[2017] JMSC Civ. 69

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2014 HCV 03277

BETWEEN	**FAITH WEBSTER**	**CLAIMANT**
AND	**THE PUBLIC SERVICE COMMISSION**	**DEFENDANT**

OPEN COURT

Mr. Douglas Leys, Q.C. and Ms. Kimone Tennant, instructed by LeySmith Attorneys-at-Law, for the Claimant

Ms. Althea Jarrett, instructed by the Director of State Proceedings for the Defendant

Heard: February 16, 17 and 20, 2015 and May 12, 2017

JUDICIAL REVIEW – NATURAL JUSTICE – LEGITIMATE EXPECTATION – WHETHER HEARING REQUIRED PRIOR TO INTERDICTION OF PUBLIC OFFICER – WHETHER WITHHOLDING OF HALF OF THE CLAIMANT'S SALARY WHILE CLAIMANT IS ON INTERDICTION CONSTITUTES A PENALTY – WHETHER CLAIM HAS BEEN FILED AGAINST THE APPROPRIATE PARTY AS DEFENDANT – PRESUMPTION OF REGULARITY – BREACH OF CONSTITUTIONAL RIGHTS TO FAIR HEARING AND ENJOYMENT OF PROPERTY – ABUSE OF PROCESS.

ANDERSON K., J

BACKGROUND

[1] Prior to the hearing of this application for judicial review, leave was duly sought by way of Notice of Application for Court Orders, filed on July 9, 2014, and

granted by his Lordship Sykes J. on July 11, 2014. It is worth noting that in addition to granting the claimant leave to apply for judicial review, his Lordship – Sykes J. made an order barring the defendant from proceeding to hear and determine the disciplinary charges preferred against the claimant until this court has heard and determined the issues raised in the claimant's application for judicial review.

[2] Prior to hearing and determining the claimant's application, it was incumbent upon this court to address a housekeeping matter. The aforementioned leave to apply for judicial review was granted in respect of claim number 2014 HCV 03277; however, the corresponding Fixed Date Claim Form and Supporting Affidavit, filed on July 24, 2014, were improperly assigned a different claim number - 2014 HCV 03603.

[3] To rectify that error, an order was made by this court on February 16, 2015, that the documents filed in respect of claim number 2014 HCV 03603 shall be treated and recorded by the Registrar as if they had been filed in respect of Claim No. 2014 HCV 03277, which is of course, this claim.

SUMMARY OF THE CLAIMANT'S STATEMENT OF CASE

[4] On or about June 17, 2008, the claimant was appointed as the Executive Director of the Bureau of Women's Affairs ('the Bureau'). The Bureau was then under the aegis of the Ministry of Youth, Sports and Culture and is a department of the Government which then was under the portfolio of the Office of the Prime Minister ('OPM').

[5] Some six (6) years after her appointment, the claimant was called into two (2) meetings with the Permanent Secretary in the OPM, Ms. Onika Miller ('Ms. Miller'). Both meetings were held on February 10, 2014. The claimant contends that she was only given notice of the first meeting and was informed that the purpose of the said meeting was to discuss an internal audit report which

contained the findings of an audit which commenced in May 2013 in respect of the Bureau.

[6] In respect of the first meeting, the claimant contended that her requests to be notified of the format of the meeting and to be accompanied by support staff were both denied. After the first meeting concluded, a second meeting was then convened. The claimant has contended that she had no prior notice of the second meeting. The purpose of this second meeting was to address complaints made in respect of the claimant that were submitted to the OPM by members of staff from the Bureau and other external parties.

[7] At the conclusion of the second meeting, the Permanent Secretary, Ms. Miller, informed the claimant that she would be interdicted from her duties and to that end, a letter (dated February 7, 2014) was given to the claimant which advised, inter alia, –

> *'... pursuant to the powers delegated by the Governor-General acting on the advice of the Public Service Commission (The Delegation of Functions) (Public Service) (Specified Ministries and Departments) Order 2000), I am to inform you that you are being interdicted from duties with effect from 10th February 2014 pending disciplinary proceedings being instituted against you.*
>
> *In keeping with Regulation 32 of the Public Service Regulation, 1961, you will be interdicted on half salary...'*

That letter was signed by the Permanent Secretary, Ms. Miller.

[8] The claimant sought leave to apply for judicial review by way of Notice of Application for Court Orders, filed on March 11, 2014. That application was however, subsequently withdrawn on June 26, 2014, as the interdiction (effective as of February 10, 2014) was rescinded by way of letter dated June 24, 2014, signed by the Senior Director of Human Resource Development for the Permanent Secretary. The claimant also received the portion of her salary which was withheld.

[9] The claimant subsequently received a second letter also dated June 24, 2014, from the Chief Personnel Officer of the Office of the Services Commission which informed her of the following -

> *i. that approval had been given for fifteen (15) charges, which were attached, to be preferred against her under **regulation 43** of the **Public Service Regulations**, 1961 with a view to her dismissal;*
>
> *ii. that approval had been given for her interdiction from duty on half salary with effect from June 25, 2014 in accordance with **regulation 32** of the **Public Service Regulations**, 1961, pending the outcome of the disciplinary proceedings;*
>
> *iii. that she had fourteen (14) days to send to the Chief Personnel Officer the written grounds on which she would rely to exculpate herself from the charges ('grounds of exculpation');*
>
> *iv. that should she fail to send the grounds of exculpation, the matter would be pursued by the Public Service Commission (the defendant herein) without any further reference to her;*
>
> *v. that she would be furnished with copies of the necessary statements relating to the charges;*
>
> *vi. that she should make the necessary arrangements to (a) secure the attendance of any witnesses that she intended to call at the Enquiry; and/or (b) produce the evidence that she intended to rely on at the Enquiry; and*
>
> *vii. that she should submit the name and contact information of her representative if she intended to seek permission to be represented at the Enquiry.*

[10] In response to this second letter which, inter alia, placed the claimant on interdiction, the claimant sought leave to apply for judicial review and upon receiving the requisite leave, she duly filed a Fixed Date Claim Form and Supporting Affidavit on July 24, 2014. That Supporting Affidavit was deponed to by her. The relief sought by the claimant is as follows –

'1. An Order of Certiorari quashing the decision of the defendant to interdict the claimant by way of letter dated June 24, 2014;

2. An Order of Certiorari quashing the final audit report on which inter alia the decision to place the claimant on interdiction was taken;

3. A Declaration that the decision to place the claimant on interdiction, was done in breach of the [sic] her constitutional rights as a public officer and in breach of the rules of natural justice;

4. Further or alternatively to (3) above, a declaration that the decision to interdict the claimant and to withhold half of her salary, was done in breach of her constitutional rights as a public officer and in breach of the rules of natural justice;

5. An Order of Prohibition restraining the defendant from considering and determining the charges which have been preferred against the claimant with a view to dismissal;

6. Cost of the Application to the Applicant; and

7. Any other remedy that this Honourable Court deems just.'

[11] The grounds upon which the claimant is seeking the relief (supra) may be summarised as follows –

i. The claimant was not given an opportunity to be heard/ given a fair hearing prior to being placed on interdiction and this was in breach of the claimant 's constitutional rights and the rules of natural justice;

ii. The claimant had a legitimate expectation that she would be given a fair hearing prior to being placed on interdiction;

iii. The charges which have been preferred against the claimant neither warrant her being placed on interdiction, nor dismissal;

iv. The interdiction is oppressive and an abuse of process;

v. The defendant failed to allow the claimant the opportunity to show why her salary should not have been reduced by half, nor did the defendant provide reasons for the reduction; and

vi. The internal audit report which gave rise to the institution of disciplinary proceedings was unfair, unbalanced and biased as it did not take into account the comments of the Bureau's senior management.

No Opportunity to be Heard

[12] The claimant in her Affidavit filed on July 24, 2014 in support of the Fixed Date Claim Form, has asserted that the first time that she was placed on interdiction (by Ms. Miller), it was based on facts and circumstances which cannot be justified and if she had been afforded a proper hearing, perhaps she would not have been placed on interdiction. The claimant stated that the very same circumstances have arisen again, save that she has been placed on interdiction by the defendant (the Public Service Commission) rather than, by the Permanent Secretary.

[13] The claimant has contended that the second interdiction (by the defendant) is in breach of her constitutional rights as a public officer and her common law rights as a citizen by not affording her a hearing; and also a breach of natural justice as the interdiction interferes with her property (namely her salary, entitlement to salary and perquisites of office). She further contended that save for the letters dated June 24, 2014 (mentioned in paragraphs [8] and [9] herein), she was given no notification, nor any opportunity to be heard before the second interdiction was put in effect. It must be recalled though, for the purpose of clarity, that only one of those letters, provided her with notification as regards her second interdiction.

[14] The hearing that the claimant asserts that she was entitled to, was one to determine whether interdicting her and paying her half salary was appropriate in

all the circumstances, as distinct from a hearing to determine the validity of the charges preferred against her.

[15] The claimant also alleges that the interdiction is prejudicial to the (disciplinary) hearing of the charges against her, as she is unable to properly defend herself as she does not have access to her office and staff and as such, she is unable to obtain critical documents and to interview staff members.

The charges do not warrant interdiction

[16] The claimant has also contended that the charges preferred against her do not warrant interdiction for the following reasons –

a) *The charges arise substantially out of an internal audit report which in the claimant's view, is flawed in its compilation and findings;*

b) *The majority of the charges are related to the inefficient performance of duties and there are no charges which involve dishonesty, fraud, defalcation or misappropriation of public funds or public property.*

c) *The charges ought not to be considered with a view to dismissal;*

d) *The charges do not preclude her from performing her functions as Executive Director;*

e) *Prior to this instance, she has never been the subject of any disciplinary proceedings or action;*

f) *It is not in the public interest for her to be interdicted as she can continue to contribute meaningfully to the operations of the Bureau;*

g) *The internal audit report was not finalized and in the absence of fraud, gross negligence or appropriation of government property, it is not customary to suspend or remove persons from their duties pending a final audit report. The internal audit report ought to have been signed*

off, recommendations made and follow up undertaken before it could be considered final, and the claimant asserts that to her knowledge none of this was done.

[17] The claimant pleaded alternatively, that if this court is minded to conclude that her interdiction was warranted in the circumstances, that the court ought to find that the nature and circumstances of the charges preferred against her do not warrant half of her salary being withheld.

The second interdiction is oppressive and/or and abuse of process

[18] The claimant has referred to the interdiction via letter dated June 24, 2014 as the second interdiction and for ease of reference, that phraseology will be adopted. She contended that said second interdiction is an "abuse of statutory process", a breach of the rules of natural justice and is ultimately oppressive.

[19] In support of the claimant 's assertion that the second interdiction is oppressive she has stated that no reasons were given to her for the following –

i. The rescission of the first interdiction which lasted approximately four (4) months;

ii. The decision to place her on interdiction from duties at half salary and why this was considered appropriate; and

iii. Why it was in the public interest for her to be removed from her post while there is an investigation into the charges preferred against her.

[20] In addition to having stated that she believes the process to be intentionally oppressive and a clear abuse of the **Public Service Regulations**, its philosophy and her constitutional rights as a public officer and a citizen of Jamaica; the claimant at the last paragraph of her affidavit, filed on July 24, 2014 has stated:

'I have been made to endure severe punishment which has been meted out in what can only be described as heavy-handed and arbitrary fashion. I have faced criticism and embarrassment as a result of being interdicted, and I believe that a punishment with

such profound consequences, which affect my livelihood, should not be handled in this way.'

SUMMARY OF THE CLAIMANT'S SUBMISSIONS

Natural Justice requires a hearing prior to interdiction

[21] Counsel for the claimant contended that the defendant contravened the claimant's constitutional rights as a public officer and/or breached the rules of natural justice when it purported to interdict the claimant from duties and withhold half of her salary by way of letter dated June 24, 2014 without giving her a hearing.

[22] Counsel for the claimant relied on ***Cooper v Wandsworth Board of Works*** – *(1863) 14 CBNS 180 and* ***Ridge v Baldwin*** *- [1964] AC 40,* in support of his submission that the provisions of the **Public Service Regulations** relating to disciplinary procedures should be interpreted in a manner consistent with natural justice. Reference was made to the following dicta:

In ***Cooper*** (op.cit.), Willes J said at page 418:

'I apprehend that a tribunal which is by law invested with power to affect the property of one of Her Majesty's subjects, is bound to give such subject an opportunity of being heard before it proceeds: and that rule is of universal application, and founded upon the plainest principles of natural justice.'

Also in ***Cooper*** (op.cit.), Byles J said at page 420:

'It seems to me that the board are wrong whether they acted judicially or ministerially. I conceive they acted judicially, because they had to determine the offence, and they had to apportion the punishment as well as the remedy. That being so, a long course of decisions, beginning with Dr. Bentley's case (a), and ending with some very recent cases, establish that, although there are no positive words in a statute requiring that a party shall be heard, yet the justice of the common law will supply the omission of the legislature.'

Lord Hodson in ***Ridge*** (op.cit.), said at page 130:

> *'the answer in a given case is not provided by the statement that the giver of the decision is acting in an executive or administrative capacity as if that was the antithesis of judicial capacity. The cases seem to me to show that persons acting in a capacity which is not on the face of it judicial but rather executive or administrative have been held by the courts to be subject to the principles of natural justice.'*

[23] It was submitted that when the defendant comes to the decision that disciplinary proceedings ought to be instituted against a public officer, then the defendant is not to function as a rubber stamp. Instead, the defendant should independently exercise their discretion and ensure that they have available to them, all reasonable information they could have had at that time, including information from the public officer who has been accused of wrongdoing.

[24] It is further submitted that if the defendant is to impose a penalty by withholding salary, then the defendant is obliged to afford a hearing to the person affected. Reference was made to section 15 of the **Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act**, 2011 ('**Charter of Rights**') which speaks to the protection of property rights. Further, it was submitted that when construing the statutory regulations, the court must give effect to the provisions of the Constitution. Counsel for the claimant referred to ***Card v the Attorney General*** - *BZ 1938 SC 15,* in particular the ninth paragraph from the beginning of the judgment, for support that the suspension of half salary is a penalty. That paragraph is quoted immediately below:

> *'Secondly, was the suspension of half of salary infliction of a penalty? In my view penalty in this context means any punishment, suffering or disadvantage imposed. The Solicitor General contended that the Governor-General acted under paragraph 6 of Appendix A of the General Orders for the Public Services Regulations which paragraph is purely procedural. That while the paragraph does not empower the Governor-General to impose a punishment, withholding of salary is dependent on the outcome of*

disciplinary proceedings. I considered the submission in this way. Firstly, if withholding salary is only a procedural step, when officer X has half of his salary withheld until the Public Services Commission decides and after consideration the Commission dismisses him, does the withholding remain a procedural step or is it not what it always was? A penalty. Secondly, if it is a procedural step, when officer X has half his salary withheld; Public Services Commission after consideration reprimands, and the Governor-General refunds only quarter. Does the withholding of the remaining quarter remain a procedural step or is it not always what it was? The imposition of a penalty. I have noted that elsewhere in the said Regulations, stoppage of an increment is referred to as a penalty. As I understand it, stopping an increment is withholding money form [sic] an officer and that is stated as a penalty. I reject the defendant's contention and hold that suspension of half of an officer's salary is the imposition of a penalty.'

[25] Counsel for the claimant also referred to ***Re Mitchell, Rafael*** - *TT 2003 HC 85* in which the Trinidadian High Court considered whether natural justice was applicable at the interdiction stage of disciplinary proceedings. Ventour J. opined at pages 20- 21:

'Considering all the circumstances I have found that interdiction of an officer pursuant to regulation 89 is a punishment. It could hardly be that the power of interdiction was intended to be exercised without the officer being afforded the opportunity to make representations on his own behalf.

Having regard to the adverse effects interdiction would have on the applicant and the likelihood of emotional stress and personal embarrassment I would conclude that in the absence of any clear legislative intent to the contrary that the rules of natural justice and fairness would apply in the circumstances where the applicant, in addition to having to suffer the indignity of being suspended from performing the duties of his office, is being made to suffer financial losses.'

[26] Having referred to ***Card*** (op.cit.) and ***Re Mitchell*** (op.cit.), the counsel for the claimant has submitted that the decision to interdict her as communicated in the

letter dated February 24, 2014 is a penalty and ought to be quashed as the defendant acted contrary to the rules of natural justice as the claimant was not afforded a hearing prior to being interdicted (for a second time).

[27] The claimant contended that the decision to interdict her was taken prior the purported hearing of February 10, 2014 given that the letter indicating that she was being interdicted (for the first time) was dated February 7, 2014, prior to the meeting.

