

Filing Cabinet

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN MISCELLANEOUS
CLAIM NO. 81 OF 2002

IN THE MATTER OF THE JAMAICAN (CONSTITUTION) ORDER IN COUNCIL
AND IN THE MATTER OF THE PUBLIC SERVICE REGULATIONS 1961
AND IN THE MATTER OF THE STAFF ORDERS FOR THE PUBLIC SERVICE 1976

R v PERMANENT SECRETARY MINISTRY OF JUSTICE EX PARTE
LACKSTON ROBINSON

AND

CLAIM NO. HCV 0612 OF 2003

BETWEEN	LACKSTON ROBINSON	APPLICANT
AND	DAISY COKE	1 st DEFENDANT
AND	MICHAEL FENNEL	2 nd DEFENDANT
AND	EDWIN JONES	3 rd DEFENDANT
AND	PAULINE FINDLAY	4 th DEFENDANT
AND	GEORGE PHILLIP (All Members of the Public Service Commission)	5 th DEFENDANT

APPEARANCES:

RNA Henriques Q.C, and Seyon Hanson instructed by Livingston Alexender and Levy for Applicant.

Dennis Morrison Q.C, Nicole Foster-Pusey and Kalaysia Clarke instructed by Director of State Proceedings, together with Patricia Jackson, Legal Officer of the Office of the Services Commission, for Defendants

HEARING DATES: May 15, 16, 17, 18, June 27, 28 and July 31, 2007

JUDGMENT

JONES J:

INTRODUCTION

[1] The Solicitor General of Jamaica, Michael Hylton Q.C would no doubt agree that his Darwinian approach to the selection of persons for the post of Deputy Solicitor General was done with the noblest of intentions. Yet, some persons and in particular Mr Lackston Robinson, "the Applicant" in this case, (who at the time acted in the post of Deputy Solicitor General) perceived the new method of selection as an assault on the traditional values and legitimate expectations inherent in the public service.

[2] The Austrian philosopher Ludwig Wittgenstein many years ago used an ambiguous line drawing showing how perceptions are informed by prejudices and circumstance: the drawing looks like a rabbit to some persons and a duck to others, but never both at the same time. In this case, what the Solicitor General saw as an opportunity to weed out inefficiency and promote the best candidate for a permanent appointment to the vacant post of Deputy Solicitor General, the Applicant saw as an abuse of power.

[3] As a senior member of the Department, the Applicant was clearly less deferential to the Solicitor General, and less inclined to take things on trust. He filed an action in this court claiming legitimate expectation and challenging his reversion from the post of Acting Deputy Solicitor General to that of Divisional Director. The pursuit of the suit by the Applicant while working within the Attorney General's Department led to a poisonous and, in the end, unfruitful relationship between the Solicitor General and himself. The matter was eventually determined at first instance and upheld in the Court of Appeal in favour of the Solicitor General. It is now on further appeal before the United Kingdom Privy Council.

[4] These consolidated proceedings for judicial review arise from two other decisions. First, the decision of the Permanent Secretary of the Ministry of Justice to direct the Applicant to go on vacation leave without him having first apply to go on such leave. Second, the decision of the Public Service Commission to recommend to the Governor General to prematurely retire the Applicant in accordance with section 24 of the Public Service Regulations 1961. The background to these decisions is critical to our understanding of the issues in this case.

BACKGROUND FACTS

[5] Here is the story, in brief. On October 17, 2001, the Solicitor General visited the Applicant's office and informed him of his intention to implement a rotation system for the post of Deputy Solicitor General and so revert him to his substantive post as Divisional Director. On the following day (18/10/2001) the Solicitor General convened a meeting with other senior Attorneys in Chambers (called the Executive Committee) to discuss the matter. It is clear that the Applicant intended to be tetchy and difficult on the issue of being reverted; he there and then informed the Solicitor General that the procedure for his reversion was improper and he intended to take legal advice on the matter.

[6] The Applicant contends that at the meeting on October 18, 2001, the Solicitor General stated that his work and conduct were not factors which were taken into consideration in coming to a decision to revert him. He also contends that the complaints about his work and conduct were not only erroneous but were a direct result of his decision to take legal action in relation to his reversion. He said that prior to October 19, 2001, the Solicitor General had not made any complaints, either oral or written, about his work and conduct; nor did the Solicitor General invite him to respond to his complaints.

[7] On October 19, 2001, the Solicitor General wrote two letters to the Applicant and a third to the Public Service Commission. In the first, he confirmed his intention to recommend to the Public Service Commission that the Applicant be reverted. In the second, he made it clear that the Applicant's performance and conduct was unremarkable. In the third letter, the Solicitor General wrote to the Public Service Commission recommending that the Applicant revert to his substantive post as Divisional Director and that Hugh Salmon act as Deputy Solicitor General.

[8] On November 7, 2001, the Chief Personnel Officer confirmed Hugh Salmon's appointment to act as Deputy Solicitor General for six months commencing on December 1, 2001, and also that the Applicant was to revert to his substantive post. The Chief Personnel Officer also requested the Solicitor General to provide a performance evaluation on the Applicant. In lieu of an evaluation report, the Solicitor General provided the Public Service Commission with his memorandum dated October 19, 2001, written to the Applicant, which included complaints about his competence; attitude and cooperativeness; and, trust and confidence.

[9] On April 9, 2002, the Applicant commenced proceedings by way of originating summons against the members of the Public Service Commission and the Attorney General asking for a declaration that he continue to hold the post of Acting Deputy Solicitor General until a proper determination of the suitability of his appointment to the post is made.

[10] Enter the Permanent Secretary in the Ministry of Justice, Carol Palmer. On April 25, 2002, she responded to the Applicant's legal challenge by directing him to proceed on vacation leave with effect from May 1, 2002, and until further orders. She also directed that he was to be paid full salary and allowances for the period of the leave. At the time of the decision, she provided no reasons. On July 23, 2002, the Applicant filed an action in this court seeking leave to apply for

judicial review of the decision of the Permanent Secretary in the Ministry of Justice to direct that he go on vacation leave until further orders. Leave to apply for judicial review was granted on October 2, 2002. This decision of the Permanent Secretary in the Ministry of Justice is one of the matters in this substantive application for judicial review.

[11] On January 24, 2003, the Applicant's originating summons in his first matter was dismissed. Mr. Douglas Leys, the Deputy Solicitor General at the time, (who appears to have been sympathetic to the Applicant's cause) in an affidavit says that on the same day that the Applicant's suit was dismissed, he informed the Solicitor General that the Applicant intended to lodge an appeal against the dismissal of the originating summons. On March 6, 2003, the Applicant was advised by the Chief Personnel Officer that based on a report received from the Solicitor General, the Public Service Commission had advised the Governor General and the Governor General had agreed that steps should be taken to retire him in accordance with the provisions of Regulation 24 (1) and (2) of the Public Service Regulations, 1961. It was in this letter that the Applicant was invited to submit representations in response to his retirement within 14 days. It is not in dispute that the "report" referred to by the Chief Personnel Officer is the memorandum (save for a few additions), that the Solicitor General delivered to the Applicant on October 19, 2002.

[12] The Applicant sought and received an extension of time within which to submit a response and eventually submitted a "limited response to Allegations" under cover of letter dated April 30, 2003. In his letter the Applicant stated that he was not accepting or submitting to the jurisdiction of the Commission as regards the proceedings to retire him pursuant to Regulation 24 of the Public Service Regulations 1961. The Applicant was clearly by his actions treating the decision of the Commission with impunity and as having no legal effect.

[13] The Applicant contends that he was not informed by the Solicitor General that a report relating to him was submitted to the Public Service Commission. He also says that he first became aware of the report on March 21, 2003, on receipt of the Chief Personnel Officer's letter dated March 6, 2003. On April 23, 2003, the Applicant filed an action in this court seeking leave to apply for judicial review of the decision of the Public Service Commission to prematurely retire him in accordance with Regulation 24 (1) and (2) of the Public Service Regulations 1961.

[14] On March 11, 2003, the Applicant filed an appeal in the Court of Appeal in the first action. This appeal was dismissed by the Court of Appeal on November 8, 2006, and the matter is now on appeal to the United Kingdom Privy Council.

[15] In what can only be described as a curious turn of events, the Public Service Commission held another meeting on May 15, 2003, to consider the Applicant's "limited response" and concluded that he had not shown any sufficient cause why he should not be retired prematurely. They again recommended to the Governor General that the Applicant be retired.

[16] By letter dated May 19, 2003, the Governor General's Secretary advised the Applicant that the Commission had recommended that he be retired under Regulation 24 of the Public Service Regulations 1961. He was advised in the letter that he could apply for his case to be referred to the Jamaica Privy Council for consideration and recommendation to the Governor General. The Applicant did not take up the offer to have his matter reviewed by the Privy Council and was advised of his retirement from the public service by letter dated January 19, 2004.

ISSUES

[17] The issues for the Court's consideration are as follows:

- i) Whether the Permanent Secretary in the Ministry of Justice has improperly exercised her power under Staff Order 5.23 to direct that the Applicant proceed on vacation leave having regard to the fact that he made no application for leave and had been given permission to accumulate leave beyond the maximum and, if so, whether the Permanent Secretary's decision is ultra vires, and a nullity.
- ii) Whether the Public Service Commission acted unlawfully; in breach of the Public Service Regulations and of natural justice in recommending to the Governor General that the Applicant should be prematurely retired from the Public Service and, if so, whether the decision of the Public Service Commission is ultra vires and a nullity.

