



[2016] JMSC Civ 121

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

**CIVIL DIVISION**

**CLAIM NO. 2016HCV02234**

<b>BETWEEN</b>	<b>DEBORAH PATRICK-GARDNER</b>	<b>APPLICANT</b>
<b>AND</b>	<b>JACQUELINE MENDEZ</b>	<b>FIRST RESPONDENT</b>
<b>AND</b>	<b>THE PUBLIC SERVICE COMMISSION</b>	<b>SECOND RESPONDENT</b>

**IN CHAMBERS**

Hugh Wildman and Barbara Hines for the applicant

Nicole Foster-Pusey QC, Solicitor General, and Monique Harrison for both respondents instructed by the Director of State Proceedings

June 3 and July 8, 2016

**JUDICIAL REVIEW – APPLICATION FOR LEAVE – ABOLITION OF POST –  
WHETHER NATURAL JUSTICE APPLICABLE**

## **SYKES J**

### **The context**

- [1]** February 24, 2016 was the day appointed by the Jamaica Gazette for amendment to the Judicature (Supreme Court) Act to come into effect. The amendment established an entity known as the Court Administration Division ('CAD'). The amendment did other things such as adding Registrars and Deputy Registrars but those other things are irrelevant to the present proceedings.
- [2]** The statute states expressly that the CAD 'shall be under the direction and control of the Chief Justice.' The CAD is to be headed by a person styled the Director of Court Administration ('DCA') and that person 'shall be responsible for the day-to-day supervision of the work and staff of the Division.' The CDA is permitted to employ persons on 'terms and conditions as may be approved by and with the authority of the Governor-General acting on the advice of the Public Service Commission.'
- [3]** According to the memorandum of objects and reasons of the Bill a decision was taken to establish the CAD 'which will supersede and replace the Court Management Services which was 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.'
- [4]** What all this means is that before the statute was passed there was an administrative entity known as the Court Management Service ('CMS') headed by a Principal Executive Officer ('PEO'). Mrs Patrick-Gardner was the first person appointed as PEO for CMS by letter dated September 28, 2011. She appears to be the last as well. As will be seen below a decision was taken to retire Mrs Patrick-Gardner. This decision and its implementation have ignited this application.
- [5]** For the respondents to this application, Mrs Jacqueline Mendez, Acting Chief Personnel Officer ('CPO'), assigned to the Public Service Commission ('PSC'),

swore in her affidavit that the duties which were carried out by the PEO would now be carried out by the DCA once the Act came into force and someone was appointed to that post. When this decision was made there was a ticklish question – what to do about Mrs Patrick-Gardner?

- [6] Mrs Mendez informs us that the PSC took the view that Mrs Patrick-Gardner ought to be retired from the public service on the ground of re-organisation in accordance with section 6 (1) (iv) of the Pensions Act. It is this decision and its implementation that have led to this application for leave to apply for judicial review.

### **Mrs Patrick-Gardner's complaint**

- [7] Mrs Patrick-Gardner states that after her appointment as PEO the Chief Justice suggested to her that she should pursue legal training in order to be able to discharge her functions better. She acted upon this suggestion and enrolled in the Bachelor of Laws programme at the University of the West Indies. She took up this course in September 2013.
- [8] In order for her to complete this course of training she was granted study leave for 36 months – two years with pay and one year without pay. By September 2015 she completed the degree. Apparently she was a direct entrant which means that she had a prior degree which led the Faculty of Law to conclude that she was able to complete the programme in two years instead of the usual three. She did exceptionally well by taking a first class honours.
- [9] She states that on September 25, 2015 she reported for work at her office at CMS but found that her temporary successor was still in physical occupation of the office. Mrs Mendez's affidavit completes this portion of the narrative. Mrs Mendez states that Mrs Patrick-Gardner, by letter dated September 9, 2015, advised the then CPO, Dr Lois Parkes, that she had completed her studies early and had resumed duties on September 4, 2015. Mrs Patrick-Gardner proposed to Dr Parkes that she would proceed on recreational leave effective September

4, 2015. She also referred to an application for further paid leave to do the Certificate of Legal Education at the Norman Manley Law School.