[28] Counsel for the claimant submitted that in all the circumstances, the defendant's decision to interdict the claimant was unfair and unreasonable. Counsel for the claimant submitted that –

a) The claimant was not notified of the charges against her until the letter of June 24, 2014;

b) The claimant was not given an adequate opportunity to explain or respond to criticisms, whether by way of consulting with the relevant persons or furnishing documents;

c) **Regulation 28(2)** states that the defendant or the delegated officer must be of the opinion that disciplinary proceedings ought to be instituted against an officer and that opinion must be reasonably held. **Regulation 32** states that where disciplinary proceedings are imminent the defendant must be of the reasonable opinion that the public interest requires that the officer be interdicted. It was contended that the defendant could not have reasonably held either opinion, particularly as the claimant was not granted a fair hearing.

[29] Counsel for the claimant submitted that natural justice would not frustrate the objective of the legislature as the defendant can invite the affected party to respond, within a certain number of days, as to why that person's salary should be withheld to a certain proportion.

[30] Counsel for the claimant submitted that the court can take the view that even if the claimant should remain interdicted, the withholding of her salary should be quashed as being in breach of natural justice. With regards to the submission stated in paragraph [26] herein, counsel for the claimant made it clear in his oral submissions that he was not contending that the interdiction in and of itself is a penalty but rather that it is the reduction in pay, following as a consequence of interdiction which constitutes a penalty and therefore natural justice should apply to same.

[31] Counsel for the claimant accepted that unreasonableness as a ground for judicial review is not being pursued. He though, further submitted that the interdiction was unreasonable, to the extent that it was unfair.

[32] It was submitted that when the claimant was invited to the meeting with the Permanent Secretary, Ms. Miller, on February 10, 2014, she (the claimant) never even knew, at that time, that she was under investigation. The claimant was merely invited to a meeting with Ms. Miller to discuss the audit report. When she asked if she could bring her personnel to the meeting she was told that she could not.

[33] Reference was also made to ***Mafabi v Attorney General*** - [2014] 4 LRC 752 ('the Mafabi case') which was a matter before the Constitutional Court of Uganda in which the petitioner complained that his constitutional right to a fair hearing was first breached by the Inspector General and then he was wrongfully interdicted by the Chief Registrar who did not carry his own investigations or afford him the opportunity to be heard. It was held that the petitioner was denied a fair hearing by not being given enough information to realize that he was under investigation and not being given the opportunity to respond to the complaints against him.

[34] Counsel for the claimant submitted that some form of fair hearing was required prior to interdiction. It was contended by him, that perhaps the Permanent

Secretary could have given the claimant that hearing prior to having recommended to the defendant that she be interdicted, but in so far as there was, in reality, no such hearing or at least, no fair hearing conducted by the Permanent Secretary, it is required by natural justice, that the defendant exercise its independent discretion to form its opinion as to what measures should be taken in relation to the public officer, and therefore the defendant (Public Service Commission) should have conducted that hearing before having interdicted the claimant.

[35] Counsel for the claimant referred to the Privy Council decision in ***Rees v Crane*** - *(1994) 2 A.C. 173*, which sets out the circumstances in which no earlier 'fair hearing' need be held. Those circumstances, as were adumbrated in the judgment of Lord Slynn of Hadley, in that case, will be set out in detail, by means of quoting from that judgment, further on in these reasons.

[36] Further it was submitted that although the defendant has contended that the claimant will be afforded a full hearing, the rules of natural justice require that the claimant ought to have been afforded a hearing prior to the interference with her salary and the suspension from her duties. Reliance was placed on the position as summarized by Lord Diplock in ***Hillingdon London Borough Council v Commission for Racial Equality*** - *[1982] AC 779* at pages 787-788:

> *'Where an Act of Parliament confers upon an administrative body functions which involve its making decisions which affect to their detriment the rights of other persons or curtail their liberty to do as they please, there is a presumption that Parliament intended that the administrative body should act fairly towards those persons who will be affected by their decision.*
>
> *So far as the preliminary inquiry under section 49 (4) is concerned, the manifest purpose of the subsection is that before deciding to embark upon a full investigation the commission should hear what any person whom it suspects of unlawful discriminatory acts has got to say as to why and to what extent the commission's suspicions are unjustified: audi alteram partem, the first rule of*

natural justice, is expressly required to be observed by the commission at this stage.

The right of a person to be heard in support of his objection to a proposal to embark upon an investigation of his activities cannot be exercised effectively unless that person is informed with reasonable specificity what are the kinds of acts to which the proposed investigation is to be directed and confined. The commission cannot "throw the book at him"; they cannot, without further particularisation of the kinds of acts of which he is suspected, tell him no more than that they believe that he may have done or may be doing some acts that are capable of amounting to unlawful discrimination under the Act of 1976…'

[37] Counsel for the claimant submitted that this case should be considered on its own unique facts and commends to the court the case of ***Hillingdon London Borough Council v Commission for Racial Equality*** (*op. cit.*) in support of the point that a fair hearing may be required at an early stage.

[38] Counsel for the claimant also submitted that the process conducted in relation to the relevant authorities, vis-a-vis the claimant was flawed from the onset. This Court therefore, should not shut its eyes to that flawed process on the ground that the claimant will be given a hearing at a later date.

[39] It was acknowledged that there are a number of cases such as ***Furnell v Whangarei High Schools Board*** *- [1973] AC 660 and* ***Wiseman and Ors. v Borneman and Ors.*** *- [1971] AC 297,* in which it is said that where a matter is at the investigative stage and the affected person will be afforded a hearing at a later stage then the courts will not imply that the rules of natural justice are required at that preliminary or investigative stage. Counsel for the claimant has submitted that this is not a rigid rule and referred to the case of ***Rees v Crane*** (*op. cit.*) in support of the contention that the rules of natural justice should be incorporated into the interpretation of ***Regulations 28*** and ***32***.

Delay

[40] The claimant has also contended that in further breach of her constitutional rights, there was great delay in the handling of the allegations of misconduct. ***Regulation 29*** was referred to, which states that –

> *'(1) Any report of misconduct shall be made to the Chief Personnel Officer and dealt with under this Part of these Regulations* ***as soon as possible*** *after the time of its occurrence.' (emphasis added)*

It was submitted that some of the allegations/complaints against the claimant arose out of a memorandum ('memo') dated June 6, 2013 from the Chief Technical Director to the Permanent Secretary, and that no action was taken by the Permanent Secretary, nor was the claimant made aware until almost one year later.

Legitimate Expectation

[41] The issue of the claimant's legitimate expectation has also been raised. It has been submitted that during the course of her meeting with the Permanent Secretary, the claimant was informed that she would have been given the opportunity to respond to the audit report. She was given the letter of interdiction after she was told that she would be afforded the opportunity to respond. It has been submitted that the claimant had a legitimate expectation to be heard, prior to being interdicted.

[42] Counsel for the claimant referred to the dictum of Schiemann L.J. from ***R (on the application of Bibi) v London Borough of Newham*** - *[2001] All ER (D) 188 (Apr)* at paragraph 19:

> *'In all legitimate expectation cases, whether substantive or procedural, three practical questions arise. The first question is to what has the public authority, whether by practice or promise, committed itself; the second is whether the authority has acted or proposes to act unlawfully in relation to its commitment; the third is what the court should do...'*

[43] Counsel for the claimant also had regard to the following proposition from **Wade & Forsyth, Administrative Law 10th edition** page 454:

> *'Procedural expectations are protected simply by requiring that the promised procedure be followed. If the decision maker has promised to follow a particular procedure it will be held to that save in very exceptional circumstances- for instance where national security justifies a departure from the expected procedure.'*

[44] The claimant contended that the defendant has acted unlawfully when promises were made that the claimant would be given an opportunity to supply documentary evidence to explain and contradict some of the issues in the final audit report and was denied the opportunity to do so before she was interdicted.

[45] Regard was also had to ***Paponette v Attorney General of Trinidad and Tobago*** - *[2010] UKPC 32* in which the Privy Council stated that *"the promise and the fact that the proposed act will amount to a breach of it are relevant factors to be taken into account."*

The audit report which gave rise to the disciplinary proceedings was unfair/biased

[46] Counsel for the claimant submitted that the audit report was flawed, in so far as it failed to take into account the comments/responses of the Bureau's senior management, in accordance with customary practice.

[47] It was contended that in some instances the responses were provided by persons who were not in senior positions as well as responses from the Auditor herself. It is for this reason that it is submitted that there is a strong potential for bias and inaccuracy. It was also contended that the claimant's legitimate expectation that the comments/responses of senior management would have been included in the final report, as is customary, was defeated.

[48] Counsel for the claimant relied on the following principles enunciated by Lord Diplock in ***Council of Civil Service Unions and ors v Minister for the Civil Service*** *[1985] AC 375*, at page 408 :

> *'To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him too. It must affect such other person either:*
>
> *(a) by altering rights or obligations of that person which are enforceable by or against him in private law; or*
>
> *(b) by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.'*

The interdiction is oppressive and an abuse of process

[49] In relation to the interdiction being oppressive and/or an abuse of process, this is subsumed under natural justice, counsel for the claimant has submitted.

[50] It has been further submitted that the charges preferred against the claimant do not warrant her being interdicted from her duties and that no reasons were advanced by the defendant, showing why it was necessary/in the public interest, for half of her salary to be withheld.

[51] Altogether, it is the submission of counsel for the claimant that the defendant did not exercise its statutory functions to further the object and purpose of the legislation. Instead, the exercise was intended to frustrate the purpose of the legislation.

[52] Counsel for the claimant submitted that there was an abuse of statutory power. He stated that ***regulation 32(3)(a)*** stipulates that the proportion of the salary withheld should be related to the nature and circumstances of the charge against the officer. To this end, it was submitted that the charges preferred against the claimant relate to matters of inefficiency and do not contain any allegation of dishonesty, defalcation, fraud, misappropriation of public funds/property and accordingly do not warrant the claimant being interdicted on half salary, or being made the subject of disciplinary proceedings with a view to dismissal.

[53] Counsel for the claimant, in his oral submissions, stated that in relation to the withholding of the salary, the proportion of salary referred to in ***regulation 32***, can be one hundred percent (100%), the defendant has a discretion to decide on one hundred percent (100%). In the written submissions there was reference to the oft-cited case of ***R v Tower Hamlets Borough Council*** - *[1988] AC 858* in support of the principle that governmental discretion is not unfettered. Accordingly, it was the claimant's contention, that the defendant's discretion, was not unfettered.

Delegation of authority to the Permanent Secretary authorizing her office to conduct disciplinary proceedings in relation to the claimant

[54] In counsel for the claimant's response to defence counsel's submissions, it was raised for the first time that disciplinary control was not exercised by the appropriate person, this being the Permanent Secretary. Reference was made to paragraph 10 of the Affidavit of Onika Miller filed on the September 26, 2014, which stated –

> *'10. Although disciplinary control of staff holding offices in departments falling under portfolio of the OPM has been delegated to me under the Delegation of Functions (Public Service) Order 2000, I decided that I would ask the PSC to handle the disciplinary proceedings relating to the Claimant, given that she had raised the issue of 'bias' against her, subsequent to the audit and during our discussions on February 10, 2014.'*

[55] Also in relation to the delegation of function, counsel for the claimant responded to defence counsel by submitting that these courts are the courts of the Crown and thus it would not be appropriate to bring the Governor-General before the court. He acknowledged that the Attorney-General could not be properly joined as a party, as these are not Crown Proceedings.

[56] Counsel for the claimant strongly disagreed with defence counsel's contention that the Governor-General continues to exercise his authority pursuant to section 127(1) of the **Constitution** and that the Governor-General can exercise that power simultaneously with the Permanent Secretary. Section 127(1) states –

> *'127. – (1) The Governor-General, acting on the advice of the Public Service Commission, may by instrument under the Broad Seal direct that, subject to such conditions as may be specified in that instrument, power to make appointments to such offices, being offices to which this section applies, as may be so specified and power to remove and power to exercise disciplinary control over persons holding or acting in those offices, or any of those powers, shall (without prejudice to the exercise of such power by the Governor-General acting on the advice of the Public Service Commission) be exercisable by such one or more members of the Public Service Commission or by such other authority or public officer as may be so specified.'*

SUMMARY OF THE DEFENDANT'S STATEMENT OF CASE

[57] The defendant (the Public Service Commission) is one of the five (5) service commissions within central and local government, with the Office of the Services Commission ('OSC') being the administrative secretariat.

[58] The defendant filed two (2) affidavits on September 26, 2014. The said affidavits were deponed to by the Permanent Secretary in the OPM, Ms. Onika Miller, and the Chief Personnel Officer in the OSC, Dr. Lois Parkes, respectively.

[59] In February 2014, the defendant received a report from the Permanent Secretary in the OPM, Ms. Onika Miller ('Ms. Miller'). Ms. Miller has the power to carry out

disciplinary control in respect of all offices in the OPM, including the Bureau, where the claimant was appointed as Executive Director. The said report contained various allegations against the claimant arising from (i) an internal audit report, as well as (ii) various complaints made by some staff members of the Bureau.

[60] The said report –

(a) recommended that disciplinary proceedings be instituted against the claimant;

(b) included the final audit report with the Bureau Management's response affixed to it; and

(c) indicated that the internal audit for the Financial Year 2012/2013 highlighted several areas of very serious weaknesses in the operations of the Bureau, including;

i. lack of proper systems and internal controls,

ii. non-compliance with Government of Jamaica ('GOJ') procurement guidelines,

iii. inefficient management of contracts,

iv. inefficient management of accounts and finances,

v. inefficient management of the Way Out Project,

vi. careless handling of GOJ property,

vii. budgetary over-runs, and

viii. several breaches of the Ministry of Finance and Planning's guidelines.

[61] In relation to the internal audit report that was included in the Permanent Secretary's report, the defendant has contended that –

(i) it was conducted in or around May 2013 in respect of the Bureau;

(ii) an exit interview was held on December 9, 2013 with the claimant and staff members of the Bureau, in accordance with common practice;

(iii) following the discussion of the draft audit report at the exit interview, the claimant and the relevant staff members were given until January 16, 2014 to provide a response;

(iv) to assist in the completion of the said response, the claimant and the relevant staff members were provided with more than two weeks to respond, two weeks being the usual period given, in addition to assistance from an experienced Financial Specialist;

(v) notwithstanding the extra time and assistance provided the management response was not received within time and as such the audit report had to be finalized without the management response, however the comments of the Bureau staff was included and the management response was duly attached to the final audit report;

(vi) there is no general requirement for management to agree or sign off on an audit report before it is finalized. While it would be preferable, it would not have been possible with the Bureau's audit report given the delay in the provision of the management response;

(vii) several glaring and serious weakness and inadequacies in operation and management of the Bureau were raised by the audit report, many relating to careless handling of government property,

fiscal imprudence, failure to comply with guidelines and poor internal control systems.

[62] It was as a result of the audit report that the Permanent Secretary scheduled a meeting with the claimant on February 10, 2014. That meeting was to discuss issues related to the audit report as well as complaints made against the claimant. The claimant was provided with ample opportunity to respond at the said meeting. The Permanent Secretary found her responses to be unsatisfactory and as such placed the claimant on interdiction pending disciplinary proceedings.

[63] The Permanent Secretary requested that the defendant handle the disciplinary proceedings, notwithstanding the fact that disciplinary control of the claimant was duly delegated to her. This decision was taken primarily because the claimant had raised the issue of bias at the February 10, 2014, meeting.

[64] The defendant was always of the view that the claimant, as the Executive Director of the Bureau, is the accountable officer for the Bureau and therefore ultimately responsible for the proper management and stewardship of the Bureau.

[65] The defendant considered the said report and took the view that the allegations were extremely serious, particularly as many of these allegations related to the claimant's stewardship of public funds. This was coupled with the claimant's alleged poor relations with several staff members, which the defendant thought likely to militate against the claimant's ability to properly manage the Bureau. Altogether, the defendant took the view that disciplinary proceedings with a view to dismissal should be instituted against the claimant and that it was in the public interest that she cease to perform her duties as the Executive Director.

[66] In light of the foregoing, the defendant recommended to the Governor-General, that the said disciplinary proceedings should be instituted against the claimant and that she should be placed on interdiction, with half salary.

[67] The Governor-General approved the defendant's recommendation, by letter dated June 24, 2014. The claimant was advised, by letter dated June 24, 2014, of the charges preferred against her and of her interdiction with half salary, effective June 25, 2014. The claimant's Attorney-at-Law (Mr. Douglas Leys) was also duly advised. To that end, Mr. Leys wrote to acknowledge receipt of the defendant's letter, to request an extension of twenty-one (21) days to respond and to indicate that a list of the requisite documents was being compiled.