THE APPLICABLE CASE LAW

[18] The principles of law relevant to this judicial review are conveniently summarised in the skeleton arguments and submissions of RNA Henriques Q.C "Counsel for the Applicant" and Dennis Morrison Q.C "Counsel for the Respondents". The approach of counsel in presenting their submissions was both thoughtful and methodical. This included citations from numerous authorities and statutory instruments. I will make reference to some of them.

[19] The purpose of judicial review is to ensure that public bodies including the executive pursue activities that are lawful. In other words, a public body or the executive can only do what the law allows it to do. Over three centuries ago in **Entick v Carrington**¹ Lord Chief Justice Camden fashioned a remedy in trespass against public officials who searched the plaintiff's premises under a general search warrant issued by the Secretary of State. The following passage is taken from the judgment:

¹ [1765] 19 St Tr 1030

"By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license...If he admits the fact, he is bound to show by way of justification, that some positive law has empowered or excused him. The justification is submitted to the judges, who are to look into the books; and if such a justification can be maintained by the text of the statute law, or by the principles of common law. If no excuse can be found or produced, the silence of the books is an authority against the defendant, and the plaintiff must have judgment."²

[20] Later in **R v Somerset County Council ex parte Fewings and others**³ Laws J said:

"...a public body may only act in fulfilment of the duty cast upon it by statute, and has no possession of legal rights, akin to those of a private person, which are truly its own"⁴

[21] The classic statement setting out the grounds for judicial review is that of Lord Greene MR in **Associated Provincial Picture Houses Ltd v Wednesbury Corporation**. He said:

"...The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may be still possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere. The power of the court to interfere in each case is not as an appellate authority to override a decision of the local authority, but as a judicial authority which is concerned, and concerned only, to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in them."⁵

[22] Later in **Council of Civil Service Unions v. Minister of State for the Civil Service**⁶, Lord Diplock set out his celebrated classification of the grounds for seeking review under the well known heads of illegality (ultra vires as to principle), irrationality (ultra vires as to detail) and procedural impropriety (ultra vires as to procedure).

² See Fourth and Last Question

³ [1995] 1 All ER 513

⁴ [1995] 1 All ER 524

⁵ [1948] KB 223 at 233-234

⁶ [1985] AC 374

[23] The following passage is taken from his judgment:

"By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it...By "irrationality" I mean ..."Wednesbury unreasonableness"...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...I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice."⁷

[24] It is a fundamental principle of public law that there is no unfettered discretion. Where a statute or regulation gives broad discretionary authority, but does not say how that authority is to be exercised, it is the duty of the courts to construe the language of the statute against the background of the objects and policy of the statute as a whole. In **Padfield v Ministry of Agriculture, Fisheries and Food**⁸ a dispute arose under a scheme where the producers had to sell their milk to the Milk Marketing Board, which fixed the different prices paid for it in eleven different regions. These prices reflected the costs of transportation from the producers to the consumers. These prices were now changed and one set of producers contended that the differential between it and the other producers should be changed which would affect the prices in other regions. They asked the Minister of Agriculture, Fisheries and Food to appoint a committee, (which he was required to do under the legislation), to investigate this and he declined to do so.

[25] On an application to the court, it was held that the decision maker (the Minister) must act to promote the objects or purpose of the legislation which can be determined by a construction of the statute by the court. Lord Reid stated that the Minister:

⁷ [1985] AC 374 at 410

⁸ [1968] AC 998

"...contends that his only duty is to consider a complaint fairly and that he is given an unfettered discretion with regard to every complaint either to refer it or not to refer it to the committee as he may think fit. The appellants contend that it is his duty to refer every genuine and substantial complaint, or alternatively that his discretion is not unfettered and that in this case he failed to exercise his discretion according to law because his refusal was caused or influenced by his having misdirected himself in law or by his having taken into account extraneous or irrelevant considerations. In my view, the appellants' first contention goes too far. There are a number of reasons which would justify the Minister in refusing to refer a complaint. For example, he might consider it more suitable for arbitration, or he might consider that in an earlier case the committee of investigation had already rejected a substantially similar complaint, or he might think the complaint to be frivolous or vexatious. So he must have at least some measure of discretion. But is it unfettered? It is implicit in the argument for the Minister that there are only two possible interpretations of this provision either he must refer every complaint or he has an unfettered discretion to refuse to refer in any case. I do not think that is right. Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act, the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court.."⁹

[26] Another illustration is the case of **Congreve v Home Office**¹⁰. In that case, the Home Secretary announced that the television licence fee would be increased on April 1, and made an Order to effect the increase. The plaintiff purchased a new licence at the old price before April 1. The Home Office threatened to revoke the licence unless he paid the difference between the old and new price and also threatened prosecution.

[27] He applied for a declaration that it was unlawful, invalid and of no effect. At first instance the court refused to make the declaration, holding that the Home Secretary was entitled to revoke a licence. On appeal by the plaintiff, it was held that although the Home Secretary had an undoubted discretion under the Act to revoke a licence, the discretion was fettered to the extent that the courts

⁹ [1968] AC 998 at 1031-1032

¹⁰ [1976] QB 629

would intervene if it were exercised arbitrarily or improperly. It was an improper exercise of the Minister's discretionary power to propose to revoke a licence validly obtained. Accordingly, the court could and should intervene to declare the proposed revocation of the licence unlawful, invalid, and of no effect.

[28] **Richard Duncan v Attorney General**¹¹ is a case from the Eastern Caribbean Court of Appeal that deals specifically with the authority of the Public Service Commission to direct a public servant to go on vacation leave in the absence of the officer applying for such leave. The Appellant was a senior officer employed to the public service of Grenada. He was directed by the Public Service Commission to proceed on 43 days' vacation leave with immediate effect. The appellant had not applied for any leave. The explanation was that the purpose of the leave was to facilitate the improvement in the operations of the Ministry.

[29] The appellant reacted immediately and denied that the reason given to him was accurate, pointing out that he was entitled to accumulate a maximum of 126 days vacation leave, and that he had accumulated only 43 days. He claimed that he was being sent on pre-retirement leave and requested that he be retired under the constitutional provisions. The Chief Personnel Officer then wrote to him informing him that "I am directed by the PSC to inform you that in the exigencies of the Service you are required to remain on leave with effect from 8th December, 1995, and until further notice."

[30] The Appellant was never asked to resume his duties although he continued to receive his salary. It was not clearly established when that stopped, nor whether the payments occurred each month. At some stage the Appellant undertook other employment. It was undisputed that he has

¹¹ Civ. App. No. 13 of 1997 (Unreported) [Delivered December 8, 1997]

received no retiring benefits at all. The crucial issue in the case was whether the court can determine that the conduct of the Public Service Commission was different to what it said it was, and, if so, what was the essential character of what transpired. Byron C.J. in dealing with a provision similar to that of the Public Service Staff Orders 5.22 and 5.23 made it abundantly clear that:

"The power Staff Order 107 confers, to require the officer to take leave, is limited to the attainment of the objective of Staff Order 106. This is to ensure that officers do not lose their leave entitlements by failing to go on leave for periods longer than it takes for them to accumulate the maximum vacation leave for their grade. This provision for the benefit of the officer is designed to obligate the PSC to remove the risk that leave is forfeited by an officer who fails to go on leave and accumulates more leave than he is entitled to accumulate...The PSC, is obliged to exercise its power for the purpose and in the manner prescribed. Unless the PSC is acting in pursuance of Staff Order 106, it cannot employ the powers under Staff Order 107 and this does not confer on the PSC any power to require an officer to go on leave for the purpose of improving operations in a Ministry"¹².

[31] Later in dealing with the question of what is leave he said:

"The Concise Oxford Dictionary 8th edition, describes "Leave" as "Permission to be absent from duty." The Staff Orders regulate the circumstances and procedure for the grant of leave. The context of these orders clearly indicate that leave is a privilege for which the public servant becomes eligible as an incident of his employment. It is for the benefit of the worker. The character of absence from duty is also relevant because not every absence from duty is leave. The requirement to absent oneself from duty, even with pay, can be a disciplinary sanction. For example, a temporary removal for disciplinary reasons is the sanction of suspension. A permanent exclusion from the performance of one's employment would be neither a grant of leave nor a suspension. In my view it would be a matter of fact to be determined from the circumstances whether an indefinite exclusion is in reality permanent. A permanent exclusion would, in effect, be a removal from office, by whatever euphemism it is described. The payment of emoluments will impact on the question of financial loss, but a professional person or senior public servant will suffer other substantial losses, such loss of reputation, and loss of the satisfaction of discharging duties, loss of the opportunity for promotion and so on. The payment of salary would be only one factor to be considered in deciding whether the officer in receipt has been removed from office. It is not conclusive. An officer, who is preventing from

¹² At page 10

discharging the duties of his office, or is excluded from his workplace, against his will and without lawful authority has been removed from office even if he is in receipt of salary...It is unthinkable that the constitution could intend that the PSC could arbitrarily order a public servant to be prevented from performing his job for an indefinite period. The Staff Orders categorise a variety of types of leave. These include "departmental leave"; "leave on the ground of urgent private affairs"; "overseas leave"; "leave prior to retirement"; "leave prior to resignation"; "vacation leave"; "sick leave". There is no provision for the grant of leave to facilitate improvements in the organisation of a department or Ministry. An allegation that one's absence from work is necessary for making improvements in the workplace is a serious complaint about one's ability or attitude. Requiring an officer to be absent from work for that purpose is not for his benefit. It implies dissatisfaction with the officer. In my view it cannot be leave."¹³

[32] In **R v Commissioner of Police ex parte Leslie Harper**¹⁴ the applicant held the position of Deputy Commissioner of Police. He made public statements in respect of the appointment of the Commissioner of Police. He then applied for 14 days departmental leave which was granted. Subsequently, he also applied for 15 days recreational leave, which was approved. Prior to returning from his leave the applicant received a letter from the Commissioner, directing him to remain on leave until further orders. The reason given by the Commissioner was that he was considering recommending to the Police Services Commission to retire the applicant in the public interest and in the meanwhile wished that he remained on recreational leave. The reason given by the Commissioner for wishing to retire the applicant was that he made statements concerning his incumbency, his personal integrity, and had indicated that he would not be supporting his administration.

