



[2022] JMSC Civ 71

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

**IN THE CIVIL DIVISION**

**CLAIM NO. SU 2021 CV 04376**

<b>BETWEEN</b>	<b>JERMAINE SPENCER</b>	<b>APPLICANT</b>
<b>AND</b>	<b>PUBLIC BROADCASTING CORPORATION OF JAMAICA</b>	<b>1<sup>ST</sup> RESPONDENT</b>
<b>AND</b>	<b>MINISTRY OF LABOUR</b>	<b>2<sup>ND</sup> RESPONDENT</b>
<b>AND</b>	<b>OFFICE OF THE SERVICES COMMISSION</b>	<b>3<sup>RD</sup> RESPONDENT</b>

**Mr. John Clarke, Attorney-at-Law for the Applicant**

**Mr. Andre Sheckleford, Attorney-at-Law instructed by Hart, Muirhead, Fatta for the 1<sup>st</sup> Respondent.**

**Ms. Lisa White, Deputy Solicitor General (Ag), instructed by the Director of State Proceedings for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.**

**HEARD: April 28, May 27 and 30<sup>th</sup> 2022.**

**Administrative Law – Application for Leave to Apply For Judicial Review out of time – principles involved**

**Administrative Law – Application for Leave to Apply for Judicial Review – whether Applicant has a good arguable case with a real prospect of success.**

**Administrative Law – Application for Leave to Apply for Judicial Review – Delay in applying for leave – Whether Applicant has good reason for delay – Whether lengthy delay in application is a bar to obtain leave**

**DALE STAPLE, J (Ag)**

**BACKGROUND**

- [1] Mr. Spencer was employed to the Public Broadcasting Corporation of Jamaica (hereinafter the PBCJ). He was employed as the Finance and Administration Manager at the entity. He was in charge of Human Resources and Finance at that entity. Mr. Spencer was transferred on appointment to this entity from his former post at the Office of the Prime Minister.
- [2] He was eventually dismissed from this entity following a disciplinary hearing convened by the Public Broadcasting Corporation using their internal disciplinary proceedings.
- [3] Subsequent to that, there was a series of attempts made by Mr. Spencer to appeal this decision through various entities. These avenues did not result in the decision to dismiss him being overturned.
- [4] It all finally has culminated in this present Amended Application For an Extension of Time for Leave to apply for Judicial Review filed on the 21<sup>st</sup> January 2022.
- [5] During the course of the hearing of this matter on the 28<sup>th</sup> April 2022, the Applicant withdrew the Application as against the 3<sup>rd</sup> Respondents. The matter then continued as against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

**THE PRESENT APPLICATION**

- [6] Mr. Spencer has applied for permission to apply for leave to apply for judicial review out of time and for permission to apply for judicial review.

**[7]** He hopes to be given leave to pursue the following remedies at the judicial review hearing:

- 3 (a) An order of mandamus to compel the 1<sup>st</sup> Respondent to disclose any document which evidence [sic] the process engaged by it or its Chief Executive Officer to remove the Applicant from his employment;**
- (b) A declaration as to whether the Applicant is a public officer or statutory employee of the 1<sup>st</sup> Respondent;**
- (c) An order of mandamus to compel the 2<sup>nd</sup> Respondent to refer the matter to the Industrial Disputes Tribunal. Alternatively, an order of mandamus to compel the 3<sup>rd</sup> Respondent to refer the matter to the Privy Council;**
- (d) An order of mandamus to compel the disclosure of the investigator's report to the [sentence incomplete];**
- (e) An order of certiorari to quash the decisions made by the 1<sup>st</sup> to 3<sup>rd</sup> Respondents in relation to the Applicant**
  - a. The decision of the 1<sup>st</sup> Respondent to "remove the applicant from his employment" without following the appropriate procedural steps;**
  - b. The decision of the 2<sup>nd</sup> Respondent to decline to refer the matter to the Industrial Dispute(s)[sic] Tribunal on [sic] basis that the 3<sup>rd</sup> Respondent has jurisdiction over the matter;**
  - c. The decision of the 3<sup>rd</sup> Respondent to fail to refer the matter to the Privy Council or engage its normal adjudication process on the basis that it has no jurisdiction over the matter.**
- (f) A declaration that the actions of the 1<sup>st</sup> Respondent breach [sic] natural justice rights of the Applicant.**
- (g) Damages to compensate the Applicant for his loss of income from the actions of the 1<sup>st</sup> to 3<sup>rd</sup> Respondent [sic].**

