear implication of that provision is that general employees of the Commission are not public officers.

14. Mr. Samuels had also sought to argue that sub-section 25(1) of the First Schedule of the Betting Gaming and Lotteries Act requires the Minister's approval of an appointment to the position of legal officer. Mr. Morrison's response was that the Minister was required to approve only the **salary** and not the **appointment** to the post. The argument advanced on behalf of the Applicant is untenable. The Minister of Finance was only required to approve the payment of salary over seven thousand five hundred dollars. That is the plain meaning of the sub-section. He has no right or duty to veto or approve the appointments to the staff of the Commission, far less their dismissal. Indeed, I agree with Mr. Morrison that a requirement of the Minister's approval of the employment would be contrary to all principles of good governance and is in any event not typically either the law or practice for the civil service in Jamaica or for public servants. Our Constitution insulates public servants from executive influence and that is why they are appointed by the Governor General upon the advice of a body which is independent of the executive, i.e. the Public Service Commission. I am also of the view that the requirement of the Minister's approval of one of the terms of the employment, i.e. remuneration, which was Mr. Samuels counter argument, does not invest the issue of Mr. Ganga-Singh's dismissal with any public law element.

15. The Commission had the right to appoint its staff. That power goes hand in hand with a power to dismiss. Some support for that proposition is to be found in the case of Taylor v. Mayor-Alderman-Citizens of Bridgetown 13 W.I.R.368 quite apart from the ordinary employment and contract law and the terms of sub-section 25(1) of the First Schedule to the Betting Gaming and Lotteries Commission Act .

16. Employment to the Commission is not appointment to a public office. The Commission is a body corporate and is a separate legal entity from the Crown or the Government. The Applicant's position is not dealt with in the Civil Service Establishment Act and it is not a position protected under the Constitution.
17. I hold that the relationship between the Commission and Mr. Ganga-Singh is that of Master and Servant.
18. **(b) Is the Applicant the holder of a permanent appointment, legitimate expectation, and the issue of whether public law arises.**

Mr. Samuels submitted that the Applicant occupied a permanent and pensionable position and that if one enjoys such a status, then public law applies. For this proposition he relied upon the authority of **McClelland v. Northern Island General Health Services Board**[1957] 2 A.L.L.E.R. 129. In my view this case does not assist the Applicant. It reinforces that once one is dealing with employment, even if one is offered "permanent and pensionable" employment, all that means is that one is being offered general as opposed to temporary employment. Apart from a special condition, such employment is always liable to be determined by reasonable notice, or as in a case such as the instant case, it can be determined in accordance with the notice period set out in the contract of employment. Such a contract can also be terminated for just cause without notice unless there are special provisions to be considered. The term "permanent appointment" in the letter of November 14 2001 means nothing more than that the Applicant would now be in the general employment of the Commission as opposed to the temporary or probationary employment. He would be on the general staff with an expectation that, apart from misconduct or inability to perform the duties of his office, the employment would continue for an indefinite period. However, such a general employment would be subject to the terms of the letter dealing with termination, i.e. terminable on three month's notice.-see

page 133 I and page 134 I of McClelland. The case is not authority for the proposition that an issue of public law arises. Additionally, the position put forward by the Applicant during cross-examination, as to the difference between a contract of employment and a letter of appointment, i.e. that a contract of employment is for a definite period and a letter of appointment is for an indefinite period, has no sound legal basis. The Applicant seems to have confused a contract of employment with the concept of a fixed term contract of employment.

Mr. Samuels also sought to bolster his legitimate expectation argument by reference to the case of Attorney General of Hong-Kong v. NG Yuen Shiu [1983] 2 W.L.R. 735. I agree with the submission of Mr. Morrison that the applicability of the Hong Kong case begs the question of whether the application before me sounds in private law or in public law. In other words, the concept of legitimate expectation cannot be prayed in aid as a separate head of complaint, which operates outside the public law. If I find that the relationship is entirely a matter of private contract, then the vehicle of legitimate expectation cannot be prayed in aid as a separate route to arrive at a public law destination.

