[2017] JMCC COMM.38

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2017CD00355

IN THE MATTER of a Discretionary Retirement Benefit pursuant to a Contract of Employment of the Claimants with the Defendant.

AND

IN THE MATTER of the Port Authority Act.

AND

IN THE MATTER of the Port Authority (Superannuation) Regulations.

BETWEEN	**BEVERLY WILLIAMSON**	**CLAIMANT**
AND	**THE PORT AUTHORITY OF JAMAICA**	**DEFENDANT**

CONSOLIDATED WITH:

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2017CD00356

BETWEEN	**RICHARD ROBERTS**	**CLAIMANT**
AND	**THE PORT AUTHORITY OF JAMAICA**	**DEFENDANT**

IN CHAMBERS

Mr Allan Wood QC and Mr Francois McKnight instructed by Livingston, Alexander & Levy, Attorneys-at-Law for the Claimants

Mr B St Michael Hylton QC and Mr Kevin Powell instructed by Hylton Powell, Attorneys-at-Law for the Defendant

Contract –Principles to be applied by employer in making discretionary payment provided for by contract of employment - Whether discretion properly exercised - Whether decision relying on opinion of Auditor General without verifying its accuracy is irrational

13th, 16th and 30th November 2017

LAING, J

The Claims

[1] The Claimants, Beverly Williamson ("Ms Williamson") and Richard Roberts ("Mr Roberts"), are retired employees of the Port Authority of Jamaica (the "Authority") who each filed virtually identical fixed date claim forms against the Authority on 5th July 2017. On 13th November 2017 it was ordered, by consent, that the two claims be heard together. The orders sought by Ms Williamson are as follows:

> 1. *A Declaration that the provision made in the Claimant's contract of employment for the payment of a discretionary retirement benefit was lawful and binding on the Defendant.*
>
> 2. *A Declaration that the Defendant is contractually obligated to pay a discretionary retirement benefit in accordance with the contract of employment made between the Claimant and the Defendant which provided as follows:*
>
> *"Retirement Benefit*
>
> *At the discretion of the Board you may be paid a retirement benefit as follow:*

a. *The equivalent of two (2) years' closing salary, if you have served a minimum of ten (10) years; or*

b. *The equivalent of three (3) years' closing salary, if you have served a minimum of twenty-five (25) years.*

This benefit will apply on retirement or earlier through incapacity or on death."

3. *A Declaration that the Defendant, as a statutory body is bound to honour its contractual obligations to the Claimant for the payment of a discretionary retirement benefit.*

4. *A Declaration that the aforementioned provisions in the Claimant's contract of employment do not contravene any provisions of Public Bodies Management & Accountability Act ('PMBA Act') nor the Guidelines to Financial Management in Public Sector Entities Circular dated October 1, 1996 ('Guidelines') thereunder.*

5. *A Declaration that the Claimant's entitlement under her contract of employment amounts to the sum of $22,351,000.00 and an Order that the Defendant pays the aforesaid sum of $22,351,000.00 together with interest at a rate of 3% computed from the date of the Claimant's retirement date (1 July 2016) pursuant to the Law Reform (Miscellaneous Provisions) Act.*

6. *A Declaration that the Defendant proceed to pay the retirement benefit due to the Claimant under the aforesaid provision of the Claimant's contract of employment.*

7. *An Order as to the costs to the Claimant.*

8. *Such further and /or other relief as the Honourable Court may deem just.*

[2] The only difference of significance in the orders sought by Mr Roberts relate to paragraph 5 in respect of quantum where his claim is as follows:

5. *A Declaration that the Claimant's entitlement under his contract of employment amounts to the sum of $16,044,184.00 and an Order that the Defendant pays the aforesaid sum of $16,044,184.00 together with interest at a rate of 3% computed from the date of the expiration of the Claimant's contract of employment (31 December 2014) pursuant to the Law Reform (Miscellaneous Provisions) Act.*

The Background

[3] The Authority is a body corporate established under section 4 of the Port Authority Act (the PAA) and its duties as outlined in section 6 of the PAA are as follows:

> *(a) to regulate the use of all port facilities in a port;*
>
> *(b) to provide and operate such part facilities and other services as the Minister may require;*
>
> *(c) to recommend to the Minister from time to time such measures as the Authority consider necessary or desirable to maintain or improve the port facilities ;*
>
> *(d) to operate such facilities as may be vested in the Authority or to lease them on such terms as may be approved by the Minister;*
>
> *(e) to maintain and improve, where practicable, such port facilities as are vested in the Authority*

[4] Section 19 of the PAA provides for regulations to be made as follows:

> *19. The Authority may with the approval of the Minister make regulations determining generally the conditions of service of servants of the Authority and, in particular, but without prejudice to the generality of the foregoing power, may make regulations relating to –*
>
> > *(a) the grant of pensions, gratuities and other benefits to such servants and their dependents, and the grant of gratuities and other benefits to the dependents or estates of deceased servants of the Authority;*
> >
> > *(b) the establishment and maintenance of sick funds,superannuation funds and provident funds, the contributions payable thereto and the benefits receivable therefrom.*

[5] Pursuant to section 19 of the PAA, the Port Authority (Superannuation) Regulations 2004 (hereinafter called the Superannuation Regulations), were passed but did not come into effect until the appointed day which was 31st July 2007. The Superannuation Regulations created a pension scheme which by

regulation 5 was for the benefit of "*the permanent staff*" of the Authority. Accordingly, senior executives who were employed on fixed term contracts were not eligible to receive a pension under that pension scheme.

[6] However, Regulation 41 of the Superannuation Regulations provides that:

> *"Where a member of staff of the Authority has served for a period in excess of ten years and is not entitled to pension hereunder, the Authority may in its discretion grant the member a special retirement benefit."*

The term "*member of staff*" is not a term defined in the Superannuation Regulations but there is no dispute between the parties that it encompasses the Claimants.

[7] Both Claimants were employed on fixed term contracts which were periodically renewed and which contained a provision that they be paid a gratuity of 25% on gross emoluments on completion of each contract period.

