[2020] JMCA Civ 67

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 96/2017

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE SINCLAIR – HAYNES JA
THE HON MISS JUSTICE EDWARDS JA

BETWEEN	**THE ATTORNEY GENERAL OF JAMAICA**	**1st APPELLANT**
AND	**THE COMMISSIONER OF POLICE**	**2nd APPELLANT**
AND	**MACHEL SMITH**	**RESPONDENT**

Miss Tamara Dickens instructed by Director of State Proceedings for the appellants

Mrs Angel Beswick-Reid instructed by Ballantyne, Beswick and Company for the respondent

22, 23, 24 October 2019 and 18 December 2020

PHILLIPS JA

[1] I have read in draft the judgment of Edwards JA. I agree with her reasoning and conclusion. There is nothing that I wish to add.

SINCLAIR-HAYNES JA

[2] I too have read the draft judgment of Edwards JA and agree with her reasoning and conclusion.

EDWARDS JA

Introduction

[3] This is an appeal challenging the judgment and orders of Wint-Blair J ("the judge") made on 27 September 2017, in which she granted an order of certiorari quashing the decision of the Commissioner of Police ("the 2nd appellant") to dismiss Mr Machel Smith ("the respondent") from the Jamaica Constabulary Force ("the JCF"), and granted a declaration that the respondent was, at all material times, a confirmed member of the JCF with effect from 9 September 2014, pursuant to regulation 24(6)(b) of the Police Service Regulations ("the regulations"). At the time the order for certiorari was made and the declaratory judgment was granted by the judge, the 2nd appellant had already rescinded his decision to dismiss the respondent.

Background

[4] The respondent enlisted to become a member of the JCF and commenced his training on 10 September 2012. He was told that he would be placed on two years' probation, and, if his probationary period was completed successfully, his enlistment in the JCF would become confirmed effective 10 September 2014. The respondent successfully completed his period of training at the Jamaica Police Academy on 2 April 2013, and was posted at the Morant Bay Police Station in the parish of Saint Thomas. On 5 May 2014, he was transferred to the Morant Bay Criminal Investigation Bureau. On 16 May 2014, the respondent received a memorandum dated 9 May 2014 which made allegations with regard to his conduct. He responded in a memorandum, dated 20 May 2014, refuting the allegations. On 8 July 2014, he was served with a "Notice of

Recommendation for Non Confirmation as a member of the JCF" dated 5 July 2014, which set out the allegations. Upon receiving the notice, the respondent sought legal advice, and his attorneys, thereafter, wrote to the Superintendent of the Morant Bay Police Station refuting the allegations. There was no response to the attorneys' letter. The date of 10 September 2014 passed without incident and the respondent was asked to proceed on duty on 11 September 2014.

[5] On 17 September 2014, the respondent was asked to report to the Superintendent's office where he was handed a notice of dismissal dated 16 September 2014. This notice advised that he was being dismissed from the JCF with effect from 9 September 2014, pursuant to regulation 24(6)(a) of the regulations. The respondent and his attorneys wrote in response, on 30 September 2014 and 1 October 2014, respectively, asking that he be re-instated as a member of the JCF. This request proved futile.

[6] Based on the two-year probationary period on which the respondent was placed, his enlistment in the JCF would have become effective on the 10 September 2014, pursuant to regulation 24(6)(b) of the regulations. The respondent had worked and carried out duties up to 17 September 2014 before he was purportedly dismissed.

[7] Aggrieved by the decision to dismiss him, the respondent, on 12 November 2014, filed a notice of application for leave to apply for judicial review of the 2nd appellant's decision. Leave was granted and, on 23 February 2015, the respondent filed a fixed date claim form seeking orders to move the decision of the 2nd appellant into the Supreme Court for judicial review for certiorari to have it quashed, for mandamus to restore him

to his position and for a declaration that he was at all material times a confirmed member of the JCF.

[8] Subsequent to the filing of the fixed date claim form, counsel from the Attorney General's Chambers wrote to the respondent's attorneys, in a letter dated 29 February 2016, advising them of their intention to concede that "the decision of the [2nd appellant] dated 16 September 2014 to dismiss the [respondent] from the JCF, pursuant to regulation 24(6)(a) of the Police Service Regulations, after his probationary period had expired is ultra vires". Counsel also stated in the letter that the 1st appellant was of the view that the respondent should be re-instated, and that it had shared this position with the 2nd appellant.