**[8]** He also sought to obtain these other orders:

- (i) An order to compel disclosure by the Respondents to the Court of administrative files in relation to the Applicant to facilitate the court making a decision in relation to any further application for disclosure of documents to the Court in light of any Claim by the Respondent to any public interest immunity.**
- (h) He then asked for an order for the Claim to be within 14 days of the date hereof (a misconceived request).**

- (i) He repeated, unnecessarily, a request for leave to be granted in relation to the decision of the 1<sup>st</sup> Respondent in relation to the Applicant.**
  
- (j) The Applicant lists his grounds for the Application as follows:**
  - a. He was discharged from his duties as a public officer;**
  - b. He believes he was treated unfairly and that there was a breach of natural justice;**
  - c. There is no alternate form of redress;**
  - d. Anytime [sic] which has been exceeded occurred because of the Applicant's attempt to exhaust all alternative form [sic] of redress;**
  - e. The Supreme Court Civil Procedure Rules requires a person seeking judicial review to first obtain leave;**
  - f. The Application for leave may be made without notice;**
  - g. The Applicant is a person directly affected by the decision of the 1<sup>st</sup> Respondent for which leave to review is being sought;**
  - h. The Applicant has exhausted all alternative remedies which have proven to be unsuccessful;**
  - i. The Applicant has good grounds to bring a claim for judicial review.**

## **THE EVIDENCE**

### **History of Employment Up to End of Internal Appeal Process**

**[9]** In matters concerning applications to the Court for it to exercise its discretion to extend the time to do anything, delay in action is always an important consideration. The longer a person takes to perform an action that they ought to do, the less likely it is that the Court will look favourably upon their application to grant them an extension of time within which so to do.

**[10]** The evidence in this matter comes through the Affidavits of Mr. Spencer, Mr. Keith Campbell and Ms. Marlene Roper. Mr. Campbell is the representative of the 1<sup>st</sup> Respondent and Ms. Roper was (at the time of filing her affidavits) the Legal Officer

of the 3<sup>rd</sup> Respondent. There was no formal affidavit in reply from the 2<sup>nd</sup> Respondent.

- [11] In both his Affidavits, Mr. Spencer outlined his work history and the progress of the matter at the disciplinary hearing stage. I must say that sentences 2 and 3 of paragraph 4, paragraph 5 and paragraph 6 are not evidence of facts. These are, in fact, mixed findings of fact and law that the Court is to make. Therefore, the Court did not attach any significance to them as part of its determination of the facts of this case.
- [12] Mr. Spencer was employed to the PBCJ as of February 1, 2013 as the Finance and Administration Manager. I find as a fact that he was transferred on appointment to that entity from the Office of the Prime Minister on approval of the Governor-General of Jamaica. This was confirmed by letter dated June 24, 2011 from the OSC to Mr. Spencer's then Attorney-at-Law, Ms. Zara Lewis. It is found at exhibit JS-11 to Mr. Spencer's Affidavit sworn on the 21<sup>st</sup> January 2022.
- [13] In November of 2018, the PBCJ suspended Mr. Spencer and advised him that he would be suspended pending an enquiry into his conduct. Following this, there was the disciplinary hearing which is the subject of this present challenge.
- [14] Following the conclusion of the disciplinary hearing, the PBCJ, by letter dated September 27, 2019, formally notified Mr. Spencer of his dismissal from the PBCJ and advised him that he could appeal to the PBCJ within 10 working days. So this date is the date from which time for Mr. Spencer to start proceedings to get redress (in the various forms) would start to run.
- [15] I find as a fact that Mr. Spencer did not file any appeal in accordance with this letter. His Union wrote directly to Ms. Julia Campbell, Director, Industrial Relations of the Strategic Human Resources Management Division at the Ministry of Finance and the Public Service by letter dated October 8, 2019. This would have made even this step one day out of time.