19. (c) Assuming that the Commission is a public authority, does that inject an element of public law into the relationship of master and servant?

The English decisions in R.v. East Berkshire Health Authority, ex parte Walsh [1984] 3 All. E.R. 425 and R.v. Civil Service Appeal Board ex parte Bruce [1998] 3 All E.R. 686 indicate that the mere fact that an applicant is employed by a public authority does not of itself inject the necessary element of public law so as to attract the remedies of administrative law or judicial review. Whether a dismissal from employment by a public authority is subject to public law remedies depends on whether there were special statutory restrictions on dismissal that underpinned the employee's position, and not on the fact of

employment by a public authority per se or the employee's seniority or the interest of the public in the functioning of the authority.

20. In the case of **Ridge v. Baldwin** [1964] A.C.40, a case often cited in this area of the law, Lord Reid discusses the three classes into which cases of dismissal fall (page 65). He states:

These appear to fall into three classes: dismissal of a servant by his master, dismissal from an office held during pleasure, and dismissal from an office where there must be something against a man to warrant his dismissal.

The law regarding master and servant is not in doubt. There cannot be specific performance of a contract of service, and the master can terminate the contract with his servant at any time and for any reason or for none. But if he does so in a manner not warranted by the contract he must pay damages for breach of contract. So the question in a pure case of master and servant does not at all depend on whether the master has heard the servant in his own defence: it depends on whether the facts emerging at the trial prove breach of contract. But this kind of case can resemble dismissal from an office where the body employing the man is under some statutory or other restriction as to the kind of contract which it can make with its servants, or the grounds on which it can dismiss them.

21. Mr. Samuels argued that the starting point in the analysis is the letter of November 14, 2001, in particular the words "Your appointment will be subject to such rules and regulations as the Commission may determine from time to time". He argued that the letter did not constitute the entire relationship that the Applicant had with the Respondent and that the Staff orders and Regulations of the Civil Service and the Public Service Regulations also apply. This argument is discussed further at paragraphs 52-53 below.
22. He also argued that the term "rules and regulations" also includes the Schedule of the Betting Gaming and Lotteries Act, and he made reference to section 15 of the First Schedule which speaks to the fact that a person having an interest must

disclose that interest and must not sit to consider the matters in respect of which he has an interest. He claimed that two of the Commissioners sat at the investigative hearing and participated in the decision to dismiss the Applicant and that they had an interest in the matter.

23. Section 15 of the Schedule reads as follows:

A member of the Commission who is directly or indirectly interested in any matter which is being dealt with by the Commission-

- a. shall as soon as possible after the relevant facts have come to his knowledge disclose the nature of his interest at a meeting of the Commission; and*
- b. shall not take any part after the disclosure in any deliberation or decision of the Commission with respect to that matter.*

In my view, the real thrust of that section is to prevent members of the Commission from participating in matters in which they have their own personal interests and in respect of which a conflict of interest could possibly arise. This section cannot be read as according to an employee of the Commission any right to a hearing which he did not otherwise have, or to any of the natural justice protections arising on the right to a hearing, such as a right to be heard by an unbiased and impartial tribunal. This section is a classic standard form section, appearing in Statutes governing statutory corporations dealing with conflicts of interest, and indeed finds its equivalent in the articles of association of private companies. It in no way whatsoever points to an issue of public law. It is too late in the day to so interpret this section.

Mr. Samuels also sought to find statutory underpinning for the Applicant's status in the sections dealing with "authorized officer" in the Betting Gaming and Lotteries Act. Those sections are in my view irrelevant to the point under consideration, i.e. was there any statutory underpinning governing the dismissal of the Applicant.

Subject to the points discussed below, I can find no statutory restrictions on Mr. Ganga-Singh's dismissal underpinning his position.