[68] The defendant has acknowledged that under the **Public Service Regulations**, an officer in respect of whom a disciplinary hearing/enquiry is to be held is entitled without charge, to receive copies, or to be allowed access to any documentary evidence relied on for the purpose of the said hearing/enquiry. The defendant contends that the claimant has not been denied that right.

[69] Prior to the defendant having received the said audit report, the claimant was placed on interdiction (pending disciplinary proceedings being instituted) by the Permanent Secretary. This was done by way of letter dated February 7, 2014 making the effective date of interdiction - February 10, 2014. The Permanent Secretary was acting in accordance with the **Delegation of Functions (Public Service) Order**, 2000 when she exercised her authority. In essence therefore, what was being done by the Permanent Secretary was the carrying out of a function which is ordinarily reposed in the defendant, but, pursuant to the **Delegation of Functions (Public Service) Order**, 2000, the Governor-General had delegated to the Permanent Secretary, the powers of the defendant, vis-a-vis the institution of disciplinary proceedings against the claimant.

[70] No charges had been preferred against the claimant at the time when she applied for leave to apply for judicial review on March 11, 2014. When the said matter came for hearing in May 2014, charges still had not been preferred and because of the delay in preferring same, the letter dated February 7, 2014 was rescinded.

[71] The defendant acknowledges that advice was sought from the Attorney General's Chambers and it was the view of those Chambers that the delay between the claimant's interdiction and the institution of disciplinary proceedings was not in full compliance with the provisions of the **Public Service Regulations**, **1961**. At paragraph 11 of the Affidavit of Ms. Miller, it was stated –

> *'Since there was some delay between the time the Claimant was placed on interdiction and, the institution of disciplinary proceedings against her, on the advice of the Attorney General's Chambers, my letter dated February 7, 2014 interdicting the Claimant was rescinded. She was advised of the rescission, by letter dated June 24, 2014 from Heather Colquhoun-Smith, Senior Director Human Resource Management in the OPM.'*

Further, it was stated at paragraph 6 of the Affidavit of Dr. Parkes –

> *'...Consequently, on the advice of the Attorney-General's Chambers, the letter of interdiction was rescinded as it was the view of those Chambers that it did not comply fully with the provisions of the Public Service Regulations 1961, due to the delay between the Claimant's interdiction and the institution of disciplinary proceedings against her.'*

[72] However, the defendant has contended that as regards the second interdiction (i.e. the one which took effect on June 25, 2014) the process followed by the defendant, in respect of disciplinary action taken against the claimant was in compliance with the provisions of the **Public Service Regulations**, the **Constitution** and laws of Jamaica.

[73] It was further contended by the defendant that during the course of the disciplinary hearing/enquiry, the claimant will be guaranteed a full hearing in accordance with the provisions of the **Public Service Regulations.**

SUMMARY OF THE DEFENDANT'S SUBMISSIONS

[74] Counsel for the defendant framed the legal issues as follows–

i. Whether or not the claimant was entitled to have been heard by the defendant (PSC) prior to her interdiction, because of the special circumstances as alleged by the claimant as existing in relation to her case;

ii. Whether or not there exists any special circumstances in this particular case;

iii. Whether the claimant had a legitimate expectation to be heard by the defendant prior to the recommendation to interdict her;

iv. Whether or not this court can quash the relevant audit report;

v. Whether or not the claimant was entitled to be heard on the decision which the defendant made to reduce the claimant's salary by half; and

vi. Whether or not the withholding of the claimant's half salary by the defendant constitutes a penalty.

[75] It was submitted that the defendant did not and cannot interdict a public officer. By law, a public officer can only be interdicted by the Governor-General, in accordance with ***section 125*** of the **Constitution** of Jamaica.

[76] In relation to the audit report, it was submitted that the defendant was not the author nor can this Court quash such a report, as it is neither a decision nor determination.

[77] It was also submitted that the Court must look at the overall circumstances and the particular statutory scheme involved. In support of this point, counsel for the defendant cited the dictum of Lord Bridge of Harwich from ***Lloyd v McMahon*** - *[1987] AC 625* at page 702:

> *'My Lords, the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates. In particular, it is well-established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness. It follows that the starting-point for the examination of all the appellants' submissions on this aspect of the case is the Act...'*

[78] Counsel for the defendant submitted that there is no need to rewrite ***regulation 32*** so as to require that a public officer be heard prior to interdiction.

[79] Also, counsel for the defendant submitted that it is in the public interest for a person who is the subject of allegations of impropriety as a public officer, not to be afforded time to respond to the said allegations whether prior to interdiction being ordered by the Governor-General, or prior to the defendant (PSC) recommending interdiction. It is in the public interest because the subject of the allegations would remain in his or her job, until after the defendant (PSC) has heard from them and in the circumstances could either take steps to hinder the investigation into the allegations, or could create further havoc in the public service.

[80] The defence counsel further submitted in the oral submissions, that it is not a matter of time that has required ***regulation 32*** to be framed in the way in which it has been. She stated that the court must give effect to the intention of Parliament. To this end, she referred to the judgment of Harris JA in ***Beatrice McKenzie et al v The Attorney General*** *– (unreported), Court of Appeal, Jamaica, Appeal No. SCCA 86/2003, judgment delivered 22 March 2006,* in

particular an extract therefrom, which is recorded at pages 16-17 of that judgment, as quoted immediately below:

> *'In construing an enactment, the dominant purpose is to discover the intention of the legislature. If words used in a statutory instrument are plain and unambiguous, they must given their natural meaning. They must be applied as they stand, and must be taken to have been the intention as expressed by Parliament. The foregoing was exquisitely summed up by Lord Simon of Glaisdale in the case of* ***Lord Advocate v de Rosa & Anor*** *- [1974] 2 All ER 863 when he said:-*
>
> *'Justice is more likely to be served, as well as constitutional propriety to be observed, if Parliament is given credit for the meaning of what she said.'*
>
> *As it is the duty of the Court to give effect to the intention of Parliament, words cannot be imported into an enactment to modify or alter the language contained therein. In* ***Re Debtor (No. 335 of 1997) ex parte H.M. The King v The Debtor*** *[1948], 2 All ER 536,*
>
> *Lord Green said:*
>
> *"If there is one rule of construction for statutes and other documents, it is that you must not imply anything which is inconsistent with the words expressly used.'*

[81] The distinction was emphasized between ***regulation 42*** of **the Public Service Regulations** and ***regulation 32***. In respect of the former, a hearing is permitted at the interim stages, whereas in respect of the latter, no hearing is permitted at the interim stage. The reason for this is that the latter procedure, pursuant to ***regulation 32,*** pertains to serious allegations, whereas the former does not so pertain. The defence counsel also made reference to ***regulation 43*** of the said **Regulations.**

[82] Counsel for the defendant referred to the dictum of Lord Hope in ***Auburn Court Ltd v The Kingston and Saint Andrew Corporation and others*** *- [2004] UKPC 11* at paragraphs 48-49:

*'**[48]** But there were no objections for the committee to consider in this case. The meeting was, of course, attended by officials such as Mr White, whose function it was to provide the advice and information that the committee needed before the decision was taken. The question whether the appellant should be present too and given an opportunity of being heard when that advice was given was at the discretion of the committee.*

***[49]** Megarry J set the appellant's argument into its proper context when in **Gaiman v National Association for Mental Health** [1971] Ch 317, [1970] 2 All ER 362 333C he said:*

"...local planning authorities refuse thousands of planning applications each year without giving the applicant any hearing, leaving him to his remedy by way of appeal to the Minister, when a full hearing is given; yet I know of no suggestion that local planning authorities are thereby universally acting in contravention of the principles of natural justice."

As that observation indicates, the question of fairness must be answered by looking to the whole of the procedure which is provided by the statute, including the provision that is made for the applicant to be heard by way of an appeal.'

[83] It was therefore submitted by defence counsel, that ***regulations 32*** and ***regulation 43*** must be read together, as ***regulation 43*** flows from ***regulation 32.*** The procedure was outlined as follows:

i. The Permanent Secretary makes a report to the defendant (PSC) under ***regulation 32***. If the defendant, after having reviewed that report, thinks that the officer ought to be dismissed, then ***regulation 32*** has to be applied – in which case the defendant has to recommend interdiction;

ii. The officer is then interdicted and will receive a proportion of his or her salary as determined by the defendant;

iii. If the Governor-General agrees with the defendant, then ***regulation 43*** is invoked and the officer is given the charges and invited to respond;

iv. When the defendant receives the response from the officer, the defendant can decide that the officer has exculpated himself or herself and the matter ends there;

v. If, after having received that response, the defendant decides that the officer has not exculpated himself or herself, then a Committee of Inquiry must be set up to enquire into the allegations made against the relevant officer;

vi. The Committee of Inquiry would then have to conduct a full hearing into the allegations, with the full input of the relevant officer. At that enquiry, the officer can cross-examine, make submissions and is entitled to legal representation;

vii. That Committee of Inquiry is to be of a certain calibre, in terms of its constitution and will be composed in a manner, so as to be independent of the defendant;

viii. If the Committee of Inquiry makes a finding that the officer is exonerated, it would be expected that that would be the end of the matter. If the Committee of Inquiry finds/concludes that some penalty ought to be imposed, that Committee will then make such recommendation to the Governor-General.

ix. The Governor-General then, pursuant to ***section 125(3)*** of the Constitution, cannot impose any penalty without having first informed the officer that he or she has a right to refer the matter to the Privy Council.

[84] Counsel for the defendant referred the dicta of Lord Morris of Borth-y-Gest from ***Furnell v Whangarei High Schools Board*** *(' the Furnell case')(op.cit.) at page 679:*

> *'In support of these claims the rules of natural justice were invoked. It becomes necessary therefore to consider whether the detailed*

and elaborate code which prescribes the procedure to be followed when there is a suggestion of an offence under section 158 is a code which gives scope for unfairness and whether in its operation the court in the interests of fairness must supplement the written provisions. In the present case do the well-known words of Byles J. in ***Cooper v. Wandsworth Board of Works*** *(1863) 14 CBNS 180, 194 apply, viz.: ...although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature"? or is the code one that has been carefully and deliberately drafted so as so [sic] prescribe procedure which is fair and appropriate? In whatever way the status of the appellant as a teacher is in law to be defined he agreed to serve under the conditions laid down in the regulations and unless some provisions are to be read into them or are incorporated in them it is clear that they were faithfully followed. It is not lightly to be affirmed that a regulation that has the force of law is unfair when it has been made on the advice of the responsible Minister and on the joint recommendation of organisations representing teachers employed and those employing. Nor is it the function of the court to redraft the code. As was said in* ***Brettingham-Moore v. Municipality of St. Leonards*** *(1969) 121 CLR 509, 524:*

> *"The legislature has addressed itself to the very question and it is not for the court to amend the statute by engrafting upon it some provision which the court might think more consonant with a complete opportunity for an aggrieved person to present his views and to support them by evidentiary material."*

It has often been pointed out that the conceptions which are indicated when natural justice is invoked or referred to are not comprised within and are not to be confined within certain hard and fast and rigid rules: see the speeches in ***Wiseman and Ors. v Borneman and Ors.*** *[1971] AC 297. Natural justice is but fairness writ large and juridically. It has been described as "fair play in action." Nor is it a leaven to be associated only with judicial or quasi-judicial occasions. But as was pointed out by Tucker LJ in* ***Russell v. Duke of Norfolk*** *[1949] 1 All ER 109, 118, the*

requirements of natural justice must depend on the circumstances of each particular case and the subject matter under consideration.'

[85] Reference was made to ***Rees v Crane*** – *(1994) 2 AC 173* and the ***Mafabi*** case (op.cit.) which were relied on by counsel for the claimant. It was submitted that these cases pertain to circumstances in which the courts are seeking to protect the independence of the judiciary.

[86] As regards the ***Mafabi*** case (discussed at paragraph [33] herein), under the enabling legislation in Uganda, at that time, with respect to the Inspector General of Government ('IGG'), an investigation was required to have been conducted before any recommendation was made. It was held, inter alia, that there was no need for a person to be heard (even by the Judicial Service Commission) before interdiction. It was further held that the act of the Acting Chief Registrar, of interdicting the petitioner on the basis of the report of the IGG without first carrying out his own investigations and affording the petitioner an opportunity to be heard, did not contravene various constitutional provisions.

[87] It is the defence counsel's contention, that the defendant has neither criticized nor condemned the claimant. All that the defendant has done, up until now, is fulfilled its regulatory mandate to facilitate the process whereby allegations of impropriety are heard/investigated by the defendant. Reference was made to page 19 of the ***Furnell*** case (*op. cit.*) wherein it was held:

'There is a marked contrast in the regulations between a complaint and a charge. So also is there a contrast between investigating a complaint before ever there is a charge and a "determination of the matter" (see regulation 5 (1)), which is the investigation of a charge. One of the principles of natural justice is that a man should not be condemned unheard. But the sub-committee do not condemn. Nor do they criticize...There is neither condemnation nor criticism of a person if it is found that there are matters calling for determination under a scheme of procedure which amply provides (1) that before there can be any adverse finding a person must know what charge is alleged and (2) must have the opportunity to answer the charge

and (3) that before those dealing with the charge can condemn or punish they must be satisfied of guilt and (4) that their decision is subject to an appeal bye [sic] way of re-hearing. In their Lordships' view the scheme of procedure gives no scope for action which can properly be described as unfair and there are no grounds for thinking that the sub-committee acted unfairly.'

[88] In response to the claimant's contention that the circumstances of this case are peculiar, the defendant submitted that –

(i) As regards the claimant's contention that she did not know that she was under investigation by the Permanent Secretary; in May of 2013, there was an audit report provided to the Permanent Secretary which highlighted that there were glaring weaknesses in the management of the Bureau of Women's Affairs. There is no evidence of there having been any investigation undertaken by the Permanent Secretary into the conduct of the claimant. The audit was conducted with the claimant's full knowledge and participation.

(ii) The suggestion by the claimant that she was unaware of what her meeting with the Permanent Secretary was about, is refuted by the claimant's own evidence. Reference was made in particular to paragraphs 36 -37 of Exhibit "FW3" whereby the claimant stated:

'I subsequently received an email from the Permanent Secretary in the Office of the Prime Minister on the 4th of February through her Administrative Assistant, Mrs. Loreen Brown, to the effect that she wanted to have a meeting with me on the 10th February 2014 at 8.30 a.m. Annexed herewith and marked exhibit "FW8" is a copy of the said email. I responded by e-mail on the next day, 5th February 2014, stating that I was available. I enquired as to the format of the meeting, who would be in attendance and whether I could be accompanied by two of my staff members. I got no response. Annexed herewith and marked exhibit "FW9" is a copy of my email to the Ms. Loreen Brown [sic]. I subsequently received a response on Friday 7th February 2014, from the Administrative Assistant to the Permanent Secretary indicating that the Permanent Secretary

has said that there was no need for the others and that I should be guided accordingly. I responded on the same day indicating that I still wished to know who, apart from the Permanent Secretary would be attending the said meeting. I received no response to that email. Annexed herewith and marked exhibit "FW 10" is a copy the said [sic] email from Ms. Brown and my response both dated 7th February 2014.

I duly attended the meeting at 8.30 am on the 10 February, 2014. After this meeting they said they would be having a second meeting of which I had no prior notice. So in effect, the "meeting" turned out to be two (2) meetings. My expectation was for the sole meeting about which I had been informed, to discuss queries pertaining to the audit report with a view to being guided and given the opportunity to take corrective actions. I was completely unaware that the Management personnel of the OPM had already signed off on making representation to the Public Services Commission that disciplinary proceedings should be commenced against me for a range of charges and breaches.'

[89] Counsel for the defendant submitted that it cannot be said that the claimant did not know in advance what her meeting with the Permanent Secretary on February 10, 2014 was about. Reference is made to Exhibit **FW8** attached to the Affidavit of the claimant in support of application for leave to apply for judicial review in Claim No 2014 HCV 01237, in which the claimant received and email from Loreen Brown on February 4, 2014 which stated:

'Good evening Mrs. Webster;

The PS is inviting you to a meeting on Monday February 10, 2014 at 8:30 a.m. to discuss the BWA Audit Report. The meeting will take place in Room 32, Executive Building.

Kindly indicate your availability.'

[90] The court was asked to have regard to the Notes of Meeting, which is a document not agreed between the parties. Counsel for the defendant submitted that the court can give to the said document, such weight as it thinks fit.