- [16] The PBCJ responded to this letter with one of their own to Ms. Campbell. This letter was dated October 28, 2019. It is found at exhibit JS-4 to the 2<sup>nd</sup> Affidavit of Mr. Spencer. So I find that the PBCJ would have received some notification of his appeal at some point between the 8<sup>th</sup> October 2019 and the 28<sup>th</sup> October 2019, the date of their letter to Ms. Campbell.
- [17] Ms. Campbell then wrote two letters to the JCSA, one dated the 4<sup>th</sup> November 2019 acknowledging receipt of the original letter dated October 8, 2019 (JS-5) and then another letter dated January 6, 2020 (JS-6). I find that it was this January 6, 2020 letter that constituted the final stage of any internal appeal when the Ministry of Finance rejected his appeal and indicated they “could not support the reinstatement of Mr. Spencer to the PBCJ”.
- [18] Receipt of this January 6, 2020 letter was acknowledged by the JCSA by their letter dated February 6, 2020. At this point Mr. Spencer knew for certain that the decision to dismiss him from the PBCJ that was communicated to him on the 27<sup>th</sup> September 2019 was final and that this appeal mechanism had come to an end.
- [19] I find that Mr. Spencer, through his Union, **chose** (emphasis mine) to then go to the Ministry of Labour for their intervention.

### **The External Appeal Process to Application for Extension of Time to Apply for Permission to Apply for Judicial Review**

- [20] We are now at February 6, 2020, some 4 months post final decision. Mr. Spencer’s Union now writes to the Ministry of Labour for their intervention. This letter was dated the 7<sup>th</sup> February 2020 and was exhibit JS-7 to the Supplemental Affidavit of Mr. Spencer. One curiosity of that letter was at the 3<sup>rd</sup> paragraph. It said that the contract of employment of Mr. Spencer was terminated by way of recommendation from the disciplinary panel to the Board of the PBCJ for a decision to be taken as to the appropriate sanction to be applied to Mr. Spencer. This representation, I find, was not an accurate representation of what the Disciplinary Committee stated.

- [21]** Nothing happened after February 7, 2020 until June 25, 2020 when Mrs. Tucker Harrison sent the Ministry of Labour a copy of the appeal on behalf of Mr. Spencer. I find that there is no evidence of an appeal being formally lodged with the Ministry of Labour until June 25, 2020. This is now 9 months post decision.
- [22]** On July 7, 2020 the Ministry of Labour advised that a conciliation meeting was being arranged to discuss the matter. This meeting was said to be scheduled for July 15, 2020.
- [23]** The Court has no evidence of what the result of this meeting was. The next bit of evidence the Court has is a letter from the JCSA dated May 14, 2021 to Mr. Michael Kennedy, the Chief Director, Industrial Relations, in the Ministry of Labour. This letter was written in response to a letter dated April 29, 2021 from the Ministry of Labour. A copy of this letter was not seen by the Court.
- [24]** From the contents of this letter I can infer that the conciliation meeting was convened, but aborted. There does not appear to be any reconvening. The JCSA then requested that the matter be sent to the Industrial Disputes Tribunal.
- [25]** There was a swift response from the Ministry of Labour by letter dated June 2, 2021. It stated categorically that the Ministry of Labour was of the view that Mr. Spencer was a public officer over whom they had no jurisdiction and so there would have been no referral to the Industrial Disputes Tribunal. This letter is exhibited at JS-9.
- [26]** At this point, this is the end of the role of the Ministry of Labour. We are now at 20 months post decision. What followed next was a letter from Mr. Spencer's Attorney-at-Law, Ms. Lewis, to the PBCJ requiring them to clarify the status of Mr. Spencer's substantive post and his expected date of resumption as she was of the view that the "entire process was flawed and not in keeping with the relevant sections of the Public Service Regulation[sic] 1961 and as such is deemed ultra vires".

- [27] The PBCJ in a letter dated June 28, 2021 countered Ms. Lewis' letter pointing out that it was Mr. Spencer who pursued the wrong avenue in seeking redress and that his dismissal remained effective.
- [28] Ms. Lewis then wrote a letter to the OSC seeking **clarification** (emphasis mine) as to whether Mr. Spencer remained subject to the provisions of the Public Service Regulations 1961 and whether disciplinary authority and procedures must follow along the guidelines and procedures contained in the Public Service Regulations 1961.
- [29] By letter dated July 19, 2021 the OSC sent a letter of clarification stating in essence that Mr. Spencer is not in the employ of the civil service as a public officer and falls outside the scope of the Public Service Regulations 1961.
- [30] On October 20, 2021 Mr. Spencer then filed his Notice of Application for an extension of time to apply for judicial review.
- [31] This was now over two years post decision.

