[2018] JMFC Full 2

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

CLAIM NO. 2016 HCV 03045

BEFORE: THE HON. MR. JUSTICE BERTRAM MORRISON
THE HON. MRS. JUSTICE SARAH THOMPSON-JAMES
THE HON. MRS. JUSTICE AUDRÉ LINDO

BETWEEN	DEBORAH PATRICK-GARDNER	CLAIMANT
AND	JACQUELINE MENDEZ	1st DEFENDANT
AND	PUBLIC SERVICE COMMISSION	2nd DEFENDANT

Mr. Hugh Wildman and Ms. Barbara Hines instructed by Hugh Wildman and Company for the claimant

Mrs. Nicole Foster-Pusey, QC., Ms. Carla Thomas and Mr Andre Moulton instructed by the Director of State Proceedings for the defendants

Heard October 19, 20 and 21, 2016 and April 19, 2018

Administrative law – Judicial review – Constitutional relief – The Public Service – Compulsory retirement – Retirement on the grounds of re-organization– redeployment – Whether public servant has the right to be heard prior to compulsory retirement – Whether the Judicature (Supreme Court) (Amendment) Act, 2016 is unconstitutional – Separation of powers – Jamaica (Constitution) Order in Council, 1962 – The Pensions Act – The Public Service Regulations, 1961- Locus standi – Certiorari – Order of prohibition – Permanent injunction – Damages in public law – Declarations

MORRISON J:

[1] I have read the judgment of my learned sister, Thompson-James, J and am in agreement with her conclusions.

[2] I will not forbear in offering my sincere appreciation to learned Counsel on both sides for their erudite labours in assisting this court.

[3] Last, but by no means least, I seek only to add that our apparent failure to provide a more timely judgment was in no small measure due to our being overtaken by a series of supervening events and for which we tender our sincerest apologies.

THOMPSON-JAMES J:

INTRODUCTION

[4] This is an application for Judicial Review by the claimant, Mrs. Deborah Patrick-Gardener, a public officer, seeking several administrative orders, including orders for certiorari, prohibition and mandamus, in respect of her removal, not only from her appointed post at the Court Management Services (CMS), but also from the Public Service by way of retirement.

BACKGROUND

[5] The claimant is the duly appointed Principal Executive Officer of the office of the Court Management Services (CMS), an office established under the auspices of the Ministry of Justice to provide administrative support to the courts of Jamaica.

[6] The 1st defendant is the Acting Chief Personnel Officer of the Office of the Services Commissions and the 2nd defendant is the constitutionally appointed body responsible for the provision of advice to the Governor General of Jamaica in respect of the appointment, removal and disciplinary control of public officers,

pursuant to section 124 of **the Jamaica (Constitution) Order in Council, 1962 (the Constitution)**.

[7] The claimant was appointed by the Governor-General, on the advice of the Public Service Commission, as the first and only Principal Executive Officer of the CMS with effect from October 1, 2011, by letter dated September 28, 2011. In this post, she had responsibility for the establishment and management of the CMS which was mandated to provide administrative services for the Courts in the areas of:

a. Finance and accounts;

b. Customer service and client services;

c. Human resources and administration;

d. Internal audit;

e. Maintenance of Court facilities; and

f. Information technology services.

She was required to report to the Chief Justice periodically in respect of the performance of her functions.

[8] Approximately two (2) years into her tenure, the claimant sought and was approved for study leave from the Public Service Commission to pursue a Bachelors of Laws (LLB) degree at the University of the West Indies. The terms of the approval were contained in a letter dated July 16, 2013, from the then Chief Personnel Officer, Dr. Lois Parkes, to the Chief Justice, the Honourable Mrs. Justice Zaila McCalla, in which the claimant was granted thirty-six (36) months study leave with effect from September 2013. Included in these terms, were the requirements that the claimant contribute her leave entitlement for at least one (1) year's service, or accept no pay for any deficit thereof; receive additional leave on full pay up to the approved period of two (2) years; and pursue the remaining period of study without pay upon further approval from the Ministry of Finance and Planning. It was also provided that if the claimant were to complete her studies earlier than projected, she was to resume duties as early as

possible after the completion date, and the resumption date was to be reported to the Office of the Services Commissions.

[9] It is the claimant's evidence that her decision to embark on her course of study arose 'as a consequence of the direction' of the Chief Justice, who suggested that she 'embark on a course of legal training in order for her to have a better appreciation of the functions of the court system'. This evidence has not been challenged by either party, nor has the claim been otherwise refuted.

[10] The claimant began her studies September 11, 2013, and successfully completed the programme in or around September 2015, having completed the program in two (2) years instead of the usual three (3). By letter dated September 9, 2015, the claimant advised the Chief Personnel Officer of her early completion of the programme and that she had resumed duties September 4, 2015. In the same letter, she proposed to immediately proceed on recreational leave with effect from September 4, 2015, the application form for which was attached to the letter. She also indicated that she had applied to the Public Service Commission for paid study leave in order to matriculate to the Norman Manley Law School, and was awaiting a response in this regard.

[11] By letter dated September 24, 2015, the Acting Senior Director of Human Resource Management and Administration of the CMS, Mrs. Bobette Dawkins, advised the claimant that approval had been given for the grant of study leave without pay for a period of twenty-four (24) months to facilitate her studies at the Law School.

[12] By letter dated September 25, 2015 directed to the Chief Personnel Officer, the claimant advised that she had resumed duties on that same date but was unable to access the Principal Executive Officer's office as it was still being occupied by the officer who had been acting in the post during her absence. As a result she was unable to perform her duties.

[13] The claimant again sent a letter, dated September 28, 2015, directed to the Chief Personnel Officer, indicating that she had not requested unpaid study leave and

was not in a position to accept that offer. In that letter, she also advised that she was again unable to access her assigned office that same day and was therefore unable to perform any duties related to her appointed post. Further, she indicated that only one third of her salary had been lodged to her account for the month of September.

[14] On that same date, by email, the Chief Personnel Officer advised the claimant that, on the recommendation of the Chief Justice, approval had been given for her to be redeployed to the Ministry of Justice with effect from September 29, 2015, until further notice, in accordance with Staff Order 1.9.3. The letter also stated that she would be required to carry out duties relating to the co-ordination of the Justice Reform Programme, along with any other duties assigned by the Permanent Secretary.

[15] The reasons for this decision to redeploy the claimant were set out in a further letter on that date from the Chief Personnel Officer to the claimant. It outlined that the claimant had been granted three years study leave and so her resumption had not been anticipated before September 2016; the final decision in respect of the claimant's application for additional paid study leave to commence in September 2015 had not been received until September 24, 2015, the date her recreational leave had expired, and that this was the normal time frame within which such a matter would be considered by the Public Service Commission and the Governor-General, given the time that her application had been received; arrangements would not have been in place in anticipation of her resumption Friday, September 25, 2015; and the Justice Reform programme, of which the Court Management Services was a component, was at a critical juncture. In all the circumstances and in the interest of the continued smooth operation of that entity, a change of leadership at the time would be unsettling.

[16] The claimant asserts that she reported for work at the Ministry of Justice as directed on September 29, 2015, and was informed in a meeting between herself, Ms. Christine Gobern, the Senior Director of Human Resources Management and Mrs. Donna Parchment Brown, the then Director of the Justice

Reform Implementation Unit, that she was to report to Mrs. Donna Parchment Brown, who was her junior. She also asserts that it was later confirmed to her by the Permanent Secretary, Mrs. Carol Palmer, that the post to which she was redeployed was related to a SEG-5 post, which is two (2) levels below her official appointment. During this period of redeployment, the claimant continued to receive the salary and emoluments attached to the post of Principal Executive Officer.

[17] The claimant further states that on October 1, 2015, she met with Dr. Parkes and indicated her concerns regarding her deployment. These concerns were put in writing in a letter dated October 16, 2015, to Dr. Parkes seeking to confirm their discussions of October 1, 2015 and a telephone conversation between both parties on the same date of the letter. In the letter, the claimant indicates that her concerns were that her deployment was inconsistent with the Public Service Regulations and Staff Order 1.9.3, in that the position to which she had been deployed was not equivalent to that of her appointed post but was rather that of a junior officer. The claimant also noted that Dr. Parkes had given an undertaking to raise her concerns with the Public Service Commission at its October 21, 2015 meeting, and asked that she be deployed to an equivalent position in accordance with the Public Service Regulations and the Staff Orders.

[18] By letter dated January 8, 2016, the claimant wrote to Dr. Parkes reminding her of her undertaking to raise the claimant's concerns with the Public Service Commission and noting that she still had not received a response in relation thereto requesting that she be advised of the decision of the Public Service Commission.

[19] Subsequently, on January 18, 2016, the claimant met with Mrs. Jacqueline Mendez who, by then, was acting as Chief Personnel Officer in place of Dr. Parkes, at the Office of the Services Commissions regarding her deployment, after which Mrs. Mendez indicated that the matter would be placed before the Public Service Commission. The claimant followed up the meeting with a letter to Mrs. Mendez dated January 25, 2016, in which she outlined what had been

discussed at the meeting regarding all that had occurred since she returned from study leave, her desire to be formally advised as to her position within two weeks of the date of the letter, and Mrs. Mendez's undertaking to place the matter before the Public Service Commission.

[20] Mrs. Mendez acknowledged receipt of the claimant's letters of January 8 and 25 by letter dated February 15, 2016, and advised that the Public Service Commission had been made aware of the claimant's concerns and a decision would be communicated to her in due course.

[21] On February 24, 2016, the **Judicature (Supreme Court) (Amendment) Act**, 2016, which had been passed in the House of Representatives on February 2, 2016, came into effect, establishing the Court Administration Division which was to supersede and replace the Court Management Services as the entity responsible for the management of the country's courts. The new entity is to be headed by the Director of Court Administration which is a new post, based on a fixed term contract. As a result, the duties that were to be carried out by the Principal Executive Officer are now to be carried out by the Director of Court Administration in Court Administration Division.

[22] It is asserted that on March 24, 2016, the Governor-General, acting on the advice of the Public Service Commission, gave approval for the claimant to be retired from the Public Service. This was communicated to the Permanent Secretary of the Ministry of Justice, Mrs. Carol Palmer, by Mrs. Mendez, by way of letter dated May 19, 2016. In this letter it was also stated that the retirement was consequent on the amendment of the **Judicature (Supreme Court) Act,** and on the ground of re-organization in accordance with section 6(1)(iv) of the **Pensions Act**, and that it was to take effect at the expiration of the pre-retirement leave for which the claimant may be entitled as of June 1, 2016. A copy of this letter was forwarded to the claimant under cover of letter dated May 20, 2016. The claimant's deployment ended May 31, 2016.

PROCEDURAL HISTORY

[23] The claimant made a Without Notice Application for Court Orders May 31, 2016 seeking an Injunction restraining the respondents from taking steps to retire her from the Public Service, and a Stay of the decision contained in letter dated May 20, 2016 purporting to retire her from the Public Service.

[24] This application was heard on May 31, 2016 by Sykes J,(as he then was), who, inter alia, granted the interim injunction, as prayed, to June 3, 2016 when the matter was to be reconsidered.

[25] On June 2, 2016, the claimant filed a Notice of Application for Leave to Apply for Judicial Review with affidavit in support, seeking leave to apply for several reliefs in respect of the aforementioned decision, to include declarations, orders for certiorari and prohibition, an interim and a permanent injunction, as well as damages.

[26] The application for leave was heard June 3, 2016 by Sykes J, who, on that date, granted another interim injunction restraining the defendants from taking further steps to retire the claimant from her post until the decision as to leave had been made. Leave was granted July 8, 2016, the decision of which can be seen at [2016] JMSC Civ 121.

[27] The claimant thereafter filed a Fixed Date Claim Form on July 20, 2016, seeking the following twenty-three (23) orders:

1. *"A Declaration that the 1st Defendant is not empowered by law to retire the Claimant from the post of Principal Executive Officer in the Court Management Services;*

2. *A Declaration that the 2nd Defendant is not empowered by law to retire the Claimant from the post of Principal Executive Officer in the Court Management Services;*

3. *A Declaration that only the Governor General acting on the advice of the 2nd Defendant is empowered by law to retire the Claimant as the Principal Executive Officer in the Court Management Services;*

4. *A Declaration that before the 2nd Defendant can advise the Governor General to retire the Claimant from the post of Principal Executive Officer in the Court Management Services, the 2nd Defendant must afford the Claimant an opportunity to be heard as to the reasons for such retirement;*

5. *A Declaration that the Claimant has a legitimate expectation that she will not be retired from the post of Principal Executive Officer of the Court Management Services by the Governor General acting on the advice of the 2nd Defendant without compliance with the procedure laid down under Section 125 of the Constitution;*

6. *A Declaration that the purported retirement of the Claimant by the 1st and 2ndDefendants from the post of Principal Executive Officer of the Court Management Services and the Public Service is irrational;*

7. *A Declaration that the purported reason given by the 1stDefendant to the Claimant as contained in letters dated May 19 and 20, 2016 respectively, referencing the amendment to the Judicature (Supreme Court) Act and Section 6(1) & (4) of the Pension Act, is irrational;*

8. *A Declaration that the letter served on the Claimant by the 1st Defendant purporting to retire her from her position as the Principal Executive Officer in the Court Management Services, is in breach of Section 125 of the Constitution, rendering the said letter null and void and of no effect;*

9. *A Declaration that the failure of the 1st and 2nd Defendants to comply with the procedure laid down under Section 125 of the Constitution in purporting to retire the Claimant from the post of Principal Executive Officer in the Court Management Services, renders the said decision null and void and of no effect;*

10. *A Declaration that the reasons contained in the purported termination of the Claimant from the relevant post violates Section 125 of the Constitution, rendering the purported retirement null and void and of no effect;*

11. *A Declaration that under Section 125 of the Constitution the Chief Justice of Jamaica is not empowered by law to advise the 2nd Defendant on its recommendation to the Governor General for the appointment of persons to the public service;*

12. *A Declaration that under Section 125 of the Constitution the Chief Justice of Jamaica is not empowered by law to advise the 2nd Defendant on its recommendation to the Governor General for the termination/and or retirement of persons from the public service;*

13. *A Declaration that the amendment to the Judicature (Supreme Court) Act, contained in Act No.9 of 2016, and in particular*

Section 15(a)(1) of the said amendment, which purports to mandate the 2nd Defendant to consult with the Chief Justice in its advice to the Governor General on the appointment of the Director of Court Administration, violates Section 125 of the Constitution, rendering the said amendment null and void and of no effect;

14. *A Declaration that the amendment to the Judicature (Supreme Court) Act, contained in Act No.9 of 2016, and in particular Section 15(a)(3) of the said amendment, which purports to give the Chief Justice the power to designate a person temporarily to act in place of the Director of Courts Administration in the absence of the Director of Court Administration or where the office is vacant, is in violation of Section 125 of the Constitution, rendering the said amendment null and void and of no effect;*

15. *A Declaration that the amendment to aforementioned Act which purports to give the Chief Justice the power to be consulted by the 2nd Defendant on the appointment of persons to the Public Service, violates the separation of powers which is enshrined in the Jamaican Constitution, rendering the said amendment null and void and of no effect;*

16. *A Declaration that the said amendment, insofar as it purports to give the Chief Justice the power to designate a person to act temporarily in the absence of an appointment or where the office is vacant, violates the doctrine of separation of powers enshrined in the Constitution;*

17. *A Declaration that the 1st and 2nd Defendants are not empowered by law to re-deploy the Claimant from the post of Principal Executive Officer of the Court Management Services to the Ministry of Justice on the recommendation of the Chief Justice;*

18. *An Order of Certiorari quashing the decision of the 1st Defendant purporting to retire the Claimant from the relevant post as contained in the letters dated May 19 and 20, 2016 respectively, purporting to retire the Claimant from the post of Principal Executive Officer of the Court Management Services;*

19. *An Order of Certiorari quashing the decision of the 1st and 2nd Defendants purporting to re-deploy the Claimant from the post of Principal Executive Officer of the Court Management Services to the Ministry of Justice on the recommendation of the Chief Justice;*

20. *An order of Prohibition prohibiting the 1st and 2nd Defendants by themselves or servants or agents from taking any steps to prevent the Claimant from performing her functions as the duly appointed Principal Executive Officer of the Court Management Services;*

21. *An Injunction restraining the 1st and 2nd Defendants by themselves, their servants or agents, from taking any steps to*

prevent the Claimant from performing her functions as the duly appointed Principal Executive Officer of the Court Management Services;

22. *Damages to the Claimant to be assessed for the illegal action of the 1st and 2nd Defendants in preventing the Claimant from continuing in her appointment as the duly appointed Principal Executive Officer of the Court Management Services;*

23. *Cost of the Claim to the Claimant."*

[28] The Fixed Date Claim Form is supported by the affidavit of the claimant, Mrs Patrick-Gardener, filed on July 20, 2016.

[29] The defendants filed a response to the affidavit of the claimant in support of the Fixed Date Claim Form, by way of the affidavit of Mrs. Jacqueline Mendez, on October 10, 2016. In this affidavit, they set out, *inter alia*, facts relating to events leading up to May 20, 2016, the date on which the letter of May 19, 2016, addressed to the Permanent Secretary, was sent to the claimant, and proffered a justification for the abolishment of the post of Principal Executive Officer of the Court Management Services on the ground of reorganization.