[9] On 25 May 2016 a letter was sent to the respondent informing him of his re-instatement with effect from 16 September 2014 and that he would receive his salary and allowances with effect from that date. It also noted that the respondent had resumed duties from 3 May 2016. The appellants' stance was conciliatory so that the matter could be resolved between the parties, as they indicated, "without further recourse to the courts". The appellants also offered to pay a reasonable sum for costs.

[10] Despite this "conciliatory" stance, the respondent proceeded with his claim for judicial review. The claim was subsequently heard by the judge who made orders in favour of the respondent as follows:

> "1. The decision of the Commissioner of Police to dismiss the Applicant from the Jamaica Constabulary force [sic] by way of letter dated September 16, 2014 and pursuant to Regulation

> 24(6)(a) of the Police Service Regulations 1961 is hereby quashed.
>
> 2. A declaration is hereby made that the Applicant is and was at all material times a confirmed member of the Jamaica Constabulary Force with effect from the 9th day of September, 2014 pursuant to Regulation 24(6)(b) of the Police Service Regulations 1961.
>
> 3. No order as to costs."

The judge's reasons

[11] In an oral decision, which was reduced to writing, the judge highlighted the purpose of judicial review which, she said, was to ensure that the functions of public authorities are undertaken according to the law and that they are held accountable to the law. She referred to the fact that the 2nd appellant had reversed his decision and that the respondent had been re-instated and was now an enlisted member of the JCF. The judge, having considered the orders sought in the fixed date claim form, went on to state, at paragraph [3], that:

> "... The first two remedies sought appeared to be otiose in circumstances where both sides are in agreement that the Applicant has been re-instated with effect from September 16, 2014 and that he resumed duties on May 3, 2016. The Applicant was also compensated with salary and allowances with effect from September 16, 2014."

[12] The judge, however, noted that the fixed date claim form sought an award for damages and went on to state, at paragraph [5], that:

> "... A claim for damages may be included in a claim for judicial review in addition to a prerogative remedy. Damages may only be awarded if they could have been awarded in an ordinary claim, namely, a claim for a private law cause of action. The judicial review procedure does not create any new

> right or remedy in damages, if a claim for damages exists in private law, it may, in appropriate cases, be claimed in the judicial review procedure alongside the claim for a prerogative or other remedy to vindicate a public law right."

[13] She held at paragraph [6] of her judgment that:

> "The Applicant has to satisfy the court that damages arising from any matter to which the claim for judicial review relates could have been awarded in an ordinary claim ..."

[14] The judge referred to the Civil Procedure Rules (2002) ("the CPR"), Part 56 and specifically rule 56.10 and made the following observations at paragraphs [7] and [8]:

> "[7] It is clear that an applicant on an application for an administrative order may include a claim for any other relief or remedy which arises out of or is related or connected to the subject matter of the application.
>
> [8] In Rule 56.10(2) the powers of the court are set out and paragraph (a) provides that damages may be awarded subject to the inclusion in the claim form of a claim for any such remedy arising or apparent on the facts set out in the claimant's affidavit or statement of case to justify the grant of such an award and that at the time the application was made, the claimant could have issued a claim for such a remedy."

[15] The judge referred to the case of **Berrington Gordon v The Commissioner of Police** [2012] JMSC Civ 46, and the statements of principle enunciated by Sykes J (as he then was) regarding a claim for damages in an administrative action. She went on to hold at paragraph [10]:

> "[10] There is no evidence before this court to support a finding of malice, spite or ill-will on the part of the decision maker, who was the Commissioner of Police in respect of the decision. In fact, the Commissioner of Police has reversed the previous decision and accordingly the orders sought arguably have become unnecessary."