[33] On a challenge by the applicant for certiorari to quash the order of the Commissioner of Police it was contended by the Commissioner that Rule 4.3 under Chapter 4 of the Jamaica Constabulary Force Rules, 1980 gave him the authority to send the applicant on leave.

¹³ At page 13

¹⁴ [1994] 31 JLR 34

[34] The court held that Rule 4.3 of the Jamaica Constabulary Force Rules does give the Commissioner of Police a discretion as to the time when an officer can be granted leave, but this discretion is limited to where there is an application for leave by the officer or there is consultation with the officer. That the rule cannot be invoked for the purpose for which Commissioner directed the applicant to remain on leave and that the rule is applicable only to the grant of vacation leave.

[35] The leading case in the Commonwealth Caribbean of the power of the Services Commission to remove a public servant from his employment is from Trinidad and Tobago. In **Thomas v Attorney General**¹⁵. The plaintiff was a police officer, charged with the disciplinary offences of neglect of duty and a failure to carry out instructions of a senior officer contrary to the Police Service Commission Regulations 1966. Following the disciplinary proceedings, and his dismissal from the Police Service, the plaintiff challenged the validity of the proceedings and the order removing him from the Police Service by way of judicial review. The Attorney-General, who was the defendant, maintained that the plaintiff, as a public servant, was dismissible at pleasure and that the jurisdiction of the courts to inquire into his dismissal by the Commission was specifically excluded by the Constitution.

[36] The following passage from the decision of the Privy Council is taken from the head note:

“The power of the Police Service Commission to remove from office in the Police Service...embraced every means by which a police officer's contract of employment (not being a contract for a specific period) could be terminated against his will; but the power to remove meant the power to remove only for reasonable cause (of which the Commission was the sole judge), although the expression “reasonable cause” was not restricted to wilful misconduct; the right to dismiss public officers at pleasure was inconsistent with both the 1962 Constitution and the Republican Constitution...it was for the court and not for the Police Service Commission to determine what, on the true construction of the Constitution, were the limits to the functions of the Commission; if the Commission did something

¹⁵ [1981] 32 WIR 375

beyond its functions or the validity of which was challenged as a contravention of rights guaranteed by the Constitution, section 102(4) of the 1962 Constitution would not oust the jurisdiction of the courts..."¹⁶

[37] In **Jones v Solomon**¹⁷, another case from Trinidad and Tobago, the respondent was appointed to a post in the public service in October 1977. In November 1981 he was advised by letter that, in view of adverse reports on his conduct and work, the Public Service Commission was considering his removal from the public service by retirement in the public interest on the ground that he was temperamentally unsuited to his appointment. He was invited to submit representations on the matter within fourteen days, but he failed to do so. In March 1982, the respondent was notified that he had been retired. The trial judge held that the Commission had failed to take properly into account matters which it was required to take into account by Regulation 54 of the Public Service Commission Regulations on requiring the retirement of an officer from the Public Service and had thereby acted in excess of its jurisdiction.

[38] Edo J.A. had this to say:

"It has long been established that, where a procedural rule is regarded as mandatory, disobedience of it will render void or voidable what has been done; but where it is directory, disobedience will be treated as an irregularity not affecting the validity of what has been done...but for the opening words of section 121(1) of the Constitution, I would have held that the Regulations are directory and not mandatory since they are subordinate to the power conferred by the section to remove and exercise disciplinary control over public officers. The section, however, is subject to the provisions of the Constitution and a failure to comply with the Regulations, albeit that they are made by the Commission for regulating its own procedure, in my opinion, is a breach of mandatory requirements...a failure of the Commission to comply substantially with regulation 54 by not considering a full report on the respondent is likely to infringe his rights to equality of treatment and his right to a fair hearing, respectively, under sections 4(d) and 5(e) of the Constitution."¹⁸

[39] And later:

¹⁶ At page 376

¹⁷ [1989] 41 WIR 299

¹⁸ At page 310

"What is certain is that the ouster provision in section 129(3) of the Republican Constitution does not absolutely debar the court from reviewing the decisions of the Service Commissions. Apart from error of law on the face of the record which goes to jurisdiction, the authorities (especially **Thomas v Attorney-General**) demonstrate that a Commission cannot act capriciously or arbitrarily, for example by a substantial disregard of the Public Service Commission Regulations or in violation of the procedural provisions laid down in the fundamental rights provisions of the Constitution (of which the right to a fair hearing is most relevant)...the Commission's power of removal of a public officer conferred upon it by section 121(1) of the Constitution embraces what in its own judgment constitutes reasonable cause, e.g ill-health or unsuitability of temperament (the ground on which the respondent was retired), or some personal characteristic which (through no fault of his own) has rendered the officer unfit to perform his duties with reasonable efficiency..."¹⁹

I. WHETHER THE PERMANENT SECRETARY IN THE MINISTRY OF JUSTICE IMPROPERLY EXERCISED HER POWER TO SEND THE APPLICANT ON VACATION LEAVE IN ACCORDANCE WITH STAFF ORDER 5.23 GIVEN THE CIRCUMSTANCES OF THE CASE

[40] On July 23, 2002, the Applicant filed an ex parte summons for leave to apply for judicial review of the decision of the Permanent Secretary in the Ministry of Justice to send him on vacation leave under Staff Order 5.23. The application was heard by the court and leave granted on October 2, 2002, for the Applicant to apply for the following relief:

- i) An order of certiorari to quash the Permanent Secretary's decision sending him on leave;
- ii) A Declaration that in the circumstances the Permanent Secretary had no power to send him on leave
- iii) A Declaration that the Permanent Secretary's decision to send him on leave is unlawful, null and void.

A. SUMMARY OF STAFF ORDERS FOR THE PUBLIC SERVICE (LEAVE OF ABSENCE)

[41] The relevant statutory provisions governing leave for the Public Service are set out in Chapter V of the Staff Orders 1976 under the heading "Leave of Absence". They are as follows:

¹⁹ At page 315

"Public Officers are entitled to leave as of right.

5.1 Public Officers shall be entitled to leave... the grant of leave shall be subject to the exigencies of the service and to the provisions of these Orders.

Authority for the grant of leave.

5.2 Authority for the grant of leave to individual officers is vested in the Permanent Secretary of the Ministry responsible for the Public Service...General authority has, however, been given to Heads of Departments who may grant leave subject to these orders without reference to the Permanent Secretary of the Ministry responsible for the Public Service...

5.6 An officer...granted leave under these Orders may be required on public grounds to remain on leave after the expiration of the original period of leave.

Leave not to entail extra staff

5.7...

Form of Leave Particulars

5.8....

Arrangements for grant of vacation leave

5.22 It is not necessary that any specific period should elapse between two successive grants of vacation leave. Subject to the exigencies of the service Heads of Departments should arrange (a) that officers who are permitted to accumulate vacation leave do not go without leave for periods longer than it takes them to accumulate the maximum vacation leave for their particular grade (b) that officers do not forfeit any of their vacation leave.

Officers maybe directed to take leave

5.23 A Permanent Secretary may direct an officer to take vacation leave at any time.

Accumulation beyond the maximum

5.24 (i) If an officer on the permanent establishment who has accumulated the maximum vacation leave in respect of his grade without having been granted such leave, should apply in writing, for the vacation leave to which he is entitled or some portion thereof, but is not granted such leave owing to the exigencies of the service, such officer shall be allowed, with effect from the date immediately after attaining the prescribed maximum of his grade, to earn additional full pay leave beyond the maximum accumulable for his grade...the amount of additional leave which may be so accumulated shall be limited to leave in respect of service for a further period of two years, subject to the approval of the Permanent Secretary of the Ministry responsible for the Public Service.

Whenever approval is given for the accumulation of vacation leave in accordance with this Staff Order the matter should be reported to the Permanent Secretary of the Ministry responsible for the Public Service."

B. EVALUATION

1. Illegality:

[42] It is a proposition of law that the Permanent Secretary of the Ministry of Justice must act within the powers which has been given to her; in that respect, she must understand and apply the law correctly. Any decision reached on the basis of a misapplication of the law will be ultra vires. In order to understand the authority of the Permanent Secretary with regard to the staff in the Attorney General's Department one has to look at her responsibilities under the Staff Orders. In this respect three points need to be made.

[43] First, the Permanent Secretary of the Ministry of Justice has administrative responsibility for the Attorney General's Department. Second, the Staff Orders governs the relationship between the public officers and the Public Service itself and where an officer accepts permanent employment in the public service he or she accepts that they will be governed by the Staff Orders as amended from time to time. Third, the Staff Orders makes it clear that vacation leave cannot be taken by a public officer purely on a voluntary basis; it is subject to the exigencies of the service and the provisions of the Staff Orders.

[44] On the facts to this case, Counsel for the Respondents argues that the exigencies of the service may require that a person proceed on leave when ordered to do so. He contends that where the side note at Staff Order 5.23 says "Officer may be directed to take leave" this is an indication that this directive is not dependent on whether the officer has made an application for vacation leave. This view, he says, is strengthened by the fact that although it is the Permanent Secretary responsible for the Public Service who has the authority for the grant of leave, Staff Order 5.23 gives the Permanent Secretary responsible for the Department the power to direct the officer to take vacation leave. This he argues is because the Permanent Secretary heading a

Department will know the circumstances which would require an officer to proceed on leave without an application for such leave.