24. **(d) How if at all is the question affected by the fact that the Applicant from time to time had a general fiat from the Director of Public Prosecutions to prosecute offences under the Betting Gaming and Lotteries Act?**

25. The Applicant's submission under this head unfolds as follows. The office of the Director of Public Prosecutions is a public office. By virtue of section 94 of the Constitution the D.P.P. may either perform the functions himself or he may delegate his functions by way of special or general fiat. Those to whom he delegates his functions perform occupy a public office. Mr. Samuels submitted that the Applicant is no different than a member of the D.P.P.'S office. He referred to the Applicant's job description, in particular that aspect, paragraph 7, where the Applicant was required to appear on behalf of the Commission in all the Courts of Jamaica to prosecute cases of illegal betting, obtaining the fiat of the D.P.P. to do so where necessary. Mr. Samuels submitted that the Applicant's prosecutorial functions placed the issue of his dismissal more squarely within the realms of public law than was the case with Ebanks, an administrator, and Hall, an accountant. He further submitted that the Applicant was the recipient of a general, as opposed to a specific fiat from the Director.

26. By letter dated 6th December 2001, in response to a written request from the Commission, the Director of Public Prosecutions granted a prosecutorial fiat to Mr. Ganga-Singh. The letter, which was addressed to the then Executive Chairman John Thompson, was in the following terms:

Re: Prosecutorial fiat- Charles Ganga-Singh

With reference to your letter of 3rd December 2001, I have no objection to your Mr. Charles Ganga-Singh actively associating himself with the Clerk of Courts in the prosecution of charges against persons who infringe the Betting Gaming and Lotteries Act and the Regulations thereunder.

27. Although the Applicant disputes the issue of whether charges were withdrawn by him in respect of the case of **Rv. Braham** in the Resident Magistrate's Court, the Commission took the view that the Applicant had withdrawn the charges. So too did the Director of Public Prosecutions. By letter dated 24th September 2002, the Director of Public Prosecutions wrote to the Commission as follows:

Re: Withdrawal of charges against

Lee Braham

I refer to the above ending with your letter of August 14, 2002.

Where a fiat is granted in relation to a prosecution, the holder of the fiat is not empowered to withdraw the charges.

If a charge is to be withdrawn, the Director of Public Prosecutions would have to authorize it.

In the circumstances I hereby withdraw the fiat granted to Mr. Charles Ganga-Singh.

28. An investigative hearing was held by the Commission on the 13th November 2002. By letter dated November 18 2002 Mr. Ganga-Singh was informed of his dismissal with immediate effect. The letter indicated that the Board of Commissioners had concluded that there was an irreconcilable loss of trust and confidence in Mr. Ganga-Singh's ability to perform his duties. The letter advised of, amongst other matters, the following:

- a. *We find your explanation for withdrawing the charge of illegal bookmaking against the accused unacceptable;*
- b. *We find the explanation for withdrawing the charge for unlawful gaming unacceptable;*
- c. *We find your claim of the charges being duplicitous inaccurate;*
- d. *Your actions in this matter resulted in the withdrawal of your prosecutorial fiat by the Director of Public Prosecutions.*

29. Mr. Samuels relied fairly heavily on the case of R v. Crown Prosecution

Service Ex Parte Hogg, Times Law Reports, April 14 1994 page 212.

In that case it was held that a prosecutor's employment with the Crown Prosecution Service in England under the Prosecution of Offences Act 1985 was not underpinned by statute so as to render his dismissal a matter which might be challenged on public law grounds by way of judicial review. The relationship between the Crown as employer and a prosecutor as employee was ordinarily of a private law nature. However, if a prosecutor were to be dismissed for reasons, which impugned his independence in the performance of his duties, such an issue might properly fall within the area of public law. On the facts of the case of HOGG it was found that there was no case amenable to judicial review. However, Sir Thomas Bingham, Master of the Rolls as he then was, stated that if the case ever arose in which there was a plausible suggestion that action taken against a crown prosecutor was in any way attributable to any exercise of discretion, whether as to the charge being preferred or the plea to be accepted or the course to be adopted in the course of any prosecution, then his Lordship would need much persuasion that that did not fall within the area properly falling for consideration in an application for judicial review.

30. Mr. Samuels also made reference to and relied upon the case of Attorney

General of Fiji v. The Director of Public Prosecutions[1983] 2 W.L.R. 275.