[16] The judge then went on to observe at paragraph [11] that:

> "[11] The most difficult problem posed by this application was to decide what remedy was appropriate and further what the [sic] form of declaration should be made so that its practical consequences are certain. **So far as it lies within the court's power, it should, be made clear to the parties what their respective rights and obligations are in consequence of any order to be pronounced**. There is no doubt in my mind that the applicant has suffered a grievous wrong. It should not be beyond the power of the courts to provide a suitable remedy." (Emphasis added)

[17] The judge held that the respondent had claimed damages throughout and that there was some evidence of financial loss, reputational damage and emotional stress. She also stated that these needed to be further particularised and the respondents ought to be afforded the opportunity to address these issues. The judge further held, at paragraphs [13] and [14], that:

> "[13] The orders sought are necessary in that the Applicant was dismissed with effect from September 9, 2014 and re-instated with effect from September 16, 2014. There is then the issue of the days between the 9th and 16th of September which in my view, without the grant of the prerogative remedies sought could be construed negatively against the applicant and achieve the very ends from which the Applicant now seeks relief.
>
> [14] To this end, it will be to the detriment of the Applicant if the orders sought in his fixed date claim form for prerogative remedies are not granted as the unanswered question would remain – how will that period of time be viewed? The applicant has not been paid for those days, nor can it be said that the applicant faced disciplinary action or suspension between the 9th and 16th of September, 2014, in the face of the concession that the dismissal of the applicant was unlawful. The simple answer lies in the grant of the orders sought to ensure certainty on both sides."

[18] The judge, based on her findings, made the orders as I have indicated at paragraph [10] of this judgment, as well as case management orders to facilitate the hearing for the assessment of damages.

The appeal and counter-notice of appeal

[19] Notice and grounds of appeal were filed on 17 October 2017 by the appellants. A counter-notice of appeal was filed on 30 October 2017 by the respondent. The notice and grounds of appeal challenge the decision of the judge made in favour of the respondent and the counter-notice of appeal challenge the judge's decision not to make an order for costs in favour of the respondent.

[20] The grounds of appeal filed were as follows:

> "1. The learned judge erred in finding that there was in [sic] issue between the parties regarding the days between September 9-16, 2014, in circumstances where the evidence before the Court was that the Claimant was re-instated as a constable of police with effect from September 16, 2014 and paid all outstanding salaries; as well as evidence that the Claimant was employed as a constable of police and was reporting to duty up to September 17, 2014, and in circumstances where counsel for the Respondent/Claimant did not raise the days between September 9-16, 2014, as an outstanding issue to be determined by the Court;
>
> 2. The learned judge erred in exercising her discretion to grant the remedy of certiorari on judicial review in circumstances where the evidence showed that the Commissioner of Police had revoked, quashed or overturned the decision to dismiss the Respondent/Claimant from the Jamaica Constabulary Force ("the JCF').;

3. The learned judge erred in exercising her discretion to grant the remedy of a declaration on judicial review in circumstances where the evidence showed that the Commissioner of Police had revoked, quashed or overturned the decision to dismiss the Respondent/Claimant from the JCF;

4. The learned judge erred as a matter of law in finding that the court had the power to grant a remedy to the Respondent/Claimant in damages on judicial review in circumstances where there was no private law cause of action on the claim to ground an award for same; and

5. The learned judge erred in making consequential/case management orders for assessment of damages in circumstances where the Respondent/Claimant is not entitled to damages on judicial review."

[21] The counter-notice of appeal alleged that:

"a. The learned judge erred in failing to make an appropriate order as to costs. In failing to do so, this effectively removes the Respondents ability to obtain costs for the entire event up until that point;

b. The learned judge has ignored the general rule contained in the Civil Procedure Rule 64.6(1) that the unsuccessful party (herein the Defendants) must be ordered to pay the costs of the successful party (herein the Claimant)."

Issues arising in the appeal and counter-notice of appeal

[22] In the light of the grounds of appeal, the following issues arise for determination on the appeal:

1. Whether or not it was necessary for the judge to make orders quashing a decision that had already been

rescinded and to grant a declaration (grounds 1, 2 and 3); and

2. Whether the respondent was entitled to damages in the circumstances of the case (grounds 4 and 5).

[23] The sole issue which arises on the counter-notice of appeal is whether or not the judge erred in not ordering costs to the respondent, he being the successful party.