[45] The reasons given by the Permanent Secretary for the Ministry of Justice for directing the Applicant in this case to go on vacation leave are set out in her affidavit as follows.

"(6) ...I was aware that in the lawsuit the Applicant disclosed confidential information to the public in furtherance of his own interests and that he had filed the suit without obtaining the consent of the Public Service Commission and produced documents in breach of the Staff Orders. I was also aware that that the lawsuit created tension and discomfort in the Department given the suit challenged the status of other senior members.

(7) In view of the foregoing the Solicitor General recommended that the Claimant not remain in office while the lawsuit was pending.

(8) I considered the recommendation and the above considerations and I came to the view that the best interests of the Department and the Public Service demanded that the Applicant be sent on leave while the lawsuit was pending. Accordingly, by letter dated 25th April 2002, under authority of Staff Order 5.23, I instructed the Applicant to proceed on vacation leave with effect from 1st May 2002, and until further orders."

[46] What is clear, from this bit of evidence, is that the Permanent Secretary in the Ministry of Justice, Carol Palmer, was concerned about the Applicant remaining in the department while maintaining a law suit against the Public Service Commission. Counsel for the Respondents argues that these reasons are both relevant and legitimate, as they go to the heart of the functioning in the Attorney General's Department. He says that the Permanent Secretary was entitled to direct the Applicant to proceed on leave even though he had not applied for leave and had been granted permission to accumulate leave. He contends that the prior approval to accumulate leave is not binding on the Permanent Secretary where circumstances arise, such as in this case, where a suit is filed against the Public Service Commission.

[47] Counsel for the Respondents submits that the reasons given by the Permanent Secretary in her affidavit for sending the Applicant on leave are consistent with the purpose for which her powers under the Staff Orders were intended. The reasons, he said, relates to the exigencies, of the Department and was clearly meant to be exercised in the interest of the department.

[48] But, there is a dissonance here. How can a public officer be granted vacation leave without an application for leave? Vacation leave is the entitlement of every public officer. As Byron C.J. put it in **Richard Duncan**²⁰ "leave is a privilege for which the public servant becomes eligible as an incident of his employment. It is for the benefit of the worker". This is so despite the fact that the grant of leave is subject to the exigencies of the service and the Staff Orders.

[49] As Zacca C.J said in **Harper's Case**²¹ when dealing with a letter directing the claimant to remain on leave until further orders:

"...this letter is clearly not indicating that the applicant be sent on vacation leave. It is tantamount to the applicant being indefinitely suspended under a guise of the grant of vacation leave. The Applicant had not applied for vacation leave. If he had applied for leave to commence on a certain fixed date then having regard to rule 4.3 it would be open to the Commissioner of Police to direct that he proceed on leave at some other time to be fixed by him. The exigencies of the service would have to be considered. Rule 4.3 does give the Commissioner of Police a discretion as to the time when an officer can be granted leave, but we are of the view that this discretion is limited to an application for leave by the officer or in consultation with the officer. This rule cannot therefore be invoked for the purpose for which the Commissioner of Police directed the applicant to remain on leave."²²

[50] The cases of **Richard Duncan** and **ex parte Harper** make it clear that there can be no lawful grant of leave without an application for leave. A grant of leave must mean there was a prior application for leave. In this case, the Applicant did not apply for vacation leave prior to April 25, 2002, nor was he obliged to apply as he had by way of letter dated March 22, 2002, been granted

²⁰ Already cited

²¹ Already cited

²² At page 38

permission to accumulate vacation leave beyond the maximum for a period of two years in accordance with Staff Order 5.24.

[51] The words in Staff Order 5.22 mandates Heads of Departments to “arrange” or to “put plans in place” to ensure that officers do not go without leave longer than is necessary is for the purpose of ensuring that they do not forfeit any of their vacation leave. I accept that this provision is intended to protect the interests of public officers; it was never intended to be used other than for the benefit of the public officer.

[52] The powers of the Permanent Secretary under Staff Order 5.23 cannot be a “free standing power” as Counsel for the Respondents contends. Lord Reid in **Padfield** made it clear that “Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act, the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court.” It is plain that Staff Order 5.23 when read in light of the policy and purpose of the Staff Orders as a whole empowers the Permanent Secretary to direct an officer to apply for vacation leave where such an officer has accumulated the maximum vacation leave for his grade and has not been granted permission to accumulate leave beyond the maximum accumulable. Any other interpretation of this provision would be pointless. A public officer cannot “take” leave which has not been “granted” and leave cannot be “granted” unless it has been “applied for”. I accept that the provision should be given a purposive interpretation and the word “take” should be read “apply for”.

[53] Counsel for the Applicant submits that the Permanent Secretary's direction that the Applicant “take” vacation leave until further orders is the same thing as an indefinite suspension. I agree. Suspension from duty is a disciplinary measure which is usually employed where an officer

has pending charges against him or her. In this case, the Permanent Secretary, Carol Palmer, had no power or reason to institute disciplinary proceedings against the Applicant.

[54] The fact that the Applicant challenged the legitimacy of the rotation system instituted by the Solicitor General cannot subject him to what amounts to a disciplinary procedure. Suspension for disciplinary reasons and vacation leave are horses of a different colour.

[55] At the heart of the argument for the Applicant is the simple fact that the granting or withholding of leave cannot be used by the Permanent Secretary to discipline an officer for challenging the legality of executive action. It is important to the maintenance of the rule of law that persons who are affected by decisions of public bodies should have an opportunity to challenge the decision in court proceedings. There is a strong presumption that parliament would not legislate nor set up regulations to prevent persons from doing so. In **Pyx Granite Co. Ltd v Ministry of Housing and Local Government**²³ Viscount Simmonds said that:

"It is a principle not by any means to be whittled down that the subjects recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words"²⁴

[56] In my judgment, the Permanent Secretary misconstrued the provisions of Staff Order 5.23 as giving her authority to send the Applicant on vacation leave for the reason that "the best interests of the Department and the Public Service demanded that the Applicant be sent on leave while the law suit was pending". This decision is a striking example of an abuse of power, is ultra vires the Staff Orders and void.

²³ 1960 AC 260

²⁴ At page 286

2. Irrationality:

[57] It is a proposition of law that the decision maker must not use the powers given to him or her for purposes other than that for which they were entrusted. In **R v Tower Hamlets LBC ex parte Chetnik Developments Limited**²⁵ Lord Bridge of Hartwich said:

“Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely – that is to say, it can be validly used only in the right and proper way which Parliament when conferring it presumed to have intended...”²⁶

[58] Counsel for the Respondents submits that the decision of the Permanent Secretary to direct the Applicant to proceed on vacation leave was not irrational for two reasons. First, the Staff Orders did not limit the circumstances under which the power in Staff Order 5.23 is to be exercised. Second, the reasons given by the Permanent Secretary for sending the Applicant on vacation leave are, as a whole, reasonable. He says that the Courts should not take over the discretion of the public authority appointed to take the decision.

[59] In this case, I am of the view that the Permanent Secretary did not address the statutory requirements for the exercise of her discretion under Staff Order 5.23 and as a result improperly took into consideration irrelevant matters. As Denning MR said in **Congreve v Home Office** “the statutory provisions give...a discretion...but it is a discretion which must be exercised in accordance with the law, taking all relevant circumstances into account, omitting irrelevant ones and not being influenced by ulterior motives”. The fact that the Permanent Secretary took into account irrelevant matters such as that “the best interests of the Department and the Public Service demanded that the Applicant be sent on leave while the lawsuit was pending”, in exercising her discretion would in

²⁵ [1988] AC 858

²⁶ At page 872

my judgment make the resulting decision arbitrary, palpably irrational and as a consequence ultra vires and void.

3. Procedural Impropriety:

[60] Counsel for the Applicant argues that in circumstances where the Permanent Secretary failed to give the Applicant a hearing or any reasons for her decision to send him on leave; knew that he had permission to accumulate vacation leave which had not been withdrawn, this would constitute a strong inference that she acted in breach of the rules of natural justice.

[61] I agree with Counsel for the Respondents that there is no requirement that a hearing or reasons be given prior to directing the officer to go on leave, provided the exercise of the power is for the proper purpose. This ground fails.

4. Court May Refuse To Grant Relief

[62] A court will refuse to grant a remedy where it appears futile, academic or unnecessary. In this case Counsel for the Respondents submitted that the court should refuse to grant the remedies sought as no useful purpose will be served in so doing. He cited the case of **ICWI Investments et al v The Financial Services Commission**²⁷ in which Wolfe C.J (as he then was) said:

The hallowed principle comes to mind, a court must never act in vain. To do so is to make a mockery of the court's jurisdiction...it must be borne in mind that certiorari is a discretionary remedy. The fact that a person aggrieved is entitled to certiorari does not alter the fact that the court has power to exercise its discretion against him...²⁸

²⁷ Supreme Court of Jamaica M-08 2002 (Unreported)

²⁸ At pages 3-4

[63] In **R v Secretary of State for Social Services ex parte Association of Metropolitan Authorities** the court refused to quash Regulations for general administrative reasons. However, the court granted a declaration that the Secretary of State acted unlawfully. Also in **Regina v The Minister of Agriculture ex parte DYC Fishing Limited**²⁹ Reid J. while refusing to grant a prohibiting order granted a declaration on the basis that there was a difference in interpretation which had to be resolved.