[91] In response to the claimant's assertion that the internal audit report which gave rise to the institution of disciplinary proceedings was unfair, unbalanced and biased as it did not take into account the comments of the Bureau's senior management, counsel for the defendant submitted that the management response was placed at the back of the audit report. Reference was made to the audit report exhibited to the affidavit of the claimant filed on March 11, 2014 as **FW4** (draft) and **FW7** (final) and response to the audit report **FW6** which is attached to it.

[92] Counsel for the defendant has submitted that the management of the Bureau therefore did have in its possession not only the audit report, but also, the responses to same, prior to that meeting. There can therefore be no valid complaint that the claimant did not get a chance to respond to the audit report.

[93] The defendant was aware of the meeting between the claimant and the Permanent Secretary and the defendant had also seen the audit report and the management's response to that report. Reference was made to the affidavit of Lois Parkes filed September 26, 2014, in particular paragraphs 7 and 8:

> *7 ...The report from Miss Miller included the final audit report with the BWA management response affixed to it.*
>
> *8. The PSC considered the report made against the claimant and took the view that the allegations were extremely serious ones, particularly as many relate to the claimant's stewardship of public funds. The claimant's alleged poor relation with several members of the BWA staff was also viewed by the PSC as likely to militate against her ability to properly manage the BWA. Given the seriousness of the allegations, the PSC, also took the view that disciplinary proceedings with a view to dismissal should be instituted against the claimant and that it was in the public interest that she cease to perform her duties as Executive Director of the BWA. A recommendation to that effect with interdiction on half (1/2) of the claimant's salary was therefore made to His Excellency the Governor-General by the PSC.*

[94] In addressing the presumption of regularity, counsel for the defendant submitted that the defendant had taken into account all relevant considerations and there is no evidence which exists to show that the defendant did not act in good faith and in the public interest in deciding to recommend to the Governor-General that the claimant be interdicted. Counsel for the defendant went on to say that there are no "red flags", nor is there any secret information.

[95] The issue of whether the withholding of half of the claimant's salary is a penalty, was addressed. Counsel for the defendant submitted that the withholding of salary is not a penalty. She referred to ***regulation 37*** of the **Public Service Regulations** and the **Staff Orders**. It was submitted that the reduction in salary is not a penalty because where an officer is found not to be culpable, he or she gets back the sum withheld. The rationale behind the deduction is that the interdicted officer is not deployed in active service. ***Regulation 32(4)*** was referred to as well as chapter 10.6 and 10.7 of the **Staff Orders**.

[96] Further, it was noted by defence counsel that if a public officer on a withheld salary is having particular financial difficulties, he or she can bring same to the defendant's attention and the defendant can thereafter address its mind to same and if necessary, rectify same.

[97] Reliance was placed on the ***Mafabi*** case, wherein the claimant /Petitioner's salary was also being withheld and yet, the court concluded that the claimant/Petitioner was not entitled to be heard.

[98] Counsel for the defendant referred to ***Re Mitchell*** - *TT 2003 HC 85*, a case on which the claimant also relied, and submitted that this case can be distinguished from the present one. In respect of ***Card v the Attorney General*** (*op. cit.*)**,** it was submitted that the judgment was not detailed and that the court should not follow the conclusions in that judgment.

[99] Paragraph 20 of the decision of Batts J in ***Robert Rainford v. His Excellency the Most Honourable Sir Patrick Allen et al.*** was also cited:

> *'In Ground C of his submissions Mr. Leys argues that the proceedings are a nullity because the relevant authority failed to disclose to the claimant the reason why it felt the charge might attract dismissal. I do not agree. Even a cursory reading, of the charge, which was enclosed in the letter dated 8th April 2013 to the claimant , makes clear the conduct in question and the reason why it was felt that such conduct had serious implications for the claimant 's continued employment. I find that the claimant was duly notified of the case he had to meet and the reason the charge was laid.'*

[100] Counsel for the defendant contended that the claimant has brought no evidence to suggest that the defendant did not, in deciding on the quantum of the claimant's salary to be withheld pending interdiction, do what they were required to do pursuant to the applicable regulations. The defendant's evidence is that they considered the allegations as being very serious and therefore they decided to withhold half of the claimant's salary.

[101] In relation to the issue of legitimate expectation, the defendant has submitted that for one to claim on the ground of legitimate expectation it would have to be shown that the defendant made certain representations. Further, there is no evidence of any promise or expectation made by the defendant which could/would have created a legitimate expectation in the public law sense. Reliance was placed on ***Council for the Civil Service Unions v Minister for the Civil Service*** – [1985] AC 374, to support the point that legitimate expectation imports both an objective and subjective test.

[102] In respect of whether the Governor-General can properly be brought before this court as a defendant, counsel for the defendant referred to ***Neville Lewis v the Attorney General*** – *[2001] 2 AC 50.* It was emphasized that the defendant did not and cannot interdict a public officer, as a public officer can only be interdicted by the Governor-General pursuant to section 125 of the **Constitution**.

[103] Finally, in respect to the claimant's assertion that her constitutional rights under section 15 were breached, defence counsel referred to **section 15(2)(k) of the**

Charter of Rights which states that someone may be deprived of his/her or their property, pursuant to any inquiry.

ISSUES TO BE RESOLVED

[104] The issues to be resolved are as follows-

(1) Whether the withholding of the claimant's half salary by the defendant constitutes a penalty;

(2) Whether the claimant was constitutionally entitled or had a right founded on natural justice and/or had a legitimate expectation to be heard by the defendant or Permanent Secretary prior to the recommendation having been made to the Governor-General that she be interdicted;

(3) Whether the defendant was required to provide reasons for the interdiction on half salary and/or why it was in the public interest to do so;

(4) Whether the Governor-General, acting upon the advice of the defendant, could still have lawfully carried out certain disciplinary procedures in respect of the claimant, notwithstanding having previously delegated the power to the Permanent Secretary;

(5) Whether the defendant is the proper party to this claim and/or whether the Governor-General should have been made a party;

(6) Whether or not this Court can and should quash the relevant audit report;

(7) Whether the claimant's interdiction is oppressive and/or an abuse of process; and

(8) Whether the disciplinary charges preferred against the claimant warrant interdiction and/or dismissal.

THE LAW AND ANALYSIS

[105] In these reasons for judgment, the issues to be resolved will be addressed sequentially, but for convenience only, will not be addressed in the order as listed above.

Whether or not this Court can and should quash the relevant audit report

[106] This Court cannot and will not quash the relevant audit report, because the party that prepared that report, has not been brought as a party before this Court, in this claim and no leave was ever obtained by the claimant, to pursue judicial review proceedings, challenging that report. Instead, what was obtained by the claimant through this court, in terms of leave to apply for judicial review, was leave to challenge the disciplinary proceedings brought against the claimant, who is presently, an employee within the public service.

[107] In any event, it is somewhat misleading, in so far as it does not provide the full context, to state as has been stated by the claimant for the purposes of this claim, that the internal audit report did not take into account the comments of the Bureau's senior management. This Court has taken judicial notice of affidavit evidence deponed to, by the claimant and adduced on her behalf, in support of her application for leave to apply for judicial review, in respect of her first interdiction. Attached to that affidavit is a document labelled as, 'Exhibit FW6' which is in fact, the Bureau of Women's Affairs Management's response to that audit report. This Court has no reason to believe that the relevant authorities did not take into account that response, in having decided as to whether the claimant should be interdicted or not.

[108] Furthermore, the claimant got a chance to respond to that audit report. She was invited to a meeting with the Permanent Secretary ('PS'), which was scheduled for February 4, 2014, in order to discuss with the PS, the said audit report. She knew in advance of that meeting, that the same was being held, for the purpose of discussing that audit report. She was so informed, by means of the wording of

that very invitation itself, which was attached and labelled as Exhibit 'FW8', to the affidavit of the claimant, in support of her application for leave to apply for judicial review, which was filed in the claim which was instituted as claim no. 2014HCV01237. This court has, as it is entitled to do, also taken judicial notice of that exhibit.

[109] In the circumstances, the claimant's contentions as regards the audit report, are for the purposes of this claim, unmeritorious and this is also as regards her contention that she was deprived of her legitimate expectation that senior management staff of the Bureau, would have been afforded the opportunity to respond to the audit report.

Whether the defendant is the proper party to this claim and/or whether the Governor-General should have been made a party

[110] It is the considered view of this court, that it would not have been appropriate for the Governor-General to have been made a party to this claim. For the purposes of a claim such as this though, in respect of which actions taken against a public officer, by the Governor-General, are being challenged, or for that matter, in any other circumstance in which the constitutional functions of the Governor-General are being challenged, the Governor-General ought not to be named as a party to such a claim, but rather, even in respect of judicial review proceedings, it is the Attorney-General that should be named as a defendant to such a claim, so as to represent the interests of the Governor-General, in respect of that claim. On that point, see the comments of the late Wooding C.J. in ***Hochoy v N.U.G.E****. - (1964) 7 WIR 174*, at page 181E – G.

[111] In respect of this claim, it is this Court's view therefore, that it is the Attorney-General who the claim should have been pursued against, as a joint defendant, with the Public Service Commission.

[112] In that respect therefore, whilst this Court agrees with the submissions of Queen's Counsel, on the claimant's behalf, that it is not appropriate for the

Governor-General to be named as a party to this claim, this Court does not accept that the only proper party to this claim, is now before this Court as the stipulated defendant.

[113] In the circumstances, whilst, for the purposes of this claim, this court can properly make findings against the stipulated defendant, that being the Public Service Commission, it would not be appropriate for this Court to make findings against the Governor-General, in respect of any constitutional procedures carried out by that office, in relation to the claimant's employment with the Government of Jamaica. Such findings could only properly be made against the Attorney-General, as a named defendant in a claim for judicial review.

[114] This court accepts that these proceedings are not Crown proceedings, and thus, do not fall within the ambit of the Crown Proceedings Act. That was laid down by the Privy Council in the case – **Vehicles and Supplies Ltd v Minister of Foreign Affairs, Trade and Industry** – (1989, 1991) 39 WIR 270.

[115] There are though, some circumstances, when, even in judicial review proceedings, which are undoubtedly, separate and distinct from Crown proceedings, the Attorney-General, ought to be named as a defendant to such a claim.

[116] As already stated, one such circumstance would be wherein it is the actions of the Governor-General which are, either in whole or in part, being challenged within a proposed (at the leave stage) claim or an actual (at the trial stage) claim for judicial review.

[117] It could hardly be otherwise, since the named defendant although likely being represented by an Attorney from the Office of the Director of State Proceedings, whether the defendant is the Attorney-General, or as in this case, the Public Service Commission, cannot properly address the interests of the Governor-General, in response to the claim, since that Attorney would not have received or sought to take any instructions from the Governor-General, for the purpose of

defending the claim. Instead, that Attorney's instructions, could and would only have come from the named defendant, that being in this case, the Public Service Commission.

[118] This Court does accept though, that there exists precedent in Jamaica, for judicial review proceedings, or in other words, for a judicial review claim, to be brought against the Governor-General, as a named party. In that regard, see: ***Robert Rainford v His Excellency the Most Honourable Sir Patrick Allen, The Public Service Commission and The Chief Personnel Officer*** *- [2014] JMSC Civ 96.*

[119] In that case though, the issue as to whether or not the Governor-General ought to have been named as a party to that claim, was not fulsomely addressed by the parties' counsel and was only addressed in the Court's reasons for judgment, to the extent of a passing comment as to same.

[120] It would be helpful though, for present purposes, to refer to same, at this juncture. At paragraph [40] of those reasons for judgment, His Lordship stated as follows:

> *'Before closing I should advert to a certain submission made by the Learned Solicitor General. This was that it was unnecessary and not in keeping with the dignity of his high office to name the Governor General as a Defendant to this claim. No authority was cited for the proposition and the Claimant did not directly respond. The point not having been fully argued I decline to express a final view; save to say, that the Crown Proceedings Act was passed in order to do away with archaic procedures and allow civil proceedings against the Crown to be against the Attorney General. These being Civil Proceedings one would have thought it would be sufficient to name the Attorney General as a Defendant. It is however too late in the day to suggest that the Crown is above the law and not subject to decisions of the Supreme Court of Judicature of Jamaica, particularly in a claim for Constitutional relief. To be fair I did not understand that to be the Solicitor General's contention.'*

[121] I am of the view that in appropriate circumstances, the actions of the Governor-General can be challenged in judicial review proceedings and where that is being pursued, the Attorney-General can and should be made a defendant to any such claim, for the purpose of representing the interests of the Governor-General in response to that claim.

Whether the withholding of the claimant's half salary by the defendant constitutes a penalty

[122] As was earlier set out, in paragraphs [8] and [9] of these reasons, the claimant was interdicted for a second time, by the directive of the Public Service Commission, notification of which was received by the claimant in written letter form, dated June 24, 2014. On the first occasion, her interdiction which had taken effect from as of February 10, 2014, was rescinded by way of letter dated June 24, 2014 and which was signed by the Senior Director of Human Resource Development, for the Permanent Secretary.

[123] Her second interdiction, was on half salary, just as indeed had been her first interdiction. With respect to that first interdiction though, the half salary that had not been paid to her, was to have been paid to her, with effect from February 10, 2014. That was made known to the claimant, in a letter dated June 24, 2014 – Agreed document No. 5 in Bundle of Documents filed on February 17, 2015. That payment to her, was to have been made, because the claimant's first interdiction had been rescinded as of June 24, 2014.

[124] As such, what the claimant is now contending, is that the reduction of her pay by half, while she is on interdiction, constitutes a penalty. The interdiction to which she is now referring, is of course, the second one.

[125] The claimant's counsel has relied on two authorities which he contends, support that contention, as has been propounded by him, namely: ***Card v the Attorney General*** (*op. cit.*) and ***Re Mitchell, Rafael*** (*op. cit.*).

[126] Both of those authorities are, it is to be noted, first instance judgments from the Supreme Court of Belize on the one hand and the High Court of Trinidad and Tobago, on the other hand. Those are courts with jurisdiction which is similar to that of Jamaica's Supreme Court. As such, neither of those judgments are binding on this court. At most, those judgments may be considered as being persuasive.

[127] In the **Card** case (*op. cit.*), Moe C.J. concluded that interdiction is not a penalty, but the withholding of half of an interdicted public officer's salary, is a penalty. Interestingly, in the **Mitchell** case (*op. cit.*), it was the opinion of Ventour J., as expressed in the judgment which he delivered in that case, that not only was the applicant's interdiction, 'a punishment,' but also that moreover, particularly in circumstances wherein the public officer or former public officer, who is the applicant, is by virtue of that interdiction, being made to suffer any financial loss, then that applicant is entitled to a 'hearing', prior to being interdicted.

[128] Accordingly, in the **Card** case, it was held that no hearing was required prior to interdiction, whereas in the **Mitchell** case, it was held that a hearing was required, prior to interdiction.

[129] What that divergence in approach, *vis-a-vis* hearing prior to interdiction, makes clear, is that the conclusion to be drawn in one case, will not necessarily be the conclusion to be drawn in another case involving judicial review proceedings, as regards the legal issue. Whether a particular disciplinary procedure constitutes a penalty or not, must, of necessity, depend on the particular circumstances of each particular case.

[130] In Jamaica, with respect to the non-payment of a position of an interdicted public officer's salary, this court accepts firstly, that the decision as to whether that will be done or not, is not a discretionary matter. That issue will be addressed further, in these reasons.

[131] If the withholding of the claimant's half salary constitutes a penalty, then undoubtedly, a decision to impose such a penalty, could only properly be taken/made, after the claimant had been afforded a fair hearing, or in other words, 'natural justice'. See: **Cooper v Wandsworth Board of Works** (op.cit.).

[132] Whether such withholding constitutes a penalty though, must, of necessity, depend on the particular circumstances of each particular case. It is well recognized, that any decision/determination made in breach of natural justice is void. See: ***Attorney General v Ryan*** *- [1980] AC 718.*

[133] Counsel for the defendant – Ms. Jarrett, submitted during her oral submissions which were made upon the trial of this claim, that the defendant would have had no option as to whether or not to withhold half of the claimant's salary, once she was interdicted. Accordingly, it was her contention that the defendant complied with the applicable law, as set out in Jamaica's **Public Service Regulations**, 1961, in so far as the withholding of half of the claimant's salary is concerned.

[134] Ms. Jarrett's submission in that regard, is undoubtedly not a sound one from a legal standpoint and appears to me, to have been based upon an incorrect legal premise. Even if her submission in that regard is correct though, that does not mean, firstly, that the withholding of half of the claimant's salary, arising from her second interdiction is not a 'penalty' and accordingly, it also would not mean that at this stage and in this context – that being where the applicable law is being considered and consequential action of the defendant is being challenged under the rubric of 'natural justice', that this court can and/or ought to do nothing about it, even if this Court were to come to the conclusion, that the withholding of half the claimant's salary constitutes a 'penalty'.