In that case it was held and ultimately conceded that the office of Director of Public Prosecutions in Fiji was a business and department of Government.

31. It appears to me that what was stated by the learned Master of the Rolls with regard to the nature of an attack on the independence of a prosecutor and such an attack's implications for the remedy of judicial review were strictly speaking obiter dicta. In any event, in my view the dicta has no applicability to the instant case. I agree with Mr. Morrison that the grant of the fiat to Mr. Ganga-Singh by the Director of Public Prosecutions does not bear the weight of the Applicant's submission so as to convert the Applicant into a public officer. The plain language used by the Director of Public Prosecutions allowed the Applicant to actively

associate with, but not to replace the Clerk of Courts. In due course the Director withdrew the fiat. There was not any challenge, as indeed there could not be, to the withdrawal of the fiat as something in breach of natural justice. It was entirely a matter for the Director. For the Hogg dicta to be applicable to the facts in this case one would have to assume that the Commission's dismissal of the Applicant involved some kind of challenge to prosecutorial independence and there is no such evidence in this case. That assumption is, I agree with Mr. Morrison, not sustainable in light of the Director's unchallenged position that the Applicant did not have the power to withdraw the charges and the subsequent withdrawal of the fiat. I also agree with Mr. Morrison that the fiat remains a specific authority given in relation to charges under the Betting and Gaming and Lotteries Act, as opposed to being a general authority. Although it is given in relation to several persons rather than one that does not make it lose its specific nature.

The argument advanced regarding the Court's leave having been given for the charges to be withdrawn and reference to section 94 (5) of the Constitution does not take the matter any further as it does not clothe the matter with the mantle of public law. The Applicant is in my view not in the same position as a Crown Counsel or any other officer in the Director of Public Prosecution's Department. In Jamaica such officers are public officers.

I therefore hold that the prosecutorial functions carried out by the Applicant and the fiat granted to him and subsequently withdrawn, neither make him a public officer, nor convert the issue of his dismissal from a private contract matter into a matter concerning public law.

32. **(e) and (f), Are the Public Service Regulations, or the Staff Orders of the Civil Service applicable to the relationship between the Applicant and the Commission?** Mr. Samuels argued that the Public Service Regulations were incorporated into the relationship between the Applicant and the Commission and therefore that the Applicant's employment was underpinned by statutory protection relating to his dismissal. He referred to the decision of the Full Court of

Jamaica in R.v. The National Water Commission, ex parte Desmond Reid reported at 21 J.L.R 62. In that case it was held that the Water Commission was a statutory Corporation established for public purposes. Having adopted and published procedures to be exercised in respect of its powers of disciplinary control over its employees, it was bound by the principles of administrative law to follow those procedures until they were validly altered. Thus, if an employee was dismissed in breach of the procedural requirements he would have a right to challenge the decision by seeking a judicial review remedy. The employees to whom the disciplinary procedures applied therefore held their employment subject to the observance of those procedures in relation to them without the necessity for their express formal incorporation into their terms of employment. In that case the Court rejected an argument advanced on behalf of the N.W.C. to the effect that the disciplinary procedures not having been incorporated in the applicant's letter of appointment, they were merely internal rules and guidelines and did not bind the N.W.C. On a close analysis of this case it seems to me that an important point in relation to the disciplinary procedures in this case was that the Full Court considered the employees' positions with regard to dismissal to be statutorily underpinned. On the last page of the judgment the learned Chief Justice Ken Smith, at letter C, indicated that by virtue of the transitional provisions contained in paragraph 7 of the Second Schedule of the Act of 1980 the NWC acquired the employees of the Water Commission with the observance of the procedural requirements as a condition of their employment.

33. The first issue before applying the case law is to determine whether the Public Service regulations do apply in the instant case.
34. In sub- paragraphs 7(h) and (i) of his Affidavit sworn to on the 29th November 2002, Mr. Ganga-Singh stated:

(h) That the Commission did not follow the procedures set out in the staff orders for the Public Service, 1961, the Commission having adopted these Orders as those which the Commission must follow in these matters

(f) That the Staff Orders of the Public Service 1961 and the Civil Service Regulations which in practice have been used by the Commission were not adhered to in the conduct of this hearing

35. In paragraphs 2 and 4 of the Affidavit of Vaughn Goodison, sworn to on the 22nd of July 2003 and filed on behalf of the Applicant, Mr. Goodison stated:

2. That I am a former Board Member of the Board of Commissioners of the Respondent, and I served on this Board for a total of thirteen years from the 1st day of May 1989 until the 31st day of December 2002.