5. Delay

[64] The CPR 2002 provides that the Applicant must seek permission to apply for judicial review and the application must be made promptly and the application must be made promptly and in any event within three months after the grounds for making it arose. On April 25, 2002 the Permanent Secretary directed the Applicant to take vacation leave. On July 23, 2002, he applied for leave to apply for judicial review, within the three month period. In my judgment the application was done promptly and no issue arises in respect to undue delay in respect to this matter.

C. CONCLUSION

[65] Having regard to the conclusion that I have come to on the issue of the Applicant's premature retirement, I cannot agree with Counsel for the Respondents that no useful purpose would be served to quash the decision of the Permanent Secretary to direct the Applicant to go on vacation leave. For that, and all the above reasons, this court orders that certiorari shall go to bring the decision of the Permanent Secretary directing the Applicant to go on vacation leave under Staff Orders 5.23 into court and quash it.

²⁹ Supreme Court of Jamaica No. M-069 and M-146 of 2002 (Unreported)

[66] In addition, this court declares that the decision taken by the Permanent Secretary of the Ministry of Justice to direct that the Applicant proceed on vacation leave under Staff Order 5.23 is unlawful, and a nullity.

II. WHETHER IN THE CIRCUMSTANCES OF THE CASE THE PUBLIC SERVICE COMMISSION ACTED UNLAWFULLY, IN BREACH OF THE PUBLIC SERVICE REGULATIONS 24 AND IN CONTRAVENTION OF NATURAL JUSTICE IN RECOMMENDING TO THE GOVERNOR GENERAL THAT THE APPLICANT BE PREMATURELY RETIRED FROM THE PUBLIC SERVICE.

[67] The Applicant's challenge to his premature retirement set out in Fixed Date Claim Form dated December 14, 2005, is bold, and on the face of it, fairly straightforward. He claimed the following relief:

- a) An order of prohibition, prohibiting the Members of the Public Service Commission from taking any steps to retire the Applicant in accordance with the provisions of Regulation 24(1) and (2) of the Public Service Regulations, 1961.
- b) A declaration that the submission of the report by the Solicitor General to the Public Service Commission in the circumstances of this case is ultra vires, null and void.
- c) A declaration that the consideration of the Solicitor General's report by the Public Service Commission and the subsequent advice tendered by the Public Service Commission to the Governor General are ultra vires, null and void.
- d) An injunction restraining the Public Service Commission from taking steps which would interfere with the status of the Applicant's employment in the Public Service

or the terms of his said employment as regards any report made in this matter or any issues arising from related to or connected with this matter.

- e) An order of certiorari to quash the decision of the Public Service Commission to advise the Governor General that steps should be taken to retire the Applicant in accordance with the provisions of Regulation 24 (1) and (2) of the Public Service Regulations, 1961.
- f) A declaration that any decision taken by the Governor General purporting to retire the Applicant from the public service in accordance with the provisions of Regulation 24(1) and (2) of the Public Service Regulations, 1961 is ultra vires, null and void.

A. THE LEGISLATIVE AND CONSTITUTIONAL FRAMEWORK

[68] Before dealing with this issue, it is necessary to set out in brief the relevant statutory and constitutional provisions to give a context for the discussion.

[69] Section 125 of the Constitution of Jamaica provides that:

“(1)...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.

(2)...

(3) Before the Governor-General acts in accordance with the advice of the Public Service Commission that any public officer should be removed or that any penalty should be imposed on him by way of disciplinary control, he shall inform the officer of that advice and if the officer then applies for the case to be referred to the Privy Council, the Governor-General shall not act in accordance with the advice but shall refer the case to the Privy Council accordingly...

(4) Where a reference is made to the Privy Council under the provisions of subsection (3) of this section, the Privy Council shall consider the case and shall

advise the Governor-General what action should be taken in respect of the officer, and the Governor-General shall then act in accordance with such advice."

[70] Section 1 (7) of the Constitution of Jamaica provides that:

"References in this Constitution to the power to remove a public officer from his office shall be construed as including references to any power conferred by any law to require or permit that officer to retire from the public service..."

[71] Section 135 (1) of the Constitution of Jamaica gives the Public Service Commission powers in relation to misconduct and indiscipline of public officers and to formulate Regulations to regulate its own procedure:

"Section 135

(1) In relation to any Commission established by this Constitution, the Governor-General, acting in accordance with the advice of the Commission, may by regulation or otherwise regulate its procedure and, subject to the consent of the Prime Minister or such other Minister as may be authorised in that behalf by the Prime Minister, confer powers and impose duties on any public officer or any authority of the Government of Jamaica for the purpose of the discharge of the functions of the Commission".

[72] Regulation 24 and 26 of the Public Service Regulations, 1961 having been made under and by virtue of the Constitution of Jamaica has the force of law. Regulation 24 provides as follows:

"Premature retirement

Section (24)

(1) Where it appears to a Permanent Secretary or Head of Department that pursuant to paragraph (2) of section 8 of the Pensions Act an officer in his Ministry or Department who has attained the age of fifty years ought to be called upon to retire from the public service, the Permanent Secretary or Head of Department shall advise the officer accordingly and report the matter together with his reasons therefor for consideration by the Commission, and the Commission shall recommend to the Governor General whether or not that officer ought to be called upon to retire.

(2) Any such officer shall be afforded an opportunity of submitting to the Commission any representations he may wish to make regarding his proposed retirement."

[73] Section 8 of the Pensions Act referred to in Regulation 24 (1) provides that:

"It shall be lawful for the Governor General to require an officer to retire from the service of this Island-

- (a) at any time after he attains the age of fifty-five years; or
- (b) in special cases, at any time after he attains the age of fifty years; or
- (c) ..."

[74] It is apparent that the reference in Regulation 24 (1) of the Public Service Regulations to "Section 8(2)" is properly a reference to Section 8(b) of the Pensions Act.

[75] Regulation 26 of the Public Service Regulations provides as follows:

"Retirement in the public interest"

Section 26

(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.

[76] Section 136 of the Constitution of Jamaica is commonly called an "ouster clause" and deals with the protection of the Public Service Commission from legal proceedings. It provides:

"The question whether -

(a) any Commission established by this Constitution has validly performed any function vested in it by or under this Constitution;

(b) any member of such a Commission or any other person or authority has validly performed any function delegated to such member, person or authority in pursuance of the provisions of section 113 or, as the case may be, of section 127 or of section 131 of this Constitution; or

(c) any member of such a Commission or any other person or authority has validly performed any other function in relation to the work of the Commission or in relation to any such function as is referred to in paragraph (b) of this section, shall not be enquired into in any court.”

B. EVALUATION

1. Constitutional Protection of Commission from legal proceedings

[77] Counsel for the Respondents contends that judicial review of the Public Service Commission falls within the provisions of Section 136 of the Constitution of Jamaica which provides that the question whether the “Commission...has validly performed any function in relation to the work of the Commission” cannot be enquired into by any court.

[78] This was settled in **Thomas v Attorney-General**³⁰ when Lord Diplock made it clear that “if the Commission did something beyond its functions or the validity of which was challenged as a contravention of rights guaranteed by the Constitution, section 102(4) of the 1962 Constitution [similar to our ouster provision] would not oust the jurisdiction of the courts”. I have said all I need to say on this.

2. Illegality

[79] In general it can be said that where a person exercises statutory powers they must only act within the limits of the powers which have been conferred on him or her and they must understand and apply the law correctly. Therefore, any decision that is based on a misunderstanding or misapplication of the law is illegal and void and the court will interfere to take remedial action. They

³⁰ Already Cited

cannot use their powers for a purpose other than that which the statute allows: See **Padfield v Minister of Agriculture Fisheries and Food** and **Congreve v Home Office** referred to earlier.

[80] Counsel for the Applicant contends that the Public Service Commission's decision to retire the Applicant from the Public Service using Regulation 24 was inappropriate as the concerns in the report of the Solicitor General speak to trivial offences under the Public Service Regulations. The matters raised, he said, are essentially disciplinary matters. He also contends that removal from office would not be a proper response to trivial offences of misconduct. Consequently, he argues, the Public Service Commission acted illegally in recommending the Applicant's retirement under Regulation 24 (1) and (2) of the Public Service Regulations.

[81] Second, he contends that the premature retirement under Regulation 24 was primarily intended to punish the Applicant for filing a suit against the Public Service Commission. He argues that the chain of events which followed the filing of the Applicant's first suit in the Supreme Court leads to the inescapable conclusion that his premature retirement by the Public Service Commission under Regulation 24 (1) and (2) was punishment. That, he says, is not the purpose of the Public Service Regulations.

[82] I agree with Counsel for the Respondents that where the report from the Head of Department to the Public Service Commission concerns only minor offences, this fact by itself, cannot mean that they are barred from recommending premature retirement. What Section 24 (1) of the Public Service Regulations allows is the premature retirement of a public officer on his attaining the age of fifty years and in "special cases" under paragraph (b) of Section 2 of the Pensions Act. It is an accepted principle in Caribbean Public Law that any recommendation by the Public Service Commission for the premature retirement of a public servant in "special cases"

should be done in the best interests of the public service. The judgment of Edo J.A in **Jones v Solomon**³¹ made it clear that "a Commission cannot act capriciously or arbitrarily...the Commission's power of removal of a public officer...embraces what in its own judgment constitutes reasonable cause, e.g. ill-health or unsuitability of temperament, or some personal characteristic which (through no fault of his own) (which) has rendered the officer unfit to perform his duties with reasonable efficiency".