THE CLAIMANT'S SUBMISSIONS

[30] The claimant grounds her action on essentially three bases:

i. That her constitutional rights were breached in that she was not given a chance to be heard before the purported retirement, in accordance with the rules of natural justice and the Constitution;

ii. That she had a legitimate expectation that she would not be removed from the public service without being given the opportunity to be heard;

iii. That the provisions in the amendment to the Judicature (Supreme Court) Act establishing the office of the Director of Court Administration gives the Chief Justice powers to be consulted in respect of appointment and renewal of appointment of the Principal Executive Officer, is unconstitutional in that it breaches the doctrine of separation of powers.

[31] In relation to the first ground, the claimant submitted that the Public Service Commission cannot, in any circumstance, recommend to the Governor-General

that a public officer be retired from the Public Service without first giving that officer an opportunity to be heard, regardless of the reason for retirement. Not having been given that opportunity, it was submitted that her constitutionally protected right to natural justice was breached. In this respect, she relied on section 125 (1) of the **Constitution** which vests the power to appoint and remove officers to and from the Public Service in the Governor-General on the advice of the Public Service Commission. The claimant also relied on section 26 (1) and (2) of **the Public Service Regulations,** which, it was submitted, requires that, where retirement of a public officer is desirable in the public interest, the officer concerned is to be afforded an opportunity to submit why he or she ought not to be retired as contemplated, before the Commission makes a decision to retire that officer. Here, it was submitted that this provision recognizes the right to natural justice.

[32] This, the claimant contended, is buttressed by the constitutional protection laid down in section 16(2) of the **Charter of Fundamental Rights** and **Freedoms** which stipulates that once a person's rights stand to be prejudiced, irrespective of the circumstances, the aggrieved person must be afforded an opportunity to make representation before a decision is taken adverse to that person's interest. The provision must be observed in any enquiry or decision to remove a public officer from the Public Service, and no regulation or primary legislation can derogate therefrom. It was noted that section 1(7) of the **Constitution** provides that any reference in the **Constitution** to the power to remove a public officer from office includes the power to require an officer to retire, which, it was submitted, includes removal by abolition of post. The case of **Thomas v the Attorney General** (1981) 32 WIR 375 was relied on for the proposition that the Court noted that no ouster clause can oust the right to natural justice.

[33] Reliance was placed on a line of cases from the Cayman Islands involving **McLaughlin v Governor**, particularly the ones reported at [2002] CILR 576 (Court of Appeal) and, [2004-05] CILR 515 (Grand Court). The Grand Court (Smellie CJ) decision was later approved by the Privy Council [2007] UKPC 50,

in which the Court found that the rules of natural justice required that the discretion to retire an officer compulsorily had to be exercised judicially, and the relevant officer ought to be given a fair opportunity to make representations in his defence when the proposal was at a formative stage. Mr. Wildman contended that that case is 'on all fours' with the case at bar, asserting that the Privy Council stated that it was settled law that if a public officer was removed without being given an opportunity to be heard, the retirement was unlawful and must be treated as a nullity, as though it never happened.

[34] It was proposed that the reference to section 6 of the **Pensions Act** by the Commission in support of the decision to retire the claimant is irrelevant to the issues at bar, as section 6 speaks to the manner in which payments of pensions, gratuities and other emoluments on the retirement of a public officer from the Public Service are to be calculated and made. It is devoid of any procedure as to how a person is to be properly retired. Further, the section does not and could not have relieved the Commission of the obligation to afford the aggrieved public servant the right to be heard prior to any decision being made to retire the public servant on the basis of abolition of post. The claimant noted that the letter made no mention of a more relevant law, Regulation 26 of the **Public Service Regulations**, which would have provided a proper guide. This law is in keeping with the constitutional requirement of a fair hearing in section 16(2) of the **Constitution**.

[35] Mr. Wildman argued that the **Constitution** ought not to be construed to conflict with itself, and so section 125 must be construed in accordance with section 16(2) and he posited that the Commission ought to have considered sections 7, 16(2), 49 and 125 of the **Constitution**.

[36] He therefore submitted that when the defendants took the decision to retire the claimant from the Public Service, particularly, the office of the Principal Executive Officer of Court Management Services, without giving the claimant an opportunity to be heard, that decision was unlawful, null and void and of no effect. The actions of the defendants, he said, breached both the **Constitution** and the

Public Service Regulations. Thus, the claimant remains a public officer entitled to the benefits that she was entitled to prior to the purported decision to retire her from the Public Service.

[37] The claimant also took issue with the fact that the letter does not state that the Chief Personnel Officer was acting on the instruction of the Governor-General as mandated by section 125 and submitted that only the Governor-General can issue a directive for the claimant to be retired, and so, on the face of the letter, there has been a breach of the **Constitution**.

[38] In relation to the ground of legitimate expectation, it was submitted that, in light of the correspondence between herself and the Public Service Commission, the claimant had a legitimate expectation that led her to believe she would have been given a chance to be heard and that her concerns were being addressed. It was submitted that the concept of legitimate expectation can arise under the **Constitution** in respect of a constitutional breach. For this, the cases of **Paponette and Ors v Attorney General of Trinidad and Tobago** [2010] UKPC 32 and the **British Virgin Islands v Bernette** (1995) 50 WIR 153 were relied on. When Dr. Parkes and Mrs. Mendez communicated to Mrs. Gardener, by letter, that her concerns were being addressed by the Public Service Commission that, it was submitted, created within the claimant a legitimate expectation that she would not be removed from the Public Service without being given an opportunity to make representations to the Commission.

[39] Mr. Wildman rejected Mrs. Mendez's explanation in her affidavit, that the reason the claimant was retired in this way was because this is the way it has always been done over the years, and that she was 'aware of no rule that required a hearing prior to recommendations'. He submitted that the argument that it is not the same thing, as in section 26, is a redundant one. He cited the case of **Naraynsingh (Barl) v Commissioner of Police** (2004) 64 WIR 392, where the Privy Council applied the *'Doody principle'* (**R v Secretary of State for the Home Department, ex parte Doody** [1994] 1 AC 531) in respect of the removal of a fireman from his office. In that case, the Board found that the claimant was

entitled to know what the Public Service Commission had in mind before he was retired. He submitted that this claimant was entitled to the same. She would have then been in a position to assist the Commission, for instance, if it were that it had been said that she did not possess the requisite skills, she would have been able to produce evidence to show otherwise and the Commission could look at both sides and make an informed decision as to whether she should be retired, adding that the claimant went off on study leave and came back more qualified than before. Further, he noted that there was no allegation of impropriety, a disciplinary problem or incompetence. He intimated that fairness required that she be informed of the reasons the Public Service Commission felt it necessary to retire her. He added that the claimant has been in the public service for more than ten years and proposed that, in light of ***Doody, Naraynsingh*** and ***McLaughlin***, the defendants flouted the law.

[40] In relation to the constitutional amendment, it was submitted that this amendment was the reason advanced in the letter purporting to retire the claimant, and forms the hub of the case justifying her retirement and the abolition of the post. It was asserted that this amendment runs afoul of the **Constitution** of Jamaica. More specifically, it was submitted, section 3 of the amendment, which amends section 15 of the principal Act by empowering the Chief Justice to be consulted and make recommendations in respect of the appointment of the Director of Court Administration, an office in the public service, is a clear violation of the doctrine of separation of powers which is enshrined in the **Constitution**.

[41] He pointed out that **The Constitution** clearly recognizes a separation between the various branches of the state in order to safeguard and preserve the integrity of public administration and relied on the case of **Moses Hinds and Others v The Queen** (1975) 13 JLR 262, in which it is asserted that the Privy Council struck down as unconstitutional, legislation passed by the Jamaican Parliament that sought to give judicial functions to the executive arm of the state, by passing a law that made it mandatory for someone who is convicted of gun offences to be

sentenced to life imprisonment. The case of **Director of Public Prosecution v Kirk Mollison** (2003) 62 WIR 268 was relied on as well.

[42] Mr. Wildman also submitted that a good starting point is section 2 of the **Constitution** which speaks to this supremacy of the **Constitution**, and that, subject to the provisions of section 49 and 50, if any other law is inconsistent with it, the **Constitution** shall prevail and the other law be deemed void. He relied on the case of **Collymore v Attorney General of Trinidad & Tobago** (1967) 12 WIR. 5, in support of this proposition.

[43] He therefore asserted that the relevant amendment in this case falls within the mischief adumbrated in both ***Hinds*** and ***Mollison***, in that an examination of the sections of the **Constitution** dealing with appointments to the Public Service reveals clearly that the Chief Justice is devoid of any such functions under the **Constitution**. Further, he said it is clear from the language of section 124 (1) of the **Constitution** that the Chief Justice is not a member of the Public Service Commission and is not accorded any role or function in the Public Service. The Chief Justice's functions are confined to the Judiciary. In this regard, it was submitted, the amendment ignores the sacred principle that the Public Service must be insulated from the other branches of state. It was specifically designed to ensure independence in the operations and functions of the Public Service, concluding in this respect that the amendment violates the separation of powers, rendering the amendment null and void and of no effect.

[44] He stated that section 125 of the **Constitution**, which determines appointments to the Public Service by the Governor-General, is an entrenched provision in the **Constitution** which can only be amended after compliance with section 49 of the **Constitution**. The relevant amendment, which is ordinary legislation, cannot amend section 125 of the **Constitution**. The amendment therefore standing on its own derogates from section 125 and 49 of the **Constitution** and is therefore ineffective in so far as it purports to confer on the Chief Justice powers to determine appointments to the Public Service.

[45] In the circumstances, the claimant concluded that the Court should find that the defendants breached the claimant's constitutional right in purporting to retire her from the Public Service without giving her the opportunity to be heard prior to the decision being made to retire her, and the relevant amendment is null and void and of no effect as that amendment in and of itself conflicts with the clear provisions of section 125 and 49 of **the Jamaican Constitution**, and the claimant remains a public officer, willing, able and ready to perform her functions as a public officer.

DEFENDANTS' SUBMISSIONS

[46] In relation to the order sought that the Chief Personnel Officer and the Public Service Commission are not empowered by law to retire her from her post, it was posited that pursuant to section 125(1) of the **Constitution of Jamaica** and section 6 of the **Pensions Act**, decisions regarding the retirement of public officers, including their retirement on the grounds of reorganization, are to be made by the Governor-General, acting on the advice of the Public Service Commission. The defendants asserted that the affidavit evidence filed on their behalf indicates that this was precisely what occurred in the present case. It was the Governor-General, acting on the advice of the 2nd defendant, the Public Service Commission, who made the decision for the claimant to be retired. The letters of May 19, 2016 and May 20, 2016 do not contain and do not purport to contain decisions by the 1st defendant. It was therefore submitted that there is no merit in this challenge.

[47] The rule, that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the *audi alteram partem* rule) is a fundamental principle of justice, was acknowledged. However, in relation to the issue as to whether the claimant was entitled to an opportunity to be heard as to the reason for such retirement prior to the decision being made, the defendants submitted that since the claimant's

retirement was not based on any allegations against her, there was no necessity to call on her to defend herself.

[48] While the defendants recognized that Rowe JA, in **McLaughlin v Governor of Cayman Islands** [2002] CILR 576, expressed the view that where compulsory retirement is concerned, the right to be heard should apply, it was respectfully submitted that the case on which the judge of appeal relied, **Re Godden** [1971] 3 All ER 25, may not properly be regarded as authority for this principle, as **Re Godden** was not a case in which the compulsory retirement of a public officer was in issue. The orders sought in that case related to a particular medical practitioner who had been selected by the police authority to consider the fitness of a police officer for office. Therefore, the dictum of Lord Denning, on which Rowe JA relied, must be viewed as obiter. The Court held that the decision of the medical practitioner, as to the fitness of the police officer, was of a quasi-judicial nature and therefore natural justice requirements should be applied in the making of the determination as to whether the police officer in question was medically unfit. It was concluded, in this respect, that this case is readily distinguishable from the instant case. In any event, it was established that the presumption in favour of the rule may be displaced where a hearing would clearly serve no useful purpose [**Halsbury's Laws of England Vol. 61** (2010) at paragraph 639].

[49] In relation to the claimant's assertion that she had a legitimate expectation that she would not be retired from the post of Principal Executive Officer without compliance with the procedure laid down under section 125 of the **Constitution**, it was asserted that the burden of proof is on the claimant to show what that procedure is. Further, the claimant must establish facts that have led her to have such a legitimate expectation. It was submitted that it is clear from the documentary evidence in the proceedings that the process of the claimant's retirement was embarked on in accordance with this procedure, and as the evidence of the Chief Personnel Officer reflects, the procedure followed in the instant case is that which has been followed over the years by the Office of the

Services Commissions when reorganization takes place and posts are to be abolished.

[50] Consequently, it was submitted, if the claimant is asserting that there is any further legitimate expectation (procedural or substantive) which may be relied on in relation to section 125 of the **Constitution**, it would be for the claimant to satisfy the Court of certain requirements. The defendants relied on the case of **Legal Officers' Staff Association & Ors v Attorney General & Anor** [2015] JMFC FC 3 for the basic principles in relation to legitimate expectation, per McDonald-Bishop J at paragraph 45. Further, Queen's Counsel pointed out that the claimant has failed to prove any promise made or policy carried out by the Governor-General or the Public Service Commission that could amount to a procedural or substantive legitimate expectation in relation to the retirement of a person holding a public office when a post is to be abolished, and that there is no statutory provision on which this alleged legitimate expectation is based. It was therefore submitted that the order sought in relation to this issue should not be granted.

[51] In considering whether the power "to remove" a public officer under section 125 of the **Constitution** includes circumstances when the public officer is retired from the Public Service because an Act passed by Parliament abolishes the public office that that person held or leads to the said abolition', the defendant submitted that it was an Act of Parliament that has extinguished the office of the Principal Executive Officer, and that no individual exercised his or her discretionary power to retire the claimant from her public office. It was a natural consequence of the legislative construct which inevitably leads to the need for the abolishment of the post.

[52] The defendants acknowledged section 1 (7) of the **Constitution** which provides that references in the **Constitution** to the power to remove a public officer from office includes references to any power conferred by any law to require or permit that officer to retire from the Public Service provided that "any power conferred by any law to permit a person to retire from the Public Service shall, in the case

of any public officer who may be removed from office by some person or authority other than a Commission established by this **Constitution**, vest in the Public Service Commission". They also noted section 3 (1) of the **Civil Service Act** which provides that subject to the **Constitution**, the power to constitute or abolish offices in the Public Service shall be exercised by the Minister by order.

[53] The defendants relied on the Caribbean Court of Justice decision of **Campbell v Attorney General of Barbados** [2009] CCJ 1 (AJ), in which they asserted that the Court found, in circumstances where the appellant's post of Chief Electrical Engineer was abolished and he was retired from the Public Service, that it was not unconstitutional. The Court went further to hold that the abolishment of a public office by Parliament did not implicate the constitutional provision of removal from public office. The defendants highlighted paragraphs 33-36 of that Judgment, which, they submit, usefully outlines principles that are to be taken into account in the instant case.

[54] It was asserted that the difference between the **Campbell** case and the case at bar, is that the claimant has sought to prevent the exercise of the power by the relevant Minister to abolish the relevant post which would follow from her retirement from the post. In **Campbell**, the attempt at abolition of the post was carried out even while the Appellant was serving in it. It was submitted that the difficulties which the orders sought by the claimant present are obvious, as the claimant is insisting on remaining in a post which can no longer be accommodated in the statutory construct governing the administration of the courts.

[55] In relation to section 6(1)(iv) of the **Pensions Act,** referred to in letter dated May 19, 2016, addressed to the Permanent Secretary, Ministry of Justice, a copy of which was provided to the claimant, the defendants submitted that there can be no dispute as to whether there has in fact been the pursuit of measures meant to facilitate improvement in the administrative management of the court system, and the former Court Management Services. Further, the Memorandum of Objects and Reasons to the Bill for the amendment, shows that Parliament intended to,

and has in fact created a new framework which has superseded and replaced the former Court Management Services. This clearly intended to promote greater efficiency and economy in the management of the administrative services needed for the courts.

[56] With respect to the claimant's challenge that the requirement in the relevant amendment, that the Public Service Commission is to consult with the Chief Justice in respect of its advice to the Governor-General in relation to the appointment of the Director of Court Administration, is in breach of section 125 of the **Constitution**, as well as the principle of separation of powers, the defendants contended that there is no such violation.