[8] Ms Williamson was employed to the Authority since on or about 19th June 1995 and had eight consecutive contracts of employment over the course of her 21 years of employment which ended with her retirement on 30th June 2016. Mr Roberts was employed pursuant to consecutive contracts spanning 16 years from on or about 1st November 1998 until 31st December 2014 when his contract of employment ended.

[9] The Claimants both assert that their renewed contracts of employment, dated 31st May 2006 in the case of Ms Williams and 12 December 2008 in the case of Mr Roberts, were in accordance with Regulation 41 of the Superannuation Regulations in that it contained a term which provided for payment of a retirement benefit as follows:

> *"Retirement Benefit*
>
> *At the discretion of the Board you may be paid a retirement benefit as follows:*

> a. *The equivalent of two (2) years' closing salary, if you have served a minimum of ten (10) years; or*
>
> b. *The equivalent of three (3) years' closing salary, if you have served a minimum of twenty-five (25) years.*
>
> *This benefit will apply on retirement or earlier through incapacity or on death."*

(This retirement benefit will hereafter be referred to for convenience and ease of reference as the "Contractual Retirement Benefit" although it is not disputed that it is a discretionary benefit).

[10] The Authority had also established a number of retirement funds for the benefit of its senior executives. The Authority received legal advice from Hylton Powell, a distinguished law firm, dated 13th April 2014, in which it was opined that the retirement funds were "*ultra vires and not authorized under the provisions of the Port Authority Act or any Regulation passed under that Act.*" This conclusion was supported by the opinion of Dr Lloyd Barnet, a senior and well respected practitioner, dated 29th May 2015. Both opinions are referred to herein collectively as ("the Opinions").

[11] It is not disputed that Counsel providing the Opinions were not informed of the Contractual Retirement Benefit.

[12] On 8th December 2014, the Claimants and other senior executives of the Authority met with the Minister of Transport, Works and Housing. The Minister expressed a desire of the Government to terminate the Contractual Retirement Benefit. It was proposed that the executives accept in lieu thereof, a distribution of one of these funds which was named the Senior Executives Retirement Fund. The Claimants and other executives subsequently indicated their willingness to accept this proposal.

[13] On 16th September 2015 there was a meeting between some of the executives and Professor Gordon Shirley, who was at that time and remains the Chief

Executive Officer (the "CEO") of the Authority. Professor Shirley advised them of the conclusions of the Opinions and the proposal was not pursued.

[14] On 4th January 2016 Mr Roberts received a letter from the Authority's CEO advising him as follows:

> *Retirement Benefit*
>
> *I refer to your letter dated November 3, 2014. The delay in replying has been due to certain discussions between the Port Authority of Jamaica ("the PAJ") and other Senior Executives who are claiming similar Retirement Benefits.*
>
> *As you are aware, the Retirement Benefit provided for in your contract with the PAJ may be paid at the discretion of the Board. However, the PAJ has received legal advice that it is not legally permitted to grant the Retirement Benefit. In the circumstances, I regret to inform you that the PAJ is constrained to refuse to pay you a Retirement Benefit.*
>
> *I would also bring to your attention that in the circumstances, the PAJ has no discretion to pay any Retirement Benefit to its current Senior Executives on their separation from the PAJ and has communicated this position to them. The PAJ has also commenced steps to recover from past Senior Executives any similar Retirement Benefits which they were paid.*

[15] Ms Williamson also received a letter dated 4th January 2014 which was in similar terms.

> Retirement Benefit
>
> *I refer to previous discussions, meetings and correspondence on this matter.*
>
> *Your contract of employment with the Port Authority of Jamaica ("the PAJ") provides for the PAJ, at the discretion of the Board, to pay you a 'Retirement Benefit'. As you know, the PAJ has received legal advice that it has no power and therefore no discretion to make this payment. In the circumstances, I regret to inform you that the PAJ is constrained to refuse to pay you a Retirement Benefit.*
>
> *The PAJ has taken the same position with its other current Senior Executives.*
>
> *The PAJ has also commenced steps to recover Retirement Benefits paid to former Senior Executives, and to which they were not entitled.*

[16] Ms Williamson received a letter from the Authority dated 16th March 2016 which stated as follows:

> *Retirement Benefit*
>
> *I refer to previous discussions, meetings and correspondence on this matter ending with my letter of January 4, 2016.*
>
> *The Port Authority of Jamaica has obtained further legal advice as a consequence of which I hereby withdraw my last letter to you.*
>
> *The Authority has been advised that it has a discretion to award a retirement benefit to a Senior Executive who is not entitled to a pension and who served more than 10 years. Where those criteria are satisfied, the Authority must take into account all the circumstances existing at the time of retirement to decide whether the retirement benefit should be granted.*
>
> *In the circumstances, at the time of your retirement the Authority will determine whether you are paid a retirement benefit, and if so, the amount of the benefit.*
>
> *The Authority is taking the same position with its other current Senior Executives.*

[17] It is convenient to note at this point that Mr Roberts did not receive a similar letter and the last communication to him was the 4th January 2016 letter. Ms Williamson notified the Authority's President and CEO by letter dated 14th June 2016 of her retirement on 1st July 2016 and of her claim to the Contractual Retirement Benefit. Having not received a response, she filed the claim herein.

[18] The evidence of Professor Shirley on behalf of the Authority, as to the final sequence of events which eventually led to these claims is contained in paragraphs 7-9 of his affidavit filed on the 7th November 2017, and is as follows:

> 7. *In or about March 2016 the Authority sought the views of the Auditor General on the provision of the retirement benefits in light of the fact that the senior executives are also entitled to a gratuity.*
>
> 8. *The Auditor General took the position that the Authority was bound by the provisions of the Public Bodies Management and Accountability Act and that the relevant clauses in the senior*

executives' contracts of employment breached the Ministry of Finance and Planning Guidelines which prohibit the payment of both gratuity and retirement benefits.

9. As a consequence the Authority sought the approval of the Minister of Finance to pay the retirement benefits but his approval was not forthcoming. The Authority therefore formed the view that it should not properly consider paying the retirement benefits to the senior executives.