[83] Section 1 (7) of the Constitution of Jamaica makes it clear that retirement under the Public Service Regulations is a "removal from office". This retirement or removal from office under the Public Service Regulations must be done for "reasonable cause". It is not a disciplinary procedure, nor is it punishment. I agree with Counsel for the Respondent that punishment occurs where disciplinary control has been exercised. Where a person prematurely retires he qualifies for full pension benefits; where he is punished, there is a reduction in pension benefits.

[84] Counsel for the Respondents argued that what happened in this case was simply a decision to prematurely retire the Applicant in the interests of the public service. This public service interest, he contends, is the enhanced functioning and operation of the Attorney General's Chambers. The Solicitor General complained that the Applicant's conduct was a cause of concern with other members in the Attorney General's Chambers. Counsel for the Respondents relied on the case of **Union of India v M.E. Reddy & Another**³² in which the Supreme Court of India held that compulsory retirement after an employee has put in a sufficient number of years, having qualified for a full pension, is neither a punishment nor a stigma. I accept that in this case, there is no punishment.

³¹ Already Cited

³² [1979] INSC 186 [Delivered September 19, 1979]

[85] Section 125 (1) of the Constitution of Jamaica gives the Governor General acting on the advice of the Public Service Commission the power to appoint, remove and exercise disciplinary control over public officers. In this case, the Public Service Commission made the recommendation and in doing so acted by virtue of Regulation 24 (1) of the Public Service Regulations. The Governor General in turn notified the Applicant of the advice, and enquired whether he wished his case to be referred to the Jamaican Privy Council. He did not respond and the Governor General acted on the advice tendered by the Public Service Commission and retired the Applicant.

[86] Counsel for the Respondents submits that the ground of illegality raised by the Applicant cannot be sustained. First, he says the Applicant was over 50 years of age at the time of the decision to retire him prematurely. Second, the Public Service Commission removed him from office for "reasonable cause", which was as a result of "his conduct", which was a cause of concern with other members in the Attorney General's Chambers.

[87] There is a problem with this argument. Regulation 24 (1) provides a precondition to enable the jurisdiction of the Public Service Commission. It provides that where the Solicitor General as the Head of Department considers that the Applicant should be retired prematurely he "shall" advise him of that intention and recommend such a course to the Public Service Commission together with his reasons. The advice of the Head of Department or Permanent Secretary is a necessary precondition to the consideration and decision of the Public Service Commission to recommend premature retirement. In the same way, the advice of the Public Service Commission is a precondition to the Governor-General retiring a public officer. The matter of preconditions arose in the Eastern Caribbean Court of Appeal in **Public Service Commission v**

Davis³³. In that case six teachers in Antigua were charged with criminal offences. The Public Service Commission Regulations 1967 precluded the institution of disciplinary proceedings before the conclusion of any criminal proceedings arising out of the same circumstances. The teachers were sent letters by the Public Service Commission summarily dismissing them in the public interest. One other teacher, who had not been charged with any criminal offence, was similarly dismissed. The procedure for dismissing the teachers was not followed. They were not given information of the charges made against them, nor given any opportunity to answer the charges. Moreover, no inquiry was held before the decision was taken to dismiss them in the public interest. At first instance it was held that the Commission had failed to follow the proper procedure in effecting the dismissals and that the dismissals were nullities.

[88] In dismissing the appeal the court held that the requirement that no disciplinary proceedings should be instituted until after any criminal proceedings based on the same issue had been concluded was of mandatory application and a condition precedent to the assumption of jurisdiction. The court also held that the Commission disregarded the requirement that charges should be formulated in writing and sent to the respondents to allow them an opportunity to answer them before any inquiry was instituted. The court took the view, that the Commission had acted without authority in dismissing the respondents and the dismissal letters were nullities. Robotham J.A said:

“...provision is made under regulation 8(2) for the retirement of a public officer in the public interest where the Commission is of the opinion that dismissal is not warranted; but this can only be done on completion of proceedings instituted for his dismissal...If an authority purports to dismiss an employee otherwise than in accordance with mandatory procedural requirements, the courts in appropriate circumstances have jurisdiction to declare that act a nullity...where a tribunal embarks upon an inquiry without a condition precedent to its assuming jurisdiction

³³ [1984] 33 WIR 112

being satisfied. In such a case, the stage for it to embark on the inquiry would not have been set, and a superior court could properly hold in those circumstances that the inferior tribunal or authority lacked jurisdiction to embark on the inquiry. Further, that any decision arising there from was a nullity. However, it is also necessary in each case to examine closely the procedural requirement or statutory provision which has been breached with a view to seeing whether it is to be regarded as mandatory (in which case disobedience to it would make the decision void or at least voidable) or as directory (in which case disobedience could be treated as a mere irregularity, without affecting the substance of the decision or its validity)"³⁴.

[89]Applying the **Davis** decision to the facts of this case, it is my opinion that the Solicitor General's notification to the Applicant and his making the request to the Public Service Commission is a condition precedent to their arriving at a recommendation to retire the Applicant. It is common ground between the parties that the Solicitor General did not request the premature retirement of the Applicant, nor did he notify the Applicant directly of any intention to do so. In my judgment, therefore, the Public Service Commission ignored its own procedure set out in Section 24 of the Public Service Regulations, and in so doing, acted in excess of their jurisdiction in taking the initiative to retire the Applicant. Section 24 of the Public Service Regulations, is sanctioned by the Constitution of Jamaica and has the force of law. Accordingly, the decision of the Public Service Commission to retire the Applicant in these circumstances is in excess of jurisdiction and illegal. The sole issue remaining under this heading is whether the provisions of Section 24 of the Public Service Regulations are mandatory or directory.

[90]As a general rule it can be said that the courts have tended to view statutory provisions as mandatory where they protect individual interest and directory where there has been substantial compliance with the provisions or non-compliance to matters of detail. Lord Woolf MR (as he then was) in **R v Home Sec., Ex parte Jeyanthan**³⁵ issued a note of warning when considering the

³⁴ At page 117

³⁵ 2000] 1 WLR 354:

impact of breaches in procedural requirements. He took the view that the legal effect of non-compliance cannot be determined solely by reference to the nature of the requirement alone but had to take into account the factual context. He said:

"It must be remembered that procedural requirements are designed to further the interests of justice and any consequence which would achieve a result contrary to those interests should be treated with considerable reservation".³⁶

[91] Where, however, the breach involves a constitutional provision either directly or tangentially (which was not the case in **Ex parte Jeyanthan**) it is considered to be mandatory. This was held to be the case in **Jones v Solomon**³⁷ where Edo J.A. in dealing with similar Regulations to ours made it clear that the "section to remove and exercise disciplinary control over public officers...is subject to the provisions of the Constitution and a failure to comply with the Regulations, albeit that they are made by the Commission for regulating its own procedure, in my opinion, is a breach of mandatory requirements...where a procedural rule is regarded as mandatory, disobedience of it will render it void or voidable". In my judgment, therefore, the decision of the Public Service Commission to retire the Applicant is, in addition to being illegal, is also a nullity.

3. Irrationality

[92] Counsel for the Applicant complains that the Commission has abused its discretion and its actions are manifestly unreasonable having regard to the Applicant's record of employment in the public service. He argues that even if he concedes that the comments of the Solicitor General were true, they were for trifling matters, and the Applicant should not have been removed from office for those reasons. I disagree. The decisive factor in the Pensions Act Section 8 is that there

³⁶ At page 359

³⁷ Already Cited

should be "special cases" and the public servant should have reached the age of 50 years. I agree that the role of the court is not to find different facts from those found by the Public Service Commission. The court is concerned only with process. As long as the "special cases" constitute "reasonable cause", there is nothing else.

[93] On the other hand, the Public Service Commission did not follow its own procedure in obtaining a response from the Applicant concerning the proposal that he be prematurely retired as required by Section 24 (2) before recommending to the Governor General that he be retired. In my judgment, that breach by itself is unreasonable or irrational in the "**Wednesbury**" sense. In that case Lord Greene MR made it clear that "it may be still possible to say that, although the local authority has kept within the four corners of the matters which they ought to consider, they have, nevertheless, come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere". In this case, it cannot be said that a reasonable Public Service Commission in possession of the facts that it had, without the Applicant's response as required by Regulation 24 (2) would have acted as the Commission did.

4. Procedural Impropriety

a) Fairness to the Applicant

[94] Under this heading the Applicant challenged the decision of the Public Service Commission on the basis that:

- i) The Permanent Secretary or Solicitor General did not propose to prematurely retire him
- ii) He was not given notice of the proposal to retire him;

- iii) He was not given an opportunity to respond to the allegations before the Commission took the decision to recommend his retirement;
- iv) There was a real danger that the Commission was biased in arriving at its decision to recommend his retirement; and
- v) The Commission failed to provide any reasons for the decision to advise the Governor General that he should be retired from the public service.

[95] In all cases the decision maker must act fairly or in accordance with the principles of natural justice. It is a proposition of law that procedural fairness requires that a person who is affected by a decision should be given prior notice of what is proposed and an effective opportunity to make representations before the decision is made or implemented. In **R v Secretary of State for the Home Department ex parte Doody**³⁸ Lord Mustill said:

“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 the following. (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

³⁸ [1993] 3 All ER 92

weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer".³⁹

[96] In this case, the Public Service Regulations s. 24 (1) and (2) provides:

- a) that where it appears to a Head of Department that pursuant to paragraph (2) of section 8 of the Pensions Act an officer in his Department who has attained the age of fifty years ought to be called upon to retire from the public service;
- b) that Head of Department shall advise the officer; and
- c) report the matter together with his reasons for consideration by the Commission; and
- d) the Commission shall recommend to the Governor General whether the public servant ought to be prematurely retired.