## **ISSUES FOR DETERMINATION**

[32] I find that at this stage these are really the *issues* for determination:

- (i) **Does Mr. Spencer have an arguable case with a real prospect of success against both remaining Respondents?**
- (ii) **If he does, should the Court exercise it's discretion to allow Mr. Spencer's application for permission to apply for judicial review out of time and allow him to apply for judicial review?**

## **THE LAW ON APPLICATIONS FOR JUDICIAL REVIEW**

**[33]** Applications for Judicial Review are governed under Part 56 of the Civil Procedure Rules. It is a two stage process<sup>1</sup>: first, one must get the permission of the Court to apply for judicial review<sup>2</sup>. If one passes that stage, then you must file your substantive application for judicial review within 14 days of getting the Court's permission so to do<sup>3</sup>.

### **Delay In Applications for Permission to Apply for Judicial Review**

**[34]** Rule 56.6 states plainly that applications for leave (permission) to apply for judicial review must be made **promptly** (emphasis mine) and in any event within 3 months from the date when the grounds for the application first arose.

**[35]** Before one can get permission to apply for judicial review, the Applicant must, amongst other things, demonstrate that they had exhausted all other available relief or that no other relief than judicial review was available to them<sup>4</sup> or appropriate.

**[36]** The major consideration for a Court in deciding whether to exercise discretion to grant permission to apply for judicial review is whether or not there is an arguable

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<sup>1</sup> See *Public Service Commission et al v Deanroy Bernard* [2021] JMCA Civ 2 at para 36 per Simmons JA

<sup>2</sup> See Rule 56.3(1) Civil Procedure Rules 2002

<sup>3</sup> Rule 56.4(12) Civil Procedure Rules 2002

<sup>4</sup> See Rule 56.3(3)(d) and *Sharma v Brown Antoine* [2006] UKPC 57 at paragraph 14(4). This test has been adopted by the Court of Appeal of Jamaica in cases such as *Carey Brown v Board of Directors for the Jamaica Anti-Doping Commission* [2018] JMCA App 1

case with a real prospect of success<sup>5</sup>. However, delay in seeking leave and not pursuing alternative remedies are discretionary bars.

- [37]** One major thing to note for this particular case concerns a technicality. Note keenly the wording of the relief sought in paragraph 1 of the Application filed October 20, 2021 as amended January 21, 2022:

*“That the Applicant be granted an extension of time to apply for judicial review in relation to the administrative actions and decisions of the Respondents.”*

- [38]** The wording should have been that the Applicant is granted an extension of time to apply for permission to apply for Judicial Review. Then he should ask for permission to apply for judicial review etc. For one must first get the permission of the Court to apply for judicial review.

- [39]** There was an amended Notice of Application for Court Orders filed on the 21<sup>st</sup> January 2022. Again, the wording in the first paragraph has not changed. Nevertheless, pursuant to my powers under rules 26.9 and 56.4(6), the Court will further amend the application and treat with the application as though it was amended to ask for the granting of an extension of time to apply for permission to apply for judicial review and for permission to apply for judicial review etc.

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<sup>5</sup> *Sharma v Brown-Antoine* id at paragraph 14(4) and see as well Sykes J (as he then was) in *R v IDT (Ex parte J. Wray and Nephew Limited)* Claim No. 2009 HCV 04798, unreported, judgment delivered on 23 October 2009. Sykes J (as he then was) describes the threshold test as being a new and higher test than that which had previously obtained. At paragraph [58] Sykes J opined that the application for leave to apply for judicial review is no longer a perfunctory exercise that turns back hopeless cases alone. Cases without a realistic prospect of success are also turned away. Judges are required to make an assessment of whether leave should be granted in the light of the now stated approach.

[40] It was clear to all present that this was the course the applicant had intended to take. It was simply not properly presented. It is within the power of the court to amend the application to set the matter right. No party would be in any way prejudiced by this decision<sup>6</sup>.

## **ANALYSIS**

### **The Case Against the 2<sup>nd</sup> Respondent**

[41] In my view, Mr. Spencer has no arguable case with a realistic prospect of success against the decision of the Ministry of Labour to refuse to refer the matter to the Industrial Disputes Tribunal.