Whether or not it was necessary for the judge to make orders quashing a decision that had already been rescinded and to grant a declaration (grounds 1, 2 and 3)

Analysis and decision on issue 1 in the appeal

[24] The power of the court in judicial review proceedings was set out in **Associated Provincial Picture Houses Limited v Wednesbury Corporation** [1948] 1 KB 223. In that case it was held that the courts can only interfere with an act of executive authority if it is shown that the authority has contravened the law. Where there is an allegation that an authority has contravened the law the court must not substitute itself for the authority but must only determine whether the authority did in fact act in breach of the law. The court, on judicial review, does not act as a Court of Appeal but exercises a review function only. The decision whether to grant prerogative orders or a declaration on a judicial review claim is discretionary.

[25] The main complaint in this appeal is that the judge should not have exercised her discretion to grant any of the orders sought by the respondent in the circumstance where

the 2nd appellant had reversed his decision and the respondent's enlistment in the JCF had been confirmed and all payments due to him had been paid.

[26] Counsel Miss Dickens argued, on behalf of the appellants, that the judge wrongly exercised her discretion. Counsel contended that since the 2nd appellant took steps to reverse his decision to dismiss the respondent there was no basis for the court to intervene and make an order of certiorari and a declaration. It was submitted that there was no utility in making these orders and that the court had acted in vain. These are cogent arguments.

[27] Counsel Mrs Beswick-Reid submitted, on behalf of the respondent, that this court should not interfere with the judge's decision in circumstances where the exercise of her discretion was not based on a misunderstanding of the law and where the decision was not demonstrably wrong. She argued that without the court orders the 2nd appellant could once again reverse his decision and dismiss the respondent who would not have the protection of the court orders. In my view, for reasons which will become clear, that is not a likely event. Counsel also argued that the judge had a duty to ensure that the rights of citizens are not abused by the unlawful exercise of executive powers. This is indeed true.

[28] Part 56 of the CPR deals with judicial review for relief under the Constitution and for declarations, collectively described under the rules as 'applications for an administrative order'. Rule 56.1(1) outlines the applications which may be made under

this part. Rule 56.1(3) sets out the remedies which a court may grant on an application for judicial review which are:

> "(a) Certiorari, for quashing unlawful acts;
>
> (b) prohibition, for prohibiting unlawful acts; and
>
> (c) mandamus, for requiring performance of a public duty, including a duty to make a decision or determination or to hear and determine any case."

[29] Rule 56.15 deals with the hearing of applications for administrative orders and more specifically rule 56.15(3) states that at the hearing of the application:

> "(3) The court may grant any relief that appears to be justified by the facts proved before the court whether or not such relief should have been sought by an application for an administrative order."

[30] The judge, in granting the order of certiorari to quash the 2nd appellant's decision and in making the declaration she did, would have acted pursuant to the jurisdiction given in Part 56. The appellants having challenged the decision of the judge to grant the orders for certiorari and the declaration largely on the ground that there was no factual basis for doing so, I will look at each order separately to see if this challenge can succeed.

[31] Of course, this court can only interfere with the judge's decision to exercise her discretion to grant the orders sought if it was "demonstrably wrong" based on the principles in **Hadmor Production Limited v Hamilton** [1982] 1 All ER 1042. Although that case had to do with the interlocutory grant of injunctive relief, the principles set out in it are of general application and have been adopted and applied by this court. The relevant statements, at page 1046, are as follows:

> "…On an appeal from the judge's grant or refusal of an interlocutory injunction the function of an appellate court ... is not to exercise an independent discretion of its own. **It must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based on a misunderstanding of the law or of the evidence before him or on an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn on the evidence that was before the judge, can be demonstrated to be wrong by further evidence** that has become available by the time of the appeal, or on the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside on the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons that it becomes entitled to exercise an original discretion of its own." (Emphasis added)

[32] In this court's decision in **Attorney General of Jamaica v John Mackay** [2012] JMCA App 1, Morrison JA (as he then was), restated the principle at paragraph [20] as follows:

> "This court will therefore only set aside the exercise of a discretion by a judge on an interlocutory application on the ground that it was based on a misunderstanding by the judge of the law or of the evidence before him, or on an inference – that particular facts existed or did not exist – which can be

> shown to be demonstrably wrong, or where the judge's decision is so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it."