- [10] Mrs Mendez states that by letter dated September 24, 2015, Mrs Patrick-Gardner was told that twenty four month's leave was approved for her to pursue the course at the Norman Manley Law School but it would be without pay. The PSC, it appears, was not be expecting Mrs Patrick Gardner to turn up for work after the approval of her leave to attend the Norman Manley Law School.
- [11] The PSC's expectation were dashed when Mrs Patrick-Gardner, by letter dated September 25, 2015, to the CPO advised that she had resumed duties but was unable to gain access to her office by the person who had been appointed to act in the post during Mrs Patrick Gardner's study leave to read for Bachelor of Laws degree.
- [12] Three days later, Mrs Patrick-Gardner wrote yet another letter. By letter dated September 28, 2015, Mrs Patrick-Gardner wrote to the PSC complaining that she has not applied for unpaid study leave but had requested 'paid study leave.' She also stated that she would not be able to proceed on unpaid study leave. There were other issues raised which need not be addressed on this application.
- [13] The PSC responded by sending two letter to Mrs Patrick-Gardner both dated September 28, 2015. The first one contained some unexpected and perhaps unanticipated news. She was told her that on the recommendation of the Chief Justice she was re-deployed to the Ministry of Justice with effect from September 29, 2015 until further order. This letter provided grist for Mr Wildman's mill.
- [14] The second letter told her that:
- (a) she had been initially granted three year's study leave which meant that she was not expected back until September 2016;
  - (b) she had applied for additional paid study leave to commence in September 2015 and the final decision was not taken on that

application until September 24, 2015 which was the normal time frame for such decisions to be made;

(c) arrangements would not have been put in place in anticipation of her resumption on Friday, September 25, 2015; and

(d) a change in leadership at CMS was not appropriate at that point in time because CMS was involved in programmes vital for the reform of justice in Jamaica.

**[15]** It is not altogether surprising that Mrs Patrick-Gardner began to have misgivings about the recent developments. She was now in receipt of two letters from the PSC. One informing her that the Chief Justice had recommended that she be re-deployed to the Ministry of Justice and another explaining that she was not expected back at work so soon and it was thought that a change in leadership at the CMS at that time was not desirable.

**[16]** On her arrival at the Ministry of Justice on September 29, 2015, Mrs Patrick-Gardner says two things happened. First she was placed in a post (SEG – 5) which she claims was two levels below her substantive appointment as PEO. Second, she was advised that she would be reporting to an officer who was her junior. It is not clear what her remuneration was at that time. From this two things are being alleged. The first is that she was in fact demoted. Second all this took place without any hearing of any kind. It is not hard to see why she would be anxious about these developments.

**[17]** She was not happy with these turn of events and brought her discontent to the attention of Dr Parkes who it is said undertook to raise these concerns with the PSC. There was a change in CPO's and Mrs Mendez took over that post. Mrs Patrick-Gardner and Mrs Mendez met on January 18, 2016, and the matters of concern to Mrs Patrick-Gardner were discussed.

**[18]** As should be apparent by now, Mrs Patrick-Gardner was and is an avid writer of letters. Mrs Patrick-Gardner wrote two letters to the Mrs Mendez dated January 8

and 25, 2016 outlining her concerns, that is to say, one letter before the January 18 meeting and one after.

- [19]** Mrs Mendez, in a letter dated February 15, 2016, confirmed receiving letters dated January 8 and 25, 2016 from Mrs Patrick-Gardner and went on to say that the PSC had been made aware of her concerns and its decision would be communicated in due course.
- [20]** What is clear from this is that at no time was anyone suggesting that Mrs Patrick-Gardner should be separated from her job whether by retirement or otherwise. What the PSC was ostensibly addressing were (a) her de facto removal from CMS; (b) her de facto demotion without a hearing of any kind and (c) her reporting to an officer two rungs below Mrs Patrick-Gardner's appointed post.
- [21]** On the same February 15, 2016 when Mrs Mendez was assuring Mrs Patrick-Gardner that the PSC would be addressing her concerns, the legislature enacted an amendment to the Judicature (Supreme Court) Act which received the Governor General's assent and by February 24, 2016 it came into force.
- [22]** Mrs Mendez's affidavit does not say when the PSC shifted position from addressing Mrs Patrick-Gardner's concerns to one of recommending that she be retired on the ground of re-organisation. The affidavit is silent on whether other alternatives were explored. Let us recall that Mrs Patrick-Gardner is asserting that she undertook the study of law because it was recommended to her that she should have this knowledge in order to enhance her ability to perform as PEO of CMS. She not only completed the degree but took a first. It does seem odd that the PSC changed position from addressing her concerns to removal from the public service of a public servant who recently improved her qualifications. There is nothing in Mrs Mendez's affidavit to suggest that Mrs Patrick-Gardner was performing unsatisfactorily prior to going off on study leave.
- [23]** Mrs Mendez states that the Governor General accepted the recommendation of the PSC to retire Mrs Patrick-Gardner and on March 24, 2016 gave approval for

her to be retired. The PSC, by letter dated May 19, 2016, wrote to the Permanent Secretary in the Ministry of Justice informing her that Mrs Patrick-Gardner was to be retired from the public service on the ground of re-organisation. Mrs Patrick-Gardner was told the same thing by letter dated May 20, 2016.