[97] Regulation 24 (2) specifically makes the "audi alderam partem" rule applicable by giving the Applicant a right to make representations regarding his proposed retirement.

[98] In order to decide whether there was compliance with the provisions of the Regulations it is necessary to examine the evidence of the persons required to make the decisions. In his affidavit the Solicitor General Michael Hylton Q.C as the Applicant's Head of Department said at paragraph 37:

"After the decision of the Supreme Court in January 2003, I made a recommendation to the Commission that the Applicant not return to the Chambers in any capacity. This recommendation was not based on the fact that the suit was filed or the result. I was of the view that it was not in the best interest of the Chambers or in the public interest for the Applicant to return to the Chambers in any capacity because of my concerns about his competence, attitude, cooperativeness and because I did not think I could have trust and confidence in the Applicant."

³⁹ At page 106

[99] The Solicitor General's suggestion that the Applicant "not return in any capacity" was probably said with more frankness than he intended. But, what is clear from this bit of evidence, is that the Solicitor General as Head of Department did not consider that based on the Applicant's age and for any other reason (which can be considered a special case) the Applicant ought to be prematurely retired from the public service. There is also no indication in his affidavit that he notified the Applicant that he will recommend premature retirement from the public service, nor did he provide him with a copy of any report sent to the Commission. The report sent on the request of the Commission was the Solicitor General's October 19, 2001, memorandum to the Applicant together with attachments setting out his concerns with various minor disciplinary matters that he had raised on previous occasions.

[100] The next bit of evidence comes from the Chairman of the Public Service Commission. She sets out the basis on which the decision was taken to prematurely retire the Applicant. She says in her affidavit:

"The Commission at its regular monthly meeting on February 3, 2003, considered the request of the Solicitor General and decided to recommend to the Governor General that steps be taken to retire the Applicant from the Public Service in accordance with Regulation 24 of the Public Service Regulations, 1961. This regulation allows the Commission to recommend to the Governor General that an officer who has attained the age of 50 be required to retire. The Applicant was born on May 14, 1949, and had therefore attained the age of 50 by then.

7. Although the only recommendation of the Solicitor General was that the Applicant should not return to the Attorney General's Chambers, the Commission decided to recommend his retirement. Reassignment to another government department was an option available to the Commission. However, the Applicant was a senior officer and reassignment to another department would require him to be assigned at least at the same level. There are very few senior legal positions available in the civil service, and there were no suitable positions to which the Applicant could have been reassigned. In view of this and the concerns expressed by the Solicitor General, the Commission decided to recommend to the Governor General that steps be taken to retire the Applicant."

[101] Metaphorically, the Solicitor General passed the ball to the Public Service Commission; they only needed to find a way through the defence. This they failed to do, for three reasons.

[102] First, the Commission placed itself in an unflattering light by not insisting that the proper procedure be followed before dealing the matter. They requested an evaluation of the Applicant and when they were sent the memo of October 19, 2001, they went on to consider the issue of premature retirement, which was never raised expressly or implicitly by the Solicitor General. This in my judgment is a precondition to their consideration of premature retirement.

[103] Second, there is no provision under Section 24 of the Public Service Regulations to make a decision to recommend to the Governor General that "steps be taken" to retire the Applicant. There is no requirement for a preliminary decision. It is either they made a decision or they did not. The fact is, a final decision was made by the Public Service Commission and it was procedurally flawed. The only decision that could properly be made by the Commission was to recommend to the Governor General that the Applicant who had attained the age of 50 years be retired; not a decision to recommend that "steps be taken" to retire the Applicant.

[104] Third, the process by which the Commission came to its decision was ill-advised and prejudicial to the Applicant. It did not give the Applicant an opportunity to respond to the charges contained in the report of the Solicitor General and to make representations to the Commission as to why he ought not to be prematurely retired before coming to a decision. Procedural fairness under Regulation 24, which is subject to the provisions of the Constitution of Jamaica, is not a platitude; it is a fundamental Constitutional right, which was infringed by the Public Service Commission. The matter, however, does not end here.

[105] Counsel for the Respondents argued on behalf of the Commission that the Applicant's complaint of procedural impropriety or unfairness is excluded by his own behaviour. He says that the Applicant was informed of his right to apply for his case to be referred to the Privy Council after the recommendation by the Public Service Commission and the decision of the Governor General. This, Counsel for the Respondents submits, would have had the effect of curing the breach under Section 24 of the Public Service Regulations. He says that despite this opportunity being given to the Applicant to appeal to the Privy Council, he chose not to do so.

[106] This is not a situation in which the Applicant's right to procedural fairness can be excluded either expressly or by implication. In the leading case of **Calvin v Carr**⁴⁰, which was cited with approval in the Jamaican Court of Appeal in **Nyoka Segree v Police Service Commission**⁴¹, it was held that the fact that an initial decision was procedurally flawed can be cured by a rehearing or appeal that is procedurally fair. The plaintiff was part-owner of a horse which failed to win a race. Acting under powers given to them by the Jockey Club Rules the stewards brought an action against him. After a hearing his was disqualified for a year. The Committee of the Jockey Club heard an appeal and dismissed it.

[107] The Privy Council held that the full hearing by the Committee of the Jockey Club on an appeal against the Stewards decision cured any defects in the decision of the Stewards. Lord Wilberforce in delivering the judgment of the Board said:

“it is for the court, in the light of the agreements made, and in addition having regard to the course of proceedings, to decide whether, at the end of the day, there has been a fair result, reached by fair methods, such as the parties should fairly be taken to have accepted when they joined the association. Naturally there may be instances when the defect is so flagrant, the consequences so severe, that

⁴⁰ [1980] AC 574

⁴¹ SCCA 142/2001 (unreported) [Delivered March 11, 2005]

the most perfect of appeals or re-hearings will not be sufficient to produce a just result.”

[108] Applying the decision in **Carr’s Case** to the instant matter, I have concluded that “the defect is so flagrant, the consequence so severe” that a hearing before the Jamaican Privy Council would not be “sufficient to produce a just result”. These are my reasons.

[109] First, the procedural breach was in respect to a decision that was for the purpose of “recommending the Applicant’s premature retirement”. This is a “removal or termination from employment” in the public service, which has enormous consequences on the Applicant’s reputation, self esteem as a professional man, and the amount of his ultimate pension on retirement. As was said by Byron C.J in **Richard Duncan** on removal from office “a professional person or senior public servant will suffer other substantial losses, such as loss of reputation, and loss of the satisfaction of discharging duties, loss of the opportunity for promotion and so on”.

[110] Second, the Public Service Commission has an important role to fulfil under the Constitution of Jamaica and the Regulations which they have formulated to govern their own operations provide important constitutional safeguards for the protection of a public officer from political abuse, victimisation and favouritism.

[111] Third, any rehearing or appeal hearing by the Jamaican Privy Council under the Constitution could only provide partial relief in giving the Applicant an opportunity to be heard. The fact is that the Solicitor General did not communicate to the Applicant any intention to recommend premature retirement, nor did he recommend such a course for the approval of the Public Service Commission. The recommendation of the Solicitor General for premature retirement is an important procedural precondition for the Public Service Commission’s recommendation to the Governor General of premature retirement.

[112] In order to protect public servants, the Public Service Regulations does not give the Head of Department or Permanent Secretary the final word in the removal or termination of public servants for whatever reason. In relation to Regulation 24, the Commission by itself would hardly be expected to know - without the input of the Head of Department or Permanent Secretary - the reasons for the removal from office of particular public servants. Consequently, in relation to Regulation 24, the Commission can only act after a request, and then only on the basis of the reasons provided by the Head of Department or Permanent Secretary.

[113] In my opinion, the Public Service Commission has, on the face of it, no power to, on its own recommend premature retirement under Section 24 of the Regulations. Nor, in my view, could any such request be implied from the statement by the Solicitor General that the Applicant "not return to the Chambers in any capacity". A straight comparison with Regulation 26 of the Public Service Regulations is sufficient to make the point. It provides at subsection (1) that "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" (my emphasis) the Commission would take steps to retire the public officer. What is clear here is that the Commission under Regulation 26 is given the discretion to make the decision independently of any recommendation from the Head of Department or anyone else. Regulation 24 of the Public Service Regulations, on the other hand, is set out differently and necessarily must be interpreted differently.

[114] Fourthly, Section 24 (1) and (2) of the Public Service Regulations provides significant protection to the rights of a public servant being removed from his job in the public service for reasons other than misconduct. As I have said before the provisions of Section 24 of

the Public Service Regulations have constitutional protection, are mandatory, and must be complied with: See statement of Edoe J.A. in **Jones v Solomon**⁴².

[115] Fifthly, in addition to the procedural safeguards in the Public Service Regulations, the Applicant enjoys the "protection of law" under section 13 of the Constitution of Jamaica, which encompasses fairness and natural justice. As Lord Slynn of Hadley said, speaking on behalf of the majority of the Privy Council in **Neville Lewis v Attorney General of Jamaica**⁴³ "...a breach of the rules of fairness, of natural justice...means that the applicants did not enjoy the 'protection of law' either within the meaning of section 13 of the Constitution or at common law⁴⁴".