A. *The order granting certiorari*

[33] There was no dispute that the order by the 2nd appellant dismissing the respondent was ultra vires, a fact which led to the 2nd appellant rescinding his decision before the claim was heard by the judge. The 2nd appellant purported to act pursuant to regulation 24(6)(a). Paragraph (6) of regulation 24 applies to constables. I will set out regulation 24(6) in full. It states as follows:

> "On first appointment to the Force a constable shall –
>
> (a) during the period of his training be deemed to be on probation, and if during that period he is in the opinion of the Commissioner found wanting in any such qualities as are likely to render him a useful member of the Force, his services may forthwith be dispensed with by the Commissioner; and
>
> (b) at the end of the period aforesaid, if his services have not been dispensed with, be deemed to have been duly confirmed as respects his enlistment."

[34] Regulation 24(6)(a) gives the Commissioner of Police the power, during the probationary period of a newly enlisted recruit, to dispense with his or her service forthwith, if he or she is found wanting. If the service of the recruit is not dispensed with during the training period, which is deemed to be the probationary period, then at the end of that period his or her enlistment in the JCF is confirmed. Regulation 24(6)(b) makes it clear that once an officer serves out the probationary period without being

dismissed he would be "deemed to have been duly confirmed as respects his enlistment". Therefore, at the time when the letter of dismissal was written on 16 September 2014, the respondent, having not been dismissed before his probationary period ended, would have already become a confirmed enlisted member of the JCF on 10 September 2014, by operation of law.

[35] Although Part 56 gives the jurisdiction to the court to grant the remedy of certiorari or a quashing order, as it is known in some jurisdictions, it does not outline the factors or criteria which should guide a court when deciding whether or not to make such an order. The appellants maintain that the first rule of thumb is that a decision to be quashed should at least still be in existence before an order for certiorari is made to quash it. In other words, it is not possible to quash a decision that does not exist. This seems to me to make perfect sense.

[36] As stated earlier, the orders set out in Part 56 of the CPR are all discretionary orders. The judge, therefore, had a discretion whether or not to grant a remedy at all and what form that remedy should take. However, like all other discretionary powers it must be judicially exercised. In deciding whether to exercise the discretion to grant relief, there are several relevant factors which a judge ought to take into account. Certainly one factor for consideration in the grant of a prerogative order is whether it is unnecessary to do so. Most relevant to that question is whether the impugned decision which has been brought into the court for review, is still extant and, whether there still remains an issue joined between the parties. In considering that fact, the court ought to bear in mind that

it is no part of the court's function to make academic orders (see **R v Ministry of Agriculture and Fisheries and Food ex parte Live Sheep Traders Ltd** (QBD judgment delivered 12 April 1995) [1995] COD 297, as cited in Halsbury's Laws of England [2018], Volume 61A, para. 109). See also **R (John Smeaton on behalf of Society for the Protection of Unborn Children) v The Secretary of State for Health et al** [2002] EWHC 886 (Admin) where it was said, at paragraph 22 of the court's judgment, that the courts, including the Administrative Court, exists to resolve real problems and not disputes of merely academic significance.

[37] Another factor to consider is whether the dispute has a wider public interest element. For though an order on judicial review may be of little practical value to the claimant, it may be of greater significance to make a decision in the wider public interest. In **R v Secretary of State for the Home Dept, ex parte Salem** [1999] 2 All ER 42, the House of Lords, in deciding whether to hear an appeal in circumstances where there was no longer an issue joined between the parties, held that it had a discretion to hear an appeal where the issue was one of public law involving a public authority, even though at the time the appeal was due to be heard, there was no longer a lis to be decided directly affecting the rights and obligations of the parties. It held further that the discretion should be exercised with caution and such an appeal would not be heard if the result would be academic between the parties, unless there was a good reason, in the public's interest, for doing so.

[38] The Law Lords, at page 47 of the judgment in that case, put it this way:

> "…in a cause where there is an issue involving a public authority as to a question of public law, your Lordships have a discretion to hear the appeal, even if by the time the appeal reaches the House there is no longer a lis to be decided which will directly affect the rights and obligations of the parties inter se…
>
> The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future."

[39] They held that that case was not one such. The appellant's claim for income support was satisfied, he had been paid housing benefits and his reputation was fully ventilated as a result. The parties had agreed no orders as to costs. There was, therefore, no live issue remaining relating to the appellant's position. The Law Lords found that there was no basis in the particular case where a lis no longer existed between the parties, for the matter to be decided as a general principle.