### **The submissions**

- [24]** Mrs Foster Pusey QC opposed the application on three main grounds. Firstly, the decision to retire Mrs Patrick Gardner was on the ground of re-organisation. That involved no adverse view of her work and worth. The decision was arrived because a statute had been enacted which sought to replace CMS with the CAD. Secondly, the Public Service Regulations were silent on the matter and therefore no hearing of any kind was required and in any event it would be difficult to see what purpose any such hearing would serve since it was a decision by the legislature and not by a public servant. Thirdly, Mrs Mendez made no decision. The PSC made a recommendation and not a decision. The actual decision was made by the Governor General.
- [25]** Mr Wildman submitted that having regard to the suggestion from the Chief Justice to Mrs Patrick-Gardner that she pursue legal studies and having regard to the fact that she was granted study leave, Mrs Patrick-Gardner had a legitimate expectation that she would not be retired once she successfully completed the course of study. Mr Wildman submitted that the PSC gave no reason for the change in its position in light of promises made by the CPO to take Mrs Patrick-Gardner's concerns to the PSC and thereafter she would be told the outcome.
- [26]** Counsel contended that regulations 24 and 26 of the Public Service Regulations were applicable. Regulation 24 deals with persons at least 50 years old being asked to retire. In such circumstances the regulation actually states that the affected person shall be afforded an opportunity to make representations to the PSC. Regulation 26 speaks to retirement in the public interest.

- [27] Mrs Foster Pusey submitted that these two regulation are not applicable because the ground of retire of Mrs Patrick-Gardner is reorganisation and not retirement because she is at least 50 years old and she is not being retired in the public interest.
- [28] The court is not entirely convinced that these regulations are applicable but no final decision needs to be made because that would be a matter for decision at the full hearing of this matter should leave be granted.
- [29] Mr Wildman submitted that Mrs Patrick-Gardner should have been given a hearing in all the circumstances of the case. He submitted that the PSC did not give thought to whether a hearing was desirable. He pointed to paragraph 21 of Mrs Mendez's affidavit which states that she is not aware that in instances where posts are abolished, a hearing is required. This paragraph establishes, submitted counsel, that the PSC did not even think a hearing was required. The court accepts that this paragraph is capable of being so understood.
- [30] Mr Wildman relied on **McLaughlin v Governor of the Cayman Islands** [2002] CILR 576. This is the Court of Appeal of Cayman Islands' decision reversing the decision of Graham J which is reported at [2001] CILR 249. At the time of the hearing the Privy Council decision on another aspect of the case was what was available. Thanks to an attorney at law in the Cayman Island the initial decision of Graham J and the decision of the Court of Appeal from that decision were made available. They were sent to both counsel after the hearing concluded and the court received further written submissions.
- [31] The important point from Mr Wildman's perspective that arose from the Privy Council decision was that if the removal of public officer was invalid and void, then that means that the officer was never properly dismissed and is consequently entitled to the full benefits of the office he or she held until he or she resigns, retires or is lawfully removed. Mr Wildman still relies on this point even though the main authority now is the Court of Appeal's judgment on appeal from Graham J.



- [32] In **McLaughlin** the Governor purported to abolish the office of the claimant and he was told that there was no other area of the public service to which he could be transferred. The claimant challenged the termination as being procedurally unfair because (a) no alternative was discussed with him; (b) no examination had been done to determine which offices should be abolished and (c) a precondition for abolishing his office was that his career prospects had failed. Graham J dismissed his claim for judicial review.
- [33] In the Court of Appeal he fared much better. The Court of Appeal held that while the Governor could abolish posts there was little evidence to show that the post had in fact been abolished. Apparently, there was evidence that his post was advertised at the time he was being told that the post was abolished. It was also found that there was non-compliance with regulation 29 which stated that where an officer was being compulsorily retired he had to be given a fair opportunity to make representations. Regulation 29 was not brought to the attention of Graham J.
- [34] In coming to its decision Rowe JA speaking for the Court of Appeal stated in paragraph 26 that 'a decision leading to compulsory retirement is of a judicial character and must conform to the rules of natural justice.' His Lordship seems to stating this as a principle that has a separate existence from regulation 29. On the face of it an argument could be made that regulation 29 while helpful to the appellant in that case was not the only basis of the decision because Rowe JA had separately and distinctly held that since a decision to compulsorily retire someone is a judicial act it necessarily attracted natural justice requirements. If that is so then it may be that the appellant would have been successful even if regulation 29 did not exist. The Jamaica regulations have not equivalent of regulation 29 but since it appears that Mrs Patrick-Gardner is being compulsorily retired, albeit because of the passage of an Act of Parliament, it can be argued that the decision to retire her was a judicial act which attracted natural justice principles.