[19] The Authority's reasons for refusal to pay the Contractual Retirement Benefit are summarised in the said affidavit of Professor Shirley at paragraph 11 as follows:

....a. The Authority is a statutory authority and is therefore a public body for the purposes of the Public Bodies Management and Accountability Act and the Financial Administration and Audit Act;

b. The Auditor General is the constitutional office with authority to oversee and investigate corporate governance practices in public bodies;

c. The Authority was uncertain about the legitimacy of a scheme that would involve certain senior executives receiving retirement benefits in addition to receiving a gratuity;

d. The Authority therefore sought guidance from the Auditor General;

e. The Auditor General took the position that by reason of the relevant legislation and the Ministry of Finance and Planning Guidelines the Authority should not pay retirement benefits to senior executives who are also entitled to receive a gratuity, without the approval of the Minister of Finance; and

f. The Minister of Finance has not approved the payment of retirement benefits to the Claimant.

The submissions

[20] Mr Wood QC submitted that the issues which arise for determination are as follows:

i. whether the Authority has the power under its constituent, statute and regulations to grant a retirement benefit by contracts of employment entered into with its senior executives;

ii. Is there any provision of the Public Bodies Management and Accountability Act (PBMAA) or Regulations and Guidelines

thereunder that render invalid the contractual provision for grant of a discretionary retirement benefit;

iii. *if the contracts of employment do contain a valid provision for payment of a discretionary retirement benefit is that discretion unfettered or is it reviewable in accordance with principles that the Authority must exercise same rationally and in good faith;*

iv. *has the Authority exercised its discretion irrationally and in breach of good faith;*

v. *are the Claimants entitled to relief as claimed.*

Mr Hylton QC accepted that Mr Wood's framing of the issues was accurate save for issue ii which for convenience may be referred to as "*the accuracy of the Auditor General's opinion issue*". Mr Hylton submitted that this issue was irrelevant for reasons which will be addressed subsequently in this judgment. The Court will therefore adopt the issues as framed by Mr Wood. The accuracy of the Auditor General's opinion Issue will be the final issue addressed, solely for reasons of convenience which will become apparent when it is analysed.

Issue 1. Whether the Authority has the power under its constituent, statute and regulations to grant a retirement benefit by contracts of employment entered into with its senior executives

[21] It was common ground between both Queen's Counsel that the Authority did have the power under the Port Authority Act and the Superannuation Regulations to grant the Contractual Retirement Benefit since the Claimants were senior executives employed under fixed term contracts who were not eligible to receive a pension under the pension scheme created by Superannuation Regulations. This conclusion is sound based on the clear words of the appropriate provisions which have been referred to in the background of this judgment and I do not think this issue needs any additional treatment.

Issue 3. If the contracts of employment do contain a valid provision for payment of a discretionary retirement benefit is that discretion unfettered or is it reviewable in accordance with principles that the Authority must exercise same rationally and in good faith;

[22] In addressing this issue it is helpful at the outset to appreciate that the relevant clause of the employment contract of the Claimants which provide for the Contractual Retirement Benefit states that the Authority "*may*" pay the benefit. There is no issue between the parties as to the fact that the entitlement to the Contractual Retirement Benefit is at the discretion of the Authority and that the Claimants are not entitled to be paid as of right. The contractual obligation of the Authority was to consider whether to pay the Contractual Retirement Benefit but that discretion should be exercised properly.

[23] Issue 3 may be addressed out of sequence for convenience because both Queen's Counsel are agreed that the discretion is not unfettered and is reviewable in accordance with principles that the Authority must exercise same rationally and in good faith. This principle is well established. Mr Wood very helpfully provided the Court with a scholarly analysis of the relevant laws with a number of authorities demonstrating this including the statement of Lord Sumption in **British Telecommunications plc v Telefonica O2 UK Ltd** [2014] 4 All ER 907, at page 923 paragraph 37 which succinctly and accurately expresses the position as follows:

> *...As a general rule, the scope of a contractual discretion will depend on the nature of the discretion and the construction of the language conferring it. But it is well established that in the absence of very clear language to the contrary, a contractual discretion must be exercised in good faith and not arbitrarily or capriciously: Abu Dhabi National Tanker Co Ltd v Product Star Shipping Ltd, The Product Star (no.2) [1993] 1 Lloyd's Rep 397, (per Leggatt LJ at 404); Gan Insurance Co Ltd v Tai Ping Insurance Company Ltd) [2001] EWCA Civ 1047, [2001] 2 All ER (Comm) 299, 9 per Mance LJ at [67]); Paragon Finance plc v Staunton, Paragon Finance v Nash [2002] EWCA Civ 1466, [2002]2 All ER 248, 1 WLR 685, (per Dyson LJ at [39]-[41]). This will normally mean that it must be exercised consistently with its contractual purpose: see Ludgate Insurance Co Ltd v Citibank NA [1998] Lloyd's Rep IR 221 (per Brooke LJ*

> *at 239-240); Equitable Life Assurance Society v Hyman [2002] 3 All ER 961 (per Lord Steyn and Lord Cooke of Thorndon at 970 and 972, [2002] 1 AC 408 9at 459 and 461).*

[24] Another of the authorities which the Court found to be particularly helpful was the case of **Braganza v BP Shipping Ltd** [2015] 1 WLR 1661 (UKSC) and the observations of Lady Hale at page 1672 C-G (paragraphs 28-29) as follows:

> *28 There are signs, therefore, that the contractual implied term is drawing closer and closer to the principles applicable in judicial review. The contractual cases do not in terms discuss whether both limbs of the Wednesbury test apply. However, in Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd [2001] 2 All ER (Comm) 299 , where the issue was the limits, if any, to the reinsurers' power to withhold approval to the insured's agreement to settle a claim, Mance LJ first commented, at para 64, that "what was proscribed was unreasonableness in the sense of conduct or a decision to which no reasonable person having the relevant discretion could have subscribed"; but he concluded, at para 67:*
>
> > *"any withholding of approval by reinsurers should take place in good faith after consideration of and on the basis of the facts giving rise to the particular claim and not with reference to considerations wholly extraneous to the subject matter of the particular reinsurance …"*
>
> *29 If it is part of a rational decision-making process to exclude extraneous considerations, it is in my view also part of a rational decision-making process to take into account those considerations which are obviously relevant to the decision in question. It is of the essence of "Wednesbury reasonableness" (or "GCHQ rationality") review to consider the rationality of the decision-making process rather than to concentrate on the outcome. Concentrating on the outcome runs the risk that the court will substitute its own decision for that of the primary decision-maker.*

[25] Here again, I do not think it is necessary for the Court to devote any additional review or discussion of this issue having regard to the fact that the law is settled and there is no disagreement between counsel. It is the application of the law to the particular facts in each case which usually creates the points of disagreement as will be seen in the next issue which will be deserving of much greater analysis.