[40] In the instant case, the judge herself recognised this was a relevant factor when she said at paragraph [3] of her judgment that:

> "[3] Counsel Ms Dickens representing both Respondents has correctly conceded that the Applicant had been unlawfully dismissed by the Commissioner of Police and both sides have agreed that he has since been reinstated to his position as an enlisted member of the Jamaica Constabulary Force. Remedies in judicial review proceedings are discretionary. **The first two remedies sought appear to be otiose in circumstances where both sides are in agreement that the Applicant has been re-instated with effect from September 16 2014 and that he resumed duties on**

> **May 3 2016. The applicant was also compensated with salary and allowances with effect from September 16 2014**." (Emphasis added)

[41] In paragraph [10], she again referred to the reversal of the decision and concluded that, accordingly "the orders sought arguably have become unnecessary". Having determined that the remedies sought were "otiose" and "unnecessary" why then did the judge exercise her discretion to grant them anyway? Of course there is no naysaying the fact that she had the jurisdiction to hear the matter. The claim for judicial review of the 2nd appellant's decision had been made long before it was rescinded.

[42] The answer to the question "why?" is to be found in the judge's finding that the respondent had "suffered a grievous wrong" and that it should not be "beyond the powers of the court to provide a suitable remedy". However, I find it necessary to point out at this stage that some might be tempted to say that the respondent had already obtained his remedy in the form of his re-instatement, having his enlistment confirmed and all sums due to him paid over.

[43] The judge said at paragraphs [13] and [14]:

> "[13] The orders sought are necessary in that the Applicant was dismissed with effect from September 9, 2014 and reinstated with effect from September 16, 2014. There is then the issue of the days between the 9th and 16th of September which in my view, **without the grant of the prerogative remedies sought could be construed negatively against the Applicant and achieve the very ends from which the applicant now seeks relief.**
>
> [14] To this end, it will be to the detriment of the Applicant if the orders sought in his fixed date claim form for prerogative remedies are not granted as the unanswered question would

> remain- how will that period of time be viewed? The applicant has not been paid for those days, nor can it be said that the Applicant faced disciplinary action or suspension between the 9th and 16th of September, 2014 in the face of the concession that the dismissal of the Applicant was unlawful. The simple answer lies in the grant of the orders sought to ensure certainty on both sides." (Emphasis added)

[44] The judge, therefore, thought it was necessary to quash the order of dismissal made by the 2nd appellant which no longer existed. The question is whether this was a correct exercise of the judge's discretion and whether it served the purpose she envisioned. The answer to both questions, in my view, is in the negative. Furthermore, it is unclear what the judge meant by the days between 9 and 16 September 2014 being construed negatively and "achieve the very ends from which the applicant now seeks relief". The relief the respondent sought was confirmation of his enlistment, which he received from the 2nd appellant. Nothing could be construed negatively with regard to the period as his enlistment was confirmed from 10 September 2014.

[45] The respondent's fixed date claim form filed 23 February 2015 sought an order for certiorari to quash the decision of the 2nd appellant to dismiss him from the JCF, effective 9 September 2014. At the hearing of the fixed date claim form, that decision no longer existed. The decision of the 2nd appellant which exercised the mind of the judge as regards the dates between 9 and 16 September 2014, was the decision to reinstate the respondent effective 16 September 2014. However, this decision to reinstate was not a decision forming the subject matter of the claim, neither was the fixed date claim form amended to include a request to quash that decision. That decision was not before the court for review.

[46] By virtue of rule 56.16, a claimant seeking a "writ of certiorari to remove any proceedings for the purpose of quashing them" must lodge a copy of the order with supporting affidavit verifying it, with the registry, or account for the failure to do so to the satisfaction of the court. The court must be satisfied that there are reasons for quashing the decision to which the claim relates. The court has the power to quash the decision and in addition remit the matter to the authority concerned with a direction to reconsider it. The rules anticipate that an existing decision will be brought into court for examination and, if necessary, quashing. The effect of quashing an unlawful decision is to set it aside and deprive it of all legal effect from its inception. It is self-evident therefore, that before an order of certiorari is made there must be an existing decision capable of being deprived of its legal effect. It is also clear that quashing the original decision of the 2nd appellant which no longer existed, could not cure the fault identified by the judge in the decision of the 2nd appellant to reinstate the respondent effective 16 September 2016, which still stood.