- [35] The Solicitor General and Miss Monique Harrison, in further written submissions, emphasised that in the **McLaughlin** case there was no wholesale replacement of one administrative structure with another by legislation as has happened here. Mr Wildman's counter to this submission was that it matters not how the abolishing of the post occurred, once there is an abolishing of posts, natural justice applies. Mr Wildman has a good arguable response to this submission and it has a real prospect of success.
- [36] Mrs Foster Pusey suggested that Mrs Mendez herself made no decision and the PSC did not make any decision. This was to say that there would hardly be any point in letting this case go forward so far as Mrs Mendez is concerned. The court does not quite see the matter in that way. It is well established that recommendations are capable of being reviewed (**OUR v Contractor General** [2016] JMSC Civ 27 para 57 – 63 (David Fraser J)). Mrs Mendez was quite likely an active participant in that process of recommending the retirement of Mrs Patrick-Gardner. What Mrs Patrick-Gardner would be seeking to review is the recommendation of the PSC to the Governor General.
- [37] So far as Mrs Mendez is concerned while she may not have made the decision to retire Mrs Patrick-Gardner what she did was to indicate that Mrs Patrick-Gardner's concerns would be addressed. As the CPO of the PSC at the material time it is virtually inconceivable that she would not have known of the recommendation to retire Mrs Patrick-Gardner since under the regulations the CPO is (a) to submit matters for the decision of the PSC; (b) attend meeting of the PSC; (c) carry out the decisions of the PSC and (d) have general responsibility for matters relating to the functions of the PSC.
- [38] If one looks at the time line from Mrs Patrick-Gardner's letters of January 8 and 25, 2016 and Mrs Mendez's letter dated February 15, 2016 to Mrs Patrick-Gardner the following can be gleaned working backwards. The Governor General on March 24, 2016 gave approval to the recommendation to retire Mrs Patrick-Gardner. What is it that could have caused that recommendation? Based on

what has been said by Mrs Mendez, it would appear to be the passage of the Act which we know received the Governor General's assent on February 15, 2016. This must mean that it went through both Houses of Parliament before February 15, 2016. It was an appointed day statute which means that it was the Minister who would decide when the Act was brought into force. We know that it was brought into force on February 24, 2016. The Gazette that did this is also dated February 24, 2016. It was one month after this that the recommendation was **approved** to retire Mrs Patrick-Gardner. This means that there must have been a decision to make the recommendation for Mrs Patrick-Gardner's retirement. This discussion must have taken place, at the very least, between February 15, 2016 (the date of Mrs Mendez's letter to Mrs Patrick-Gardner assuring her that her concerns would be raised with the PSC) and March 24, 2016, the date the recommendation was accepted. This must mean that Mrs Mendez either knew or ought to have known given that she was the Acting CPO of the PSC at that time and given the role of the CPO under the relevant regulations that the retirement of Mrs Patrick-Gardner was afoot. Mrs Patrick-Gardner was left in the dark. She was not told that her fate would become one of job separation as distinct from resolving her de facto demotion without a hearing, her de facto transfer by the PSC which was said to have been acting on the recommendation of the Chief Justice.

- [39] Even if Mrs Mendez did not know of the passage of the statute on February 15, the same date as her letter to Mrs Gardner, she would undoubtedly have become aware and quite likely had direct knowledge of a fundamental change in position on the part of the PSC. The discussion within the PSC had shifted from seeking to mollify Mrs Patrick-Gardner regarding her (a) apparent demotion; (b) reporting to a subordinate and (c) not being able to resume her substantive post to separating Mrs Patrick-Gardner from her job through the medium of retirement.
- [40] In effect what may be inferred is what Mrs Patrick-Gardner was told would be discussed by the PSC became a different kind of discussion – it became a job separation discussion. Yet not a word was breathed to Mrs Patrick-Gardner. No

word to Mrs Patrick-Gardner in March. No word to Mrs Patrick-Gardner in April. No word to Mrs Patrick-Gardner until a letter dated May 20, 2016 told her she would be retired and she would be sent on pre-retirement leave as of June 1, 2016. Mrs Patrick-Gardner did not get the letter until May 24, 2016. She now had seven days to prepare for her job separation on the ground of retirement – something that was not on the cards having regard to the discussions between herself and the PSC from September 2015 to February 15, 2016. Was this process fair? That is the question. Most fair minded persons would think that something is not quite right given the sequence of events as outlined by Mrs Patrick-Gardner.