[116] In summary then, the Public Service Commission in pursuing the premature retirement of the Applicant displayed a cavalier attitude to justice and due process and has breached the Applicant's rights to procedural fairness and natural justice. This constitutes a breach of Section 13 of the Constitution of Jamaica and is, therefore, unlawful, null and void.

b) Appearance of Bias

[117] As a general rule where judicial or quasi-judicial proceedings have been tainted by bias or there is an appearance of bias the court will interfere and set aside the proceedings. In **R v Gough**⁴⁵ the test is whether there is a "real danger of bias on the part of a relevant member of the tribunal in questioning the sense that he might unfairly regard (or have unfairly regarded) with favour or disfavour the case of a party to the issue under construction by him". In **Porter v McGill**⁴⁶ the House of Lords modified the test for apparent bias to "whether the fair-minded and

⁴² Already Cited

⁴³ [2001] 2 AC 50

⁴⁴ At page 80

⁴⁵ [1993] AC 646

⁴⁶ [2001] UKHL 67

informed observer having considered the facts, would conclude that there was a real possibility that the tribunal was biased"⁴⁷. I accept without doubt that the rule against bias applies to administrative decisions.

[118] Counsel for the Applicant contended that on the facts of this case the Public Service Commission has an interest in the outcome of this Application and has shown bias in relation to the issues for the following reasons. First, he says, the members of the Public Service Commission are parties to the first case brought by the Applicant now before the Privy Council. Second, at issue in that case is the behaviour of the Public Service Commission and the Solicitor General Michael Hylton Q.C. Thirdly, the Public Service Commission secured the Applicant's retirement from the Public Service even though the appeal process had not come to an end.

[119] On the other hand, where the facts justify a finding that the rule against bias has been breached the ground of challenge will fail where it is necessary for the decision maker to act. In other words, the doctrine of necessity creates an exception. Counsel for the Respondents is right to say that although the Public Service Commission are the Defendants in an action filed by the Applicant, there is no other body with the authority to make the decision to retire the Applicant. The Public Service Commission is the only body that is empowered to recommend the early retirement of an officer under the Public Service Regulations. In **Meerabux v. Attorney General of Belize**⁴⁸ (a decision of the Privy Council on an appeal from Belize) the appellant a former judge of the Supreme Court of Belize was the subject of complaints from the Bar Association alleging that he had misbehaved in office. The Governor General referred the matter to the Belize Advisory Council ("BAC") pursuant to the Belize Constitution. By section 51 of the Belize Constitution, the

⁴⁷ At page 103

⁴⁸ [2005] 66 WIR 113

Chairman of the Council was required to preside at meetings. The appellant objected to the presence of the Chairman and another member of the Bar Association on the basis that the Chairman was automatically disqualified by reason of his membership to the Association or alternatively that a fair minded informed observer would have concluded that there was a real possibility that the Chairman was biased. Lord Hope said;

"The question is, whether it can be said, simply because of his membership of the Bar Association, that Mr Arnold could be identified in some way with the prosecution of the complaints that the association was presenting to the tribunal so that it could be said that he was in effect acting as a judge in his own cause? Only if that proposition could be made good could it be said, on this highly technical ground, that he was automatically disqualified. Their lordships are not persuaded that the facts lead to this conclusion. Leaving the bare fact of his membership on one side, it is clear that Mr Arnold's detachment from the cause that the Bar Association was seeking to promote was complete. He had taken no part in the decisions which had led to the making of the complaints, and he had no power to influence the decision either way as to whether or not they should be brought. In that situation his membership of the Bar Association was in reality of no consequence. It did not connect him in any substantial or meaningful way with the issues that the tribunal had to decide. As Prof David Feldman has observed, the normal approach to automatic disqualification is that mere membership of an association by which proceedings are brought does not disqualify, but active involvement in the institution of the particular proceedings does; Their lordships are of the opinion that the principle of automatic disqualification does not apply in this case. The issue of apparent bias having been raised, it is nevertheless right that it should be thoroughly and carefully tested. Now that law on this issue has been settled, the appropriate way of doing this in a case such as this, where there is no suggestion that there was a personal or pecuniary interest, is to apply the Porter v Magill test. The question is what the fair-minded and informed observer would think. The man in the street, or those assembled on Battlefield Park (to adopt Blackman J's analogy), must be assumed to possess these qualities. The observer would of course consider all the facts which put Mr Arnold's membership of the Bar Association into its proper context. But the facts which he would take into account go further than those described in the previous paragraph. They include the nature and composition of the tribunal, the qualifications which a person must possess to be appointed chairman, the fact that the first proviso to s 54(11) of the Constitution directs the chairman to preside where the BAC is convened to discharge its duties under s 98 and the fact that this direction is subject only to the special provision which the second proviso makes for what is to happen if the BAC is convened to consider the chairman's removal. Their lordships are inclined to agree with Carey JA that, if he had taken these facts into

account, the fair-minded and informed observer would not have concluded that Mr Arnold was biased.⁴⁹

[120] In the instant case, the Public Service Commission is the only body authorised to exercise powers related to appointments, discipline and terminations under the Constitution of Jamaica. Counsel for the Respondents also referred the court to the earlier case of **H. Tolputt & Co. Limited v. Mole**⁵⁰. In that case the Defendant was sued for negligence. He was also a Solicitor and the Registrar and High Court Bailiff. The Plaintiff elected to sue him in the Court in which he was Registrar. The Defendant appeared in person. A verdict was given for the Defendant. The only person who could tax the Defendant's cost was of necessity, the Defendant himself. The Registrar gave notice of taxation before himself. In an appeal by the Plaintiff the Divisional Court held that the taxation was as a result of a necessity before the defendant himself as Registrar of the County Court and had properly come before the judge based on the rules.

[121] Based on the authorities and the reasons, the Respondents have established that the exceptional grounds of necessity exist here so there can be no bias in the Public Service Commission. This ground fails.

c) Reasons for Decision

[122] At common law there is no duty on decision makers to give reasons for their decisions. The House of Lords in **ex parte Doody**⁵¹ per Lord Mustill indicated that:

"I accept without hesitation, and mention it only to avoid misunderstanding, that the law does not at present recognise a general duty to give reasons for an administrative decision. Nevertheless, it is equally beyond question that such a duty may in appropriate circumstances be implied...The giving of reasons may be inconvenient, but I can see no ground at all why it should be against the public

⁴⁹ At page 126 -127

⁵⁰ [1911] 1 KB 836

⁵¹ [1993] 3WLR 154

interest: indeed, rather the reverse. This being so, I would ask simply: Is refusal to give reasons fair?"⁵²

[123] Counsel for the Applicant contended that fairness demand that the Public Service Commission ought to give reasons for its decision in this case where the Applicant's future, livelihood and reputation have been prejudiced by the decision of the Commission. He argued that the Commission has acted improperly by not advising the Applicant of the reasons for its decision to retire him prematurely.

[124] In this case there is no statutory requirement for reasons to be given. Where fairness demands it and the decision maker fails to supply reasons for a decision this will not automatically make the decision itself void or open to challenge as an error on the face of the record. The absence of reasons may, however, lead the court to infer that the decision was irrational and on that basis quash it. In this case I accept that the October 19th memo with its attachments indicated the basis on which the Commission recommended the retirement of the Applicant and that this would have been notified to the Applicant. This ground fails.

d) Delay

[125] The Public Service Commission notified the Applicant of its decision to retire him prematurely by way of letter dated March 6, 2003, which the applicant said was delivered to him on March 23, 2003. On April 23, 2003, he applied for judicial review of the decision of the Public Service Commission. This application was made promptly and the issue of undue delay does not arise.

⁵² At page 172

C. DAMAGES

[126] In general it can be said that there is no right to damages as a result of public law breaches. However, Rule 56.10 of the CPR 2002 provides that a claim for damages or restitution can be made where it "arises out of or is related to or connected to the subject matter of the application". The Applicant must include the claim for damages either in the claim form, the statement of case or his affidavit to justify granting the relief.

[127] In this case, the Applicant has claimed loss of salary, allowances and benefits from the date of his retirement. He has also claimed payment for leave entitlement, damages, interest and cost. Counsel for the Respondents rightly submits that the Applicant's grounds do not reveal a separate cause of action against the Public Service Commission and, therefore, general damages and interest should not be awarded. He cites the case of **Commissioner of Police for NSW v Jarratt**⁵³ where Mason P said that:

"Unless statute creates its own cause of action sounding in damages, conduct that is invalid for administrative law reasons (including denial of procedural fairness) but is not tortious or breach of contract does not usually sound in damages.⁵⁴"

[128] It is unchallenged, and the court accepts that the Applicant is without a doubt entitled to an amount equivalent to the diminution in his salary and allowances from the date of the date of his retirement to the date of this judgment.

D. CONCLUSION

[129] In my judgment, the case for the Applicant that the Public Service Commission is in breach of Section 24 (1) and (2) of the Public Service Regulations and of natural justice in

⁵³ [2003] NSWCA 326 [Delivered November 11, 2003]

⁵⁴ At paragraph 120

recommending to the Governor General that he should be prematurely retired from the Public Service is unanswerable. Accordingly, the Applicant is entitled to the following relief:

- i) A declaration that the consideration of the Solicitor General's report by the Public Service Commission and the subsequent advice tendered by the Public Service Commission to the Governor General are ultra vires, null and void.
- ii) An order of certiorari to bring the decision of the Public Service Commission to advise the Governor General that steps should be taken to retire the Applicant in accordance with the provisions of Regulation 24 (1) and (2) of the Public Service Regulations, 1961 into court and quash it.
- iii) A declaration that the decision taken by the Governor General to retire the Applicant from the Public Service in accordance with the provisions of Regulation 24 (1) and (2) of the Public Service Regulations, 1961 is ultra vires, null and void.
- iv) An order that damages for loss of salary and allowances be assessed on a date to be fixed by the Registrar of the Supreme Court.
- v) No order as to cost.