[47] In any event, the respondent's confirmation as an enlisted member of the JCF was by operation of law, he having passed his probationary period, so that the dates in the letter of reinstatement from the 2nd appellant could only have been for some administrative and perhaps accounting purposes only. The evidence before the judge, which was not disputed, was that the respondent worked up to 17 September 2016, which was inclusive of the dates 9 to 16 September 2016. The respondent made no complaints in any of his four affidavits before the court nor in any submissions to the

judge that he had not been paid for the days he worked or that the confirmation of his enlistment did not include those days.

[48] Having recognised that the decision which the respondent applied to have removed into the court for review was no longer extant at the time of the review, the judge wrongly exercised her discretion to grant a remedy, she recognised was, in her own words, "otiose and unnecessary". The basis on which she granted the remedy was a decision which was not brought into court for her review. The perceived mischief the judge sought to cure did not exist, and was, with the greatest of respect, a dispute created by the judge herself, as it was not raised as a genuine dispute between the parties.

[49] There being no outstanding genuine dispute for decision remaining between the parties at the time of the hearing before the judge, there was no necessity for a prerogative order. There was no matter of public importance which would have made it necessary for the judge to make an order in the public's interest. In the result, the grant of this relief was not justified by the facts proved (to use the language of rule 56.15 (3)). The judge made a wholly academic, otiose and unnecessary order and she erred in exercising her discretion to do so on the basis of how the dates between 9 and 16 September 2014 "would be viewed".

B. *The declaration*

[50] Although the remedy of certiorari was no longer necessary, there was, in principle, no obstacle to the court making a suitable declaration where that was an appropriate

remedy to grant (see Albert Fiadjoe in Commonwealth Caribbean Public Law, (3rd edition), at page 15). It is a fact that relief by way of a declaration is a separate and discrete remedy and may be granted even where no other prerogative remedy is available. On the distinction between the two regimes see the discussion by Fraser J (as he then was) in **Office of Utilities Regulation v Contractor General** [2016] JMSC Civ 27 (see also the case of **Lois Young Barrow et al v Glenn Tillett** (unreported), Court of Appeal, Belize, Civil Appeal No 20 of 2011, judgment delivered 28 June 2013).

[51] At paragraph 138 in the Halsbury's Laws of England (2018) Volume 61A, it states that the grant of a declaratory remedy may serve the purpose of "vindicating the rule of law and confirming that there has been a breach of the relevant principles of law". However, the authorities suggest that declarations ought not to be granted for purely hypothetical or academic issues. So a court would not normally grant a declaration in relation to a law which has been repealed. Nor would it normally grant it where there is no live issue to be resolved between the parties. There should at least be a genuine dispute about the subject matter or a live practical question to be answered. A declaration is more likely be granted where it involves a cogent public or individual interest rather than one which is purely fact sensitive, has no impact on the wider public, and is of little utility to the claimant before the court (see the case of **R (on the application of Rusbridger and another) v Attorney General** [2003] UKHL 38 which outlined the criteria to be applied when determining whether to grant declarations regarding future conduct, all of which are of general application).

[52] A good example of how the court usually deals with applications in those circumstances may be found in the English case of **R v Ministry of Agriculture and Fisheries and Food**, **ex p Live Sheep Traders Ltd**. In that case, an application was made for declarations in respect of a challenge to a number of decisions taken by the Ministry of Agriculture, refusing the grant of licences and alternatively granting certain licenses, subject to conditions. The applicants launched a challenge to, amongst other things, the legality of the licensing regime introduced by the Ministry in 1981. That legislation was, however, repealed and replaced two months before the application for orders was heard. The result was that the application, with respect to a large part of the claim, had no practical advantage to the applicants. The court heard arguments on whether in the light of the fact that the matter was now academic, it would be convenient or just to make a declaration. The applicants argued that the orders ought to be made by the court to declare that the Ministry had been part of an illegal regime in order to protect individuals against a public body and that it would also assist the applicants in any further cause of action against the Ministry.