[57] The defendants acknowledged that separation of powers is a fundamental pillar of the **Jamaican Constitution**, and that the need for judicial independence is a necessary corollary thereto, both in terms of judicial impartiality and institutional independence. They, however, submitted that there will inevitably be the need for 'some overlap because the lines between the respective branches are not clearly demarcated' [Robinson T., Bukan A. & Saunders A., **Fundamentals of Caribbean Constitutional Law**, at para. 7-029 to 7-034]. Notwithstanding this, it was submitted that one of the very purposes of the amendment was to facilitate a greater separation between the Executive and the Judiciary, in that judicial independence is largely dependent upon judges having administrative control of their own affairs [**The Judiciary in Contemporary Society: Australia**, Julie Anne Kennedy and Anthony Ashton Tarr at pg. 262]. The defendants relied on the **Draft Universal Declaration on the Independence of Justice ("Singhvi Declaration")** for the proposition that:

> *"32. The main responsibility for court administration including supervision and disciplinary control of administration personnel and support staff shall vest in the judiciary, or in a body in which the judiciary is represented and has an effective role."*

[58] It was submitted that the longstanding reform of the justice sector that led to the enactment of the **Judicature (Resident Magistrates) (Amendment and Change of Name) Act, 2016** and the **Judicature (Supreme Court)**

(Amendment) Act, 2016 "are planks in the journey of the Jamaican justice sector towards the strengthening of judicial independence", and that it is clear that the intention of the statutory framework was to establish a Court Administration Division that is independent of the Executive and which will take directions from the Chief Justice. In that regard, reference was made to the **Memorandum of Objects and Reasons** in respect of both Acts, particularly that in the former Act, in which it was stated that the treatment of Resident Magistrates, as ordinary civil servants, especially in relation to salaries and benefits, was *"...anomalous and inconsistent with the foundational principle of judicial independence from the executive branch of government"*.

[59] It was posited that the new legislative construct in the impugned amendment and provisions is "a recognition for the Executive to not intrude unduly on the running of and administrative arrangements in respect of the new Division of the Supreme Court". Interestingly, the defendants submitted that, had the legislation not required the consultation with the Chief Justice, or recommendation, it was arguable this could infringe judicial independence in respect of the courts.

[60] The defendants pointed out that the Director of Court Administration is:

1. an officer of the court;

2. under the direction and control of the Chief Justice, manages the administrative division of the Supreme Court; and

3. accountable to take directions from, and is to comply with the directions of the Chief Justice.

[61] It was noted that as the Chief Justice, as head of the Judiciary, has, *inter alia*, 'overall administrative responsibility for the courts', it is understandable that, as provided in section 15A of the amendment, the Director of Court Administration is to be appointed by the Governor-General on the recommendation of the Public Service Commission after consultation with the Chief Justice, and is to be accountable to and take directions from the Chief Justice.

[62] Thus, it was asserted, it is understandable that the Chief Justice would have an important role to play in the initial selection and the renewal of the contract of the Director, who directly reports to him/her. Further, it was argued that, whilst it is agreed that the Public Service Commission must be free to exercise its duties without interference, 'a distinction must be drawn between the Commission responding to a directive from the Chief Justice and the Commission itself seeking to consult the Chief Justice', which are not the same. Moreover, the defendants submitted that it is not only lawful, but good governance for the Public Service Commission to pursue the advice of the head of the Judiciary when making a public service appointment within a division of the court.

[63] The defendants acknowledged that pursuant to section 125, the power to appoint, remove and institute disciplinary proceedings is vested with the Governor-General, and the ultimate decision to advise the Governor-General of any appointment falls on the Commission. However, it was argued that section 10 of the Regulations empowers the Public Service Commission to consult with any public officer or other person as the Commission thinks proper and desirable, in considering any matter or question. They argue that although the **Constitution** itself is silent on whether the Public Service Commission can consult with any other person prior to advising the Governor-General of its position, it would be irrational for the Public Service Commission to be required to obtain personal knowledge of the vast personnel of the entire Public Service without ever consulting the persons to whom they report. Thus, it was concluded, this could not have been the intention of the framers of the **Constitution** as such a circumstance would greatly hinder the effective discharge of their function.

ISSUES

[64] There are no factual issues in dispute but from the foregoing, it is seen that the claim raises fundamental issues relating to:

i. Whether the claimant has locus standi to challenge the validity of the relevant amendment.

ii. Whether the claimant was retired in a proper and lawful manner and whether in retiring the claimant, the defendants complied with the procedure set out in section 125 of the **Constitution.**

iii. Whether the claimant was entitled to an opportunity to be heard prior to the decision and whether the purported retirement was irrational.

iv. Whether the claimant had a legitimate expectation that she would not be retired from her post without compliance with the procedure laid down under section 125 of the **Constitution** and if so whether it was breached.

v. Whether the defendants are empowered by law to re-deploy the claimant on the recommendation of the Chief Justice.

vi. Whether the impugned provisions of the amendment is unconstitutional in that they offend section 125 of the Constitution as well as the principle of the separation of powers

vii. Whether the claimant should be granted any of the reliefs sought, in the circumstances.

LAW & ANALYSIS

[65] The employment of persons in the government service is governed by Chapter IX of the **Jamaica (Constitution) Order in Council,** 1962 (referred to as the "**Constitution**"). Section 124 of the **Constitution** establishes the Public Service Commission and section 125(1) empowers it with the control and management of the Public Service and public service officers as follows:

> *"(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"*

[66] The **Public Service Regulations, 1961** (preserved by section 2 of the **Constitution** and hereinafter referred to as the "Regulations"), further outlines the manner in which public service officers should be appointed, removed and disciplined.

> *"Provided that –*
>
> *...*
>
> *(b) any power conferred by any law to permit a person to retire from the public service shall, in the case of any public officer by some person or authority other than a Commission established by this Constitution, vest in the Public Service Commission."*

[67] In the letter purporting to retire the claimant, it was stated that her retirement was to be done on the grounds of re-organization in accordance with the **Pensions Act**. The letter, dated May 19, 2016, sent from the 1st defendant, as Chief Personnel Officer, to the Permanent Secretary in the Ministry of Justice, Mrs. Carol Palmer, communicated the following:

> *"...I am to inform you that consequent on the amendment to the Judicature (Supreme Court) Act, approval has been given for Mrs. Deborah L. Patrick-Gardener, Principal Executive Officer (GMG/CTD), Court Management Services, to be retired from the Public Service, on the grounds of re-organization, in accordance with Section 6(1)(iv) of the Pensions Act..."*

[68] The cover letter addressed to Mrs. Patrick-Gardner from Mrs. Mendez, the 1st defendant, attaching the above letter dated May 20, 2016, simply and abruptly stated, "*Kindly see attached...regarding your retirement from the Public Service.*" In her Affidavit evidence, at paragraphs 16 to 18, she stated the following in relation to how the claimant was retired:

> *"16. The Public Service Commission considered the matters raised by the claimant and also the coming into effect of the Act and came to the decision that in light of all the circumstances a recommendation should be made to the Governor-General, that the Claimant be retired from the public service on the ground of re-organization, in accordance with section 6(1)(iv) of the Pensions Act.*
>
> *17. The Governor-General, acting on the advice of the Public Service Commission, gave approval on March 24, 2016 for the Claimant to be retired.*

> *18. Letter dated May 19, 2016 to the Permanent Secretary in the Ministry of Justice advised that approval had been given for the Claimant to be retired from the public service on the ground of re-organization in accordance with section 6(1)(iv) of the Pensions Act at the expiration of the pre-retirement leave for which she may be eligible from June 1, 2016. I sent copy of this letter to the Claimant under cover of letter dated May 20, 2016 from the Office of the Services Commissions..."*

Whether the claimant has locus standi to challenge the constitutionality of the relevant amendment

[69] The claimant has sought several reliefs in respect of what she asserts is the unconstitutionality of the impugned amendment to the **Judicature (Supreme Court) Act,** in that provisions of the Act contravene section 125 of the **Constitution**, as well as the seminal principle of separation of powers encapsulated in the **Constitution**. It is the contention of the defendants, however, that, having regard to the provisions of the **Constitution** and case law, the claimant is not entitled to bring such a challenge.

[70] The purpose and importance of the requirement for rules regarding legal standing is outlined by the learned authors SA De Smith, H Woolf and JL Jowell in **Judicial Review of Administrative Action** (5th edn, 1995), (as cited by the Privy Council in **Attorney General v Dumas** (2017) 90 WIR 507) at paragraph 42:

> *"All developed legal systems have to face the problem of resolving the conflict between two aspects of the public interest--the desirability of encouraging individual citizens to participate actively in the enforcement of the law, and the undesirability of encouraging the professional litigant and the meddlesome interloper invoking the jurisdiction of the courts in matters in which he is not concerned. The conflict has been resolved by developing principles which determine who is entitled to bring proceedings: that is who has* **locus standi** *or standing to bring proceedings. If those principles are satisfactory they should only prevent a litigant who has no legitimate reason for bringing proceedings from doing so."*

[71] Our **Constitution** outlines limited circumstances in which a person is entitled to bring a challenge under the **Constitution**. Section 19(1) of the **Constitution** provides:

> *". . . if any person alleges that **any of the provisions of this Chapter** has been, **is being or is likely to be contravened in relation to him**, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress."*

[72] Section 19(2) permits 'a public or civic organization' to bring a claim on behalf of a person entitled under subsection 1, and subsection 6 permits Parliament to make provisions in respect of court procedure surrounding a constitutional challenge, but this is limited to the circumstances in subsection 1. It is apparent, therefore, that the section limits the persons entitled to bring a constitutional claim to a person who is personally affected in respect of a particular provision set out in that Chapter. There is only one other section of the **Constitution**, section 44, that expressly gives standing to persons to challenge questions as to Parliamentary membership. In the circumstances, this does not apply.

[73] It has been submitted that the claimant has the requisite standing by virtue of her citizenship of Jamaica, and her attendant 'interest in the **Constitution** being observed by the State'. Further, it was contended, the claimant is directly affected by the amendment 'which proposes to introduce a new office or post and to abolish the office that she now holds which is of a similar character'. Particularly, it was alleged that the amendment was directly aimed at removing the claimant from the Public Service. The claimant had relied on **Farooque v Secretary of the Ministry of Irrigation, Water Resources & Flood Control (Bangladesh) and Others** [2000] 1 LRC 1, **Independent Jamaica Council for Human Rights (1998) Limited and Others v Hon. Syringa Marshall-Burnett and the Attorney General of Jamaica,** UKPC Appeal No. 41 of 2004; **R v Inland Revenue Commissioner ex parte National Federation of Self-Employed and Small Businesses Ltd** [1981] 2 WLR 722.

[74] The defendants are resisting the claimant's entitlement to bring the challenge on the basis that the **Constitution** only gives standing to persons pursuant to sections 19 and 44, which require that a person seeking relief be personally affected. It was submitted that the claimant has failed to demonstrate by way of evidence that she has the requisite interest to challenge the relevant

amendment. It was asserted that there is no evidence that any of the claimant's **fundamental rights** under **chapter 3** are being breached or are likely to be breached, and that the circumstances are such that section 44 is inapplicable. She has not shown how she will be directly affected by the Act, in that "*she does not claim to be acting in the post; nor does she assert that she is entitled to be appointed to the post. She has not even asserted that she has applied for the post*".

[75] The defendants rejected the claimant's reliance on the test of "sufficient interest" in the **Inland Revenue Commissioner** case on the basis that that test was established in judicial review proceedings and so only apply to same. They argued that support for distinguishing the test for standing in judicial review cases, as opposed to constitutional cases, is to be found in part 56 of the **Civil Procedure Rules (CPR)** which restricts the sufficiency of interest test to judicial review, and the case of **Marie Jean Nelson Mirbel and Others v the State of Mauritius & Others** [2010] UKPC 16, in which, it was submitted, the Privy Council found that '*the claimants'/appellants' attempt to rely on the principles of locus standi was misconceived*'. Though the defendants acknowledged that there are cases that show that a constitutional challenge may be raised in respect of non-fundamental rights provisions in the public's interest, they argued that the requisite threshold that must be satisfied is for the claimant to show ". . .*that the impact of the impugned law on his personal situation discloses an injury or prejudice which he has either suffered or is in imminent danger of suffering*", as outlined by Henchy J in the Irish case of **Cahill v Sutton** [1980] IR 269.

[76] Finally, it was argued that this approach is in line with other jurisdictions that have express constitutional provisions that allow non-fundamental rights challenges, such as section 119 of the **Constitution** of Antigua and Barbuda, as well as the approach in **Hinds v R** [1977] AC 175 and **Director of Public Prosecutions v Mollison** (2003) 62 WIR 268, albeit that this particular issue did not arise in those cases.

[77] I reject the contention that the claimant is directly affected by the amendment. There is no evidence before the Court that the amendment was directly aimed at removing the claimant from the Public Service, and in my view, simply because the new office or post created under the amendment 'is of a similar character' to that held by the claimant, does not provide a basis for finding that she is directly affected by the provisions of that Act. In that regard, I find favour with the submissions of Counsel for the defendants, that the claimant does not hold the post, she does not purport to be acting in the post, or claim an entitlement to be appointed to the post, nor has she even asserted that she has applied for the post. I, therefore, can see no way in which this legislation directly affects her in order to give her standing.

[78] This Court, however, recognizes that there is jurisprudential support for taking an expansive approach to standing in constitutional cases, even where the proposed litigant is not directly or personally affected by the subject matter of the claim. In that regard, I find the decision of **Attorney General v Dumas** [supra], a decision from the Court of Appeal of the Republic of Trinidad and Tobago which was approved by the Privy Council (with the leading judgment of Jamadar JA being described by the Board as "an impressive judgment" [paras. 12 and 14]), to be instructive.

[79] The issue that the Court had to grapple with in **Dumas** was very similar to the one in the instant case, in that it centred around the question of whether a public-spirited applicant, not personally affected by impugned legislation, could have locus standi to bring a constitutional challenge not involving **fundamental rights**, where there was no express conferral of standing to do same by any provision of the Constitution of Trinidad and Tobago. The Appellant was described by the Court as a public-spirited applicant who sought to vindicate a general grievance in relation to the rule of law on the basis that the exercise of the President's power under section 122 of the **Constitution** to appoint two particular persons to the Police Service Commission was *ultra vires.*

[80] In assessing the issue and finding that the applicant indeed had standing, the Court considered the following:

1. The purpose of rules of standing – the determination of who is allowed to bring what issues before the Courts, that is, who has access to justice and on what issues and basis [paras 42- 43].

2. The dynamic and developing nature of the Common Law, and in particular, the law relating to 'standing', owing to judge-made law - The Court cited with approval the words of Lord Diplock in ***R v IRC, ex p National Federation of Self-Employed and Small Business Ltd*** *[supra]* and noted that *"what is significant about this decision of the House of Lords, is that the courts have the jurisdiction, power and duty to develop the law of standing so as to keep pace with societal change; and in the area of public law, to do so in order to protect the rule of law, as the changing expectations of a democratic society legitimately demand."* **[para. 51]**

   Also, importantly, the Court noted that the above House of Lords decision *"liberalised the rules of standing, out of a recognition that: 'public law was concerned with protecting the public interest...so as to recognize the role of individuals in asserting the public interest'*. The Court noted that it had made those observations notwithstanding and being fully aware that the **IRC** decision was a judicial review matter pursuant to the English Rules of Court. **[para. 52]**

3. It is the duty of the Court, by virtue of its role as the guardian of the Constitution in a democratic society, to ensure that the Constitution and rule of law are upheld. At para 128, the Court stated: *"[t]he courts are the recognised guardians of the Constitution, not merely because ss 14 and 108 of the Constitution give the court the power to undertake constitutional review, but because in the context of the separation of powers, it is the judiciary that has both the duty and the responsibility in a modern democratic society such as exists here, to ensure that the Constitution and the rule of law are upheld in Trinidad and Tobago".*

4. The Court examined in great detail the rules of standing and approach by the courts in the United Kingdom and Common Law jurisdictions (including Hong Kong, India, Canada, and found that, in spite of their varying constitutional arrangements, except for Australia, there is a tendency towards the development and enlargement of the rules of standing **[paras. 53, 56]** and that *"...courts have been working assiduously, if not uniformly, to open the gates to general grievance public interest litigation, where an applicant is not directly affected by the impugned legislation or public/governmental action"* **[para. 67]**.

5. The Court examined the Caribbean cases of **Lionel v A-G of St. Lucia** (1995) Suit No 357 of 1995, 25, **A-G of St. Christopher and Nevis v Payne** (1981) St. Kitts HC No 7 of 1981 (9 July 1981), and **Richards v A-G of St. Vincent and the Grenadines** [1991] LRC (:Const) 311, as well as public law legislative initiatives in Barbados and Trinidad and Tobago which facilitate public interest litigation (in judicial review), and found that these demonstrate a trend towards a more expansive and 'permissive' approach to standing in public interest litigation in the Caribbean region [paras 75-95].

6. In the area of public law in England, the focus of standing is on public law wrongs, particularly, misuses of public power [paras 70 and 71; see **R v Somerset County Council, ex parte Dixon** [1998] Env LR 111].

7. Whilst, historically, it was within the ambit of the Attorney General to raise issues of this nature, this ordinarily did not happen.

8. The Court accordingly devised a list of 'relevant and appropriate' considerations, albeit disclaiming its use as a checklist or absolute criteria or precedent:

   (i) Standing goes to jurisdiction and is to be determined in the legal and factual context of each case. It is a matter of judicial discretion.

   (ii) The merits of the challenge and the nature of the breach raised are important considerations.

   (iii) The value in vindicating the rule of law (the principle of legality) is a significant consideration.

   (iv) The importance of the issue raised.

   (v) The public interest benefit in having the issue raised and determined.

   (vi) The bona fides and competence of the applicant to raise the issues.

(vii) Whether the applicant is directly affected by, or has a genuine and serious interest and has demonstrated a credible engagement in relation to the issue raised.

(viii) The capacity of the applicant to effectively litigate the issues raised.

(ix) Whether the action commenced is a reasonable and effective means by which the courts can determine the issues raised.