Issue 4 - Has the Authority exercised its discretion irrationally and in breach of good faith?

[26] Mr Wood has asserted that "*The Authority has pursued a course of conduct displaying a woeful absence of good faith to avoid its contractual obligations and it has pursued that course by decisions that are irrational and perverse*."

Potential acts of bad faith

[27] Mr Wood submitted that it is "*somewhat amazing*" that the Authority did not bring the existence of the Contractual Retirement Benefit to the attention of the Counsel at the time they sought the Opinions. He expressed the view that:

> *"...it is inconceivable to suggest that the Authority would have withheld such instructions to deliberately mislead. Yet it has provide no explanation for its failure to make full disclosure of the contracts of employment to the attorneys who were giving advice in 2014 and 2015 that the Authority would be relying upon and then proceeded to act on the advice which it knew was based on an incorrect factual premise.*

[28] Mr Hylton made the point that the opinions were concerned with the very narrow issues of the legality of the establishment of the retirement funds which the Authority had created, the legitimacy of any expectation of payout from these funds by the current and recently retired executives and the actions which should be taken in relation to these funds. Counsel submitted that in these circumstances, the contracts of the various executives were immaterial to those issues and it is understandable why it may have been thought unnecessary to forward them or to advise of the term relating to the Contractual Retirement Benefit contained therein.

[29] Mr Hylton conceded that having regard to the narrow ambit of the Opinions they did not provide any support for the position advanced by Professor Shirley in the 16th September 2015 meeting that the Authority is not legally permitted to grant the Contractual Retirement Benefit. By extension, to the extent that the letters to

the Claimants dated 4th January 2016 repeated that assertion it was similarly flawed. Queen's Counsel submitted that this erroneous reliance on the Opinions and misconceived position which resulted ought not to be accepted as evidence of bad faith when viewed against the background of 8th February 2016 letter to Ms Williamson which indicated that the Authority had obtained further legal advice and withdrew its letter of the 4th January 2016. The 8th February 2016 letter also made it clear that the Authority accepted that it had a discretion to award the Contractual Retirement Benefit.

[30] The Court does not find that the Authority's earlier reliance on the Opinions is evidence of bad faith having regard to the fact that it abandoned that position when presented with additional legal advice subsequently.

[31] Mr Hylton also submitted that no weight should be placed on the fact that there was no evidence that the Authority had written to Mr Roberts withdrawing the 4th January 2016 letter and confirming its new position. Queen's Counsel posited that this may perhaps be explained by the fact that at that time Mr Roberts had already been retired and outside the Authority while Ms Williamson was still present and easily accessible. Learned Queen's Counsel submitted that in any event, the Authority was not purporting to take different positions in respect of the each Claimant. This is evidenced in the treatment of both Claimants when the earlier proposal was being floated for executives to take a share of the Executive Retirement Fund in lieu of their Contractual Retirement Benefit. What is seen in the 9th January 2015 Dugan Consulting Limited letter to the Authority, is that the entitlement of Mr Roberts was listed along with that of Ms Williamson (albeit both would have been entitled to different amounts). The Court finds that the position as reflected in the 9th January 2015 letter is limited by its date when one considers the Authority's position on 8th February 2016. Nevertheless, the Court accepts that there is no evidence that the Authority was treating the validity of Contractual Retirement Benefit any differently in the case of Mr Roberts, although the revised position reached by the Authority might not have been communicated directly to him.

[32] Mr Wood also submitted that the Authority's act of giving Ms Williamson the assurance that at the time of her retirement it would determine whether she be paid a retirement benefit and if so the amount while consulting with the Auditor General in the same month in respect of such payments is evidence of bad faith. However, Mr Hylton submitted that these two things were not inconsistent and certainly not evidence of bad faith. This he said was because the consultation was born out of the fact that the Authority intended to make payments but was taking the responsible and proper course of seeking the advice of the proper office. The Court also accepts that this is not evidence capable of amounting to bad faith.

[33] There was also a complaint on behalf of the Claimants that the Authority consulted the Auditor General without first obtaining ministerial direction to do so pursuant to section 17(5) of the Port Authority Act. This section provides as follows:

> *17 (5) The Auditor-General shall be entitled, on the direction of the Minister, at all reasonable times to examine the accounts and other records in relation to the business of the Authority.*

The Court agrees with the submissions of Mr Hylton that the section does not support the argument that the Authority must secure ministerial approval before consulting the Auditor General, but that it requires that the Auditor General must examine the account of the Authority if required to do so by the Minister.

[34] Viewed in this legal context, the Court finds that the Authority consulting the Auditor General cannot amount to bad faith. Having regard to the limited scope of the Opinions the Court does not find that the delay in sharing them amounted to bad faith, nor does the failure to respond appropriately to Mr Roberts advising him in a reasonable time of the Authority's changed position. The Court accepts the submission of Mr Hylton that the elements of the Authority's conduct which were submitted as constituting bad faith do not individually or collectively amount to bad faith on the part of the Authority.

Whether the Authority acted irrationally when it took the findings of the Auditor General into account

[35] It was asserted on behalf of the Claimants that it was irrational for the Authority to have sought the opinion of the Auditor General. Reference was made to section 122 of the Constitution the marginal note of which reads "*Functions of Auditor General*". It is perhaps prudent to set out hereunder the section in its entirety.