[135] The applicable law, as regards this particular issue, is set out in **regulation 32 of the Public Service Regulations**, 1961. It is worthwhile, for the purpose of enabling a proper understanding of the legal context surrounding this particular

issue, to set out in full**, regulations 32(1) – (4)** of the said **Regulations**. Accordingly, same is set out in the next paragraph of these reasons.

[136] Regulations 32 (1) – (4) state –

> *'(1) Where –*
>
> *(a) disciplinary proceedings; or*
>
> *(b) criminal proceedings,*
>
> *have been or are about to be instituted against an officer, and where the Commission is of the opinion that the public interest requires that that officer should cease to perform the functions of his office, the Commission may recommend his interdiction from the performance of these functions.*
>
> *(2) An officer so interdicted shall, subject to the provisions of regulation 36 and paragraph (3) hereof, be permitted to receive such proportion of the salary of his office as the Commission shall recommend to the Governor-General.*
>
> *(3) The proportion of salary referred to in paragraph (2) shall be related to the nature and circumstances of the charge against the officer, so, however, that –*
>
> *(a) subject to sub-paragraphs (b) and (c), the proportion shall not be less than one-half;*
>
> *(b) subject to sub-paragraph (c), where the charge involves an allegation of defalcation, fraud or misappropriation of public funds or public property, the proportion shall not be less than one-quarter; and*
>
> *(c) where special circumstances exist which in the opinion of the Public Service Commission justify such action, the Commission may recommend to the Governor-General that salary be paid at a proportion less than one-quarter or entirely withheld.*
>
> *(4) Where disciplinary proceedings against an officer under interdiction from duty result in his exculpation, he shall be entitled to the full*

amount of the salary which he would have received had he not been interdicted, but where the proceedings result in any punishment other than dismissal the officer shall be allowed such salary as the Commission may in the circumstances recommend.'

[137] In interpreting how **regulation 32 (1) – (4)** ought to be applied, it can readily be recognized that the maximum withholding of salary to be recommended to the Governor-General by the Commission, in a circumstance such as the claimant herein, is presently facing, is one-half of that officer's salary.

[138] In some circumstances, the proportion of the officer's salary which ought to be withheld, can be more than one-half - as for instance, where the charge involves defalcation, fraud, or misappropriation of public funds or public property. The claimant herein, does not face any such charge.

[139] In some circumstances, such as wherein, special circumstances exist which, in the opinion of the Public Service Commission, justify such action, the Commission may recommend to the Governor-General, that salary be paid at a proportion less than one-quarter, or entirely withheld. That does not though, apply to the claimant herein, since, from the evidence presented, it does not appear that any such recommendation was made, or that any such 'special circumstances' existed.

[140] To my mind, it is incorrect, as a matter of law, to state that **regulation 32** of the **Public Service Regulations**, afforded to the Public Service Commission, no option other than to have recommended to the Governor-General that one-half of the claimant's salary be withheld pending the outcome of the disciplinary proceedings surrounding her interdiction.

[141] The wording of **regulation 32(2)** of the **Regulations**, when carefully considered, does, to my mind, make it clear that, upon the interdiction of a public officer, the Commission shall recommend to the Governor-General that the said officer receive a proportion of his or her salary. The wording of **regulation 32(2)** appears to preclude the Commission from lawfully recommending to the

Governor-General, that the public officer who has been interdicted, shall receive his or her full salary whilst that interdiction remains extant. The Commission though has a discretion as to the precise extent of that salary withholding which they will recommend. In having suggested otherwise, in her oral submissions on this issue, I believe that the defence counsel was incorrectly stating the law.

[142] To my mind also if the **Regulations** had been intended to be interpreted and applied, so as to have allowed for an interdicted officer to receive his or her salary, then **regulation 32(2)** would have specifically so provided, by stating therein, for instance, that an officer so interdicted shall, subject to the provisions of **regulation 36** and paragraph (3) 'hereof', be permitted to receive, '*all or such proportion of the salary of his office, as the Commission shall recommend to the Governor-General.'* Instead though, what **regulation 32(2)** has actually required is that an officer so interdicted shall, subject to the provisions of **regulation 36** and paragraph 3 'hereof', be permitted to receive, '*such proportion of the salary of his office as the Commission shall recommend to the Governor-General*.'

[143] The word, 'proportion', cannot to my mind, be equated with the word 'all'. I therefore wholly disagree with the claimant's counsel's contention that the claimant could have received 100% of her salary while on interdiction. If it had been intended that such an officer could possibly be made subject to a recommendation by the Commission to the Governor-General, that he or she receive all of his or her salary while under interdiction, as distinct from a proportion thereof, then such should have been stated in explicit terms in **regulation 32(2).** That though was not done. A 'proportion' must always be less than, 'the whole,' or 'all.'

[144] Having thus concluded that a proportion of the claimant's salary was, as a matter of law, required to be withheld, once it was determined by the Commission that the claimant should have been interdicted and thus, once the recommendation was made by the Commission to the Governor-General, that the claimant should be interdicted, the next issue to be carefully considered is whether, as has been

submitted by defence counsel, the Commission had no choice other than to recommend that half of her salary be the proportion of that salary of hers, which was to be withheld from her, whilst she remains under interdiction.

[145] It is my considered opinion that it would have been entirely open to the Commission, to have recommended to the Governor-General, that up to ninety-nine percent (99%) of the claimant's salary be paid to her, pending the outcome of the disciplinary proceedings which have led to her having been interdicted. After all, if even only one percent (1%) of one's salary is withheld, that is still, 'a proportion'.

[146] What the Commission would have been unable to have done as regards the claimant herein, is to have recommended that the claimant was to have received a proportion of her salary, which is less than one-half. The Commission could therefore have recommended to the Governor-General, that the claimant receive a proportion of her salary, which is more than one-half. The recommendation to be made, according to the wording of **regulation 32**, is not as to how much of the interdicted officer's salary is to be withheld, but rather, as to how much of the interdicted officer's salary, he or she should be permitted to receive. Accordingly, the Commission can recommend that he or she should receive more than one-half, but not, less than one-half.

[147] In the case at hand, there exists no evidence from the defendant, that is capable of even remotely suggesting that the Commission had recommended to the Governor-General, that while under interdiction, the claimant should receive any proportion of her pay, which is more than one-half.

[148] As I understood the defence counsel's submissions on this particular aspect of this particular case, the defendant acted on the understanding, or, as is my view and perhaps therefore, more aptly stated, the misunderstanding, that the Commission was mandatorily required, by the provisions of **regulation 32** of the **Public Service Regulations**, to withhold not less than one-half of the claimant's

salary, once she (the claimant), remains under interdiction. To my mind, that is the, 'incorrect legal premise' to which I made reference in paragraph [134] of these reasons.

[149] Even if I am wrong about that though, that still would not affect my determination as to whether that withholding of a proportion of the claimant's salary constitutes a penalty or not.

[150] The withholding of a public officer's salary, pending the outcome of criminal or disciplinary proceedings for as long as that officer remains interdicted, is undoubtedly, just as is that interdiction, which could among other things, lead to that public officer's dismissal from employment, a serious matter.

[151] A view may be held by some that since the public officer, once interdicted, would cease to perform the functions of his or her office, it must follow logically, that he or she should not be paid his or her salary, following upon interdiction.

[152] Whilst that does, at first glance and without careful consideration, appear to be a logical conclusion, upon more careful consideration it is my considered opinion that such a conclusion is neither a fair nor logical one, in the present context. I will now set out why it is, that I have so concluded.

[153] The starting point for my considerations in that regard, is that anyone who is interdicted based upon disciplinary or criminal proceedings being underway in respect of him or her as the alleged wrongdoer, is always to be presumed innocent, unless and/or until it has been proven to the requisite standard, otherwise.

[154] Accordingly, whilst remaining under interdiction, the interdicted party is not to be presumed either by a court of law, or by members of the public-at-large, as being guilty of any alleged wrongdoing.

[155] An equally important consideration, is that a public officer who has been interdicted, automatically, by virtue of having been interdicted, must cease to

perform the functions of the office held by that officer. It is therefore not by choice of that public officer, that he or she does not actually continue to carry out the functions of that office, while under interdiction.

[156] Accordingly, the question may reasonably be asked – If the public officer is presumed innocent whilst under interdiction and is not actually working whilst under interdiction, but that is not so, as a matter of his or her personal choice, why then should that interdicted officer, not receive his or her full public officer's salary, whilst under interdiction? That is a question which cannot, I think, be easily answered.

[157] In some cases, the interdiction proceedings may last for a very short period of time, before being concluded. In other cases though, the interdiction proceedings may last for a very long period of time. In some cases too, the interdiction proceedings, may last for neither a short, nor a very long period of time. What is a short period of time, or a very long period of time though, will, of necessity, depend on the particular circumstances of each particular case. That will be equally so, as regards whether those proceedings have lasted for a moderate period of time. Thus, there can be no set timetable for interdiction proceedings to last. Everything in that regard, will depend on the circumstances of each particular case.

[158] In respect of the case at hand, the interdiction proceedings which were instituted against the claimant on the second occasion, commenced on June 24, 2014. That was, of course, the second interdiction proceedings, as the first one had by then, been discontinued against her and she had been duly notified of same.

[159] The interdiction proceedings which are pending in respect of the claimant, have been placed on hold, because of this ongoing claim, in respect of which, when His Lordship Mr. Justice Sykes, granted leave to apply for judicial review, on July 11, 2014, he had also ordered that, *'the Public Service Commission is barred from proceeding to hear and determine the charges preferred against the*

applicant, until the Supreme Court hears and determines the issues raised in the application for judicial review.'

[160] As such, it is clear that whilst the second interdiction proceedings brought against the claimant, may be considered as having been pending for a very long period of time and this, as causing great hardship to the claimant, another reasonable viewpoint would be that the delay has been caused by the claimant's actions in having mounted a legal challenge to the second interdiction proceedings which have been instituted against her. Of course though, it must always be recognized that the institution of these court proceedings is not, a matter of privilege for the claimant, but rather, a matter of right, following on the grant of leave by this Court, which has properly entitled her, to pursue same.

[161] Even if therefore, it were to be considered as interdiction proceedings that have lasted for a very long period of time, that very long period may be entirely justified in the particular circumstances of this particular case.

[162] It follows therefore, that even if the length of time that interdiction proceedings have been ongoing for, has been very long, that cannot, in and of itself, mean that the said proceedings have been ongoing for an unduly long period of time.

[163] The critical consideration for a Court, in deciding on unfairness, *vis-a-vis* the length of time that particular proceedings have been ongoing for, is whether the said proceedings have been ongoing for an unduly long period of time. The next consideration would then be as to whether same has been ongoing for an unduly long period of time, due to the fault of either, or any of the parties who are most closely involved with these proceedings. It should be noted that in some cases, those proceedings may be ongoing for an unduly long period of time, due to circumstances beyond the control of either party who/which is/are most closely involved with these proceedings.

[164] This present claim constitutes one such circumstance, since neither party to this claim has any control over the timetable within which this court resolves this

claim. That timetable is not controlled by the parties, but rather, by this court. That is equally so, in circumstances wherein a person is interdicted, after having been criminally charged.

[165] So, back then directly to the issue as to whether or not the withholding of a portion of a public officer's salary, whilst that public officer is under interdiction, constitutes a penalty. Why should a public officer's salary be withheld to any extent whatsoever, because disciplinary proceedings are ongoing against him or her and as a consequence, he or she has been interdicted? Try as I might, the only logical reason that I am able to proffer to that question, is that, in some circumstances, it may be primarily due to the fault of that public officer, in some circumstances, that has caused or significantly contributed to having caused those disciplinary proceedings to have lasted for an unduly long period of time. Such circumstances though, must, of necessity, be rare. Those few circumstances need not be adumbrated. I have addressed, further on in these reasons, why it is that I view the contention that since, as an interdicted public officer, one is suspended from carrying out the functions of that office, one should have a proportion of one's pay suspended, as being an unsound contention.

[166] What will be a matter of one's viewpoint is whether, with the disciplinary process involving the claimant herein, having been ongoing for a very long period of time, has the same been ongoing for a period of time which can properly be characterised as unduly long, in view of the typical length of time that it takes for court claims in this court, to be concluded? Different persons can perhaps, reasonably, be of a different viewpoint, in that specific respect.

[167] Some persons may reasonably be of the view that the court proceedings challenging the interdiction have been ongoing for an unduly long period of time, whilst others may reasonably be of the view that due to the shortage of human and physical resources, the length of time that those court proceedings have been ongoing for, has not been unduly long.

[168] What cannot be disputed though, is that, firstly, no fault can be attributed to the claimant, either for her having mounted a court challenge to her interdiction which is a challenge that is presumed to have had a realistic prospect of success from the onset, since otherwise, leave to apply for judicial review, ought not to have been granted. In that regard, see: ***Sharma v Brown-Antoine*** – *[2007] 1 WLR 78 (PC)*. Secondly, no fault can be attributed to the claimant, for the length of time that her court challenge of her interdiction, has been ongoing for.

[169] In the final analysis on this issue, this court has reached the conclusion therefore, that since a party who is made subject to interdiction, is not so subject, as a matter of his or her personal choice and since, in some circumstances, those interdiction proceedings may last for a very long period of time, through no fault of the interdicted party, it follows, as a matter of fairness, that a public officer who has been interdicted and whose salary will to whatever extent, be withheld, should be afforded a hearing prior to there being recommended by the Public Service Commission, that a portion of that officer's salary, be withheld.

[170] If a public officer's salary is withheld, to whatever extent that may and will, in all likelihood, be a detriment caused to that public officer, solely by virtue thereof. That officer may have mortgage commitments and also members of his or her family, that have to be financially maintained, at least to some extent, if not wholly. How can that public officer meet those commitments, if interdicted and his or her salary, is to whatever extent, withheld? The severity of the detriment experienced, will, of necessity, vary according to the particular circumstances of each particular case.

[171] In respect of the matter now at hand, fifty percent (50%) of the claimant's salary, has been withheld. In other cases and circumstances, the interdicted party's salary may either be entirely withheld, or at the very least, withheld to some extent/proportion. Any such withholding is detrimental to the party who has been made subject to it.

[172] If therefore, **regulation 32 of the Public Service Regulations**, as those regulations are presently worded, is to be applied in respect of a public officer, or in other words if it is, that a public officer has been interdicted, then a hearing must be held prior to there being a determination made as to what proportion of that officer's salary, should be withheld, as a consequence of that interdiction. That is not because the withholding of a proportion of salary is detrimental, but because, when looked at holistically, in the Jamaican context, the suspension of an interdicted officer's salary, is unfair, when considered in the context of the applicable statutory provisions. That is thus the same as should be done, prior to any disciplinary sanction/penalty being imposed, following upon the interdiction of a public officer.

[173] There is though, an important distinction between those two scenarios, in that the **Public Service Regulations** set out a detailed procedure concerning the hearing to be held, prior to any disciplinary sanction/penalty being imposed, whereas, to the contrary, no such procedure is set out or required by those regulations as currently worded, prior to the Commission making its recommendation to the Governor-General that a portion of the interdicted public officer's salary, is to be withheld.

[174] In a circumstance such as this therefore, in view of the fairness required, if any portion of an interdicted public officer's salary is to be withheld, it is always open to this court to rectify the legislature's omission. See: ***Cooper v Wandsworth Board of Works*** – *(op. cit.),* at 194.

[175] This though, this Court duly recognizes, should only be done, in the appropriate circumstances. So as to assist in constraining the length of this judgment, I have referred to those circumstances, as are to be recognized and applied by courts in that respect, at paragraphs 233 – 251 of this judgment and therefore, have deliberately chosen, for that reason only, not to refer to same, in this segment of these reasons for judgment.

[176] Natural justice is but fairness writ large and juridically. It should be carefully noted that natural justice is not merely a well established, salutary, common-law principle, but also, a fundamental right, since it falls within the ambit of the 'protection of the law', as is embodied in section 16 of the **Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act**, 2011. In that regard, see: ***Rees v Crane*** (*op. cit.*) and ***Neville Lewis v the Attorney General*** (*op. cit.*).

[177] The hearing which is so required, as a matter of fairness, need not be an oral hearing and of course, the person who has been interdicted would have to, prior to that hearing, be provided with sufficient details as to the allegations being made and the evidence intended to be relied on, in support of these allegations, so as to enable him or her to properly respond to same. See: ***Kanda v Government of Malaya*** - *[1962] AC 322;* and ***O'Reilly v Mackman*** - *[1983] 2 AC 237*, especially at page 279F-G, per Lord Diplock. The interdicted party though, would be heard only on the issue as to what proportion of his or her salary, should be withheld, arising from the decision of the Commission to recommend that he or she be interdicted.