(x) The imperative to be vigilant so as to prevent an abuse of process by busybodies and frivolous and vexatious litigation.

(xi) Whether the issues raised are a general or specific grievance and whether there are other challengers who are more directly impacted by the decision challenged, or more competent to litigate it.

(xii) The availability and allocation of judicial resources.

[81] The Court of Appeal concluded at paragraphs 133 and 134:

> *"[133] In our opinion, barring any specific legislative prohibition,* ***the court in the exercise of its supervisory jurisdiction and as guardian of the Constitution, is entitled to entertain public interest litigation for constitutional review of alleged non-Bill of Rights unlawful constitutional action; provided the litigation is bona fide, arguable with sufficient merit to have a real and not fanciful prospect of success, grounded in a legitimate and concrete public interest, capable of being reasonably and effectively disposed of, and provided further that such actions are not frivolous, vexatious or otherwise an abuse of the court's process.*** *The approach to be taken to this issue of standing is a flexible and generous approach, bearing in mind all of the circumstances of the case, including in particular the need to exclude busybody litigants and those who have no genuine interest in the issues raised and have not demonstrated credible engagement in relation to them.* ***The public importance of the issues raised and of vindicating the rule of law are significant considerations.***
>
> *[134] The limitations that we have articulated in this opinion satisfy the balance to be struck between allowing bona fide and legitimate public interest constitutional review and preventing those actions which are, for one reason or another, an abuse of process or ought not to be otherwise*

entertained. Standing is a matter of discretion. Even though the constitutional court is concerned to vindicate the rule of law by focusing on public wrongs, this is not open-ended. Ultimately (and beyond the exclusion of a busybody) context is the determining factor. In some contexts, it may be appropriate for an applicant to demonstrate a direct or particular interest in the matter complained about; in others, it may not be necessary. For example, where the alleged unlawfulness affects the public generally, no particular or direct interest in the matter may be necessary; but even then, a discretion exists in relation to standing to be exercised contextually. The constitutional function of the court's supervisory jurisdiction in the area of constitutional review of unlawful constitutional action must always operate to protect the legitimacy of that sacrosanct purpose. This is the true role of the first gatekeeper." ***[Emphasis added]***

[82] In finding that the appellant had standing, the Court on the above principles, considered that the appellant was a well-respected, outspoken, forthright and rational citizen who had a genuine, serious and bona fide interest. The Court found that he was not a mere busybody with an ulterior motive, and demonstrated a capacity and willingness to litigate the issue in the public interest and in service of upholding the Constitution and the rule of law [para. 18].

[83] In the case at bar, I consider the challenge raised to the amendment to be very serious, in that the amendment appears to be prima facie, unlawful. This Court recognizes and appreciates the importance of its role as the guardian of the Constitution, and that the Constitution is sacrosanct. It also recognizes the fundamental principle of separation of powers and its inextricable link to the rule of law and maintaining our democracy. Although it is doubtful that the claimant would have brought this challenge had she not been retired by the Public Service Commission, I am of the view that this is a challenge that is not frivolous, in that, it raises issues of grave public importance. On the balance, I therefore find that this Court ought to permit the claimant to challenge the amendment, and therefore the claimant has standing.

Was the claimant retired in a proper and lawful manner?

[84] It is common ground that the claimant was not subject to any disciplinary action for misconduct, and there is no suggestion that she was performing unsatisfactorily in her post. It is also common ground that she was not given an

opportunity to be heard in relation to her purported retirement, nor was she informed at any time prior to the decision that this was even a consideration. The evidence of both the claimant and the 1st defendant attest to the communication that took place between the claimant and representatives of the 2nd defendant in relation to the claimant's complaints, during which it had been indicated to the claimant that her concerns would have been addressed. There was no mention that her retirement was being considered. This is curious considering that Mrs. Mendez's letter of February 15, 2016, noting that the Public Service Commission had been made aware of the claimant's concerns and that their decision would be communicated in due course, bears the same date as that of the Governor-General's assent to the **Judicature (Supreme Court) (Amendment) Act 2016** which, among other things, establishes the post of Director of Court Administration. That post, by virtue of the Act, is intended to replace the post that the claimant now occupies.

Whether the claimant was retired in accordance with section 125 of the Constitution; Whether the letter purporting to retire the claimant, and the reasons stated therein are in breach of section 125 of the Constitution and thus null and void (Reliefs 1, 2, 3, 8, 9 & 10)

[85] The effect of section 125 (1) of the **Constitution** is that only the Governor-General, acting on the advice of the Public Service Commission, can properly make the decision to retire the claimant. The claimant contended that, because the impugned letter did not expressly state that the Chief Personnel Officer (CPO) was acting on the instruction of the Governor-General, section 125(1) was breached, rendering the decision null and void. In that regard, reliefs numbered 1, 2 and 3, seek declarations that the 1st and 2nd defendants are not empowered to retire the claimant from the post, imputing that it was they who made the decision. I reject that contention. I agree with the defendants that, from the words of the letter, neither the 1st nor 2nd defendant, expressly or impliedly, purported to make the decision to retire the claimant. The letter clearly indicates that the CPO

was simply informing the Permanent Secretary of the decision that had been made to retire the claimant:

> *". . . I am to inform you . . . approval has been given. . ."*

The CPO, in her capacity as the head of the Public Service Commission, who has the duty of carrying out the decisions of the Public Service Commission and being generally responsible for matters relating to the functions of the Public Service Commission (section 6, **Public Service Regulations**), was fully within her right to do so. She was acting for and on behalf of the Public Service Commission.

[86] Further, the 1st defendant's evidence is that it is the Governor-General who made the decision on March 24, 2016, acting on the advice of the Public Service Commission. Whilst I do not see any documentary evidence to support this, the claimant has not discharged her burden of refuting the 1st defendant's affidavit evidence in support of her assertion that this was not indeed so. Therefore, in the absence of evidence to persuade otherwise, this Court accepts the defendants' evidence that it was indeed the Governor-General who made the impugned decision. I see no reason to believe otherwise. I therefore find the retirement was done in accordance with section 125 (1) of the **Constitution**. Accordingly, reliefs 1, 2 and 3 are refused.

[87] However, it seems to me that section 125(3), a subsection that was not specifically dealt with by either party, is not only applicable, but was breached. It states:

> *"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 he 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". [**Emphasis added**]*

[88] On an ordinary interpretation of the words therein, the subsection creates two (2) circumstances, either of which would trigger the requirement for the procedure

outlined therein to be followed. The process envisioned is that the Governor General would have informed the claimant of the advice of the PSC and this would be done before acting on it. The claimant could then have exercised her right to have the matter referred to the Privy Council. What is clear is that the PSC having recommended to the Governor General that the claimant should be removed from office, she ought to have been advised of the right to have the matter referred to the Privy Council, and natural justice required that she should be given the opportunity to make representations and avail herself of the right to refer the matter, but she was denied such an opportunity.

[89] Even if I am wrong, I am fortified in my view of the interpretation and application of section 125(3) based on the case of **Lackston Robinson v Daisy Coke et al** (unreported), Supreme Court, Jamaica, Claim No. 81 of 2002/Claim No. HCV 0612 of 2003, judgment delivered July 31, 2007, in which it was found that the claimant was prematurely retired in breach of the PSR and natural justice. It is to be noted that that claimant who the Public Service Commission sought to retire under Regulation 24 of the PSR, was advised by the Governor-General's secretary of his right 'for his case to be referred to the Jamaican Privy Council for consideration', a right that he chose not to avail himself of. Whilst, it was not stated that that right emanated from section 125(3) of the **Constitution**, it is my view that it did in fact emanate therefrom, particularly in light of the fact that that right is not one that is outlined in Regulation 24.

[90] It may well be, therefore, that section 125(3) of the **Constitution** ought to have been followed and was therefore breached. A problem, however, arises, in that the duty under that section is that of the Governor-General, rather than that of the Public Service Commission. This, I will address when I deal with the issue of relief at the end of this judgment.

Whether the claimant was entitled to an opportunity to be heard prior to the decision

[91] One of the claimant's main grouses is that she was not given an opportunity to be heard. The defendants argued that there is no such requirement in law in these circumstances. In fact, in her affidavit, Mrs. Mendez depones that she is *"aware of no rule or regulation requiring a hearing to be conducted by the Public Service Commission prior to making a recommendation regarding retirement in these circumstances. The procedure followed in this instance is the process followed generally where reorganisation and consequential abolition of office are required."*

[92] The Regulations make provision for the compulsory retirement of a public officer in certain circumstances and the manner in which this ought to be done, providing mechanisms for the affected officer to be heard and to achieve overall fairness. However, the defendants did not retire Mrs. Patrick-Gardener pursuant to any of those provisions, and it is indeed their contention that none of those provisions apply in the circumstances. The defendants rely only on section 6(iv) of the **Pensions Act** as a basis for the purported retirement.

[93] The claimant, however, contends that the requisite procedure that ought to have been followed, is that set out in section 26 of the Regulations which speaks to the retirement of an officer in the public interest. It provides:

> *"(1) Notwithstanding the provisions of regulations 42 and 43, where it is represented to the Commission or the Commission considers it desirable in the public interest that an officer ought to be required to retire from the public service on grounds which cannot suitably be dealt with under any of these Regulations it shall call for a full report from the Head of every Ministry or Department in which the officer has served during the last preceding ten years.*
>
> *(2) If, after considering such reports and giving the officer an opportunity of submitting a reply to the grounds on which his retirement is contemplated, and having regard to the conditions of the public service, the usefulness of the officer thereto, and all the other circumstances of the case, the Commission is satisfied that it is desirable in the public interest so to do, it shall recommend to the Governor-General that the officer be required to retire."*

[94] The claimant submitted that this provision mandates that the officer in question be afforded an opportunity of submitting why he or she ought not to be retired as contemplated, before the Commission makes the decision. This, it was argued, is in line with section 16(2) of the **Charter of Fundamental Rights and Freedoms** which provides that '*once a person's rights stand to be prejudiced, irrespective of the circumstances, the aggrieved person must be afforded an opportunity to make representation before a decision is taken adverse to that person's interest*'.

[95] Conversely, the defendant rejected this provision on the basis that section 26 is applicable only to matters for cause, and argued that, pursuant to the fundamental principle of *audi alteram partem,* since the claimant's retirement was not based on any allegations against her, there was no necessity to call on her to defend herself. Further, it was submitted that the presumption in favour of the rule may be displaced where a hearing would serve no useful purpose.

[96] In respect of section 26, I am in agreement with Counsel for the claimant. The clear and literal interpretation of that section is that the procedure set out will be applicable where the following criteria are met:

1) Retirement has been proposed to the Commission or the Commission considers it desirable;

2) the proposed retirement is in respect of a 'public officer';

3) the proposed retirement is in the public interest;

4) the grounds of the proposed retirement cannot 'suitably' be dealt with under any of the other regulations.

However, it may be argued that the criterion in relation to "in the public interest" has not been met, considering that what is being dealt with is the management of the administrative services needed for the courts.

[97] Sections 24 and 25 which also deal with compulsory retirement, however, are inapplicable. Section 24 is applicable only in cases where the officer has attained the age of fifty years, which the claimant has not, and section 25 (1) applies to cases where one post, out of several like posts, is being abolished but others remain, which is not the case here. Section 25 (2) deals with termination of appointments for facilitating improvement in the organization of a Ministry or Department. However, a precondition of its applicability is that the above circumstances in 1) exist.

[98] Though it is often referred to in our legislation, I have been unable to find a definition in our law as to what amounts to '*public interest*'. **Black's Law Dictionary** (9th Edition, 2009), defines '*public interest*' as:

> *"1. The general welfare of the public that warrants recognition and protection.*
>
> *2. Something in which the public as a whole has a stake; esp., an interest that justifies governmental regulation."*

[99] In the UK Court of Appeal case of **London Artists Ltd v Littler; [And Associated Actions]** [1969] 2 All ER 193, Lord Denning defined '*public interest*' as '*a matter which is such as to affect people at large, so that they may be legitimately interested in it, or concerned at what is going on; or what may happen to them or others*' (pg. 198). Although he said this in relation to the defence of fair comment in a defamation matter, I am of the view that it may well be applicable here. The stated purpose of the claimant's retirement was re-organization pursuant to section 6 of the **Pensions Act**, which is "*for the purpose of facilitating improvement in the organization of the department to which he belongs, by which greater efficiency or economy may be effected*". In that regard, it is the evidence of the 1st defendant that the passing of the relevant Act necessitated the compulsory retirement of the claimant.

[100] The Memorandum of Objects and Reasons attached to the Bill of that Act, states the following:

"A decision has been taken, to amend the Judicature (Supreme Court) Act in order to provide for –

a) the establishment of a Court Administration Division, which will supersede and replace the Court Management Services which was

b) initially established as an administrative arrangement, and which shall be responsible for the provision of general administration and management services in respect of all the courts of Jamaica;

c) the appointment of a Director of Court Administration, who shall be the Chief Executive Officer of the Division;

d) the appointment of an Executive Legal Officer to the Chief Justice; and

e) the governance framework for the Court Administrative Division, including the appointment of an advisory Board.

This Bill seeks to give effect to that decision, and is a companion measure to the Bill shortly entitled the Judicature (Resident Magistrates) (amendment and Change of Name) Act, 2015."

[101] The defendants themselves have argued in their submissions that:

> *"[t]here can be no dispute as to whether there has in fact been the pursuit of measures meant to facilitate improvement in the administrative management of the court system. There can be no dispute that Parliament intended to and has in fact created a new framework which has superceded and replaced the former Court Management Services. Further the memorandum of objects and reasons to the Bill for the amendment of the judicature (Supreme Court) Act, and the new provisions, when read together are clearly intended to promote greater efficiency and economy in the management of the administrative services needed for the courts".*

[102] It may well be then that the purpose of the claimant's retirement constitutes a cause in the '*public interest*'.

[103] I am not therefore attracted to the assertion that Regulation 26 is only applicable to '*matters for cause*'. Whilst our jurisprudence illustrates that this is how it is most often used, there is no indication, in the provision or any other part of the regulations, expressed or implied, that this is to be so.

[104] I also find support for my view from a purposive interpretation, and the spirit that is to be gleaned from all of the provisions dealing with compulsory and pre-

mature retirement of a public officer (Regulations 24, 25 and 26). In my view, it is clear that the intention of the framers of the **Constitution**, in outlining such detailed procedures in those circumstances, that persons being forced to retire prematurely ought to be treated with fairness. The provisions are a recognition of the principles of natural justice.

[105] Consequently, I lean towards a finding that Regulation 26, and the procedure outlined therein, applies in the circumstances, and the claimant was entitled to the benefit of that procedure, namely, (1) the Commission ought to have called for a full report from the Head of every Ministry or Department in which the claimant had served; (2) the report ought to have been considered; (3) the claimant ought to have been given an opportunity of submitting a reply to the grounds on which her retirement was contemplated; and (4) the Commission was to have regard to the conditions of the Public Service, the usefulness of the claimant thereto, and all other circumstances. It would have only been permissible for the Commission to recommend to the Governor General that the claimant be required to retire, after the above things were done. None of those procedures was followed in this case. No report was commissioned, the claimant was not given an opportunity to be heard in the form of a reply, and while it has been averred that there was no other comparable position available in which to place the claimant, there is no evidence before the Court that this was indeed so and what, if any, efforts were made to assess the claimant's usefulness to the Public Service and to properly and fairly satisfy themselves that the retirement of the claimant was required in the interest of the public.

[106] In any event, if Regulation 26 ought not to apply, I am still of the view that standards of fairness and natural justice dictate that the claimant should have been given an opportunity to be heard. The defendants have argued that since the claimant's retirement was not based on any allegations against her, there was no necessity to call on her to defend herself. I reject that contention. I see no reason the claimant, who had, on the suggestion of the Honourable Chief Justice, gained additional qualifications to make her better suited for the job

should not have been given a hearing. This, I believe, raises issues of justification and procedural fairness as the retirement should be substantially justified and procedurally fair.