> *122.(1) The accounts of the Court of Appeal, the accounts of the Supreme Court, the accounts of the offices of the Clerks to the Senate and the House of Representatives and the accounts of all departments and offices of the Government of Jamaica (including the offices of the Cabinet, the Judicial Service Commission, the Public Service Commission and the Police Service Commission but excluding the department of the Auditor- General) shall, at least once in every year, be audited and reported on by the Auditor General who, with his subordinate staff, shall at all times be entitled to have access to all books, records, returns and reports relating to such accounts.*
>
> *(2) The Auditor General shall submit his reports made under subsection (1) of this section to the Speaker (or, if the office of Speaker is vacant or the Speaker is for any reason unable to perform the functions of his office, to the Deputy Speaker) who shall cause them to be laid before the House of Representatives.*
>
> *(3) In the exercise of his functions under the provisions of subsections (1) and (2) of this section, the Auditor- General shall not be subject to the direction or control of any other person or authority.*
>
> *(4) The accounts of the department of the Auditor- General shall be audited and reported on by the Minister responsible for finance, and the provisions of subsections (1) and (2) of this section shall apply in relation to the exercise by that Minister of those functions as the apply in relation to audits and reports made by the Auditor- General.*
>
> *(5) Nothing in this section shall prevent the performance by the Auditor-General of –*
>
> *(a) Such other functions in relation to the accounts of the Government of Jamaica and the accounts of other public authorities and other bodies administering public funds in Jamaica as may be prescribed by or under any law for the time being in force in Jamaica ; or*

> *(b) Such other functions in relations in relation to the supervision and control of expenditure from public funds in Jamaica as may be so prescribed; or*
>
> *(c) Such other functions in relation to the accounts of any other government as he may be empowered to perform by any authority competent in that behalf.*

[36] Mr Wood submitted that the function of the Auditor General is the auditing of accounts and the Authority should not have consulted her with reference to legal advice. The proper entity which the Authority should have consulted for advice is the Attorney General who by virtue of section 79 of the Constitution is the principal legal advisor to the Government of Jamaica.

[37] It was also submitted by Mr Wood that the Authority, being a public authority, "*should be acquainted with Government policy guidelines that govern its operations without the need to have consulted the Auditor General.*"

[38] Mr Hylton submitted that it would have been improper for the Board of Directors of the Authority to have accepted the view of the management of the Authority as to the interpretation and applicability of the Government Policy guidelines. This is so because that view would have emanated from or be influenced by some of the very executives who stood to gain or lose depending on the view adopted by the Authority. Therefore, there was a potential conflict of interest in relation to some of these executives such as Dr Carrol Pickersgill and Ms Williamson, the latter being one of the Claimants herein, who was the Senior Vice President of Business Management and Special Projects.

[39] It was further submitted by Mr Hylton that the Authority is a statutory authority and is therefore a public body for the purposes of the Public Bodies Management and Accountability Act ("PBMA") as well as the Financial Administration and Audit Act. He argued that in this case, the Authority was not seeking legal advice but was seeking advice in relation to dealing with public funds. It was submitted that this was because the Authority was uncertain about the scheme providing for the payment of the Contractual Retirement Benefit to executives who were also

entitled to receive a gratuity. In these circumstances, it was argued that seeking the guidance of the Auditor General and relying on her opinion was wholly appropriate.

[40] In response to a question posed by the Court as to whether there was a very fine distinction if any between seeking the advice of the Auditor General on a legal issue and seeking the advice of the Auditor General in relation to dealing with public funds, Mr Hylton conceded that there are overlapping issues. He argued that notwithstanding the fact that the Authority could have also sought the legal advice of the Attorney General does not mean that the reliance on the Auditor General's position was irrational.

[41] Mr Wood relied on the case of **Clark v Nomura International** [2000] IRLR 766, which was applied by the Jamaica Court of Appeal, in the case of **NCB Insurance Company Limited v Claudette Gordon-McFarlane** [2014] JMCA Civ 51. In **Clark v Nomura**, Mr Clark had been employed as a senior trader in equities from 1995 at an annual salary which was supplemented by a bonus awarded under a discretionary scheme. It was specifically stated in his letter of appointment that the bonus "*..is not guaranteed in any way, and was dependent on individual performance and after the first 12 months your remaining in our employment on the date of payment*". Mr Clark was dismissed on three months' notice which he was required to serve out as garden leave. The reasons for his dismissal included complaints about his dress and appearance, erratic attendance and timekeeping, lack of attendance at management meetings, circulating rumours about peers and outright criticisms of the management committee and their strategy. He was paid his basic salary for the three months but not a bonus, although he was employed on the date for payment of the annual bonus and he had earned substantial profits for the company during the relevant period.

[42] Mr Clark filed a claim for damages contending that the failure to pay him a bonus amounted to a breach of contract. He asserted that the exercise of the

employers' discretion to pay a bonus to him was dependent on his individual performance as a trader. The employers' position was that on a proper construction of his letter of appointment, the fact that Mr Clark was performing adequately was a trigger condition to the exercise of the discretion to award a bonus. Thereafter in exercising that discretion his individual performance was only one factor to be considered in deciding whether to award a bonus and other factors included the company's business needs and interests which included the need to retain and motivate Mr Clark.

[43] The High Court held that the Defendants' failure to award Mr Clark a discretionary bonus for the nine month period prior to his dismissal amounted to a breach of contract. It was the Court's view that "individual Performance" meant performance of the employee's contract. Whereas profitability was not the only measure, the employers could consider other factors such as corporate contribution, team working, capital usage and due regard to risk however the significance of those matters had to be viewed in the context of the requirement for the employee to fulfil his contractual obligations and to make a profit. The decision of the employer to consider the allegations that were made was perverse and irrational and did not comply with the terms of the employer's discretion especially since those allegations had previously not been found to be deserving of even advice or warning and certainly not sufficient to justify summary dismissal,.