[42] The cases and the **Public Broadcasting Corporation of Jamaica Regulations** clearly demonstrate that Mr. Spencer's rights as a public servant continued based on the fact that he was transferred from his post as a civil servant to the PBCJ.

[43] In the circumstances, he was not subject to the jurisdiction of the Ministry of Labour's labour dispute resolution mechanism and they were quite correct to refuse to refer the matter to the IDT. Accordingly, I do not find that leave should be granted in relation to the 2<sup>nd</sup> Respondent.

### **The Case Against the 1<sup>st</sup> Respondent**

#### **Does Mr. Spencer Have a Good Arguable Case With a Realistic Prospect of Success?**

[44] I find that Mr. Spencer does have a good arguable case with a realistic prospect of success. I am of the view that it could be successfully argued before the Judicial

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<sup>6</sup> See decision in *Public Service Commission et al v Deanroy Bernard* n 3 supra

Review tribunal that the wrong procedure was used to terminate the employment of Mr. Spencer.

[45] I find that Mr. Spencer has a good arguable case with a realistic prospect of success that he was an employee of the PBCJ **transferred on appointment from central government** (emphasis mine) to that entity. The evidence comes from the Affidavit of Mr. Keith Campbell filed on the 25<sup>th</sup> April 2022 and the exhibits attached thereto.

[46] Pursuant to regulation 11.5 of the **Public Broadcasting Corporation of Jamaica Regulations, 2002** the Governor-General may, “approve the appointment of any public officer in the service of the Government of Jamaica to any office with the Corporation and any public officer so appointed shall in relation to pension, gratuity, or other allowance **and to any other rights as a public officer** (emphasis mine), be treated as continuing in the service of the Government”.

[47] The decision of the Court of Appeal in *Eugenie Ebanks v Betting Gaming and Lotteries Commission*<sup>7</sup> makes it clear that persons being moved from the service of the Government (i.e. central government as public officers), to a government run public body, will continue to be treated as central government public officers for the purposes of pension, gratuity, or other allowance as well as maintain their entitlement to **other rights** as public officers in central government depending on the wording of the regulations governing the particular entity. The provisions in the regulations of the Betting Gaming and Lotteries Commission that were under consideration in the *Eugenie Ebanks* case, are similar to the provisions in the regulations under the **PBCJ Regulations**.

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<sup>7</sup> Unreported SCCA No. 97/2003, December 20, 2005

- [48] So I find that an argument with a realistic prospect of success could be made that Mr. Spencer was such an employee who, whilst employed at the PBCJ, because he was transferred on appointment from central government to the PBCJ, would continue to be treated as a central government employee for the purposes of pension, gratuity or other allowance and **he maintained his entitlement to other rights** (emphasis mine) as if he were continuing his employment in central government.
- [49] Mr. Spencer's letter of appointment from the PBCJ, exhibited to the affidavit of Mr. Keith Campbell filed on the 25<sup>th</sup> April 2022, provides evidence capable of supporting an argument that the PBCJ knew or ought to have known that Mr. Spencer's appointment was governed by the PSR, 1961. The letter is under the signature of Ms. Natasha Smith the Director HR Management and Development.
- [50] The comparison of the procedures used by the PBCJ Disciplinary Panel, juxtaposed to what obtains under the procedure laid down in the **Public Service Regulations, 1961**, provide the basis for a challenge that Mr. Spencer was arguably deprived of more substantive protections that he had the right to under the **Public Service Regulations, 1961**.
- [51] A ready example of this is that it would have been a matter for the Public Service Commission, an independent body, after doing their own investigation, to determine whether or not to hold an enquiry. If they were minded to hold an enquiry with a view to dismissal, then Mr. Spencer would have enjoyed the protections afforded by the procedure in regulation 43 of the **Public Service Regulations, 1961**. This is materially different from the procedure conducted.
- [52] In addition, any grievance with the outcome of the disciplinary enquiry would be appealable to the Governor-General who may, refer the matter to the Privy Council. Again, materially different from an appeal to the Minister of Finance.

**[53]** There are others, but there is clearly a substantial difference in the remedies and protections he had a right to enjoy as distinct from what was afforded him by the PBCJ in the procedure they chose to adopt.