[107] The requirement for a decision maker to adhere to standards of procedural fairness was outlined by our Court of Appeal in the case of **Derrick Wilson v The Board of Management of Maldon High School and The Ministry of Education** [2013] JMCA Civ 21. In assessing whether the Appellant ought to have been given the opportunity to make representations before it was recommended that he not be appointed in his post, the Court made it clear that the absence of a specific statutory provision requiring same does not negate the requirement for a decision maker to adhere to the rules of natural justice. At paragraph 28, Harris JA stated the following:

> *"[28] The Act and the Regulations made thereunder are silent as to the right of a party to be heard during the conduct of proceedings which affects him or her. However, the lack of statutory provision would not operate as a bar to an aggrieved party praying in aid the rules of natural justice. It is well settled that, where the circumstances so demand, the court, by implication, may give consideration to the principle of natural justice despite the absence of statutory guidance. In* ***Wiseman v Borneman****, Lord Guest at page 310 had this to say:*
>
> > *'It is reasonably clear that on the authorities that where a statutory tribunal has been set up to decide final question affecting parties' rights and duties, if the statute is silent upon the question, the courts will imply into the statutory provision a rule that the principles of natural justice should be applied. This implication will be upon the basis that Parliament is not, to be presumed to take away parties' rights without giving them an opportunity of being heard in their interest.'*
>
> *[29] Natural justice demands that both sides should be heard before a decision is made. Where a decision had been taken which affects the right of a party, prior to the decision, in the interests of good administration of justice, the rules of natural justice prevail. In Sir William Wade's Administrative Law (6th Edition) at pages 496 and 497, the learned author placed this proposition in the following context:*
>
> > *'As the authorities will show, the courts took their stand several centuries ago on the broad principle that bodies entrusted with legal power could not validly exercise it without first hearing the person who was*

> *going to suffer. This principle was applied very widely to administrative as well as to judicial acts, and to the acts of individual Ministers and officials as well as to the acts of collective bodies, such as justices and committees. The hypothesis on which the courts built up their jurisdiction was that the duty to give every victim a fair hearing was just as much a canon of good administration as of good legal procedure. Even where an order or determination is unchallengeable as regard its substance, the Courts can at least control the preliminary procedure so as to require fair consideration of both sides of the case. Nothing is more likely to conduce to good administration.'"*

[108] At paragraphs 47 and 48, she went on to say the following:

> *"[47] A decision maker is required at all times to observe the requirement of procedural fairness. The rule is "of universal application and founded on the plainest principles of justice" – see* ***Ridge v Balwin*** *[sic]. As a consequence, an aggrieved party must be given an opportunity to address any adverse complaint affecting his rights.*
>
> *[48] The importance of observing the audi alteram partem maxim has been pronounced in a trilogy of authorities. This rule embraces the concept of fairness. In* ***R v Secretary of State for the Home Department v [sic] ex parte Doody*** *[1993] 3 WLR 154 at page 169, Lord Mustill speaking to the requirement of fairness within the rules of natural justice had this to say:*
>
> > *'My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them I derive that (1)* ***where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances****. (2)* ***The standards of fairness are not immutable. They may change with the passage of time,*** *both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation.* ***What fairness demands is dependent on the context of the decision*** *and this is to be taken into account in all its aspects. (4)* ***An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system*** *within which the decision is taken. (5) Fairness will very often require that a person who may be affected by the decision will have an opportunity to make representations on his own behalf*

either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interest fairness will very often require that he is informed of the gist of the case which he has to answer.'" ***[Emphasis added]***

[109] Hence, the question that arises in the case at bar is, what did fairness require in all the circumstances? It is important, to consider the 'necessity' of the re-organization exercise and the amendment (as averred) that it is said required the claimant's displacement; the position of the claimant; her qualifications and the alleged purpose for which she embarked on study leave (which was not challenged); her age at the time of the purported retirement (43 years); her years of service in the Public Service; and the fact that she had been in dialogue with the Chief Personnel Officer and had been advised that her concerns would have been brought before the Public Service Commission. There was no indication whatsoever to the claimant that it was even a possibility that she would be retired, with her having more than ten (10) years left before retirement age. This is curious considering that Mrs. Mendez's last letter to the claimant dated February 15, 2016, noting that the Public Service Commission had been made aware of the claimant's concerns and that their decision would be communicated in due course, bears the same date as that of the passing of the **Judicature (Supreme Court) (Amendment) Act 2016** which, among other things, establishes the post of Director of Court Administration (the post intended to replace that which the claimant holds). This fact would indicate that the passing of the Act, and, by extension, the displacement of the claimant, was in the pipeline for a period of time. The claimant was not offered any other position, nor was she advised, at the material time, of the existence of the new post and/or that she could apply for it. The defendants argued that there was no available position in the Public Service that was on equal footing with the claimant's appointed post at the material time. However, there is no evidence before the Court to substantiate that there was even an attempt to find one in which to place the claimant. The argument was also made that a hearing would not have served

a useful purpose. I reject that contention for the reason that the claimant, being faced with an imminent loss of her livelihood, may very well have been inclined to take a position that was lower in standing than her appointed post rather than finding herself unemployed. However, she was never given that chance.

[110] It seems to me that the re-organization and passing of the Act did not, in and of itself, require that the claimant be retired from the government service altogether. It was open to the Public Service Commission to place the claimant elsewhere in the Public Service. Whilst, upon inquiry, the Public Service Commission could have properly found that there were no available positions. In my estimation, the standards of fairness dictate that genuine efforts should have been made to satisfy itself that this was indeed so before taking the drastic step of retirement. Whilst it has been argued that, despite her retirement, there is nothing to stop the claimant from reapplying for a new post in the Public Service, the decision is still one which has serious consequences for the claimant. In the difficult economic climate that we face in this country, a job is a vital and scarce thing of value. It is something that ought to be handled with care. Invariably, some amount of hardship will flow from any loss of a stable source of income and livelihood. The claimant ought to have been given the opportunity to dialogue with the Public Service Commission on the matter in order to try to find a solution that would minimize the possible hardship that she would face. Standards of fairness would require, in my view, that, at the very least, the claimant be advised of the re-organization exercise prior to its commencement or in its early stages, as well as be given an opportunity to make representations as to the best way forward for all parties.

[111] I am fortified in my view by the case of **McLaughlin v Governor of Cayman Islands**, relied on by the claimant, in which the Court of Appeal of Cayman Islands found that *"the discretion to retire an officer compulsorily had to be exercised judicially, and he was to be given a fair opportunity to make representations in his defence when the proposal was at a formative stage"*.

[112] In **McLaughlin,**, the Appellant, who was an administrative officer in the Ministry of Agriculture, Environment, Communications and Works, sought Judicial Review of the Governor's decision to retire him on the ground that the office had been abolished. This decision was made on the recommendation of the Public Service Commission, to whom it had been recommended by the Chief Secretary of the relevant ministry that the Appellant be retired due to abolition of office, since the Appellant did not have the necessary skills and experience for a transfer. The basis of the recommendation was that the Appellant's level of salary was inappropriate to the functions he performed and the post could no longer be justified. The reorganization of government entities was subsequently announced, with certain responsibilities of the Appellant's ministry to be transferred to another. However, this did not come to pass, nor was the Appellant's position ever abolished. Moreover, unknown to the Appellant, the government advertised overseas for a post equivalent to the Appellant's field of expertise.

[113] Mr. McLaughlin filed a claim for judicial review against the Governor that his dismissal was unlawful, but his application was dismissed by the Grand Court. Upon appeal, the Court of Appeal found that Mr. McLaughlin had been dismissed in a procedurally unfair manner, contrary, not only to Regulation 29 of the Public Service Commission Regulations, but also to the rules of natural justice. This is a conclusion that was upheld by the Privy Council, albeit the matter was before it in respect of the relief to be granted.

[114] The defendants objected to the applicability of the **McLaughlin** line of cases on the basis that the authority of **Re Godden** [1971] 3 All ER 25, on which Rowe JA relied, may not properly be regarded as authority for the principles expressed in relation to compulsory retirement, as in their view, the decision considered by the Court in **Re Godden** was not the compulsory retirement of a public officer. It was therefore submitted that the dictum of Lord Denning, relied on by Rowe JA in **McLaughlin,** must be viewed as obiter.

[115] In **Re Godden**, the applicant, who was a chief inspector of police, was transferred from his post to administrative duties. Being of the view that he had been unfairly treated, he and his wife made accusations against his superior officers in the police force. Following an investigation and hearing, it was found that there had been no impropriety. None of the papers regarding that enquiry were shown to the applicant. About two months later, it was alleged that a senior police officer had searched the applicant's desk and found an erotic magazine, as well as an indecent letter to a newspaper, including perversions, such as whipping, allegedly in the applicant's handwriting. This was not admitted by him. Consequently, the deputy chief constable considered the documents and formed the view that the applicant was mentally unstable and that he should no longer carry out duties as a police officer. It was arranged for the applicant to be seen by the chief medical officer of the Force, who, after speaking with the applicant for approximately 12 minutes and examining the statements and other documents sent to him relating to the initial enquiry, formed the opinion that the applicant was suffering from a mental disorder of a paranoid type, albeit he stated he saw no useful purpose in referring to the erotic paraphernalia allegedly found in the applicant's desk. The doctor thereafter gave a certificate of unfitness for police duty in respect of the applicant. The applicant was put on sick leave as a result. The applicant was examined by his own doctor, a consultant psychiatrist, who was not permitted by the Force to have sight of the documents to which the chief medical officer had been privy. This doctor determined that the applicant was normal psychiatrically. However, the Force commenced steps to retire the applicant compulsorily on the ground of ill-health.

[116] In coming to his decision, Lord Denning noted that decisions leading to compulsory retirement are of a judicial character and must conform to the rules of natural justice (pg. 25, paragraph b), and that 'when a medical practitioner is making a decision which may lead to a man being compulsorily retired, he must act fairly'. His Lordship was of the opinion that the relevant decision (that is to determine the Applicant's mental state as to whether he is fit or unfit for duty) affects not only his pension rights and payments to him, but also his standing in

the community, his ability to get other work and the like. "It affects his whole future". Thus:

> *"It is quite plain...that the person concerned is entitled to have a fair opportunity of correcting or contradicting any statements made to his prejudice, and a fair opportunity of calling in his own medical consultant and getting him to give his opinion to the deciding person. His own medical consultant should be entitled to have before him all material which the other doctors have".*

[117] I reject the argument has been made that **Re Godden** is distinguishable from **McLaughlin** and that the above statement was *obiter* because that case was not one in which the decision being considered was the compulsory retirement of a public officer.

[118] Firstly, the question before the Court was in relation to an administrative decision made by the police authority in carrying out a series of procedures intended to lead to the compulsory retirement of Inspector Godden and secondly, the relevant statement of principle by Lord Denning was made for the very purpose of assessing the issue at hand in the case, that is, whether the police authority had acted fairly in making the decision to appoint a particular medical doctor. Whilst the learned Law Lord went on to rely on other authorities that dealt more specifically with circumstances where a medical practitioner was required to make a decision which may lead to compulsory retirement of an officer, the overarching principle which he relied on was to be found in the above passage, that being, the decisions leading to compulsory retirement must conform to the rules of natural justice. It can be gleaned that the learned Law Lord placed weight on the seriousness of the situation and the negative impact that the impugned decision could potentially have on the life of the officer involved.

[119] Whilst Salmon LJ., (at pg. 26, paragraphs f-j) stated that the decision was of a quasi-judicial nature, this, in my view, does not detract from the general applicability of the overarching principle. In that regard, Salmon LJ also lamented the seriousness of the decision, noting that it was of the greatest importance to the officer because he would be retired from the force before time, and if so retired, would suffer great loss, including serious financial loss.

[120] It is quite plain, in my estimation, that the decision of the court in **Re Godden** was centred around the premise on which learned counsel for the defendants have suggested, this court reject the applicability of the **McLaughlin** case. I reject that submission and find that Rowe JA properly relied on **Re Godden** to arrive at the decision in **McLaughlin**. In the premises, I find that the claimant ought to have been given the opportunity to be heard.

Whether the purported retirement of the claimant is irrational (Relief no. 6)

[121] It is well accepted in Jamaican law (**Jamaicans for Justice v Police Service Commission and The Attorney General** [2015] JMCA Civ 12, paras. 117-120) that the question of irrationality is to be determined based on the following classic formulation laid down in the landmark case of **Council of Civil Service Unions and Others v Minister for the Civil Service** [1985] AC 374 (CCSU) by Lord Diplock (at pg. 410, para. G):

> *"By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness' **(Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation** [1948] 1 K.B. 223). **It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.**" [Emphasis added]*

[122] The '*Wednesbury unreasonableness*' referred to above was adumbrated in **Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation** [1948] 1 K.B. 223 as:

> *"...a conclusion so unreasonable that no reasonable authority could ever have come to it." [pg. 234]*

[123] In the case of **Jamaica Public Service Company Limited v The All Island Electricity Appeal Tribunal et al** [2015] JMCA Civ 17, our Court of Appeal noted at paragraph 57, that . . . '*the complaint in relation to irrationality requires that there be some consideration of the evidence that was before the decision making body in question*'.

[124] Thus, the question that arises is: 'was the purported retirement of the claimant so unreasonable that no reasonable authority could have come to that decision, or, was the decision so outrageous that no sensible person could have come to it?' I interpret the relief sought under this head to be referring to the fact of the retirement itself.

[125] As stated earlier, the need to retire the claimant allegedly emanated from the desire of Parliament to re-organize the management of the court system for greater efficiency. There is no evidence before the Court of bias or that there was some other purpose for the claimant's retirement, nefarious or otherwise. The effect of the words stated in the impugned letter purporting to retire the claimant was that the retirement was '*consequent on the amendment to the Judicature (Supreme Court) Act*' and '*on the grounds of re-organization*'.

[126] Further, the Memorandum of Objects and Reasons accompanying the relevant Bill, together with the pleadings and evidence of the defendants, indicate that the amendment to the relevant Act was devised, *inter alia*, to establish an improved and more efficient administrative body responsible for the general administration of the Courts that would supersede the existing arrangement, Court Management Services, of which the claimant was the head. The Act provides for a new position of Director of Administration and which post was intended to replace the one which the claimant currently sits. It is, in my view, as the defendants have posited, a necessary corollary to the coming into effect and implementation of this Act, that the Court Management Services would cease to exist and by extension, the role of the claimant would become redundant.

[127] There can be no doubt that Parliament is empowered to enact laws 'for the peace, order and good government of Jamaica', insofar as these laws do not offend the provisions of the **Constitution** (section 48, the **Constitution of Jamaica,** and section 13(2)(b) of the **Charter of Fundamental Rights and Freedoms**). As was opined by Lord Diplock in **Hinds and Ors v The Queen** [1977] A.C. 195, what is reasonably required for same is prima facie within the discretion of Parliament as such decisions involve "*considerations of public policy*

which lie outside the field of the judicial power and may have to be made in the light of information available to government of a kind that cannot effectively be adduced in evidence by means of the judicial process" (page 224).

[128] Further, section 3 of the **Civil Service Establishment Act**, 1976 empowers the Minister responsible for the Public Service to 'constitute or abolish offices in the public service' by order, again, insofar as this action does not offend the **Constitution**.

[129] In **Legal Officers' Staff Association & Ors v Attorney General & Anor** [*Supra*, paras 103-106], McDonald-Bishop J (as she then was), in discussing the extent to which the Court could interfere with the actions of the other two arms of government, particularly the Legislature, and commenting on the Privy Council decision of **The Bahamas District of the Methodist Church in the Caribbean and the Americas and Others v The Hon. Vernon J Symonette M.P. Speaker of the House of Assembly and 7 Others, and Ormond Hilton Poiter and 14 Others v The Methodist Church of the Bahamas and Others**, Privy Council Appeal nos. 70 of 1998 and 6 of 1999, delivered July 26, 2000, stated the following which I think apt:

> *"[105] . . . the courts have recognized that Parliament has exclusive control over the conduct of its own affairs, subject of course to the Constitution. This principle, their Lordships said, "is essential to the smooth working of a democratic society which espouses the separation of power between executive government and an independent judiciary". According to them,* ***"the courts must be ever sensitive to the need to refrain from trespassing, or even appearing to trespass, upon the province of the legislators."*** *(My emphasis)*
>
> *[106] It is, indeed, the province of the legislature that has delegated authority to the relevant Minister, to determine the emoluments to be paid to judges, legal officers as well as to other public sector groups. The judiciary has no control over the financial matters of government to say what should or should not be expended or on whom or for whose benefit. That is the exclusive remit of the executive and the legislature...no rational basis for the court to interfere with the treatment of those matters by those arms of the State in the absence of any infringement by them of the Constitution or any law."*

[130] She concluded the issue by finding thus:

> *"[114] . . . having looked at the instant case in its totality...it is my considered view that the claimants' legitimate expectation has been overridden by the promulgation of the Order made pursuant to the Civil Service Establishment Act...The Order is not shown to be unconstitutional or illegal to warrant intervention of the court. It, therefore, stands as a valid exercise of legislative power in respect of which the court would have no right in law to intervene. In the end, I find that there is no basis in law on which this court could intervene with the decision and action of the 2nd defendant without violating the doctrine of the separation of powers. This is so because to intervene in such matters would be to don the policy-making garb of the government which is not the function of the court."*

[131] Undoubtedly, it would be inimical to good administration if the government, and in particular, the legislature, were to be constrained to allow an administrative structure to remain that proved to be inefficient and uneconomical. In that regard, I am of the view that the fact of the retirement in and of itself is not unreasonable or irrational.

[132] However, the question remains whether, in all of the circumstances, the decision to retire the claimant was irrational. Though the fact of the retirement itself was not unreasonable or irrational, I am of the view that it was indeed irrational and unreasonable to retire the claimant.

[133] As stated earlier in this judgment, the claimant was only 43 years of age at the material time, thus having more than ten (10) years left before reaching retirement age. Her stated purpose for which she embarked on study leave (which was unchallenged by the defendant) was to improve her legal knowledge base given the nature of the position that she held. I also consider the fact that she had been in dialogue with the Chief Personnel Officer and had been advised that her concerns would have been brought before the Public Service Commission, coupled with the fact that no indication whatsoever was given to her that it was even a consideration that she would be retired.