[41] Inferentially the process seemed to have gone like this. The first was that Mrs Patrick-Gardner's concerns was no longer worthy of consideration because of a change in circumstances. Second, someone had to decide to consider whether Mrs Patrick-Gardner should be retired. Third, someone had to decide after considering whether she should be retired to actually make the recommendation that she be retired. It is almost inconceivable that Mrs Mendez would not be privy to these discussions and decisions. Did fairness demand that Mrs Mendez inform Mrs Patrick-Gardner that there was a fundamental shift in the thought processes of the PSC? The good thing is that the law does have something to say on this.

[42] Lord Mustill in **Regina v Secretary of State for the Home Department Ex parte Doody** [1994] 1 AC 531 stated at page 560:

*What does fairness require in the present case? 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 adversely 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 interests fairness will very often require that he is informed of the gist of the case which he has to answer.***  
(Emphasis added)

- [43] Lord Millet was referring to an Act of Parliament. This court would say that if a 'mere' Act of Parliament attracts such consideration then all the more reason why such consideration should exist in the case of a written constitution. The reference to the constitution arose in this manner in this case. Mr Wildman submitted that under the Jamaican Constitution where a public officer has been appointed to a post by the Governor General acting on the advice of the PSC then only the Governor General can remove such a person. Mrs Patrick-Gardner was so appointed. Learned counsel contended that in this case the statute upon which the PSC relied on for its actions may very well have run afoul of the Constitution. He also submitted that the entire process from September 2015 to May 2016 was deeply flawed.
- [44] This is his argument. Mr Wildman insisted that the separation of powers doctrine is entrenched in the Jamaican Constitution. This he submitted was made clear by **Hinds v R** [1977] AC 195. He submitted that when the PSC wrote to Mrs Patrick-Gardner by letter dated September 28, 2015 and told her that '[o]n the recommendation fo the Chief Justice of Jamaica, I am directed to advise that approval has been given to you to be re-deployed to the Ministry of Justice with effect from September 29, 2015' the series of errors began and only got worse

from there. He submitted that the separation of powers doctrine not only applies between the executive and legislative branches not encroaching on the judicial branch but it also means that the judicial branch is not to have any say, except in its adjudicative capacity, in matter within the preserve of executive branch.

**[45]** The proposition advanced by counsel is that the Chief Justice as head of the third branch of government cannot have anything to do with public sector employment. Public sector employments is governed by the Constitution of Jamaica and under the Constitution it is the PSC which advises the Governor General. No role is given to the Chief Justice. Mr Wildman accepted that the Chief Justice may be consulted but for the PSC to act upon the recommendation of Chief Justice is completely wrong. In fact, he submitted it is only the Governor General who can act upon the advice of the PSC. The PSC may consult but no person is given any authority to make any recommendation to the PSC and the PSC is certainly not authorised to act on the recommendation of any person including the Chief Justice. The import of counsel's argument is that the PSC seemed to have felt bound by Chief Justice's recommendation and thus did not exercise its own independent judgment. Thus said counsel, when the PSC told Mrs Patrick-Gardner that she was being re-deployed to the Ministry of Justice on the recommendation of the Chief Justice, that was a fundamental error. It is this court's view that this submission is arguable.