[178] The affected public officer may wish to put forward his or her 'defence' in response to the allegations, or may wish to point out to the Commission particular circumstances which render the relevant allegation(s), spurious, if not, perhaps even, entirely untenable. The affected party may even wish to put forward the particular reasons why it may create immense difficulty for him or her, if any portion of his or her salary is withheld. This is by no means intended to be considered as constituting an exhaustive list, but rather, merely, as setting out some factors which may be brought to the Commission's attention, arising from a hearing at that stage, which will enable fairness to be brought to bear on the process of determining the proportion of the interdicted officer's salary, which will be withheld.

[179] There is now a secondary issue, which must be addressed, arising from this Court's conclusion that the withholding of half of the claimant's salary without a hearing having been held prior thereto, constitutes a penalty and that the appropriate orders must be made to rectify that unlawful action. That secondary issue is: Since the Public Service Commission can only, by virtue of **regulation 32 of the Public Service Regulations**, recommend to the Governor-General, that a specified proportion of an interdicted public officer's salary be withheld, at what stage should the required hearing be held?

[180] I am of the view that the said hearing ought to be held, prior to any such recommendation being made by the Public Service Commission, to the Governor-General. That is the best time for said hearing to take place, because it will likely allow for a more fully informed, rather than a partially informed recommendation to be made by the Public Service Commission to the Governor-General and of course then, that will be more useful, for the Governor-General to rely on. The Governor-General will always have a discretion to exercise, in the course of deciding as to what proportion of the interdicted public officer's salary will be withheld. The holder of that august office, may or may not act in compliance with the recommendation made by the Commission. Accordingly, the Governor-General has a discretion to exercise, just as does the Commission. What is unfortunately, a certainty, from the wording of **regulation 32 of the Public Service Regulations**, is that a proportion of an interdicted public officer's salary must either be withheld or at the very worst, where, in the opinion of the Public Service Commission, special circumstances exist which justify the taking of such action, the interdicted public officer's salary, may be entirely withheld.

[181] What is also certain, is that there need only be one hearing, whether before the Public Service Commission, or before the body designated to advise the Governor-General – the Privy Council. The **Public Service Regulations** should be amended to reflect that such a hearing needs to be held and preferably it should be mandated by those **Regulations**, that said hearing be held prior to the Public Service Commission making the requisite recommendation. At present,

the regulations do not provide for any such hearing to be held, either prior to the Governor-General deciding as to what proportion of the interdicted officer's salary to be withheld, or prior to the Public Service Commission, making its recommendation as to same, to the Governor-General.

[182] For the more direct purposes of this claim though, it is this Court's conclusion that the withholding of half of the claimant's salary without a hearing having been held prior thereto, constitutes a penalty and that action is thus brought into this Court and quashed.

[183] It is worthy of emphasis at this juncture, that it is not the withholding of half of the claimant's salary which is, in and of itself a penalty. What has ultimately led to this Court having concluded that the doing of same constitutes a penalty, is the fact that said withholding occurred, without the claimant having been afforded a hearing beforehand.

[184] I am strengthened in this view of mine, based on my consideration of the **Staff Orders** for the public service, 2004, in particulars, orders numbers 10.6 – 108, of same.

[185] **Staff Order 10.6** reads as follows:

> *'i) where, based on the outcome of an investigation or the findings of a committee of inquiry, an infraction is found to have occurred, the penalty imposed should be consistent with the nature and gravity of the infraction and should be progressive.*
>
> *ii) The following progression may be considered;*
>
> *a) Verbal warning*
>
> *b) Written reprimand*
>
> *c) A fine*
>
> *d) Deferment or withholding of increment*

e) Suspension without pay for a period not exceeding three (3) months

f) Reduction in rank

g) Dismissal

[186] Order 10.7 reads as follows:

'i) Where an infraction is considered to be serious, and pending the outcome of disciplinary proceedings, the accused officer may be interdicted from duty on half, quarter or no salary.

ii) Where an officer has been, or is about to be charged with a criminal offence, he/she may be interdicted from duty on half, quarter or no salary, pending the outcome of the criminal proceedings.'

[187] Order 10.8 reads as follows:

'i) Employees who have reason to believe that a disciplinary process was unfair, or who are displeased with the disciplinary penalty imposed, may appeal to the Privy Council through the Public Service Commission.

ii) If, following a ruling by the Public Service Commission the employee is still displeased he/she may make a reference to the Privy Council.'

[188] Try as I might, I have been unable to find any provision in the **Public Service Regulations**, specifically permitting a public servant whose salary has either been withheld totally, or partially, to address the Public Service Commission as to same, either on the ground that such will create undue difficulty for him or her, or based upon any other ground. That may be the reason why the defence counsel did not cite any specific regulation or staff order in support of her specific proposition that if a public officer on a withheld salary is having particular financial difficulties, he/she can bring same to the defendant's attention and the

defendant can thereafter address its mind to same and if necessary, rectify same. The closest provision, in either the **Public Service Regulations**, or the **Staff Orders**, that I could find, which could possibly be applied in such a way, is **Order 10.8 of the Staff Orders**.

[189] **Order 10.8 of the Staff Orders** though, does not assist sufficiently, in ensuring overall fairness to the affected party. That order allows for an appeal by an affected party, after a penalty has been imposed or after an unfair disciplinary process has been effected in relation to him or her. By law, there should be a hearing before any, 'penalty' is imposed. Furthermore, it casts the onus on the affected party to establish that the disciplinary process was unfair. That latter-mentioned aspect, would perhaps be appropriate, if a hearing had earlier been held, but in circumstances such as obtain in the present case, it may be considered to be a 'disciplinary process,' in accordance with **regulation 32 of the Public Service Regulations**, to interdict a person and suspend up to a maximum of half of that person's salary, for as long as those interdiction proceedings are pending or ongoing.

[190] In a circumstance such as obtains in this case, it should not be for the affected party to prove that such a disciplinary process is unfair, in order or obtain appropriate relief from the very same body, that being the Public Service Commission, which has caused that unfairness.

[191] In a case such as the present, where no hearing has as yet been held with respect to the interdicted party, pursuant to the provisions of **regulations 42 and 43 of the Public Service Regulations**, the interdicted party must, I emphasize, be presumed innocent. She should not therefore, have to show that her suspension on half pay, is unfair, before she can obtain relief from same. The process should be such that any objective person, when looking at that process in the round, can reasonably conclude that the process of interdicting on half pay or interdicting someone and suspending a proportion of that person's pay, whilst that interdiction remains extant, would be fair.

[192] Whilst judicial views on this particular legal issue may differ, I am firmly of the view that a hearing beforehand would result in fairness to the public officer concerned, if suspension of a proportion of the public officer's salary is being considered. To do otherwise in Jamaica, in the context of the **Public Service Regulations and the Staff Orders** as currently worded, is neither more nor less, than the imposition of a penalty.

[193] Interestingly enough, **regulation 37(1) of the Public Service Regulations and Order 10.6 (ii) of the Staff Orders**, have specifically designated suspension without pay, for a period not exceeding three (3) months, as a 'penalty.' In the case at hand, the claimant's pay to the extent of half thereof, has been suspended for a period of much longer than three (3) months, due to the claimant's challenge of same. Is that not a 'penalty?'

[194] Added to that, is the fact that in **regulation 38 (1) of the Public Service Regulations**, it is provided that, 'subject to the provisions of this regulation, an increment shall be suspended, deferred or withheld except by the Governor-General acting upon the recommendation of the commission.' Further on, in **regulation 38(5**) of the said regulations, after having earlier referred to the permanent secretary or Heads of Department's power to suspend, for a period not exceeding three (3) months, the payment to the relevant officer, of his or her increment, the following is stated: '*In making a recommendation for the suspension, deferment or withholding of an increment the Permanent Secretary or Head of Department shall take into account the gravity of the original misconduct or dereliction of duty if any, and the nature of the officer's subsequent behaviour, or his present degree of efficiency; he shall bear in mind that ... c) 'withholding is a very serious penalty which deprives the officer of the amount of that increment ...'*

[195] If the withholding of an increment for three (3) months is considered, in the very wording of the **Public Service Regulations**, as constituting a 'penalty,' why then,

should not the withholding of a portion of one's salary not also be viewed as constituting a 'penalty?'

[196] On a separate, yet related issue**, Staff Order 10.7 (i)** may also have contributed to the defendant having fallen into error, as disclosed by their counsel during her submissions, when, as I have concluded, she erred in having submitted that the defendant had no discretion other than to suspend 50% of the claimant's salary while the claimant remained/remains on interdiction. I so conclude because that particular staff order refers to interdiction from duty on, 'half, quarter or no salary.' **Regulation 32** on the other hand, in particular, **regulation 32 (i), (2) and (3)** which are applicable to the matter at hand, does not specifically provide what proportion of the salary of that public officer, shall be received by him or her, while he or she remains interdicted and indeed provides, that the public officer shall receive a proportion of his or her salary, while on interdiction, which shall not be less than one half. **Staff Order 10.7 (i)** specifies, to the contrary, that the accused officer, '*may be interdicted from duty on half, quarter or no salary*.' That provision in the **Staff Orders**, is in fact inconsistent with **regulations 32 (i) – (iii**) **of the Public Service Regulations**.

[197] Finally on this withholding of salary issue, I would wish to mention that I am of the view that the wording of **regulation 32(2)** ought to be further amended, as a matter of fairness to interdicted public officers, so as to make it abundantly clear that if a public officer is interdicted, the recommendation may be made by the Commission to the Governor-General, that no portion of that officer's salary be withheld and thus the interdicted officer may either be permitted to receive all of his salary, or a proportion of his salary, as the Commission shall recommend to the Governor-General.

[198] That recommendation is not one which the legislature or the defendant will be obliged to follow, since it is not directly pertinent to the matter at hand, but I do hope that same will be followed, nonetheless, simply as a matter of overall

fairness and to avoid that becoming a direct issue in future cases before this Court.

The interaction and relationship between the staff orders and the Public Service Regulations

[199] It is important to note that the **Staff Orders** are not in fact, law, but only constitutes that which ought to be considered as a useful guide and summary of the law relating to public officers and matters pertaining to the public officers which those persons hold.

[200] The wording of the portion of those **Staff Orders** which is headed – 'Introduction,' makes this clear. It is worthwhile quoting that wording, to some extent. Same is partially quoted, immediately below:

> 1) *'The Staff Orders of the Public Service of Jamaica governs the conditions of service for Public Officers. It comprises provisions from relevant legislation, regulations, policies, directives and the results of collective bargaining agreements between the Government and the respective unions and staff associations...'*
>
> 3) *'It is the responsibility of each Permanent Secretary/Head of Department to ensure that the Staff Orders and all Government notifications and instructions issued from time to time are brought to the attention of employees and made readily available and easily accessible.'*
>
> 4) *'Any or all of the provisions of the Staff Orders may be adopted for use by any other entity within the wider Public Service.'*

[201] If that which is set out in the **Regulations**, is mis-stated in the **Staff Orders**, it must be the **Regulations** that public service personnel in Jamaica, should always consider themselves as being authoritatively guided by.

[202] The **Staff Orders** were last revised in 2004. To my mind, it is now time for them to be revised again, this especially bearing in mind that there exists, to my mind, at least one important mis-statement in the **Staff Orders**, as has already been referred to, in those reasons, at paragraph 196. There may be other mis-statements therein, but I have not had regard to other aspects of the **Staff Orders**, since same were not relevant for present purposes.

Whether the defendant was required to provide reasons for the interdiction on half salary and/or why it was in the public interest to do so

[203] Finally on this issue, in view of this Court's conclusion as to the withholding of the claimant's half salary, being a penalty, it is now unnecessary for this court to address the issue as to whether the defendant was required to provide reasons for the interdiction on half-salary and/or why it was in the public interest to do so. 'Sufficient unto the day', would be the only apposite saying to make in that regard, at this time, save and except that reasons can often, as a matter of fairness to an affected party, be required.

Whether the Governor-General, acting upon the advice of the defendant, could still have lawfully carried out certain disciplinary procedures in respect of the claimant, notwithstanding having previously delegated the power to the Permanent Secretary

[204] In the claimant's affidavit which was filed on July 25, 2014, in support of her Fixed Date Claim Form, as she was required to do, by virtue of rule 56.9 of the Civil Procedure Rules ('CPR'), the claimant has set out the grounds on which the reliefs which she seeks, are founded.

[205] That is of course, a very important procedural step in any judicial review proceedings, because it is only by doing so along with, as required by rule 56.9 of the CPR, setting out the reliefs sought and the facts on which the claim is based, that the defendant will be in a proper position to know and respond to the case which has to be met.

[206] There was no application made on the claimant's behalf, at any time during court proceedings pertaining to this claim, to amend that Fixed Date Claim Form. In fact, the claimant could have through her Attorney, without the need for an application to this Court, have amended her Fixed Date Claim Form, without this Court's permission, at any time prior to the case management conference, or in more precise terms, at any time prior to the, 'first hearing' of the Fixed Date Claim Form having been held. That option though, was never exercised by the claimant, through her Attorney.

[207] The significance of the failure to do so, in the context of this particular issue, is that it will be recalled, as stated earlier on in these reasons, that it was only in response to defence counsel's submissions, as made at trial, that the claimant's counsel had raised for the first time, that disciplinary control was not exercised by the appropriate person and that the appropriate person was the Permanent Secretary.

[208] That was not set out by the claimant, in her Fixed Date Claim Form as one of her grounds for judicial review and accordingly, it does not now properly lie before this Court, as a ground upon which the claimant can properly succeed, in respect of her claim. In reality, it is not, in light of that context, an issue which requires any further consideration by this Court, for present purposes.

[209] In any event though, it is an unmeritorious issue, since the Permanent Secretary undoubtedly acted appropriately in having not exercised ultimate disciplinary control over the claimant, since the claimant had raised the issue of 'bias' against her. In the circumstances, the claimant obtained the benefit of what she has

wished, which was for an unbiased and objective body to exercise any disciplinary control which was to be exercised in relation to her. That unbiased and objective body, would be none other, than the Governor-General, in conjunction with the defendant.

[210] Whilst it is correct to state that the Governor-General had previously, pursuant to his office's powers under section 127(1) of the **Constitution**, delegated that power to the Permanent Secretary, via the **Delegation of Functions (Public Service) Order**, 2000, if the Permanent Secretary could not properly carry out that delegated function, in the context of disciplinary proceedings which were being pursued against the claimant, then certainly, the function which had previously been delegated, could still be carried out, by the party who delegated that function. It could not be otherwise and indeed, I agree with the defence counsel's submission that the delegation of authority to the Permanent Secretary, does not preclude the Governor-General, acting on the advice of the Public Service Commission, from exercising disciplinary control.

[211] It is not that the power to exercise disciplinary control will be exercised simultaneously by the Governor-General and the Permanent Secretary. It is instead, that the delegation of authority to exercise disciplinary control shall be exercised by the party or parties, to whom that authority has been delegated, but that shall be without prejudice to the exercise of such power by the Governor-General acting on the advice of the Public Service Commission. That is my interpretation of **section 127(1) of the Constitution**, which was set out at paragraph [56] of these reasons.

[212] That section of the **Constitution**, to my mind, allows for the Governor-General to delegate the power of disciplinary control, as well as the power of appointment and removal of public officers to such one or more members of the Public Service Commission, or such authority or public officer, as may be specified by instrument under the Broad Seal, but those powers shall be exercised without prejudice to the exercise of such powers or any such power, by the Governor-

General, acting on the advice of the Commission. Accordingly, notwithstanding that said power or powers have been delegated by the Governor-General, this would not preclude the Governor-General from so exercising that power of those powers. **Section 127(1) of the Constitution**, expressly so permits.

Whether the claimant was constitutionally entitled or had a right founded on natural justice and/or had a legitimate expectation to be heard by the defendant or Permanent Secretary prior to the recommendation having been made to the Governor-General that she be interdicted

[213] As regards the issue of legitimate expectation, in the context of whether the claimant had a legitimate expectation to be heard by the defendant or Permanent Secretary prior to the recommendation having been made to the Governor-General that she be interdicted, the claimant must, in order to be successful on that ground, allege and prove that she had what, in law, is characterized as a, 'legitimate expectation' which ought to be recognized and enforced by this Court, since that 'legitimate expectation' has been dispelled by the defendant's subsequent actions.