[134] Undoubtedly, the advent of new legislation to change the structure of an entire entity is not something that could arise suddenly. There is no evidence that the Public Service Commission made any attempts to find alternative placement for the claimant in the Public Service. Furthermore, the fact that the Act was

assented to on the same date as the last correspondence from Mrs. Mendez (about two (2) weeks after it was passed in Parliament), in my view, indicates that there was no intention to even attempt to find alternative placement for the claimant in the Ministry of Justice or even the Public Sector. In my estimation, it is irrational and unreasonable for the Public Service Commission to retire a 43-year-old senior public officer who has no blemish on her performance record; had just completed an extensive course of study pertinent to her post (in an exceptional manner), and had been redeployed to a post below the level of her appointed post, without advising her of the impending re-organization, the enactment of legislation and that her retirement was being contemplated, without making a legitimate attempt to redeploy her in a comparable position in the Ministry of Justice or other Ministry or department in the Public Service, and without giving her an opportunity to make representations in relation thereto.

Whether the reason given for claimant's purported retirement in the relevant letters pursuant to Sections 6(1)(iv) of the Pensions Act is irrational (Relief no. 7)

[135] Further to the above discussion, the impugned letter also stated as a 'reason' that the retirement was pursuant to section 6(1)(iv) of the **Pensions Act**, in the sense that the retirement was empowered by that section of the Act.

[136] It is to be noted that on October 23, 2017, Parliament enacted the **Pensions (Public Service) Act**, 2017 which repeals several pension related Acts, including the aforementioned Act (section 39). It is well established that the law in force at any given time is the law that is applicable to the resolution of an issue which arose during that material time, particularly where that law has subsequently been repealed, unless it is that the new law expressly states that it is to be retrospective. Whilst section 37 of the new Act gives the Minister such powers to create regulations with retrospective effect, this has not been done to date. Therefore, the **Pensions Act**, 1947 is applicable.

[137] Section 6(1)(iv) provides:

"subject to subsection (3), no pension, gratuity, or other allowance, shall be granted under this Act to any officer except on his retirement from the public service in one of the following cases –

...

(iv) on compulsory retirement for the purpose of facilitating improvement in the organization of the department to which he belongs, by which greater efficiency or economy may be effected."

[138] I am in agreement with Mr. Wildman's submissions that the aforementioned provision only speaks to the manner in which payment of pensions, gratuities and other emoluments consequent on retirement of a public officer are to be determined. It in no way empowers or governs the decision or action of the Public Service Commission to recommend compulsory retirement, or of the Governor-General to retire an officer. I also find favour with the argument that that provision could not have relieved the Public Service Commission of any obligation it may have had to afford the claimant a right to be heard prior to a decision to retire her.

[139] In fact, it is to be highlighted that the **Pensions Act** has other provisions that speak to compulsory retirement. These, as contained in section 8, as well as section 6(2), have not been raised by either party and I will not examine them for the purposes of this application. It may well be then that the purported retirement is irrational.

Whether the claimant had a legitimate expectation that she would not be retired from her post without compliance with the procedure laid down under Section 125 of the Constitution and, if so, whether this was breached.

[140] Having regard to my finding at paragraph [82] above that the Court is satisfied on the evidence that section 125 was complied with, this issue has been rendered nugatory. In any event, I am of the view that a sufficient factual foundation in aid of such a contention has not been established by the claimant. The law of legitimate expectation necessarily involves, as an initial step, the establishment of some policy or promise by a public authority to a person in respect of an

interest in a benefit or advantage that that person enjoys that, (1) said benefit or advantage will not be withdrawn unless or until the person is notified and consulted with in relation thereto (procedural legitimate expectation), and/or (2) that the relevant benefit or advantage will not be withdrawn, unless or until there is some overriding or countervailing public interest or reason that justifies the withdrawal of the benefit or advantage. [**Council of Civil Service Unions v Minister for the Civil Service** (CCSU) [1985] A.C. 374; **Bhatt Murphy (a firm), R v (on the application of) the Independent Assessor** [2008] EWCA Civ 755 (9 July 2008); **Legal Officers' Staff Association & Ors v Attorney General & Anor** [2015] JMFC FC 3 **(LOSA),** paras 43-46]

[141] In **LOSA**, McDonald Bishop J, at paragraph 45, summarized the broad principles governing the doctrine, as set out by Laws LJ in **Bhatt Murphy,** as follows:

> *"(i) The power of public authorities to change a policy is constrained by the legal duty to be fair and other constraints, which the law imposes.*
>
> *(ii) A change of policy which would otherwise be unexceptionable may be held to be unfair by reason of prior action, or inaction, by the authority.*
>
> *(iii) If the authority has distinctly promised to consult those affected or potentially affected, then ordinarily it must consult. This is the paradigm case of procedural expectation.*
>
> *(iv) If it has distinctly promised to preserve existing policy for a specific person or group who would be substantially affected by the change, then ordinarily it must keep its promise. This is substantive expectation.*
>
> *(v) If, without any promise, it has established a policy, distinctly and substantially, affecting a specific person or group who in the circumstances was in reason entitled to rely on its continuance and did so, then ordinarily it must consult before effecting any change. This is the secondary case of procedural expectation.*
>
> *(vi) To do otherwise, in any of these instances, would be to act unfairly so as to perpetrate an abuse of power."*

[142] The Privy Council in **Francis Paponette and Others (3) v The Attorney General of Trinidad and Tobago** [2010] UKPC 32, stated the following at para 34 in relation to the applicable test as to whether a public authority is entitled to frustrate a substantive legitimate expectation:

"The leading case is R v North and East Devon Health Authority, Ex p Coughlan [2001] QB 213. Lord Woolf MR, giving the judgment of the Court of Appeal said, at para 57:

> *'Where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy.'"*

[143] The claimant's contention under this ground is predicated on compliance with section 125 of the **Constitution**. I cannot see why this line of argument is appropriate in the circumstances, in light of the fact that it provides a legal obligation on the parties to whom it applies, a breach of which would invalidate any action or inaction in contravention thereto. There would therefore be no need to assess whether the claimant had a legitimate expectation in relation thereto.

[144] Further, the provision does not impose a procedure or policy beyond that which is expressly stated in the section, nor has it been argued or established by way of evidence that this is indeed so. Moreover, there is no allegation or evidence before the court that a promise was made to the claimant that would create a legitimate procedural or substantive expectation on her part that a particular procedure would have been followed, or that she would not have been retired. Indeed, there was no communication whatsoever with the claimant that her retirement was even in contemplation, thus no promise could have been made in that respect.

[145] The authorities establish that it is for the claimant to meet the initial burden of proving that she indeed had a legitimate expectation and that this was breached. It is only then that the burden would shift to the defendants to justify the said breach. In that regard, in the **Francis Paponette** case, the Privy Council stated the following at paragraph 37:

"The initial burden lies on an applicant to prove the legitimacy of his expectation. This means that in a claim based on a promise, the applicant must prove the promise and that it was clear and unambiguous and devoid of relevant qualification. If he wishes to reinforce his case by saying that he relied on the promise to his detriment, then obviously he must prove that too. Once these elements have been proved by the applicant, however, the onus shifts to the authority to identify any overriding interest on which it relies to justify the frustration of the expectation. It will then be a matter for the court to weigh the requirements of fairness against that interest."

Whether the defendants are empowered by law to re-deploy the claimant from the post of Principal Executive Officer of the Court Management Services to the Ministry of Justice on the recommendation of the Honourable Chief Justice (*Reliefs 17 & 19*)

[146] On September 28, 2015, the claimant was advised by the Chief Personnel Officer (CPO), via letter, that on the recommendation of the Chief Justice, approval had been given for her to be re-deployed with effect from the following day, to the Ministry of Justice, in keeping with **Staff Order 1.9.3,** until further notice. The letter also required the claimant to perform duties in relation to the co-ordination of the justice reform programme, along with any other duties assigned by the Permanent Secretary, to whom she was to report.

[147] The Public Service Regulations do not speak to the deployment of a public officer. However, under Chapter 1 of **Staff Orders for the Public Service**, 2004, **Staff Order 1.9.3** provides the following guidelines in respect of a deployment:

*"**1.9.3 Deployment***

(i) A deployment is an assignment from one position to another that is equivalent in level, emoluments and benefits;

(ii) A deployment is normally at the discretion of the Permanent Secretary/Head of Department to satisfy operational requirements or to resolve job-related difficulties;

(iii) A deployment may be temporary in the first instance and could lead to a transfer;

(iv) A deployment may be within a Ministry, between Departments within a Ministry or between Ministries."

[148] In that vein, the defendants contend that the Chief Justice is both the 'constitutional and administrative head' of the Judiciary in charge of the courts, and as such would be empowered as a 'head of department', that is, the department of CMS, to make a recommendation that a member of the court staff be deployed.

[149] As pointed out by Counsel for the defendants, section 103(2)(b) of the **Constitution** states that 'the Chief Justice by virtue of his office as head of the Judiciary...". Indeed, the Principal Executive Officer of the CMS is mandated to report to the Chief Justice in respect of the operations of that entity, that entity being responsible for providing administrative services for the entire judicial system. Certainly, therefore, it would be within the purview of the head of the judicial system to make recommendations as he or she deems necessary for the proper functioning of the said system. In fact, the Chief Justice as the person with integral involvement in the day to day operations of the system, would be in a better position than the Permanent Secretary of the Ministry of Justice to make an informed and practical determination as to the 'operational requirements to resolve job-related difficulties' (Staff Order 1.9.3(ii)). Invariably, some input or advice from the Chief Justice in this regard would be required.

[150] I therefore find that the Chief Justice, as the head of the relevant department, is empowered to make recommendations to the Permanent Secretary, in relation to the deployment of officers within the court system.

[151] However, the problem that arises with the deployment in this case is the nature of the post to which the claimant was deployed. The relevant Staff Order dictates that the deployment is to be "*equivalent in level, emoluments and benefits*". There is no dispute between the parties that, although the claimant was being paid the same emoluments and benefits during her period of deployment, the level of that post, SEG-5, was well below (two levels below) her appointed post. The unchallenged evidence is also that the claimant was required on site to report to an employee junior to her. This remains unchallenged.

[152] I therefore find that the deployment of the claimant was *ultra vires* the Staff Orders, in that it was not equivalent in level to the claimant's appointed post as dictated by the established policy that is to govern officers in the public service.

[153] Notwithstanding this, the Court is cognizant of the fact that, since the claimant's deployment ended May 31, 2016, the usefulness and propriety of granting the relief sought is doubtful. However, this will be dealt with in more detail when the issue of whether relief should be granted is dealt with.

Whether the impugned provisions of the relevant amendment were unconstitutional, in that they offend section 125 of the Constitution, as well as the principle of separation of powers (*Reliefs 11-16*)

[154] The claimant challenges the constitutionality of the **Judicature (Supreme Court) (Amendment) Act 2016**, on the basis that the requirement therein that the Public Service Commission is to consult with the Chief Justice in respect of its advice to the Governor-General on the appointment of the Director of Court Administration contravenes section 125 of the **Constitution**, as well as the principle of separation of powers. The defendants submitted, however, that there is no such violation as, firstly, section 125 is to be read in tandem with Regulation 10 of the PSR which empowers the Public Service Commission to consult with whomever it sees fit (a limited interpretation of section 125 would be irrational), and secondly, that the amendments actually function to reinforce the principle of separation of powers by fostering and strengthening judicial independence.

[155] It is well established and accepted that the principle of separation of powers, albeit not provided for expressly, underpins the **Jamaican Constitution**, and the framework under which the **Constitution** ought to be interpreted. It is a principle that is fundamental and inextricably linked to the achievement of the Rule of Law in a democratic nation such as Jamaica. This was established by the Privy Council in **Hinds and Others v R** [1977] AC 195, and reinforced in **DPP v Mollison (No.2)** [2003] UKPC 6.

[156] In **Hinds**, Lord Diplock, at page 212, described the principle as follows:

> *"Nevertheless it is a well established as a rule of construction applicable to constitutional instruments under which this governmental structure is adopted that the absence of express words to that effect does not prevent the legislative, the executive and the judicial powers of the new state being exercisable exclusively by the legislature, by the executive and by the judicature respectively.*
>
> . . . .
>
> *In the result, there can be discerned in all those constitutions which have their origin in an Act of the Imperial Parliament at Westminster or in an Order in Council, a common pattern and style of draftmanship which may conveniently be described as "the Westminster model".*
>
> . . . .
>
> *All Constitutions on the Westminster model deal under separate Chapter headings with the legislature, the executive and the judicature. The Chapter dealing with the judicature invariably contains provisions dealing with the method of appointment and security of tenure of the members of the judiciary which are designed to assure to them a degree of independence from the other two branches of government. It may, as in the case of the Constitution of Ceylon, contain nothing more. To the extent to which the Constitution itself is silent as to the distribution of the plenitude of judicial power between various courts it is implicit that it shall continue to be distributed between and exercised by the courts that were already in existence when the new Constitution came into force...What, however, is implicit in the very structure of a Constitution on the Westminster model is that judicial power, however it be distributed from time to time between various courts, is to continue to be vested in persons appointed to hold judicial office in the manner and on the terms laid down in the Chapter dealing with the judicature, even though this is not expressly stated in the Constitution: Liyanage v. The Queen [1967] 1 A.C. 259, 287-288."*

[157] In ***Mollison***, the Board in applying ***Hinds***, stated the following:

> *"It would no doubt be open to the Board to reject the reasoning, but it would be reluctant to depart from a decision which has stood unchallenged for 25 years, the more so since the decision gives effect to a very important and salutary principle. Whatever overlap there may be under Constitutions on the Westminster model between the exercise of executive and legislative powers, the separation between the exercise of judicial powers on the one hand and legislative and executive powers on the other is total or effectively so. Such separation, based on the rule of law, was recently described by Lord Steyn as 'a characteristic feature of democracies': R (Anderson) v Secretary of State for the home Department [2002] UKHL 46. . ."*

[158] In my view, the above quote from ***Mollison*** indicates that it is accepted that there will be some overlap of the functions of the different branches of government. Also well accepted across different jurisdictions as an integral feature of separation of powers, is the principle of Judicial Independence.

[159] Two authorities were relied on by the defendants. Firstly, the article **Judicial Independence from the Executive: A First-Principles Review of the Australian Cases** by Rebecca Ananian-Welsh and George Williams (Monash University Law Review, Vol. 40, No. 3 Aug. 2015, pgs. 594 & 611-613) was relied on for the proposition that judicial independence includes *'operational independence'*, and that operational independence involves the following (pg. 600):

> *"The daily operational processes and procedures of courts require freedom from executive interference. In essence, the executive should not control the courts, but should support them sufficiently to facilitate their effective and independent functioning. Thus, executive funding and other resourcing to the judiciary must be adequate to allow it to perform its functions, and there should be no interference in respect of the assignment of judges, sittings of the court or court lists...Judicial independence requires restrictions on the ability of the executive to interfere in the operational aspects of a court. As former Justice of the Supreme Court of Victoria R E McGarvie observed:*
>
> > *'A court in which those responsible to the executive decide the way in which the operations of the court will be managed, the way cases will progress towards hearing and which cases will be heard by which Judge at which time, is not likely to produce the impartial strength and independence of mind which the community requires of its judges.'"*

[160] Secondly, the defendants relied on the Draft Universal Declaration on the Independence of Justice ("Singhvi Declaration") for the following:

> *"32. The main responsibility for court administration including supervision and disciplinary control of administration personnel and support staff shall vest in the judiciary, or in a body in which the judiciary is represented and has an effective role."*

[161] The **Basic Principles on the Independence of the Judiciary**, adopted by the 7th United Nations Congress on the Prevention of Crime and the Treatment of Offenders (held at Milan from August 26 to September 6, 1985 and endorsed by

General Assembly resolutions 40/32 of November 29, 1985 and 40/146 of December 13, 1985), which has expressed as its purpose the formulation of principles to assist member states in securing and promoting the independence of the Judiciary, also provide some guidance. Importantly, the Declaration recognizes the following:

> *"1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.*
>
> *2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.*
>
> *3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.*
>
> *4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.*
>
> . . . .
>
> *14. The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration."*

[162] In **Valente v The Queen** [1985] 2 SCR 673, a case involving whether a tribunal was '*impartial and independent*' under section 11 of the **Canadian Charter of Rights and Freedoms**, the Supreme Court of Canada described 'judicial independence' as involving "*both individual and institutional relationships: the individual independence of a judge as reflected in such matters as security of tenure and the institutional independence of the court as reflected in its institutional or administrative relationships to the executive and legislative branches of government*".

[163] Further, it listed as an essential condition of judicial independence, "the institutional independence of the tribunal with respect to matters of administration

bearing directly on the exercise of its judicial function. Judicial control over such matters as assignment of Judges, sittings of the court lists has been considered the essential or minimum requirement for institutional independence. Although an increased measure of administrative autonomy or independence for the courts may be desirable it cannot be regarded as essential for purposes of section 11 (d) of the Charter" [pg. 5].

[164] What can be gleaned from the above authorities, in addition to the pervasive view that the principle of separation of powers is steadfast and critical to the rule of law in a democracy such as ours, is that there will invariably be some amount of overlap across the functions of the different branches of government. Also, there appears to be a widely held view to a move towards an increasing involvement of the Judiciary in its own administrative affairs.

[165] Notwithstanding this, this Court must ultimately be guided by what is the applicable law in this jurisdiction. In my estimation, questions that arise for determination are:

i. Which branch of government is responsible for the administration of the courts, particularly in respect of the employment of the director of court administration?

ii. Does judicial independence extend to administrative affairs of the Court

iii. Is there an encroachment of the functions of the Executive by the Judiciary by virtue of the impugned provisions?

iv. To what extent is such encroachment permissible?