**[46]** In response to this Mrs Foster Pusey submitted that the authorities cited by Mr Wildman were ones where the issue was the separation of powers between the judiciary and executive. It is true to say that actual cases decided were concerned with the executive either encroaching upon or taking away judicial functions but that does not mean that the principle cannot apply as between the judiciary and the executive branch of government. The point raised by Mr Wildman is an important one because it has implications for the constitutionality of the part of the very statute what was passed to give effect to the CAD. Mr Wildman submitted that section 15A of the statute states that the DCA shall be appointed by the '*Governor-General, on the recommendation of the [PSC] after*

*consultation with the Chief Justice, for a term of three years which shall be renewable, **subject to the approval of the Chief Justice.*** It is the highlighted text that has drawn the fire of Mr Wildman. Counsel's view was that the first part of the statute was not inherently objectionable in that the initial appointment to the public service was in keeping with section 125 of the Constitution of Jamaica in that it was the Governor General who appointed on the recommendation of the PSC. The latter part was wrong according to counsel because it means that if the PSC wishes to retain the person initially appointed and if even the very Governor General wished to act on the PSC's recommendation to retain that person such a person could not continue in the post because the Chief Justice objected. Mr Wildman's view is that the legislature was attempting to alter the Constitution without using the special provisions to amend an entrenched provision. This he submitted is a legal impossibility. He said that nowhere in section 125 is the Chief Justice given any role in public sector employment. The Chief Justice he urged cannot have any veto power (for that is appears to have happened in the case of Mrs Patrick-Gardner and is now sought to be placed in the statute) over any public office. Thus for the legislature to attempt to give the Chief Justice power to determine employment in the public service when section 125 establishes the mechanism is an infringement of the separation of powers of doctrine.

- [47] The court understands Mr Wildman's submission to be constructed in this way. Under the Constitution public office means any office of emolument in the public service (section 1 of the Constitution). Public service means, subject to sub section (5) and (6) of section 1, 'the service of the Crown in a civil capacity in respect of the Government of Jamaica (including service as a member of the Judicial Service Commission, the Public Service Commission or the Police Service Commission) and includes public service in respect of the former Colony of Jamaica.'
- [48] Mrs Patrick-Gardner does not appear to fall within the exemptions of section 1 (5) and (6). Under section 125 of the Constitution, it is provided that subject to the provisions of the Constitution power to make appointments to public offices,

remover and to exercise disciplinary control is vested in the Governor-General acting on the advice of the PSC. All this according to Mr Wildman means that the Chief Justice has no role in the appointment to any public office, no power to remove and no power to exercise disciplinary control over such persons.

**[49]** He added that section 125 falls within the entrenched provisions and so under section 49 of the Constitution section 125 cannot be changed by ordinary legislation. He concludes by saying that the reference to the recommendation of the Chief Justice to the removal of Mrs Patrick-Gardner from CMS and assigning her to the Ministry of Justice has no foundation in law and the PSC was wrong to act upon such recommendation if indeed it did.

### **Resolution**

**[50]** The test for judicial review is that there should be a good arguable case with a real prospect of success and no discretionary bars to relief are applicable. It is this court's view that this test has been met. The rival submissions of both sides indicate that a full hearing is required to resolve the important legal questions that have arisen. This case has important implications for public sector employment. It raises the question of whether the PSC can seek to have public sector workers compulsorily retired because an Act of Parliament has been passed. To put it more bluntly, can legislation be used as a guise to remove persons from public employment without any kind of hearing or process thereby gutting the protection given to public sector workers by Constitution of Jamaica and case law developed over many decades?

**[51]** Both counsel have raised arguments that show that leave ought to be granted. At this stage the court is not making any final decisions but is simply assessing whether there is an arguable case with a realistic prospect of success that is not subject to discretionary bars. The test has been satisfied and leave is granted.

### **Orders**

- a) Leave to apply for judicial review granted.



- b) An injunction restraining the respondents from taking steps whether by themselves, their employees, agents, officers or otherwise to retire the applicant from the public service pursuant to letter dated May 20, 2016 from the first respondent to the applicant pending determination.
- c) An injunction is granted restraining the respondents from taking any steps or further steps whether by themselves, their employees, agents, officer or otherwise from giving effect to the recommendation and/or decision to retire the applicant from the public service or to terminate her employment in the public service in any manner whatsoever including but not limited to retirement until the matter is heard and determined by the Supreme Court.
- d) The applicant is to be in receipt of all salary, emolument, benefits, allowances and entitlements due to her as the Principal Executive Officer of the Court Management Services holder whether or not such post has been or about to be abolished and whether or not she is the holder of the post of Principal Executive Officer of the Court Management Services.
- e) The applicant gives the usual undertaking as to damages.
- f) Nothing in this order prevents the Public Service Commission, its employees, servants, agents or officers from doing anything required to give effect to the implementation of the post of Director of Court Administration save however that in doing so the PSC, its employees, servants, agents or officers are restrained from doing anything that would be in breach of paragraphs (b) and (c) of this order.
- g) Costs of application to the applicant to be agreed or taxed.
- h) First hearing to take place on July 12, 2016.