[44] The Claimants relied on the observation of Burton J at paragraph 40 of the judgment as follows:

> *"[40]. Quite apart from the additional contractual straitjacket for the discretion in this case, the employer's discretion is in any event, as a result of the authorities, not unfettered, as both sides have accepted to be the law in this case. Even a simple discretion whether to award a bonus must not be exercised capriciously (United Bank Ltd v Akhtar [1989] IRLR 507 EAT, Clark v BET plc [1997] IRLR 348 and Midland Bank plc v McCann 5/6/1998 unreported EAT) or without reasonable or sufficient grounds (White v Reflecting Roadstuds Ltd [1991] IRLR 331 EAT, and McClory v Post Office [1993] IRLR 159). I do not consider that either of these definitions of the obligation are entirely apt, when considering*

> *whether an employer was in breach of contract in having exercised a discretion which on the face of the contract is unfettered or absolute, or indeed even one which is contractually fettered such as the one here considered. Capriciousness, it seems to me, is not very easy to define: and I have been referred to Harper v National Coal Board [1980] IRLR 260 and Cheall v APEX [1982] IRLR 362. It can carry with it aspects of arbitrariness or domineeringness, or whimsicality and abstractedness. On the other hand the concept of 'without reasonable or sufficient grounds' seems to me to be too low a test. I do not consider it is right that there be simply a contractual obligation on an employer to act reasonably in the exercise of his discretion, which would suggest that the court can simply substitute its own view for that of the employer. My conclusion is that the right test is one of irrationality or perversity (of which caprice or capriciousness would be a good example) ie. that no reasonable employer would have exercised his discretion in this way. I canvassed this provisional view in the course of argument with both counsel, and neither appeared to dissent, and indeed Mr Temple QC in his closing submissions expressly adopted and used a test of irrationality. Such test of perversity or irrationality is not only one which is simple, or at any rate simpler, to understand and apply, but it is a familiar one, being that regularly applied in the Crown Office or, as it is soon to be, the Administrative Court. In reaching its conclusion, what the court does is thus not to substitute its own view, but to ask the question whether any reasonable employer could have come to such a conclusion. Of course, if and when the court concludes that the employer was in breach of contract, then it will be necessary to reach a conclusion, on the balance of probabilities, as to what would have occurred had the employer complied with its contractual obligations, or, as Timothy Walker J put it in Clark v BET plc [1997] IRLR 348, assess, without unrealistic assumptions, what position the employee would have been in had the employer performed its obligation. That will involve the court in assessing the employee's bonus, on the basis of the evidence before it, and thus to that extent putting itself in the position of the employer; but it will only do it if it is first satisfied, on the higher test, not that the employer acted unreasonably, but that no reasonable employer would have reached the conclusion it did acting in accordance with its contractual obligations, and the assessment of the bonus then of course is by way of an award of damages."*

[45] The Court finds that the facts of **Clark v Nomura** (supra) are distinguishable from those facts which are before the Court in this claim. In this claim the evidence is clear that the Authority was not raising the issue of poor performance as a basis for not making the payment of the Contractual Retirement Benefit. Having regard to the role and function of the Auditor General (which will be explored in greater detail later in this judgment), the Court finds that it would not be accurate to equate the allegations against the employee which were considered by the Defendant in **Clark v Nomura** with the opinion of the Auditor General which was

considered by the Authority. In **Clark v Nomura** the Court duly dismissed the allegation considered by the employer as not being matters not deserving of the attention they received given the nature of those allegations. In the instant case, the Court is assessing whether the opinion of an official whose appointment is by virtue of the Constitution and who has a very important supervisory role ought to be considered and if so the importance which ought to be placed on it, without more.

[46] The Claimants also relied on the subsequent case of **Braganza** (supra) to support the contention that the reliance on the Auditor General's position was irrational. Both Queen's Counsel agreed that the facts of that case are closest to the facts of the claim before this Court. Mr Braganza had served as chief engineer on the first defendant's vessel. He disappeared overnight while he was serving on the vessel in the mid-Atlantic. On arrival of the vessel in New York an investigation was carried out which concluded that he was lost overboard presumably drowned but no finding was made as to the reason this occurred. The second defendant set up its own investigative team which ruled that the most likely explanation from his disappearance was that he had committed suicide, as opposed to falling overboard accidentally although the team found that an accidental fall from the vessel could not be discounted. This conclusion was reached after they had seen e-mail messages between the Claimant and the deceased which suggested that he had family and/or financial issues which were causing him concerns. They were also of the opinion that there had been no good reason or him to have gone on deck that night. There was evidence that Mr Braganza had met with the Master that night and discussed the weather conditions for the next day with the assistance of a weather routing report and Mr Braganza had indicated by e-mail to the engineering superintendent that he would like to stop the main engines the next day and weather permitting change certain parts. His death in service benefit under the terms of his contract of employment excluded suicide and on the basis of the report the second

defendant's manager refused to pay the benefit to his widow who had made a claim.

[47] Mr Braganza's widow filed a claim in the High Court seeking *inter alia,* the death benefit and the judge held that the decision to refuse payment of the benefit was unreasonable. The judge found that because the nature of the clause was exclusionary, the burden of proving the reasonableness of the opinion was on the employer. The bases for this finding were, firstly, that the investigative team had failed to take in to account Mr Braganza's interest in the weather having regard to the plans for the following day and might have gone on board to check the weather conditions and had accidentally fallen overboard. Secondly the Investigative team had failed to direct themselves that "*before making a finding of suicide there should be cogent evidence commensurate with or proportionate to the seriousness of a finding of suicide*" and accordingly the team and the Manager had failed to take into account the possibility that Mr Braganza had have gone out on deck to check the weather having regard to his interest in the weather sensitive work planned for the next day. The Court of Appeal reversed the Judge's findings on these issues and there was an appeal to the Supreme Court.