[166] The power to appoint, remove and exercise disciplinary control over public officers is vested in the Governor-General on the advice of the Public Service Commission pursuant to section 125 of the **Constitution**. Of note is that the provisions dealing with the Public Service and the creation of the Public Service Commission in the **Constitution** are encapsulated separately under Part 1 of Chapter IX. Section 10 of the **Public Service Regulations** further provides that:

> *"The Commission in considering any matter or question **may consult** with any such public officer or other person **as the Commission may consider proper and desirable** and may require any public officer to attend and give evidence before it and to produce any official documents relating to such matter or question."**[Emphasis added]***

[167] The Public Service Commission, it is apparent, is established as an independent and impartial body under the **Constitution**, whose functions are not subject to any person, entity or particular branch of government, albeit that the Public Service falls under the auspices of the Ministry of Finance and Public Service, which is an executive body (performing administrative functions). This, in my view, was not unintentional. It seems to me that the intention of the framers of the **Constitution**, in this vein, was to insulate, in particular, the employment of persons in the Public Service from political and other pressure.

[168] Section 15 A (1) of the amendment which creates the post of Director of Court Administration, recognizes the role of the Governor-General and the Public Service Commission in appointing the Director as a public service officer, but also seeks to mandate that the Public Service Commission consults with the Chief Justice prior to making its recommendation to the Governor-General, and that renewal of such appointment is subject to the Chief Justice.

[169] In my estimation, this is wrong and a usurpation of the discretion of Public Service Commission as conferred by section 125 of the **Constitution**. While I accept the defendants' submission that (1) 'it would be irrational for the Public Service Commission to obtain personal knowledge of the vast personnel of the entire public service without ever consulting the persons to whom they report', and (2) 'it would be good governance for the Public Service Commission to pursue the advice of the head of the Judiciary when making a public service appointment within a division of the court', it is not for the Legislature to do so in a manner repugnant to the provisions of section 125. There is a marked difference, it seems to me, between a discretion by the Public Service Commission to choose to consult with a person or body as they think necessary, as opposed to being mandated to do so, which is what the amendment purports to do. The latter is not an intention that can be readily gleaned from section 125,

whether expressly or impliedly, or one that is in accord with the spirit of that provision.

[170] The implication of section 15A (1) of the amendment would be that the discretion of the Public Service Commission to consult with whomever it chooses in respect of appointment would be fettered, and would create such an absurdity, in that, if it chose not to consult with the Chief Justice, it would be in breach of the amendment, but not section 125 of the **Constitution**. Further, the requirement that the renewal of the appointment ought to be 'subject to the approval of the Chief Justice', would fetter the Public Service Commission's discretion even more, as the Public Service Commission could not, under the amendment, appoint someone as Director who does not find favour with the Chief Justice. This would give the Chief Justice an incredible amount of power, and one that it is doubtful could be subject to judicial review as is that of the Public Service Commission. This, in my view, could not have been the intention of the framers of the **Constitution**.

[171] The supremacy of the **Constitution** is incontrovertible. For the Legislature to enact a law with provisions repugnant thereto, it would have been required that such Act be passed by the votes of not less than two-thirds of all the members of each House of Parliament, in accordance with section 49 of the **Constitution**. This was not so.

[172] I find the words of Lord Diplock in **Hinds**, at pg. 214, to be apt:

> *"...[I]n deciding whether any provisions of a law passed by the Parliament of Jamaica as an ordinary law are inconsistent with the Constitution of Jamaica, neither the courts of Jamaica nor their Lordships' Board are concerned with the propriety or expediency of the Law impugned. They are concerned solely with whether those provisions, however reasonable and expedient, are of such a character that they conflict with an entrenched provision of the Constitution and so can be validly passed only after the Constitution has been amended by the method laid down by it for altering that entrenched provision. "*

The learned Law Lord further stated, at pg, 226:

"A breach of a constitutional restriction is not excused by the good intentions with which the legislative power has been exceeded by the particular law."

[173] It is therefore my considered view that the impugned provisions encroach upon the discretion of the Public Service Commission bestowed upon it by section 125 and are therefore unconstitutional, having not been passed in accordance with the requisite majority to amend the **Constitution**.

[174] I cannot, however, find that there has properly been a breach of the principle of separation of powers based on the traditional formulation of such, as espoused by the authorities. As stated above, the Public Service and the functions of the Public Service Commission do not fall squarely within the realm of the executive branch of government. In my estimation, as a corollary to the discussion above, to bestow on the Chief Justice the power which the amendment seeks to give, arguably oversteps the bounds of the functions of the Judicature as prescribed by our law. I am therefore not prepared to find that the provisions of section 15A(1) ,as amended, offend the principle of separation of powers, but I do find that that provision is in breach of section 125(1) of the **Constitution**.

[175] The claimant also sought several reliefs (14-16) in relation to the section 15 A (3) of the Act as amended, on similar grounds that the provision offends section 125 of the **Constitution**, as well as separation of powers. Section 15A(3) provides:

"(3) The Chief Justice may designate a person to act temporarily in the place of the Director of Court Administration in the absence of the Director of Court Administration or where the office is vacant."

[176] The claimant takes issue firstly with the fact that the amendment seeks to give the Chief Justice the power to designate a Director, temporarily. For the same reasons discussed above, I find that this is not a power that was intended to be exercised by the Chief Justice, in light of the express words of section 125 of the **Constitution**, and is therefore unconstitutional. Similarly, I do not find that the provision breaches the principle of separation of powers. As to the second issue raised, the claimant argued that the section purports to give the Chief Justice the power to be consulted by the 2nd defendant on the appointment of persons to the

Public Service, and is therefore in violation of section 125 and the principle of separation of powers. I reject that argument on the basis that section 15A (3) does not so purport. There is therefore no basis for the particular relief sought.

[177] The claimant further sought declarations (reliefs 11 and 12) that the Chief Justice is not empowered under section 125 to (1) advise the Public Service Commission on its recommendation to the Governor-General, and (2) advise the Public Service Commission on its recommendation to the Governor-General for the termination and/or retirement of persons from the Public Service. I disagree for the following reasons: Notwithstanding that I have found that it is unconstitutional for the amendment to require the Public Service Commission to consult with the Chief Justice in respect of appointment, as stated above, it is within the discretion of the Public Service Commission to consult with whomever they deem necessary (Regulation 10 of the Public Service Regulations). It is, in my view not unlawful for the Chief Justice, as head of the Judiciary, to advise the Public Service Commission in regard to the appointment of persons within the Judiciary, if it is that the Public Service Commission, in exercise of its functions, so requests that advice. Regulation 10 is not repugnant to section 125. I am therefore unable to find a basis to grant the declarations sought in that regard.

[178] From the foregoing, I find that section 15A(1) is in breach of section 125 of the **Constitution**, but does not violate the principle of separation of powers, whilst section 15A(3) is neither. Further, I am unable to find that the Chief Justice is not empowered to advise the Public Service Commission on its recommendation to the Governor-General in respect of appointments and removals from the Public Service. I will deal with what ought to flow from these findings below.

Whether the claimant should be granted any of the reliefs sought in the circumstances

[179] It is well established that the grant of judicial review remedies are discretionary and that that discretion is wide. As noted by McDonald-Bishop J., in ***LOSA***, whether the Court will exercise this discretion will depend on the circumstances

of the case including delay, whether granting relief would cause hardship or prejudice to a party, and what is in the interest of good administration. In that regard, her ladyship noted that this discretion is such that "*a claimant could win on every point and still find that the court refuses a remedy in the exercise of its discretion*", and that the court "*may still refuse relief if it considers that granting relief would be likely to cause substantial hardship to, or substantially prejudice the rights of any person or would be detrimental to good administration* [para. 148]."

DECLARATIONS

[180] A Declaration is a formal statement by the Court declaring the rights of the parties and the legal state of affairs: [**Judicial Review of Administrative Action** (Fifth Edition), De Smith, Woolf and Jowell, Ch. 18, para. 18-001]. The power to grant declaratory relief is discretionary in nature, and depends on the circumstances of each case. The claimant seeks seventeen (17) declarations. I will deal with each in turn.

[181] In ***LOSA***, McDonald-Bishop J, at paragraph 162, described the circumstances the Court ought to consider when granting such relief as follows:

> *"The court has a general power to make declarations although a claim to consequential relief has not been made, or has been abandoned or refused. However, it is essential that some relief should be sought or a right to some substantive relief established. The declaration being claimed must relate to some legal right(s) and must confer some tangible benefit on the claimant: (Halsbury's (supra), para. 1610). The court, however, will not make a declaratory judgment where the question raised is purely academic, the declaration would be useless or embarrassing or where an alternative remedy is available. The authorities have explained that it is of the greatest importance in deciding whether or not discretion should be exercised in favour of granting declaratory relief that the relief should serve some useful purpose. If it does not, it is difficult to see what reason there can be for granting relief. Usefulness does not have to take a material or tangible form; all that is required is that the declaration should resolve a real difficulty with which the claimant or applicant* ***is*** *faced (See de Smith, Woolf & Jowell, Judicial Review of Administrative Action, para. 18-022 and Halsbury's (supra) para.1611)."*

[182] It is my view that, of the declarations sought, reliefs 1, 2, 3, 5, 8, 9, 10, 11, 12, 14, 15, 16 and 17 should be refused. The first three (3) declarations sought (reliefs 1-3) are:

> *"1...that the 1st Defendant is not empowered by law to retire the Claimant from the post of Principal Executive Officer in the Court Management Services;*
>
> *2...that the 2nd Defendant is not empowered by law to retire the Claimant from the post of Principal Executive Officer in the Court Management Services;*
>
> *3...that only the Governor General acting on the advice of the 2nd Defendant is empowered by law to retire the Claimant as the Principal Executive Officer in the Court Management Services."*

Having regard to my findings at paragraph [85] these declarations are refused. Neither the 1st nor 2nd defendant purported to retire the claimant from her appointed post, and there is no dispute that the law provides that only the Governor-General, acting on the advice of the 2nd defendant, was empowered to retire the claimant. The defendants did not assert otherwise.

[183] In relation to relief no. 5, '...that the claimant has a legitimate expectation that she will not be retired from the post of Principal Executive Officer of the Court Management Services by the Governor General acting on the advice of the 2nd defendant without compliance with the procedure laid down under section 125 of the Constitution', having found that the claimant has not established a legitimate expectation, this declaration is refused.

[184] In relation to relief no. 8, '...that the letter served on the claimant by the 1st defendant purporting to retire her from her position as the Principal Executive Officer in the Court Management Services, is in breach of section 125 of the Constitution, rendering the said letter null and void and of no effect', having found that the letter, on its face, is not in breach of section 125, this declaration is refused.

[185] In relation to relief no. 9, '...that the failure of the 1st and 2nd defendants to comply with the procedure laid down under section 125 of the Constitution in

purporting to retire the claimant from the post of Principal Executive Officer in the Court Management Services, renders the said decision null and void and of no effect", I have found that section 125(1) was complied with, but not section 125(3). However, the duty to carry out the procedure outlined in section 125(3) is owed by the Governor-General and not the 1st and 2nd defendants. Therefore, there was no 'failure' in this regard by the 1st and 2nd defendants. Accordingly, I will not grant this declaration.

[186] In relation to relief no. 10, '...that the reasons contained in the purported termination of the claimant from the relevant post violate section 125 of the Constitution, rendering the purported retirement null and void and of no effect', having found that this is not so, there is no basis to grant this declaration.

[187] In relation to relief nos. 11 and 12, '...that under section 125 of the Constitution the Chief Justice of Jamaica is not empowered by law to advise the 2nd defendant on its recommendation to the Governor General for the appointment (11) and the termination/and or retirement (12) of persons to and from the public service from the public service', for the reasons expressed above, I find no basis to grant such declarations.

[188] Relief nos. 14, 15 and 16, '...that the amendment to the Judicature (Supreme Court) Act, contained in Act No.9 of 2016, and in particular section 15(a) (3) of the said amendment, which purports to give the Chief Justice the power to designate a person temporarily to act in place of the Director of Courts Administration in the absence of the Director of Court Administration or where the office is vacant, is in violation of section 125 of the Constitution...' (14);...that the amendment to aforementioned Act which purports to give the Chief Justice the power to be consulted by the 2nd defendant on the appointment of persons to the Public Service, violates the separation of powers which is enshrined in the Jamaican Constitution...' (15); and '...that the said amendment, insofar as it purports to give the Chief Justice the power to designate a person to act temporarily in the absence of an appointment or where the office is vacant, violates the doctrine of separation of powers enshrined in the Constitution' (16),

are all refused, having regard to my findings that (1) the Chief Justice as the head of the Judiciary, charged with managing the operations of the Court, and in the interests of efficiency, can properly place a person to act as Director, provided that same is temporary in the true sense, in that such placement does not usurp the function of the Public Service Commission to appoint a person to act in that position; (2) it is within the purview of the Public Service Commission to choose of their own volition to consult with the Chief Justice in respect of appointments in her capacity as head of the Judiciary, provided that the true exercise of the discretion to make the recommendation remains with the Public Service Commission.

[189] In relation to relief no. 17, 'that the 1st and 2nd defendants are not empowered by law to re-deploy the claimant from the post of Principal Executive Officer of the Court Management Services to the Ministry of Justice on the recommendation of the Chief Justice', having found that as the head of the Judiciary, the Chief Justice may properly recommend that the claimant be deployed, albeit that I have found that the deployment was ultra vires the Staff Orders for a different reason, I will decline to grant the declaration. I have found that the deployment was ultra vires because the 2nd defendant is not empowered to deploy the claimant to a post below the level of her appointed post. Notwithstanding this, since the claimant has not sought relief on this basis, I am prohibited from granting relief in this respect. In any event, I am in agreement with the defendants that since the deployment has long since ended, and the claimant suffered no financial loss therefrom, a grant of relief on this ground would serve no useful purpose.

[190] The declarations sought at nos. 4, 6, 7, 13 are granted. Relief no. 4, '...that before the 2nd defendant can advise the Governor-General to retire the claimant from the post of Principal Executive Officer in the Court Management Services, the 2nd defendant must afford the claimant an opportunity to be heard as to the reasons for such retirement', is granted having regard to my finding at paragraph [119] that the claimant ought to have been given an opportunity to be heard pursuant to Regulation 26 and as a matter of natural justice.

[191] Relief no. 6, '...that the purported retirement of the claimant by the 1st and 2nd defendants from the post of Principal Executive Officer of the Court Management Services and the Public Service is irrational', is granted, having regard to my finding at paragraph [137] that the retirement of the claimant was irrational in the circumstances.

[192] Relief no. 7, '...the purported reason given by the 1st defendant to the claimant as contained in letters dated May 19 and 20, 2016 respectively, referencing the amendment to the Judicature (Supreme Court) Act and section 6(1) & (4) of the Pensions Act, is irrational', is granted, having regard to my finding at paragraph [138], that, insofar as the reference to section 6 (1) & (4) purports to provide a basis in law for the retirement, is irrational.

[193] Relief no. 13, '...that the amendment to the Judicature (Supreme Court) Act, contained in **Act No. 9 of 2016**, and in particular section 15(a)(1) of the said amendment, which purports to mandate the 2nd defendant to consult with the Chief Justice in its advice to the Governor-General on the appointment of the Director of Court Administration, violates section 125 of the Constitution, rendering the said amendment null and void and of no effect', is partially granted, having regard to my finding at paragraph [177] that section 15(a)(1) of the Act, as amended, contravenes section 125(1) of the **Constitution**. However, in my view, the Court will only declare the offending part to be null and void by way of severance. The rest of the amendment is to remain.

[194] In ***Hinds***, Lord Diplock, at pg. 229, explained the approach the Court should take after having found that legislation offends the **Constitution**. After finding that specific provisions of the Gun Court Act 1974 were void, he stated:

> *"The final question for their Lordships is whether they are severable from the remaining provisions of the Act so that the latter still remain enforceable as part of the law of Jamaica...The test of severability has been laid down authoritatively by this Board in Attorney-General for Alberta v. Attorney-General for Canada [1947] A.C. 503, 518:*
>
> > *'The real question is whether what remains is so inextricably bound up with the part declared invalid*

that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is ultra vires at all.'"

[195] There is no question, in my mind, that the other provisions of the Act can survive independently from section 15A(1) of the amendment. The result would simply be that the Director falls to be appointed in the manner set out in section 125 of the **Constitution**.

CERTIORARI

[196] The claimant sought an order of certiorari in respect of two decisions: (1) the decision in the relevant letters purporting to retire her (relief no. 18), and (2) the decision to deploy her on the recommendation of the Chief Justice (relief no. 19). In relation to the former, the defendants submit that certiorari does not lie, as the defendants made no decision. The decision was made by the Governor-General. In relation to the latter, the defendants submitted that, even if the Court were to find that the deployment was unlawful, which they submitted it was not, an order for certiorari would serve no useful purpose as the deployment has ended and the claimant suffered no financial loss, having been paid the salary attached to her appointed post.