[214] A natural corollary of that is that since this claim is made against the Public Service Commission as the sole defendant, the relevant 'legitimate expectation', must be proven by the claimant, if she is to be successful on the 'legitimate expectation' ground, to have been made or created as a consequence of the defendant's action and/or comments. Thus, as was reiterated by the Privy Council, in the case ***HMB Holdings Ltd v Cabinet of Antigua and Barbuda*** - *[2007] UKPC 37* at paragraph [31], a legitimate expectation claim fails, *'if the public body has done nothing or said nothing which can legitimately have generated the expectation that is contended for.*' As stated in ***Council of Civil Service Unions and ors v Minister for the Civil Service*** *(op. cit.)*, at page 401B, *'Legitimate...expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue.'*

[215] In disposing of this particular ground of this claim, that being the ground that based upon, 'legitimate expectation', the claimant ought to have been heard by either the Public Service Commission or the Permanent Secretary, prior to the recommendation having been made to the Governor-General that she be interdicted, suffice it to state that the claimant's evidence has fallen woefully short of what would have been required to establish, on a balance of probabilities, that the claimant ever had any such, 'legitimate expectation.'

[216] The claimant's evidence, as set out in both of her affidavits which were respectively filed on July 24 and November 7, 2014 have only when considered collectively, addressed the issue of, 'no opportunity to be heard', using that same rubric, in five paragraphs which have been numbered as paragraphs 12-16 of the claimant's affidavit in support of this claim, which was filed, first in time.

[217] What those paragraphs of sworn evidence and the exhibit referred to within those paragraphs – to the extent as is relevant for present purposes, refer to, is firstly, the claimant's contention that to have not afforded her a hearing, prior to having interdicted her, was unfair to her and that, had a hearing been afforded to her beforehand, it is her view, as expressed clearly in paragraph [12] herein, that she perhaps, would not have been placed on interdiction. Secondly, she has asserted, in those paragraphs, a fact which is, of course, not in dispute, which is that, she was not afforded a hearing before the recommendation was made by the Commission to the Governor-General that she interdicted, or prior to her having been interdicted. Thirdly, in those paragraphs of her written and sworn evidence, the claimant has asserted that her constitutional right to a hearing has been breached and that her common law right to natural justice has been breached, in so far as she was not afforded a hearing, prior to her having been interdicted. That of course though, is a conclusion that only a court of law can properly draw and is thus, not evidence which is worthy of more than a brief, passing reference.

[218] In the final analysis, the evidence led by the claimant is insufficient to even enable this court to draw a reasonable inference that the defendant had done, or said anything, in relation to the claimant, or any other public officer for that matter, at any time, which could have and most importantly, which did in fact create in the claimant's mind, a legitimate expectation, that she would have been afforded a hearing, prior to her having been interdicted.

[219] In the event that I am wrong in having reached that conclusion though, I will go further and consider whether, assuming that the claimant had that expectation and that said expectation had been created by words or actions of the defendant and/or past practice of the defendant, such would be, in the particular circumstances of this particular case, of a nature as could properly give rise to this Court enforcing that expectation as being one which falls within the broad category of legal jurisprudence, known simply as a 'legitimate expectation.'

[220] What then, are the particular circumstances of this particular case? The claimant has been interdicted by the Governor-General, who would have in that regard, acted on the recommendation of the Public Service Commission, in having decided to interdict her. The claimant was not afforded a hearing, prior to having been interdicted and following her having been interdicted, she was placed on half pay, pending the conclusion of the disciplinary proceedings brought against her. She has, by means of this claim, which was, as legally required, instituted with the leave of this Court, challenged her interdiction and suspension from duties, on half pay.

[221] The **Public Service Regulations**, in **regulations 42 and 43** respectively, set out the requirements regarding a hearing which must be held, in relation to any disciplinary proceeding instituted against a public officer. **Regulation 42** sets out the procedure concerning a hearing into an allegation of misconduct which is not in the opinion of the 'appropriate authorized officer', so serious as to warrant proceedings under **regulation 43**, with a view to dismissal. **Regulation 43** sets out in much greater detail than **regulation 42**, the procedure to be followed, in

terms of a hearing, in circumstances wherein it is being sought to have the disciplinary proceedings against a public officer, possibly lead to the dismissal of that public officer.

[222] It would be contrary to law, if a public officer were to be dismissed from his or her employment in the office which he or she holds in the public service, without the procedure as set out in **regulation 43** of the **Public Service Regulations** having been applied, in the context of the disciplinary allegations made against that officer.

[223] Overall though, the range of penalties that may be imposed on a public officer against whom a disciplinary charge has been established, vary in strength/severity, ranging from a reprimand to dismissal. It is **regulation 37** of the **Public Service Regulations**, that sets out the variety of penalties that may be imposed.

[224] Accordingly, it is very clear from the wording of the **Public Service Regulations**, that once a disciplinary allegation has been made against a public officer, a hearing must be held into that allegation and that hearing, in whatever form it may take, will permit the accused public officer, to take an active part in defending himself or herself, during the pendency of those disciplinary proceedings.

[225] The precise nature of that hearing will vary, depending on whether dismissal is being sought as a possible sanction, of that disciplinary offence allegation, has been duly proven.

[226] The **Public Service Regulations** though, do not necessitate or specify that there should be a hearing, prior to interdiction.

[227] What is important to note at this stage though, is that a public officer may be interdicted, arising from there having been disciplinary allegations made against him or her, but that does not at all mean that the sanction likely to be imposed, or

that even will be sought to be imposed on him or her, if that disciplinary allegation is at a later stage, following upon a hearing determined as having been 'established', is dismissal from employment. A range of other less severe/strong sanctions may be imposed.

[228] What then is an, 'interdiction'? In the Oxford Dictionary of the English Language, the word 'interdiction', is defined as meaning, 'an authoritative prohibition.' Thus, when one is interdicted as a public officer, what it means is that said public officer has been authoritatively prohibited, by the directive of the Governor-General, or anyone to whom the Governor-General may have lawfully delegated that authority, from carrying out the functions of the office which he or she holds, during the pendency of the required disciplinary proceedings, a significant part of which must always include, a hearing into those allegations.

[229] From a, 'legitimate expectation,' context therefore, with **the Regulations** being worded as they are, the claimant could not properly have had that which is known and recognized in law, as a, 'legitimate expectation,' that a hearing would have been held prior to her having been interdicted for the purpose of determining whether she should have been interdicted or not . The law requires otherwise, at present.

[230] Any expectation that the claimant may have had, that she would have been afforded a hearing prior to her interdiction, would have been an expectation contrary to the clear intent of the **Public Service Regulations**. That therefore, even if she (the claimant) had it and even if it were proven that she had it, arising from the actions and/or promises made by the defendant, cannot give rise to an expectation that would be enforceable in law, because to do so, would over-ride the clear provisions of the legislation which applies to that issue. Legitimate expectations must yield to primary and secondary legislation. See: ***R v Secretary of State for Education and Employment, Ex parte Begbie*** *- [2000] 1 WLR 1115*, especially at 1125D and 1129E; ***R v DPP Ex parte Kebeline*** *- [2000] 2 AC*

326, at 368E ; and ***R v Staffordshire Moorlands DC, Ex parte Bartlam*** - *(1998) 77 P & CR 210.*

[231] Even though, 'legitimate expectation' cannot aid the claimant, she is also relying on the well-established principles of natural justice to aid her in her contention that she should have been afforded a hearing prior to her having been interdicted. There is no doubt that natural justice is a constitutional right. The case law which supports that assertion, was referred to earlier on in these reasons. That though cannot mean that the claimant was entitled to a hearing prior to having been interdicted. Rather, the question now to be answered in those reasons for judgment, is whether the claimant's right to natural justice, or in other words, fairness writ large, were breached, arising from the failure to have afforded her a hearing, prior to her having been interdicted.

[232] If the claimant succeeds in her assertion that she was entitled to a hearing prior to being interdicted, then the net effect of that would be that she would ultimately, have to be afforded two (2) hearings, prior to any disciplinary sanction being imposed on her. That would be so, because, she would then be entitled to a hearing, not only prior to her interdiction, but also, by virtue of **regulations 42 and 43 of the Public Service Regulations**, another hearing before a determination is made as to whether or not any penalty should be imposed on her.

[233] An interdiction can, in certain circumstances, be properly considered as being very detrimental to the party who has been interdicted. That though, cannot and will not always be so.

[234] A party against whom a disciplinary allegation has been brought, within the context of Jamaica's public service, will not be entitled, as of right, to multiple, or even more than one 'hearing', pertaining to that disciplinary allegation. What he or she will be entitled to, is fairness, in the proceedings, from start to finish. The

important question now to be answered is: Did fairness to the claimant require that she be afforded a hearing prior to her having been interdicted?

[235] It is helpful to quote from portions of the judgment delivered by the Privy Council, in the case ***Auburn Court Ltd v The Kingston and Saint Andrew Corporation and others*** (*op. cit.*), in particular paragraphs [46] – [49] and [51], of that Court's judgment, which was delivered by Lord Hope of Craighead –

> *'[46] There is no doubt that the principles of natural justice require that before a decision is taken by a tribunal that is acting judicially the person against whom it is taken must be given a fair opportunity of setting out the facts which he thinks are relevant and the arguments on which he relies. But, as Lord Reid observed in Ridge v Baldwin [1964] AC 40, 65, [1963] 2 All ER 66,attention needs to be paid to the great difference between the various cases in which it has been sought to apply this principle. He elaborated upon this point in Wiseman v Borneman [1971] AC 297, [1969] 3 All ER 275, 308:*
>
> *"Natural justice requires that the procedure before any tribunal which is acting judicially shall be fair in all the circumstances, and I would be sorry to see this fundamental general principle degenerate into a series of hard-and-fast rules. For a long time the courts have, without objection from Parliament, supplemented procedure laid down in legislation where they have found that to be necessary for this purpose. But before this unusual kind of power is exercised it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation."*
>
> *[47] The legislation under which the committee were acting in this case does not require the applicant to be present at the meeting at which the decision is to be taken as to whether or not to grant his application. He has, of course, an opportunity to set out his case that permission should be granted in his application. It must be accompanied with plans and such other details as the authority may require. Regulation of the Kingston and St Andrew Building (Notices and Objections) regs 1938 provides that a hearing may be held if there are objections to the proposal, at which both sides may*

appear or be represented. It is obvious that the principle requires that, if an objector is to be heard by the committee, the committee ought to give the applicant an opportunity of being heard also. In a contest of that kind, one side cannot properly be heard without hearing the other.

[48] But there were no objections for the committee to consider in this case. The meeting was, of course, attended by officials such as Mr White, whose function it was to provide the advice and information that the committee needed before the decision was taken. The question whether the appellant should be present too and given an opportunity of being heard when that advice was given was at the discretion of the committee.

[49] Megarry J set the appellant's argument into its proper context when in Gaiman v National Association for Mental Health [1971] Ch 317, [1970] 2 All ER 362 333C he said:

> *". . . local planning authorities refuse thousands of planning applications each year without giving the applicant any hearing, leaving him to his remedy by way of appeal to the Minister, when a full hearing is given; yet I know of no suggestion that local planning authorities are thereby universally acting in contravention of the principles of natural justice."*

As that observation indicates, the question of fairness must be answered by looking to the whole of the procedure which is provided by the statute, including the provision that is made for the applicant to be heard by way of an appeal.

[51] Their Lordships have concluded that, when account is taken of the whole of the procedure which the statutes lay down, including the opportunities for appeal, the rules of natural justice were not breached in this case.'

[236] In considering any issue involving an alleged breach of natural justice, particularly one as regards alleged procedural unfairness, which is the foundation of this claim, it is essential to consider the relevant provisions of any pertinent legislation, so as to firstly, determine whether the statutory framework makes

adequate provision for fairness and secondly, whether the committee established under the statute and/or the proceedings conducted in relation to the applicant who thereafter pursued a claim for judicial review, were conducted in accordance with that fair statutory procedure and overall, whether he or she was treated in a fair manner.

[237] Furthermore, as was emphasized by Viscount Dilhorne in ***Pearlberg v Varty (Inspector of Taxes)*** - *[1972] 2 All ER 6*, at 15 and 16,

> *'one should not start by assuming that what Parliament has done in the lengthy process of legislation is unfair. One should rather assume that what has been done is fair until the contrary is shown.'*

On this point, see the similar words as were expressed by Lord Reid, in ***Wiseman and Ors. v Borneman and Ors.*** (*op. cit.*) at 545. That dicta was referred to and applied by the Privy Council, in ***Furnell v Whangarei High Schools Board*** - *[1973] AC 660, at 681.* The judgment in the ***Furnell*** case, it should be noted, was a majority judgment of three (3) Judges in favour and two (2) dissenting judgments.

[238] I think that equally useful dicta from the ***Pearlberg v Varty (Inspector of Taxes)*** (*op. cit.*), particularly in the context of this claim, can be found at 17, where it is reported that Lord Pearson stated as follows:

> *'A tribunal to whom judicial or quasi-judicial functions are entrusted, is held to be required to apply those principles in performing those functions, unless there is a provision to the contrary. But where some person or body is entrusted by Parliament with administrative or executive functions, there is no presumption that compliance with the principles of natural justice is required, although, as 'Parliament is not to be presumed to act unfairly', the courts may be able in suitable cases (perhaps always) to imply an obligation to act with fairness. Fairness, however, does not necessarily require a plurality of hearings or representations and counter-representations.'*

In reference to that last quotation, I would only wish to make it clear that I am aware that the case: ***Ridge v Baldwin*** (*op. cit.*) has exploded the myth that natural justice applies only to judicial and quasi-judicial proceedings and not to administrative proceedings. I have adopted that view as expressed in ***Ridge v Baldwin*** in rendering judgment upon this claim.

[239] As already stated, the requirements of natural justice, or in other words, fairness, will vary from case to case. That is in fact why it is not typically, particularly helpful to a Court in cases involving alleged violations of natural justice, to rely on case law precedent. Thus, it comes as no surprise that in one of the leading texts on this area of law, the learned author – Wade, in his text – **Administrative Law 10th edition, 2009** states as follows, at page 463 and cites the following cases:

> *'Suspension from office, as opposed to dismissal, may be nearly as serious a matter for the employee, but the courts have wavered between two different views. One is that the employer needs a summary power to suspend without hearing or other formality as a holding operation, pending inquires into suspicions or allegations,' see: Lewis v Heffer - [1978] 1 WLR 1061 ('party officers suspended "as a matter of good administration"); R v Cole - (1979) 27 ACTR 13 ('suspension without hearing valid, but not as to withholding of pay). The other is that "suspension is merely expulsion pro tanto. Each is penal and each deprives the member concerned of the enjoyment of his rights of membership or office." See: John v Rees - [1970] Ch. 345 and see also: R v Committee of Lloyd's ex p. Posgate - The Times, 12 January 1983. Taking the former view in a controversial decision, a majority of the Privy Council held that a schoolteacher in New Zealand need not be given a hearing before being suspended without pay pending the determination of a disciplinary charge against him on which he would be fully heard in accordance with statutory regulations,' see: Furnell v Whangarei High Schools Board [1973] AC 660 ("Lords Reid and Dilhorne dissenting") 'Although it was recognized that suspension without pay might involve hardship and also a temporary slur on the teacher, it was held that he had accepted this possibility in the terms of his employment and that the disciplinary procedure as a whole was fair. It has been said also that a police*

officer need not be heard before being suspended from duty pending investigation of charges of misconduct.' See: Norwest Holst Ltd. v Secretary of State for Trade [1978] Ch. 201 at 224, repeated in Cinnamond v British Airports Authority [1980] 1 WLR 582 at 590 (Lord Denning MR).

[240] Then there are the cases involving either the removal from office, or the proposed removal from office of Judges. See: ***Barnwell v Attorney-General and another*** *– (1993) 49 WIR 88; and* ***Rees v Crane*** *– (1994) 2 AC 173.* Of those cases it was held by the Guyana Court of Appeal in the former-mentioned case and the Privy Council in the other, that prior to a recommendation being made that a Judge be suspended from office and be made subject to possible removal from office, a hearing should be held and the Judge concerned should be given an adequate opportunity to defend himself or herself, at that preliminary stage, notwithstanding that he or she will undoubtedly be afforded such a hearing, at a later stage, when a committee is formed, in accordance with the applicable constitutional provisions, to consider those allegations.