4. That I recall that the Respondent adopted and used, during my tenure as a Commissioner, the Public Service Regulations, 1961 as the Regulations to regulate its administrative proceedings in relation to staff; and that if a matter of a Investigative or Disciplinary Hearing was to be heard, the Public Service Regulations , 1961, was what was required to be followed.

36. Paragraph 4 of the Affidavit of Courtney Williams, sworn to on the 22nd July 2003 and filed on behalf of the Applicant is in exactly the same terms as paragraph 4 of Mr. Goodison's Affidavit. At paragraph 2 Mr. Williams states:

2. That I am a former member of the Board of Commissioners of the Respondent, and I served on this Board from the 1st day of August 2001 until the 31st day of December 2002.

37. Paragraphs 2, 10, 11 and 12 of the Affidavit of Howard Mollison sworn to on the 4th of July 2003 are in the following terms:

2. That I am the former Acting Chairman of the Respondent and I am duly authorized to swear to this Affidavit on behalf of the said Respondent.

10. It was never the practice of the Commission to adopt either the staff orders to the Public Service, 1961 or the Civil Service Regulations, when dismissing employees.

11. That rules and regulations on matters of employees' conduct and discipline, have been drafted for the employees of the Respondent, but they have never been put into practice.

38. *12. That even though under the Applicant's contract of employment, he could have been dismissed without a hearing, the Commission had a hearing so that the Applicant could make representations, with respect to the charges levied at him.*

39. In paragraphs 2 and 3 of the Affidavit of John Thompson, sworn to on the 25th July 2003, and filed on behalf of the Commission Mr. Thompson states:

2. That I was the Chairman of the Respondent during the period, 1st August 2001- October 2002 and I was the Executive Chairman of the Respondent during the period of the 15th August 2001 to August 2002.

40. *3. During my tenure as a member of the Board of the Respondent and in my capacity of Executive Chairman, the Public Service Regulations of 1961 was never adopted and used by the Commission in relation to its administrative proceedings with respect to staff.*

41. In paragraphs 2-5 of the Affidavit of Michael Surridge, sworn to on the 27th day of July 2003, filed on behalf of the Commission, Mr. Surridge states:

2. I am a former member of the Board of the Commissioners of the Respondent and I held that position of Commissioner for the period 21st May 1997 to the December 2002.

3. During my tenure as a Commissioner, the Respondent never adopted the Public Service Regulations, 1961 as the Regulations to regulate its administrative proceedings in relation to staff.

4. Furthermore, if the Respondent was dissatisfied with the performance of its employees, an investigative hearing would normally be held by the Respondent, which would be presided over by the Chairman of the Respondent.

5. The procedure for the holding of an investigative hearing was as follows:

- a. The employee would first be notified of the date and time of the investigative hearing.
- b. The employee would be informed of the concerns of the Respondent before the hearing.
- c. At the investigative hearing the employee would be given an opportunity to make representations.

42. In his Third Affidavit sworn to on the 24th of November 2003, Mr. Ganga-Singh refers to and relies on a letter from the Attorney General's Department dated 20th November 2002, rendering advice to the Commission in respect of the Patrick Hall matter. At paragraph 13 of that letter, exhibit C.G.3-1, the Attorney General's Department's letter states:

13. *We understand from your Mr. Lawrence Jones that, at present, the Commission applies the provisions in the Staff Orders of the Public Service, 1976, regarding vacation leave. Indeed, the Applicant(Patrick Hall) impliedly concedes this in his further Affidavit, when he states,*

"That I am an employee of the Betting Gaming and Lotteries Commission being paid an annual salary of \$1,550,037.00 and by virtue of that the Betting Gaming and Lotteries Commission must seek the approval of the Minister prior to my appointment to my post and hence the Commission must look to the Statute to determine my terms and conditions of my employment which in practice has been governed by the (Civil Service Regulations) Staff Order of the Civil Service Association of Jamaica."