[48] In the Supreme Court their Lordships examined the principles governing the exercise of a discretion (to which I have referred earlier in this judgment), and confirmed that decisions should not only be in good faith but also not be arbitrary, capricious or irrational. The Court also reiterated that among the reasons that a decision could also be impugned, include the situation where in the decision making process, the decision maker fails to exclude extraneous considerations. In applying these principles to the facts of that case, the Court found that the Manager should not simply have accepted the view of the investigation team that Mr Braganza's disappearance was most likely explained by suicide. As Lady Hale expressed it at page 1675A (paragraph 39):

> *...He should have asked himself "whether the evidence was sufficiently cogent to overcome the inherent improbability of such a thing. In my view that can be expected of any employer making a decision under a provision such as this. But it could certainly be expected of BP, which clearly has access to in-house legal expertise to guide it in the decision making process.*

[49] Mr Wood submitted that in the case before the Court:

> *Unlike Braganza, the employer is a public authority, which should be well acquainted with Government policy guidelines that govern its operations without the need to have consulted the Auditor General. The cases demonstrate that in the exercise of a contractual discretion, an employer's discretion is not unfettered. It must not be exercised capriciously, irrationally, or perversely and further, the decision is reviewable on principles akin to that applied in judicial review of decisions of public authorities. On such principles as demonstrated in Braganza, where a decision is based on the existence of a fact, then that fact must be established or the decision will be set aside as irrational. It is simply not sufficient to act on a report that is in turn based on an unsubstantiated fact that is dogmatically assumed to exist because someone says so, amounting to no more than straws in the wind.*

[50] The case of **Braganza** is of tremendous assistance in its analysis of the relevant law. Although the facts are similar the distinguishing features in the source and nature the extraneous matters which were considered in **Braganza** means that the case does not provide a clear precedent for our purposes. The decision and the explanation as to why the Manager ought not to have accepted the conclusion of the investigative team in the particular facts of that case is quite easily understood. However this Court is not dealing with reliance on a investigative team. This Court is dealing with the opinion of the Auditor General who is charged with certain auditing and supervisory responsibilities. Therefore, in determining the claim, this Court must assess the hierarchical position of the Auditor General's opinion and determine whether it was sufficient for the Authority to rely on that opinion without verifying its legal soundness.

The Court's analysis of the Auditor General's functions

[51] The issue as to whether the Authority acted irrationally in relying on the Auditor General's opinion can only be determined by examining and having a clear appreciation of the role and function of the Auditor General. I have earlier referred to and quoted section 122 of the Constitution which outlines the functions of the Auditor General. I have also noted Mr Wood's submission that those functions are limited to auditing accounts, not giving advice. However, the question arises naturally as to, what does auditing accounts entail? To find an answer to this question, assistance can be gained by reference to the Financial Administration and Audit Act. The relevant portion of section 25 of that act provides as follows:

> *25.(1) The Auditor-General shall, in performing his functions under section 122 (1) of the Constitution ascertain whether in his opinion-*
>
> *(a) the accounts referred to in that section are being faithfully and properly kept;*
>
> *(b) the rules and procedures framed and applied are sufficient to secure an effective check on the assessment, collection and proper allocation of the revenue and other receipts of the Government;*
>
> *(c) all money expended and charged to an appropriation account has been applied to the purpose for which the provision made by Parliament was intended and that any payment of public money conforms to the authority which governs it, and has been incurred with due regard to the avoidance of waste and extravagance;*
>
> *(d) essential records are maintained and the rules and procedures framed and applied are sufficient to safeguard the control of Government property;*
>
> *(e) the provisions of this or any other enactment relating to the administration of public moneys and Government property have been complied with;*
>
> *(f) satisfactory procedures have been established to measure and report on the effectiveness of programmes and services.....*

[52] Section 26 of the Financial Administration and Audit Act provides as follows:

> *26. If, in the course of an audit it appears to the Auditor- General that-*
>
> *(a) any loss or deficiency has occurred and has not been reported to the Financial Secretary, the Auditor-General shall report the matter to the Financial Secretary and shall inform the accounting officer concerned;*
>
> *(b) any payment is improper or, as the case may be, is so extravagant or nugatory as to be regarded as an improper payment, the Auditor-General shall send a statement of such findings to the Financial Secretary.*

[53] One can conclude from the section 122 of the Constitution and sections 25 and 26 in particular of the Financial Administration and Audit Act, that the responsibilities and remit of the Auditor General is not simply limited to examining the accounts of public bodies to determine if they are accurate, but extends to ensuring that they are in accordance with any applicable laws, regulations and directives. It is the responsibility of the Auditor General to ensure that payments are not improper or improperly made.

[54] This supervisory function of the Auditor General is not subject to ministerial direction. Pursuant to section 13A of the PBMA the Auditor General may if he/she thinks fit audit the accounts of any public body and shall do so if the House of Representatives so direct. Public body is defined in the PBMA as "*a statutory body or authority or government company, but does not include an executive agency designated under the Executive Agencies Act*."

[55] It is stated in the executive summary of the Auditor General's Report that the purpose of the audit was as follows:

> *"The audit was undertaken to determine whether the PAJ's governance practices accorded with the Public Bodies Management & Accountability (PBMA) Act, GOJ Governance and Accountability Frameworks and Circulars issued by the Ministry of Finance and the Public Service (MoFPS). Section 20 of the PBMA Act requires that in the exercise of any powers conferred on a*

board by a relevant enactment or any constituent documents in relation to:

(a) emoluments payable to the staff of a public body,

(b)any other policies and guidelines applicable.

The board shall act in accordance with such guidelines as are issued from time to time by the Minister responsible for the public service and the Minster, respectively."

[56] It should be noted that section 27 of the PBMA speaks to its superiority as against other acts in the following terms:

27. Notwithstanding any provision of any other law or enactment to the contrary, where that other law or enactment raises any inconsistency between this Act and that provision in relation to the operation of any public body, the provision of this Act shall prevail.

[57] Section 20 of the PBMA provides as follows;

20. In the exercise of any powers conferred on a board by a relevant enactment or any constituent document in relation to –

(a) emoluments payable to the staff of a public body;

(b) any other policies or guidelines applicable,

The board shall act in accordance with such guidelines as are issued from time to time by the Minister responsible for the public service and the Minister, respectively.