[241] Unsurprisingly, upon the trial of this claim, the claimant's lead counsel relied on the ***Rees v Crane*** case (*op. cit.*), whereas the defence counsel, relied heavily on the ***Furnell*** case (*op. cit.*)

[242] In the ***Rees v Crane*** case (*op. cit.*), both the ***Furnell*** case (*op. cit.)* and the ***Lewis v Heffer*** case (*op. cit.*) were considered by the Justices who presided and their judgment was delivered by Lord Slynn of Hadley. The facts underlying the ***Rees v Crane*** case (*op. cit.*), can helpfully be extracted from the headnotes to that judgment, as reported. Same is set out, next.

[243] The respondent was a Judge of the High Court of Trinidad and Tobago and thus, could only be removed from office from misbehaviour or for inability to perform the functions of his office, whether from infirmity of body or mind, or any other cause, in accordance with the provisions of section 137(1) of the **Constitution of the Republic of Trinidad and Tobago**, 1976.

[244] After having received complaints about the respondent, the Chief Justice of Trinidad and Tobago decided not to include him on the roster of Judges who were to sit in Court for the following term. The Judicial and Legal Service Commission, of which the Chief Justice was ex officio a member, agreed with that decision. The respondent was eventually informed that it had been decided that he should cease to preside in Court until further notice. Without notifying the respondent the Commission met to consider whether to make a representation to the President under section 137(3) that the question of removing the respondent from office ought to be investigated. After the Commission had requested further information, the Chief Justice supplied it with the statistics and records related to the respondent's performance in Court and thereafter, ceased to participate in the Commission's deliberations. The respondent was not told of the complaints against him, or given an opportunity to answer them. The Commission made a representation to the President under section 137(3) that the question of removing the respondent from office for inability to perform the functions thereof, due to body infirmity and/or misbehaviour, ought to be investigated. In accordance with section 137(3), the President appointed a tribunal to inquire into the matter, report on the facts and recommend to him, whether he should refer the question of removal of the respondent from office to the Judicial Committee of the Privy Council, and pursuant to section 137(4), the President suspended the respondent from performing the functions of his office.

[245] The respondent commenced proceedings against the appellants, who were the three members of the tribunal, the Chief Justice and the other four members of the Commission, and the Attorney-General of Trinidad and Tobago, seeking judicial review and redress for alleged infringement of his constitutional rights. Blackman J. dismissed both the application for judicial review and the constitutional motion. The Court of Appeal, by a majority, allowed the respondent's appeal in part and quashed the Chief Justice's decision to exclude the respondent from the roster and the Commission's representation to the President, directed to the tribunal not to inquire into the matter and ordered

damages to be assessed, but allegations of bias against the Chief Justice and the Commission were rejected. On the appellant's appeal and the respondent's cross-appeal, both of those were dismissed.

[246] ***Lewis v Heffer*** was distinguished but the dicta of Tucker LJ. in ***Russell v. Duke of Norfolk -*** *[1949] 1 All ER 109, 118,* Court of Appeal and of Lord Morris of Borth-y-Gest in ***Furnell v Whangarei High Schools Board*** (*op. cit.*) at 679, (Privy Council), were applied.

[247] Lord Slynn in his judgment, to my mind, stated the applicable and pertinent legal principle commencing in the report at 191G and continuing on to 192C. It is therefore, worthwhile, for present purposes, to quote that extract from his judgment. Same is done, below.

> *'It is clear from the English and Commonwealth decisions which have been cited that there are many situations in which natural justice does not require that a person must be told of the complaints made against him and given a chance to answer them at the particular stage in question. Essential features leading the courts to this conclusion have included the fact that the investigation is purely preliminary, that there will be a full chance adequately to deal with the complaints later, that the making of the inquiry without observing the audi alteram partem maxim is justified by urgency or administrative necessity, that no penalty or serious damage to reputation is inflicted by proceeding to the next stage without such preliminary notice, that the statutory scheme properly construed excludes such a right to know and to reply at the earlier stage.*
>
> *But in their Lordships' opinion there is no absolute rule to this effect even if there is to be, under the procedure, an opportunity to answer the charges later. As Professor de Smith puts it in de Smith's Judicial Review of Administrative Action, 4th ed. (1980), p. 199:*
>
> > *"Where an act or proposal is only the first step in a sequence of measures which may culminate in a decision detrimental to a person's interests, the courts will generally decline to*

> *accede to that person's submission that he is entitled to be heard in opposition to this initial act, particularly if he is entitled to be heard at a later stage." (Emphasis added.)*
>
> *In considering whether this general practice should be followed the courts should not be bound by rigid rules. It is necessary, as was made clear by Tucker L.J. in Russell v. Duke of Norfolk [1949] 1 All E.R. 109, 118 (as approved by Lord Guest in Wiseman v. Borneman [1971] A.C. 297, 311, and by Lord Morris of Borth-y-Gest in Furnell v. Whangarei High Schools Board [1973] A.C. 660, 679) to have regard to all the circumstances of the case.'*

[248] Lead counsel for the claimant, also relied heavily on the case ***Mafabi v Attorney General*** - *[2014] 4 LRC 752,* which is a reported judgment of the Constitutional Court of Uganda. Suffice it to state though, as regards that case, that it is my view that the same does not add anything useful, for present purposes, save and except that in that case, which concerned a Magistrate against whom, disciplinary proceedings were ongoing and who had been interdicted as part of the process of those proceedings, it was held that what was necessary before interdiction, were facts relating to the alleged misconduct and that there was no need for a hearing, or an investigation to be conducted, prior to the interdiction. The petitioner's submission to the contrary, was not accepted by the Ugandan Constitutional Court.

[249] Prior to carefully considering the peculiar facts of this case, along with the particular statutory scheme which is relevant for present purposes, there is only one other point of law which needs to be referred to at this juncture, solely for the sake of completeness.

[250] That is simply that if this Court were to reach the conclusion that fairness to the claimant required that she be afforded a hearing, prior to her having been placed on interdiction, then this Court will in this particular case, rectify the omission of the legislature. As stated in ***Lloyd v McMahon*** - [1987] 1 All ER 1118, at 1161 by Lord Bridge of Harwich –

> *'In particular, it is well established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness.'*

That is a quotation which followed from a principle stated in one of the early leading cases on natural justice, that being: ***Cooper v Wandsworth Board of Works*** – (*op. cit.*) at 194, where it is reported that Byles J. stated that a long course of authority established that *'although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the Legislature.'*

[251] Furthermore, as stated in ***Wiseman and Ors. v Borneman and Ors.*** (*op. cit.*), by Lord Reid –

> *'Natural justice requires that the procedure before any tribunal which is acting judicially shall be fair in all the circumstances, and I would be sorry to see this fundamental general principle degenerate into a series of hard-and-fast rules. For a long time the courts have, without objection from Parliament, supplemented procedure laid down in legislation where they have found that to be necessary for this purpose. But before this unusual kind of power is exercised it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation.'*

[252] All of the dicta as quoted immediately above, have been applied by me, not only in considering and adjudicating on the issue as to whether the claimant ought to have been afforded a hearing prior to her interdiction, but also, on the issue as to whether the claimant ought to have been afforded a hearing, prior the determination having been made by the Public Service Commission that half of the claimant's salary is to be withheld whilst the disciplinary proceedings are ongoing against her.

[253] The latter determination was, to my mind, patently unfair, bearing in mind the great hardship that such a determination would likely cause to any affected party and has caused the claimant and bearing in mind that there exists no procedure in the **Public Service Regulations** whatsoever, specifically allowing, or requiring, or for that matter, precluding any such hearing, whether before or after that determination has been made.

[254] Surely to pay to the affected pay the aggregate salary sum withheld, after that person has been vindicated, or adjudged as not culpable, would not and could not relieve the harshness of the withholding of salary, without having held a hearing involving the affected public officer, beforehand, if for instance, one has lost one's house or one's car, or was unable to maintain one's family, during the period while that salary withholding remained extant.

[255] With respect to the interdiction issue, in terms of whether or not the claimant ought to have been afforded a hearing beforehand, again, it is worthy of reiteration, that what must overall weigh most heavily on the Court's mind, is whether or not there is anything unfair done to a public officer who has been interdicted without a hearing, in circumstances wherein there exists statutory provisions which specifically not only permit, but require a hearing to be held thereafter.

[256] To my mind, for administrative purposes, there is nothing unfair being done to anyone who is interdicted without a hearing. The interdiction is neither a punishment nor a penalty. It is a suspension from carrying out the functions of one's office. In many circumstances, that will have to be allowed for and done, without a hearing beforehand. That is especially so, in circumstances wherein it has not at all been alleged by the claimant, that the Public Service Commission acted unreasonably in having decided to interdict her. That is the situation in respect of this claim and in respect of the allegations made against the claimant in the disciplinary proceedings which have been brought against her and which have led to her interdiction.

[257] For my part, I do not hold the view that to interdict a public officer without holding a hearing beforehand, is generally to be viewed as being unfair, or that to have done so in respect of the claimant, was unfair in the particular context of this particular claim. That should not though, be taken as signifying, much less stating that in a different context, an interdiction without a hearing, cannot be perceived by a court as having been unfair, but, as the saying goes, 'sufficient unto the day.' Each case must be considered on its own merits.

[258] In the context of this claim, the Public Service Commission could only have recommended interdiction. The Governor-General has an independent discretion to exercise, in determining whether that recommendation should, or should not, be accepted. That independent discretion helps to assure that there will be fairness, whilst at the same time, not impeding administrative efficiency, which, if it were to be impeded, would not inure to the benefit of the public-at-large.

[259] Furthermore, it is to be noted that it is only if the Commission is of the opinion that the public interest requires that the public officer should cease to perform the functions of his office, that the Commission may then lawfully recommend that he or she be interdicted from the performance of these functions.

[260] That also contributes to overall fairness because, firstly, in order for the interdiction to have been lawfully mandated, not only would both the Public Service Commission and the Governor-General have to first be satisfied that a prima facie case is made out against the relevant public officer, in respect of the allegations which form the foundation of the disciplinary proceedings that have been brought against him or her, but furthermore, that in the context of that particular officer's job functions and the nature of the allegations made against him or her, that the public interest requires that he or she be interdicted. Additionally, in the overall statutory scheme, interdiction can lawfully be mandated by the Commission and may lawfully be logically required, over in circumstances wherein dismissal is not being contemplated as a possible sanction.

[261] Those two preliminary steps contribute to overall fairness and it cannot be forgotten that along with that, the statutory regulations provide for a hearing to be held into the allegations made, albeit that same must be held after and not before interdiction. Overall, there will be, in the typical cases, fairness to the officer concerned, who has been interdicted without there having been held any hearing beforehand, and there was, in my considered opinion, a fair procedure utilized by the defendant, in having recommended the claimant's interdiction without having held a hearing beforehand.

[262] That fair procedure, is one which is provided for, in the **Public Service Regulations** and, it is worthy of mention, that included within that procedure is an 'appeal' in the form of a 'reference' that is permitted to the Governor-General's advisory body – the Privy Council, in the event that the Public Service Commission has recommended that a public officer either ought to be dismissed or subjected to any other penalty. Furthermore, if dismissal is contemplated as a possible sanction, the Commission shall appoint a committee to enquire into the matter and that committee will be comprised of a Chairman, who shall either be a Judge, Resident Magistrate, or legal officer and in the proceedings before that committee, the officer shall be entitled to be represented by either a public officer, or an attorney-at-law, or an accredited representative of a trade union or staff association recognized as representing the category of staff of which the officer is one. See: **regulation 43** as regards the latter respect and **regulation 39, of the Public Service Regulations**, as regards the former respect. Even in circumstances wherein dismissal is not contemplated as a possible sanction, but nonetheless, some other form of sanction is contemplated or even as much as a reprimand is contemplated, the public officer concerned shall be entitled to know the whole case against him and shall be given an adequate opportunity of making his defence. See: **regulation 42 of the Public Service Regulations** in that latter- mentioned respect.

[263] That 'adequate opportunity' would entire the relevant public officer to access all materials required, in order to enable him or her to properly defend

himself/herself, even if that will necessitate that person having to supervised access to the office which that person has been suspended from performing the functions of. The claimant therefore, has no basis, at least, certainly not at this time, for complaint in that regard.

Whether the claimant's interdiction is oppressive and/or an abuse of process

[264] Since the claimant's Attorneys subsumed their contentions on this particular issue, under the broad rubric of natural justice, it follows that this Court has already fulsomely addressed its mind to same and therefore, need state nothing more, as regards same. Suffice it to state that this Court has determined that those contentions were unsuccessful in yielding the claimant's desired result, in the context of this claim. This court also has addressed the issue of delay, which the claimant's counsel had contended, rendered the claimant's interdiction, unfair and oppressive.

Whether the disciplinary charges preferred against the claimant warrant interdiction and/or dismissal

[265] As long ago as 1905, in the case - ***Westminster Corporation v London and North Western Railway Company*** - *[1905] AC 426,* at 430, it was stated by Lord Macnaghten, that:

> *'It is well settled that a public body invested with statutory powers such as those conferred upon the corporation must take care not to exceed or abuse its powers. It must keep within the limits of the authority committed to it. It must act in good faith. And it must act reasonably. The last proposition is involved in the second, if not in the first.'*

[266] Arising from the disciplinary charges that have been preferred against the claimant, it is within the discretion of the appropriately established commission of enquiry to recommend dismissal and it was within the discretion of the defendant to recommend interdiction of the claimant, if they were of the view that it was in the public interest to have so recommended.

[267] Those discretionary powers though, are not unfettered. Public authorities do not have unfettered discretion. Any discretionary power which has to be, or has been exercised by a public authority, must be, or must have been, reasonably and in good faith and in furtherance of the pertinent statutory provisions which govern the exercise of that authority. Accordingly, there is no such thing as unreviewable or unfettered administrative discretion. That applies not only to administrative (public) authorities, but also, public authorities such as government Ministers and even a Cabinet. See: ***Padfield v Minister of Agriculture, Fisheries and Food*** - *[1968] AC 997;* ***Teh Cheng Poh alias Char Meh v Public Prosecutor, Malaysia*** - *[1980] AC 458;* and ***C.O. Williams Construction Ltd. v Blackman and Another*** - *(1989) 41 WIR 31.*

[268] The now well-established doctrine that statutory powers must be exercised reasonably and in good faith and in keeping with the overall statutory objectives as regards the exercise of that power, has had to be reconciled by the Courts with the equally important doctrine that the Court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires, but if it remains within those bounds, it acts intra vires and it is not for any Court to interfere with the exercise of that discretion.

[269] As was stated in ***R v Secretary of State for Trade and Industry, Ex parte Lonrho Plc.*** - [1989] 1 WLR 525, that being an appeal from the judgment of a Court which had invalidated a Secretary of State's decision to postpone publication of a report by company inspectors, the House of Lords held that the Divisional Court's judgments, *'illustrate the danger of judges wrongly though unconsciously substituting their own views for the views of the decision-maker who alone is charged and authorised by Parliament to exercise a discretion.'* The Court must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended.

[270] As was laid down in ***Associated Provincial Picture Houses Ltd v Wednesbury Corporation*** - *1948] 1 KB 223*, *'a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority.'* As has been stated in the text: Wade – **Administrative Law** (*op. cit.*) – *'The rule of reason is not therefore the standard of "the man on the Clapham omnibus." It is the standard indicted by a true construction of the act which distinguishes between what the statutory authority may or may not be authorized to do. It distinguishes between proper use and improper abuse of power. It is often expressed by saying that the decision is unlawful if it is one to which no reasonable authority could have come. This is the essence of what is most commonly called "Wednesbury unreasonableness"...'*

[271] In respect of her claim, the claimant's counsel has not alleged unreasonableness as per 'Wednesbury unreasonableness,' in respect of the decision made by the defendant, to recommend her interdiction. Furthermore, it is not the defendant, but rather, the Governor-General that has interdicted her. It is therefore not open to the claimant to challenge the defendant, in terms of the discretion exercised by the Governor-General, to interdict her.

[272] Finally, the claimant has not been dismissed from her employment within the public service. It is not open to this court, in circumstances wherein it is open to the appropriate party to recommend a less severe punishment arising from the allegations made, to conclude that those charges do not warrant dismissal. Once again, as the saying goes – 'sufficient unto the day.'

CONCLUSION

[273] This Court, in the circumstances, orders as follows:

It is ordered that:

1) Judgment in favour of the claimant is granted to the extent as specified in orders numbers (2) and (3) below, but in all other respects, the claimant's claim fails.

2) Withholding of half of the claimant's salary without a hearing having been held beforehand, is brought into this court and quashed.

3) The claimant shall be afforded a hearing as regards what portion of her salary ought to be withheld, whilst the disciplinary proceedings instituted against her, are ongoing and that hearing shall promptly hereafter, be held.

4) Each party shall bear their/her own costs.

5) The claimant shall file and serve this order.

.....
Hon. K. Anderson, J.