**[54]** Accordingly, I find Mr. Spencer has a good arguable case with a realistic prospect of success as against the 1<sup>st</sup> Respondent.

### **Was there Delay in Bringing this Application?**

**[55]** I find that there was a significant delay in bringing this application for extension of time for permission to apply for judicial review. The facts demonstrate that the final decision of the PBCJ's board was communicated to the Applicant by letter dated September 27, 2019.

**[56]** The internal appeal process was exhausted by January 6, 2020 and Mr. Spencer would have known of this certainly by the 6<sup>th</sup> February 2020.

**[57]** In my view therefore, Mr. Spencer should have filed this application from much earlier. He should have applied for permission to apply for judicial review of the decision handed down on the 27<sup>th</sup> September 2019 no later than 26 December 2019. He did not apply until October 20, 2021, nearly 22 months later. Alternatively, he should have applied by April 5, 2020, three months after what I consider the internal appeal process was exhausted. In either case, I find that there was an exceedingly long delay.

### **Was there a good reason for the delay?**

**[58]** Even if there was a delay, is there a good reason for same? If there is a good reason for the delay, the Court may allow permission to apply for any relief once

the limitation period for so doing has expired. In this case, I find that good reason has been given for such a lengthy delay in applying for an extension of time.

- [59] Mr. Clarke made valiant attempts in his submissions, both written and oral, to place the blame for the delay in application squarely at the feet of everyone else, except Mr. Spencer. Ms. White would have none of it during the oral arguments and in her own submissions.
- [60] In paragraph 14, of his Affidavit sworn on the 19<sup>th</sup> October 2021, Mr. Spencer said that his delay in filing the application was not intentional, but was due to his efforts to exhaust all avenues of redress available to him before seeking redress by means of judicial review.
- [61] In his Supplemental Affidavit sworn on the 21<sup>st</sup> January 2022, at paragraph 26, Mr. Spencer says that he has been unable to access alternative remedies due to the failure of both or either the Ministry of Labour or Office of the Service Commission to appropriately refer his matter to the relevant bodies.
- [62] In my view, examining the entire case and circumstances in the round, I find that these explanations and the evidence presented show a good explanation. The Court readily acknowledges that at all times Mr. Spencer was fully represented by his Union and an Attorney-at-Law. He had available to him legal advice and advice from an experienced labour organization. The decision handed down in *Eugenie Ebanks* was not a recent decision (it was some 15 years old at the time he was dismissed) and ought to have been known with some reasonable diligence.
- [63] In spite of all this, however, it is clear to me that Mr. Spencer was not at fault in the delays occasioned whilst pursuing this matter. He pursued it with diligence and as much expedition as he reasonably could. He was not, in my view, sitting down idly. He was simply being given and relying on advice from a reputable union, an attorney-at-law and the various government agencies and ministries consulted. One crucial bit of this advice came from no less an entity than the Office of the

Services Commission itself who gave an opinion in July of 2019 that would have thrown off the entire process. Which opinion they altered 6 months later.

[64] The end result of all of this was a seemingly belated realisation on the part of the applicant that he was embarking on the wrong course.

### **What is the effect of the delay?**

[65] In considering whether or not to refuse or grant relief because of delay, I am obliged to consider, pursuant to rule 56.6(5), whether the granting of leave or relief would be likely to cause substantial hardship to or substantially prejudice the rights of any person; or be detrimental to good administration.

[66] According to Lord Diplock in *O'Reilly v Mackman*<sup>8</sup>,

*“The public interest, in good administration, requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision of the authority has reached in purported exercise of decision making powers for any longer period than is absolutely necessary in fairness to the persons affected by the decision.”*

[67] In my view, the granting of leave in this case would not be detrimental to good administration. There is no evidence from the PBCJ to suggest that to give permission for him to challenge this decision nearly 3 years later would likely create upheaval at the organization. It could be argued quite successfully that it was their decision to proceed along with an incorrect course to dismiss Mr. Spencer that has put him and ultimately them in this position in the first place. It is arguable that they ought to have known better.