[58] The enforcement provision of the PBMA is Section 25. Pursuant to subsection 25(1) if the Court is satisfied, on an application by the Attorney-General, that any person has contravened a number of section including section 20 referred to above, (which deals with levels of emoluments), then pursuant to section 25(2) the Court may:-

....(a) order the person concerned to pay to the Crown such pecuniary penalty not exceeding one million dollars; or

(b) grant an injunction restraining that person from engaging in conduct described in subsection (1).

[59] If the views expressed by the Auditor General are correct and guidelines were in place prohibiting the payment of the Contractual Retirement Benefits, such guidelines would not trump the provision in the employment contracts of the Claimants for the payment of Contractual Retirement Benefit in the sense of making such payments illegal or invalid. Unless restrained by an injunction pursuant to section 25 (2)(b) of the PBMA, the benefits could still be paid and such would not be illegal. However, the members of the board of the Authority responsible for such payment would be subject to sanction in accordance with section 25(1)(l) of the PBMA on the application of the Attorney General. This provides additional support and context for the Authority considering the opinion of the Auditor General. The payees/recipients on the other hand would not be subject to any sanction pursuant to the PBMA. One would expect that in terms of practical procedure, it is the Auditor General who would raise the issue of the breach with the Attorney General for the Attorney General to decide whether the breach, if one existed, warranted Court action, and if so make the appropriate application to the Court, but in the Court view this would not affect the prudence of obtaining and considering the Auditor General's Opinion.

[60] Viewed against the backdrop of the legislative framework providing for the Auditor General and his/her functions, as well as the possible exposure of persons at the Authority to sanction in the event of a breach of section 20 of the PBMA, I do not accept the submission that it would be appropriate for the Authority to disregard the opinion of the Auditor General.

Was there a duty on the Authority to confirm the accuracy of the Auditor General's view that the payment of the Contractual Retirement Benefit was improper?

[61] It is the Court's finding that in view of the wide scope of the Auditor General's responsibilities, it would be reasonable to expect that if there are issues of law about which there is any uncertainty, the Auditor General would act prudently in

obtaining the advice of the Attorney General which is the principal legal advisor to the Government of Jamaica pursuant to section 79 of the Constitution.

[62] A public body, such as the Authority in this case, which receives the opinion of the Auditor General as to the status of a particular payment or intended payment, ought reasonably to assume that the position advanced by the Auditor General is legally sound. In the Court's view it would therefore be unreasonable to expect that public bodies should be burdened with the responsibility of verifying the opinion of the Auditor General, by themselves seeking the advice of the Attorney General or Counsel at the private bar. It would be wholly impractical, duplicative and wasteful if public bodies were to verify the opinions and directives of the Auditor General with the Attorney General before acting on them. Such an approach would diminish the office of the Auditor General and would not accord with the legislative scheme establishing that office.

[63] In appropriate cases, there will be recourse to the Court to challenge a decision of the Auditor General by way of judicial review.

[64] In the circumstances of this claim, it is the Court's finding that the Authority did not have a duty to verify the position advanced by the Auditor General.

Issue 2 - Is there any provision of the Public Bodies Management and Accountability Act (PBMAA) or Regulations and Guidelines thereunder that render invalid the contractual provision for grant of a discretionary retirement benefit?

[65] The Claimants assert that there are no Ministry of Finance and Planning guidelines in existence which prohibit the grant of a retirement benefit where the employee receives a gratuity. Accordingly, the Auditor General's analysis as contained in her publicly available report is flawed. In particular, it is the Claimant's position that the Guidelines of the Ministry of Finance and Planning issued 8 May 2012 entitled **'***Fixed-Term Contract Officers Policy Guidelines*' do

not contain such a prohibition against payment of pension or retirement benefit where a gratuity is also paid. Mr Roberts exhibited these guidelines.

[66] The submission of the Claimants on this point is conveniently summarised in learned Queen's Counsel Mr Wood's written submissions that:

> *... it was incumbent on the Authority to satisfy itself that the policy guidelines stated by the Auditor General in fact existed and it could have done so by simply going to the Ministry's website. Rather than doing so it sought an approval from the Minister of Finance that was not required and which the Minister had no competence to give as the discretion conferred was that of the Authority not that of the Auditor General or any Minister. In effect the Authority surrendered its discretion to Ministerial dictate based on a non-existent policy guideline stated in error by the Auditor General.*

[67] Part 2 of the Report at paragraph 2.3 is highlighted by the Claimants and its reference to Guidelines to Financial Management in Public Entities Circular dated 1 October 1996, with the complaint being made that no such duly gazetted guidelines have been produced to the Court by the Authority.

[68] Mr Hylton has submitted that this issue would only become ripe for consideration if the Court found that there was a duty on the Authority to verify the accuracy of the Auditor General's position. I accept the submissions of Mr Hylton on this point as being sound. The Court finds that the Authority is properly entitled to consider the Auditor General's expressed position. The Court has found that there was no such duty on the Authority to verify the correctness of that position. Based on these conclusions the Court has found that the Authority did not act irrationally in considering the Auditor General's opinion. Whether the consideration of that opinion is irrational, is not dependent on the correctness of the opinion. It is therefore irrelevant for the purposes of this judgment for the Court to make a conclusive finding on this issue and the Court opts not to do so.

Conclusion and disposition

[69] For the reasons expressed herein the Court finds that the decision of the Authority not to pay the Contractual Retirement Benefit was not arbitrary, capricious or irrational. Specifically the Court finds that the Authority did not act irrationally in seeking and/or considering the opinion of the Auditor General and consequently its decision making process did not fail to exclude extraneous considerations. The Authority as a consequence did not breach its contractual obligations to the Claimants. Based on the opinion of the Court expressed earlier in these reasons, the facts before the Court are distinguishable from those in the cases of **Braganza** as well as **Clark and Nomura** having regard to the special position which the Auditor General occupies, her statutory responsibilities and the importance which attaches to her conclusions published in her audits or her expressed opinions within her remit.

[70] In the premises the Court makes the following orders:

1. The declarations and orders sought by the Claimants are refused.

2. Costs to the Defendant to be taxed if not agreed.