43. In paragraph 7 of Mr. Ganga-Singh's Fourth Affidavit sworn to on the 23rd March 2004 the Applicant states:

7. That the Applicant awaits from the Respondent, access to the Respondent's bound volume of Minutes for the calendar year 2000, in order to establish that the Respondent adopted and used the Public Service Regulations, 1961 and the Staff Orders, 1976 for dealing with investigative hearings of staff members of the Respondent.

44. On the 29th of March 2004 it was ordered that the Applicant be permitted to inspect the Commission's Board minutes for the year 2000 and to make copies of any portion of the minutes with respect to any reference to the Public Service Regulations of 1961 and the Staff Orders of 1976.

45. Both Counsel advise that the inspection did take place. The Applicant has not put forward any documentary proof, whether in the form of copies of minutes or otherwise, of the adoption or use of the Public Service Regulations or Staff orders by the Commission.

46. On the 20th of October 2004 Mr. Samuels applied for cross-examination of the Affiants in respect of this issue as to whether the Regulations or staff orders for the Public Service, 1976 were used or adopted by the Commission. Mr. Morrison opposed the application. Though this is a preliminary point, courts can and do allow oral evidence to be led upon specific issues in order to allow for a factual basis upon which to resolve a preliminary point. See for example the cases of **Nelson v. Cookson and another** [1939] 4 All. E.R. 30, and **Razzel v. Snowball** [1954] 3 All. E.R. 429, both cases dealing with the preliminary issue whether the Public Authorities Protection Act 1893, U.K. applied and where evidence was led.

47. In my view it was just to order cross-examination and I so ordered, bearing in mind that if the preliminary point succeeds, the Applicant will be shut out from the remedy of judicial review.

48. All of the Affiants were cross-examined except Mr. Goodison. On the 21st of October neither Mr. Goodison nor Mr. Williams was available so the matter was adjourned to the 28th of October 2004 for their attendance. On that day Mr. Goodison was not in attendance. A medical report was handed to me in respect of Mr. Goodison which indicated a certain condition but gave no indication as to when if ever Mr. Goodison would be available to give evidence. Mr. Samuels applied for an adjournment in order to have Mr. Goodison attend at a later date. The application was opposed by Mr. Morrison.
49. I refused the application for an adjournment. I had regard to the nature of the proceedings, i.e. judicial review which must be dealt with expeditiously, the length of time the matter has been outstanding, the indefiniteness of the length of the adjournment bearing in mind the wording of the relevant medical report and the fact that it was the Applicant who had applied for cross-examination so late in the day. I also bore in mind the relative proportion that the issue which Mr. Goodison would be called to be cross-examined upon bore to the other evidence on the point and the rest of the case on this preliminary issue. I decided that I would still allow Mr. Goodison's Affidavit evidence to be used, bearing in mind that it is illness why he was unable to attend. However, as it had not been subjected to cross-examination I attached less weight to it than I attached to other evidence, which had been tested.
50. The cross-examination, did not and indeed, could not, upon reflection, have taken the matter much further, having regard to the fact that what was stated in the Affidavits filed on behalf of the Applicant were simply bald assertions that the Commission adopted the Public Service Regulations and the Staff Orders. Having looked at the matter in its entirety, I am not satisfied on a balance of probabilities that the Commission adopted or used the Public Service Regulations or Staff Orders in relation to its employees in respect to the question of their dismissal or otherwise. In his cross-examination the Applicant claimed that the Public Service Regulations were adopted in minutes of the Board 's meetings before his time at the Commission and used during his time. He went on to say that he cannot produce for this Court any document which demonstrates this position because

the document which he had for use at the time at the Commission was taken out of his desk drawer at the Commission and he reported this to the police. He didn't say when this report was made. Though the witness Courtney Williams insisted that the Public Service Regulations had been adopted before his stint of one year and a few months as a Commissioner, and used during his time, he was unable to give a specific date in terms of the formal adoption of the Public Service Regulations by the Commission. There is no statutory underpinning of the Applicant's dismissal by way of the Public Service Regulations or the staff orders. I am also not satisfied to the requisite standard that either the Public Service Regulations or the Staff orders for the Public Service, 1976 under the Civil Service Establishment Act were incorporated into the Applicant's contract of employment, or adopted by the Commission.