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<sup>8</sup> [1983] 2 AC 237

[68] It is likely that there are many workers in the public sector who are in a similar position to Mr. Spencer and it would be important for good administration to clarify how they are to be disciplined and which disciplinary procedure applies to them. In addition, there is the serious question as to whether Mr. Spencer continued to enjoy the right to the constitutional protection afforded him under s. 125 of the Constitution and whether such protection may have been breached.

### **The Hardship Question**

[69] There is no evidence presented in the Affidavit of Mr. Keith Campbell filed on the 25<sup>th</sup> April 2022 that the 1<sup>st</sup> Respondent would suffer any irreparable harm or suffer any serious consequences if the relief is granted. On the other hand, if the relief is not granted, Mr. Spencer would remain out of a job. That is hardship enough.

### **An Alternate Remedy?**

[70] Among the remedies sought on judicial review by Mr. Spencer is an order to quash the decision of the PBCJ to dismiss him.

[71] The material before the Court shows that Mr. Spencer, **after** filing these proceedings, has belatedly sought to involve the Office of the Services Commission by asking them to refer the matter to the Privy Council.

[72] The letter from Mr. Clarke's office, exhibited to this Affidavit of Ms. Roper is dated October 29, 2021. However, it was not received in the office of the Office of the Service Commission until January 28, 2022. This raises several questions. If it was written from them, why was it not served sooner? Curiously, Mr. Spencer has not exhibited this letter to the Supplemental Affidavit that he would have sworn on the 21<sup>st</sup> January 2022. Surely he would have had the letter in his possession at the time. Why not produce it as an exhibit?

[73] In any event, I am not in agreement with Ms. Roper's view that Mr. Spencer could have appealed to the Privy Council after being terminated by the PBCJ. In my view,

the process of appeal to the Privy Council is triggered only after the Governor-General has advised the person to be dismissed of the advice given him from the Public Service Commission that the person is to be dismissed. In this case, no advice has yet gone to the Governor-General from the Public Service Commission and so the Governor-General could not have advised Mr. Spencer of any such advice.

[74] Mr. Spencer would still be without an appropriate alternate remedy as he cannot approach the Public Service Commission directly for redress in these circumstances. The **Public Service Regulations** contain no form of direct appeal to them by an aggrieved public servant from a decision of the entity that has purportedly wrongly exercised discipline over him.

[75] In fact, the entire disciplinary proceedings under the PSR are triggered by the entity seeking to discipline the person. The only redress the aggrieved worker has is triggered after the disciplinary enquiry has been complete, the Commission gives its recommendation to the Governor-General and the Governor-General advises the person of this recommendation.

[76] So in my view, Mr. Spencer has no alternate remedy as against the 1<sup>st</sup> Respondent for the relief sought for judicial review. Other relief existed and exists for disclosure.

## **CONCLUSION**

[77] In the circumstances, I am satisfied that Mr. Spencer has a good arguable case with a reasonable prospect of success against the 1<sup>st</sup> Respondent.

[78] Despite the substantial delay in the filing of the application, I am minded to extend the time for the Applicant to apply for permission to apply for judicial review. There is no evidence of hardship about which the 1<sup>st</sup> Respondent has testified and it would be in the interest of good administration for the issues raised to be resolved

by the Judicial Review tribunal. I am also satisfied that there was a good explanation for the delay in the filing of the application that was not attributable to the Applicant solely.

## **ORDERS**

- (1) The Applicant's application is further amended at paragraph 1 to say that the Applicant is applying for an extension of time to apply for permission to apply for judicial review.**
- (2) The Applicant is granted an extension of time to the 20th October 2021 to Apply for Permission to Apply for Judicial Review;**
- (3) The Applicant is granted permission to Apply for Judicial Review in terms of the relief sought in paragraphs 3(b), 3(e)(i), 3(f) and 3(g) (as against the 1<sup>st</sup> Respondent only) of the Amended Notice of Application for Court Orders filed January 21, 2022.**
- (4) All other relief sought is refused.**
- (5) The Permission in (3) above is conditional on the Applicant filing a claim for judicial review within 14 days of the 30<sup>th</sup> May 2022.**
- (6) The first hearing of the Claim for judicial review shall take place on the 29<sup>th</sup> June 2022 at 12:00 noon for 1 hour.**
- (7) No order as to costs.**
- (8) Applicant's Attorneys-at-Law to prepare, file and serve this order.**

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**Dale Staple**  
**Puisne Judge (Ag)**