[197] The remedy of *certiorari* is ordinarily available where there is an error of law on the face of the record or a public authority has acted *ultra vires* its powers [**R v Licensing Authority ex parte Panton** (1970) 15 WIR 380. In this regard, Browne J, (whose decision was later reinstated and approved by the House of Lords [1969] 2 A.C. 147, pg. 196) in **Anisminic Ltd v Foreign Compensation Commission and Another** [1969] 2 A.C. 223, at pg. 233, stated the following:

"When the High Court quashes a decision of an inferior tribunal on certiorari, it may be doing either of two things; if the decision of the inferior tribunal was given without jurisdiction or in excess of jurisdiction, the quashing is merely a formal recording of what is already the position, namely, that the decision is a nullity, but where a decision is quashed for error of law within jurisdiction it remains a good decision until it is

quashed: for example, Reg. v. Medical Appeal Tribunal, Ex parte Gilmore *[1957] 1 Q.B. 574,* per *Parker L.J., at p. 588."*

[198] According to the learned authors of **Judicial Review of Administrative Action** (Fifth Edition), De Smith, Woolf and Jowell, an order for 'certiorari will not lie unless something has been done that can be quashed by the Court' [para. 16-017, Ch. 16].

[199] In relation to relief no. 19, *'. . . an order of certiorari quashing the decision to redeploy the claimant. . . .'* and having regard to the fact that the claimant's deployment has long since ended, I find that to grant certiorari in respect thereof would be academic and serve no useful purpose. In any event, I find no basis for such an order. This relief is therefore refused.

[200] In relation to relief no. 18, *'. . . an order of certiorari quashing the decision of the 1st defendant (as contained in letters dated May 19, and 20, 2016, respectively), purporting to retire the claimant. . . .'* the defendants' submissions have raised the issue whether certiorari can lie to quash a decision made by a person who is not a party to the claim, i.e. the Governor-General, where that decision was made pursuant to a recommendation by another person/body, the Public Service Commission, who is a party to the claim and whose recommendation is found to be procedurally flawed or unlawful.

[201] In **R v Agricultural Dwelling-House Advisory Committee for Bedfordshire, Cambridgeshire and Northamptonshire, ex parte Brough** [1987] 1 EGLR 106, in deciding to quash the report of an advisory committee, Hodgson J stated the following at pages 6 and 7:

> *"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 another, 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."

[202] Pusey J, in **Symbiote Investments Ltd v The Spectrum Management Authority et al** [2017] JMSC Civ 10, in applying ***ex parte Brough*** distilled the following principles:

[41] Firstly, ***the Court must determine whether there is a procedural impropriety. In Brough that impropriety was a defect in the right to be heard and to hear all the relevant allegations****. The mistake in the letters to the Applicant do not in the view of this Court rise to the level of a procedural impropriety. This Court has taken the view that the error is a harmless mistake not a procedural impropriety.* ***It is still necessary however to look at the other factors in setting aside a preliminary decision in case the Court is wrong on that point.***

[42] ***Secondly, the Court should look at the proximity between the preliminary decision and the final one that affects the rights of the party. In Brough the evidence indicated that the authority usually accepted the decision of the advisory committee. Consequently, the preliminary decision went a long way to determine the rights of the applicant.*** *In the case before this Court, the decision made by the agencies is merely a decision to initiate an investigation which may lead to a recommendation to the Minister. There is no evidence that the Minister always accepts such recommendations. On the contrary, there is evidence that he did not accept the recommendation of another state agency, namely the OCG in the granting of one of the original licences.*

> *[43] Thirdly,* ***the Court needs to look at what procedural steps follow this preliminary decision. If there are safeguards in the procedural steps after the preliminary decision, including an oppourtunity to influence the final determination, then to quash the preliminary decision would not be prudent.*** *In the case before this Court, the SMA and OUR are able to summon witnesses, certify documents and must give the Applicant an opportunity to be heard. In fact, the authorities have indicated to the Applicant that they intend to use those powers in the investigation, which has not yet started. Consequently, there are sufficient safeguards in the investigative process to protect the Applicant."* ***[Emphasis added]***

[203] Further, in **Dale Austin v The Solicitor General and The Permanent Secretary of the Ministry of Justice** [2018] JMSC Civ 1, Sykes J (as he then was) found that some types of recommendations are amenable to judicial review depending on its status in the decision-making process. He particularly noted that a recommendation made in a context by a body such as the Public Service Commission, where the person to whom the recommendation is made to, such as the Governor-General, would 'in all likelihood' act on the recommendation, would be tantamount to the decision, and would therefore be amenable to judicial review [para. 10].

[204] Although ***ex parte Brough***, ***Symbiote*** and ***Dale Austin*** are not squarely on point, I find them to be useful. This is to illustrate that the Public Service Commission cannot necessarily absolve itself of responsibility and the claimant will not be left without remedy, simply because, technically speaking, the Public Service Commission did not make the final decision that is impugned.

[205] In **Edward Campbell v The Police Service Commission** [2015] JMSC Civ. 202, on the preliminary issue as to whether it was within the Court's purview to grant judicial review of a decision that had been affirmed by the Governor-General, I found the following:

> *"It goes without saying that any decision borne out of an illegal process is null and void. Therefore, if it is that the process by which the appeal was handled was illegal, then the decision of the Privy Council would be a nullity and hence the order of the Governor General. The case of* ***Andrew Holness v Arthur Williams [2015] JMCA Civ 21*** *is instructive. The Court of Appeal found that the process by which resignations tendered to the Governor General by the Opposition Leader on behalf of the Respondent*

was unconstitutional and invalid, and thus the resignations were of no effect."

[206] In my view, this principle is applicable here. If the process by which the Public Service Commission arrived at its recommendation is procedurally flawed and/or unlawful, then the decision of the Governor-General would, in my estimation, indubitably be rendered null and void. I would therefore grant the order for certiorari sought.

PROHIBITION

[207] The claimant seeks an order prohibiting the defendants and/or their agents, from taking any steps to prevent her from performing her functions in her appointed post. It is the defendants' contention that since there is nothing that remains to be done which is required for such an order, prohibition does not lie. This is so, it was submitted, because the Public Service Commission has already made a recommendation to the Governor-General, which is all that it is required to do.

[208] In **Judicial Review of Administrative Action** (Supra), at para. 16-017 of Ch. 16, the learned authors support the view that "Prohibition will not lie unless something remains to be done that a court can prohibit".

[209] The issue that arises is what result ought to flow in respect of the claimant's employment in light of the findings of this Court. Should the claimant remain in her appointed post? Considering the circumstances, can the Court properly make such an order? Is there an alternate remedy that will do justice to the claimant?

[210] Having considered all the circumstances of the case, this Court is of the view that the claimant cannot properly remain in her appointed post, but ought to remain a public servant in the government service for the following reasons: In the ***LOSA*** case, McDonald-Bishop J, in outlining the factors that ought to influence the court's decision as to whether to grant prerogative relief, underscored the importance of the balancing exercise which the court must carry out in weighing the prejudice that may be caused to the claimant, against the undesirable effects

that the relief sought may cause to administration and the best interest of the nation as a whole. At paragraphs 158-159 she concluded thus:

> *"I am moved to accept on the defendants' case, after weighing all the various considerations, including fairness to the claimants, that the quashing of the decision to de-link and ordering the 2nd defendant to revert to the earlier policy could cause serious administrative inconvenience with undesirable consequences for the government and the nation. Clive Lewis in Judicial Remedies in Public Law (1992) a page 294, by citing some relevant authorities, made the relevant point under the sub-heading 'IMPACT ON ADMINISTRATION' that:*
>
> > *'The courts now recognise that the impact on the administration is relevant in the exercise of their remedial jurisdiction. Quashing decisions may impose heavy administrative burdens on the administration, divert resources towards re-opening decisions, and lead to increased and unbudgeted expenditure. Earlier cases took the robust line that the law had to be observed, and the decision invalidated whatever the administrative inconvenience caused. The courts nowadays recognise that such an approach is not always appropriate and not [sic] be in the wider public interest. The effect on the administrative process is relevant to the court's remedial discretion and may prove decisive. This is particularly the case when the challenge is procedural rather than substantive, or if the courts can be certain that the administrator would not reach a different decision even if the original decision were quashed. Judges may differ in the importance they attach to the disruption that quashing a decision will cause...'*
>
> *[159] I conclude that there is ample evidence upon which the court may legitimately find that to grant the claimants the reliefs they seek by way of judicial review would be inimical to good administration and would prove more prejudicial to the government in carrying out policies in the public's interest than it would be to the claimants. If this court were to hold otherwise, then, it would be donning the garb of the policy-makers and, by so doing, would be intruding on the field of the executive and the legislature, which it ought not to do."*

[211] I find that the words of her Ladyship are apt. To grant the order of prohibition in the terms sought by the claimant would not only be inimical to the good

administration of the justice system and an intrusion 'in the field of the Executive and Legislature', but would simply be irrational in the circumstances.

[212] The relevant amendment, with the exception of section 15A(1), was validly passed by Parliament and establishes an entire new structure for the administration of the courts of Jamaica, which was intended and is expressed to supercede and replace the Court Management Services. In essence, the Court Management Services, by law, no longer legitimately exists as the body responsible for the administration of the courts. *A fortiori*, the Court cannot, in practical terms, order that the claimant is to remain in a post in an entity that, for all intents and purposes, does not now exist.

[213] I have considered and have taken judicial notice that, although not in evidence, the administrative body still currently operates using the name 'Court Management Services', and the change to the Court Administrative Division, as required by the statute has not yet been implemented. Notwithstanding this, the Court is not empowered to make an order that is contrary to a valid Act of Parliament. The fact that certain provisions in the Act have not yet been mobilized is not a matter for this Court at this stage.

[214] So, what then is to happen to the claimant? In my opinion, the approach taken in **McLaughlin v Cayman Islands Governor** [2007] UKPC 50 by the Privy Council provides some guidance. Their Lordships, based on the exigencies of the case, found that it had been reasonable for the Court of Appeal, despite having declared that the purported retirement of Mr. McLaughlin was unlawful and of no effect, to decline to order that Dr. McLaughlin be restored to his post, nearly four years having elapsed since he had last held that particular office.

[215] In so finding, their Lordships opined at para 14:

> *"It is a settled principle of law that if a public authority purports to dismiss the holder of a public office in excess of its powers, or in breach of natural justice, or unlawfully (categories which overlap), the dismissal is, as between the public authority and the office-holder, null, void, and without legal effect, at any rate once a court of competent jurisdiction so declares or orders. Thus the office-holder remains in office, entitled to the*

remuneration attaching to such office, so long as he remains ready, willing and able to render the service required of him, until his tenure of office is lawfully brought to an end by resignation or lawful dismissal."

[216] However, the Board, at para 16 went on to note that the question of whether the relief sought will be granted depends on the circumstances of each case:

"Since public law remedies are, for the most part, discretionary, it necessarily follows that a claimant may be disabled from obtaining the full relief he seeks whether on grounds of lack of standing, delay or his own conduct, or grounds pertaining to the facts of the particular case."

[217] From the foregoing, I find that the claimant cannot remain in her post, but rather, ought to remain as a public servant, unless and until she voluntarily retires, or is removed lawfully.

INJUNCTION

[218] The claimant seeks an injunction preventing the defendants and/or their agents, from taking any steps to prevent her from performing her functions in her appointed post. The defendants submitted that the grant of an injunction in the circumstances is unwarranted and would have the effect of disregarding the statutory provisions. The defendants have not stated to which statutory provisions they refer.

[219] However, in light of the above submission, I find it necessary to state that their Lordships in the case of **Brady & Chen Limited v Devon House Development Limited** [2010] JMCA Civ 33, pronounced that section 16(2) of the **Crown Proceedings Act** 'does not prohibit the court from granting injunctive relief against an officer of the Crown in judicial review proceedings, as the prohibition in that section refers to 'civil proceedings', and by virtue of section 2(2), 'civil proceedings' do not include judicial review proceedings [para. 22].

[220] Notwithstanding this, in light of my finding and reasoning in respect of the order of prohibition, I equally decline to grant the injunction sought, which the authorities indicate would have an effect in judicial review proceedings that is

'indistinguishable' from an order of prohibition or mandamus [**De Smith, Woolf and Jowell**, Judicial Review of Administrative Action, Fifth Edition, Ch. 17, para. 17-001].

DAMAGES

[221] The claimant seeks damages "...to be assessed for the illegal action of the 1st and 2nd defendants in preventing the claimant from continuing in her appointment as the duly appointed Principal Executive Officer of the Court Management Services" (relief no. 22).

[222] The defendants opposed the grant of damages on the following bases:

i. Pursuant to CPR 56.10, the Court may only grant damages in a claim for judicial review if the claimant would have ordinarily been so entitled by way of a claim in private law. This, it is submitted, is not so. The defendants rely on the dicta of Mangatal J in Delapenha Funeral Home v the Minister of Local Government and Environment, Claim No. 2007 HCV 01554, delivered 13 June 2008 at para. 119, in that regard. It is submitted that no facts are pleaded by the claimant that could give rise to a private law claim in either tort or contract or breach of statutory duty.

ii. Section 125 does not evince an intention that the claimant be compensated by way of damages for a breach thereof.

iii. The damages awarded in McLaughlin are distinguishable from this case and cannot be relied upon by the claimant to support an award for damages.

iv. Even if the claimant were to be entitled to any damages, that amount would be limited to an amount equivalent to her entitled salary, and the evidence is that the claimant has been receiving the salary attached to her post from deployment up to the present.

[223] **Rule 56.10(2)(a)** provides that the Court may award damages to the claimant in a claim for Judicial Review or for relief under the **Constitution** if:

> *(i) The claimant has included in the claim form a claim for any such remedy arising out of any matter to which the claim for an administrative order relates; or*

(ii) The facts set out in the claimant's affidavit or statement of case justify the granting of such remedy or relief; and

(iii) The court is satisfied that, at the time when the application was made the claimant could have issued a claim for such remedy.

[224] In **Judicial Review of Administrative Action** (*supra*), the learned authors state the following in respect of the general approach to an award of damages in public law, at para 19-003:

> *"A fundamental tenet of English Law is that the failure of a public body to act in accordance with public law principles of itself gives no entitlement at common law to compensation for any loss suffered. Nor does the careless performance of a statutory duty in itself give rise to any cause of action in the absence of a common law duty of care in negligence or a right of action for breach of statutory duty. To recover damages, a recognised cause of action in tort must be pleaded and proved. In short, while in some cases it may be a necessary condition, it is never a sufficient one for the award of damages that the act or omission complained of be "unlawful" in a public law sense."*

[225] In the case of **Delapenha Funeral Home Limited** (supra), Mangatal J, in assessing whether the Applicant was entitled to damages for the illegal action of the Minister, and having considered the aforementioned passage, commented as follows:

> *"119. Although under the Civil Procedure Rules 2002, Part 56, damages may be recovered in judicial review proceedings. I take the view that no new right to damages is introduced by the new rules; it is simply a matter of procedural convenience that private law damages may be included in a claim for judicial review. For views to this same effect see **Judicial Review Remedies in Public Law**, 3rd Edition, by Clive Lewis, paragraph 2-168, and **Judicial Review of Administrative Action**, 5th Edition, by De Smith, Woolf & Jowell, paragraph 9-010.*
>
> *120. The English Common Law has traditionally set its facts against the granting of claims for damages for purely administrative acts or omissions. Such reluctance was justified on the grounds that the prerogative orders were designed essentially to cure administrative wrongdoing rather than to compensate the victim of such act or omissions. See **Damages for Administrative Errors:- The Developing Jurisprudence: A Case Note on Bolden v. Attorney General of Barbados** West Indian Law Journal (1991) Volume 16 page 59."*

[226] Her Ladyship considered several other passages, including passages from **Judicial Review of Administrative Action**, in which it is stated that negligence

cannot be inferred from a finding of unlawful action and there is 'no special affinity between any particular grounds of judicial review and cause of action for damages' (para. 121). She also considered para. 19-052 of the text, for the proposition that there will be cases where statutory provisions expressly create a right of action to pursue damages (para. 122) and concluded thus:

> *"128...However, when Rule 56.10(2)(ii) is read as a whole, in my judgment it is plain that the substantive law has not been changed, and that the Claimant must plead sufficient particulars and provide evidence which is ample to raise a private law right to damages whether by way of tort or contract."*

[227] In view of the foregoing, I agree with the defendants that there is no basis for an award of damages in this case.

LINDO J:

[228] I have read the judgment written by my learned sister Thompson-James J in relation to our decision. I am in agreement with the reasons and conclusion.

MORRISON J:

DISPOSITION:

[229] This Court has found that the manner in which the claimant was purportedly retired was unlawful in that it was contrary to section 125(3) of the **Constitution**, Regulation 26 of the **Public Service Regulations**, and contrary to the rules of natural justice. Further, the purported reasons given in the letter were irrational.

[230] Accordingly, the Court grants the order of certiorari to quash the decision purporting to retire the claimant, but declines to make an order for prohibition in the terms sought. Instead, the Court would order that the claimant is to remain as a public servant as long as she is willing and able to provide service, or unless she is removed in a lawful manner.

[231] Further, the Court, having found that the claimant had locus standi to challenge the amendment, also finds that section 15A(1) of the impugned legislation is in contravention of section 125 of the **Constitution** and thus is rendered null and void. The Court, however, does not find that the section is in breach of the doctrine of separation of powers, nor that section 15A (3) is in breach of section 125 or of the separation of powers. That section is to be severed and appointment is to be done in accordance with section 125 of the **Constitution**.

[232] No order as to costs.