51. There is another spin on the points argued which I think for completeness I should deal with given the wide range of the submissions advanced, even though I have held that I am not satisfied that the Commission did adopt the Public Service Regulations or the Staff Orders. It has to do with the fact that although under the contract of employment the Commission was not obliged to have a hearing, they did in fact have one, and utilized certain procedures, which Mr. Mollison and Mr. Surridge refer to. Does this convert the matter to an issue of public law? Indeed, even if the Commission did have regard to the disciplinary procedures set out in the Public Service Regulations or the Staff Orders, or if the Commission plucked out certain provisions for their use and convenience, would that make the issue surrounding Mr. Ganga-Singh's dismissal an issue of public law?
52. To decide this issue it is important to review the principles concerning the relationship of master and servant:
 - (a) Whether a dismissal from employment by a public authority is subject to public law remedies depends on whether there were special statutory restrictions on dismissal which underpinned the employee's position, and

not on the fact of employment by a public authority or the interest of the public in the functioning of the authority-**R.v. East Berkshire Health Authority, ex parte Walsh; R.v. Civil Service Appeal Board, ex parte Bruce.**

(b) The statutory underpinning may arise by implication under the principal Statute or regulations-**Malloch**'s case[1971] 2 A.L.L. E R 1278, as explained by May LJ at 435f-436 h of **East Berks Health Authority.**

(c) Some of the earlier decisions in this general field, such as in **Malloch**'s case were decided before the enactment of any of the modern employment protection legislation. The concept of natural justice involved in many of these cases is now subsumed in that of an unfair dismissal-May LJ 434g and 436f in the **East Berkshire** case. In Jamaica we have extensive modern legislation in the form of the Labour Relations and Industrial Disputes Act and Code dealing with industrial disputes and unfair dismissal.

(d) If there are statutory restrictions requiring the employer, a statutory body, to contract with the employee in a certain way and the employer fails to secure those private rights for the employee, then the employee of a statutory authority who does not receive those rights has an administrative law remedy by way of judicial review-Sir John Donaldson MR-431 b-**East Berks Health Authority**

(e) However, where he is the recipient of these rights, or conditions but his complaint is that under those conditions he was deprived of certain rights or was not afforded natural justice, then his complaint is really one of unfair dismissal to be directed to an industrial disputes tribunal-431c-d and 436f-437b **East Berks Health Authority.**

(f) There are three distinct areas of law potentially involved in the cases dealing with master and servant relationships between employees and statutory bodies. These are the common law, the law of contract, the law dealing with unfair dismissal, dealt with by an industrial disputes tribunal, and administrative law in the form of judicial review.

*The ordinary employer is free to act in breach of his contracts of employment and if he does so his employee will acquire certain private law rights and remedies in damages for wrongful dismissal, compensation for unfair dismissal, an order for reinstatement or reengagement and so on. Parliament can underpin the position of public authority employees by restricting the freedom of the public authority to dismiss, thus giving the employee 'public law' rights and at least making him a potential candidate for administrative law remedies. Alternatively, it can require the authority to contract with its employees upon specified terms with a view to the employee acquiring 'private law' rights under the terms of the contract of employment. If the authority fails or refuses thus to create 'private law' rights for the employee, the employee will have 'public law' rights to compel compliance, the remedy being mandamus requiring the authority so to contract or a declaration that the employee has those rights. If, however, the authority gives the employee the required contractual protection, a breach of that contract is not a matter of 'public law' and gives rise to no administrative law remedies. -Donaldson MR-
East Berks Health Authority -430e-g.*

(g) Where a public authority has acted in breach of its own dismissal procedures but these procedures are not statutorily underpinned, the employee may succeed in an unfair dismissal application. Judicial Review will not in those circumstances be appropriate.

53. I am of the view, having reviewed the authorities and the evidence in this case, that the Commission were not obliged to have a hearing and that the Applicant was accorded more rights than were contracted for. Secondly, Parliament did not require the Commission to contract with its employees upon any particular terms-see Regulation 25(1) of the First Schedule of the Betting, Gaming and Lotteries Commission Act. There is no evidence to suggest that the procedures as to hearings adopted by the Commission became a part of the Applicant's contractual entitlement or affected the clear power of dismissal set out in the letter of 14th

November 2001 in any way and therefore such procedures as were used were in the nature of internal guidelines and had no contractual status. There was no agreement, variation or acquiescence which was operative in respect of such procedures and the contract of employment between the Commission and the Applicant.. Even if the Applicant could be said to have a legitimate expectation with regard to those procedures, and as I have said there is no such supporting evidence, that expectation would arise in the private law arena and would not create an issue of public law. This is so even if the Commission adopted as its own, procedures set out in the Public Service Regulations or the staff orders. In other words, the adoption of such regulations or provisions does not amount to statutory underpinning and at their highest would have contractual status. This is because Parliament has not underpinned the position of the Applicant and his dismissal as an employee of the Commission with any statutory restrictions. Even if the Applicant had a remedy against the Commission as a result of such an expectation,(and on the evidence there does not appear to be any such entitlement), it would sound in breach of contract or unfair dismissal and not in judicial review. It is interesting to note that in the Court of Appeal decision in Civil Appeal Number 9/2002, **The Institute of Jamaica v. The Industrial Disputes Tribunal and Coleen Beecher**, delivered April 2, 2004, the Court of Appeal found that Miss Beecher was an employee of a statutory body the Institute of Jamaica, whose terms and employment were governed by her contract and that her post was not one that attracted a right to a hearing. This was so held even though the Staff Orders for the Public Service (or according to Downer J.A.at page 29, the Public Service Regulations as to salary and leave entitlement) were expressly incorporated into her letter of employment. See pages 2,3 and 22-24 of the Judgment of Downer J.A.

54. (g) If it is found that no public law issue arises, what is the appropriate way to treat with this case?

As I have indicated, the central issue in determining this preliminary point involves a finding as to whether there is any public law issue. I have found that

there is none. The application on behalf of the Commission is for the proceedings to be struck out. There is however power to transfer proceedings from one division of the Court to another. Indeed, under the C.P.R. this is to be encouraged, since, provided a transfer is appropriate, it may result in the saving of time and expense for the parties.

55. Under Rule 56.10 of the C.P.R. which deals with administrative claims, and is headed "Joinder of Claims for other relief" the Court may direct that the whole application be dealt with as a claim, as opposed to an administrative law claim, and give appropriate directions under Parts 26 and 27 of the C.P.R. These Parts deal with case management of private law claims. Also, Rule 26.9(3) states that where there has been an error of procedure the court may make an order to put things right.
56. However, it is to be noted that in this case there is no claim by the Applicant for relief, which has as its proper basis, private law rather than public law. The relief claimed here is principally for certiorari/mandamus, and the declaration and injunction claimed stand or fall on the appropriateness of judicial review. There is here no claim for damages. Further, any issues of unfair dismissal have to be dealt with by the Industrial Disputes Tribunal and cannot be dealt with by the Supreme Court. It would therefore seem to me that this would not be an appropriate case to order the proceedings to continue as a claim. See East Berks Health Authority paragraph 2 of the Headnote and the pages of the Judgment there cited.
57. Like Sir John Donaldson M.R. at 429a of East Berks Health Authority, I take the view that the term "abuse" has offensive overtones and "misuse" is a more appropriate term to use when making a ruling in relation to the continuance of the application for judicial review. The preliminary point succeeds. My ruling is that the remedy of judicial review is wholly inappropriate and the continuation of the application for judicial review would be a misuse of the process of the Court. Accordingly, the application for judicial review is dismissed.