[53] The court held that a declaration must serve some useful purpose, or affect other cases, or lay down a ruling for the future which would have some practical effect. It also cast substantial doubt on the utility of any declaration which was relevant only to a historical situation which was no longer in effect. The court also refused to follow **R v Northavon District Council, ex parte Palmer** (1993) 25 HLR 674, where the need for prerogative orders became unnecessary but the court nevertheless ordered a declaration on the basis that, not to do so would cause the applicant to fall afoul of an

established rule in England that damages resulting from the action of a public body can only be claimed in judicial review proceedings. The judge himself, in that case, cast doubt on this "debatable" procedure and the court in **R v Ministry of Agriculture and Fisheries and Food, ex p Live Sheep Traders Ltd** relegated it to its own particular facts.

[54] In the instant case, the judge observed that although the remedy of a declaration also appeared to be otiose and unnecessary, it was necessary because the respondent was dismissed with effect from 9 September 2014 and reinstated with effect from 16 September 2014, so that in her view, there was a gap in his employment between that period. In taking that position, she may well have fallen into the same error as the 2nd appellant, with regard to the significance of the dates, when he purported to dismiss the respondent in the first place.

[55] Counsel for the appellants argued correctly that the respondent did not raise any issue regarding his employment between the period 9 September to 16 September 2014, and that this had not been set out as a ground for judicial review. It was also not specified in the claim as an issue to be resolved by the court at the judicial review proceedings. Counsel for the appellant asked the court to note that at the hearing of the judicial review counsel for the respondent confirmed to the court that the respondent was reinstated and had resumed duties and all outstanding salaries had been paid to him. The fact that the respondent had been reinstated and paid all that was due to him was also raised in

the affidavit of Kamau Ruddock, filed on 26 September 2016 on behalf of the appellants, a fact which was not challenged by the respondent.

[56] It was further submitted that the fact that the respondent had been re-instated, it automatically followed that, pursuant to regulation 24(6)(b) of the Police Service Regulations, he would become a confirmed member of the JCF as at the second anniversary of his initial enlistment, and as such, a declaration from the court to that effect was not necessary. It is difficult to argue against the logic of this submission.

[57] Counsel for the respondent, however, argued that because a declaration was a separate remedy, the judge could properly, if satisfied it was necessary, make the declaration without any reference to the considerations surrounding the exercise of her powers for a grant of the prerogative reliefs. In making this submission counsel relied on the decision in **Office of Utilities Regulation v Contractor General**. Furthermore, counsel submitted, the re-instatement of the respondent would not affect the court's power to determine whether the decision to dismiss him in the first place had been reasonable and properly effected. This last submission may well be true, but the fact is that the declaration sought was not on the illegality or reasonableness of the actions of the 2nd appellant but rather, it sought a declaration of an obvious fact.

[58] Counsel also rejected the appellants' contention that there was no issue raised in relation to the period 9 September to 16 September 2014. It was submitted that it was clear from the fixed date claim form that the orders being sought concerned the decision to dismiss the respondent from the JCF by way of letter dated 16 September 2014. It

was further submitted that based on this letter it was clear that the respondent would not have been compensated from 9 September 2014 onwards. They argued that the letter, dated 25 May 2016, plainly indicated that the respondent was re-instated effective 16 September 2014. It was further submitted that based on the letter it was evident to the judge that there was an issue as it related to the dates from 9 to 16 September 2014.

[59] It is clear that the 2nd appellant had been well aware that the respondent's confirmation as an enlisted member of the JCF took effect by operation of law, once his probationary period had elapsed and that for his dismissal to be lawful and effective, the date of his dismissal must be before the end of the probationary period. This was the reason the letter of dismissal dated 16 September 2014 sought to dismiss him effective 9 September 2014, a day before the probationary period had ended. This dismissal was ultra vires and of no effect, not because the 2nd appellant had no power to dismiss during the probationary period (he did indeed), but because the time to exercise that power was lost on 10 September 2014. So, by 16 September 2014, it was no longer possible to dismiss the respondent pursuant to that provision in the regulation, as his enlistment had been deemed confirmed from 10 September 2014. Therefore, regardless of the effective date for reinstatement the 2nd appellant had stated in "his letter of reinstatement", the respondent was a confirmed member of the JCF as of 10 September 2014.

[60] Therefore, the judge's concern that the days between 9 and 16 September 2014 could be construed negatively "against the Applicant and achieve the very ends from which the Applicant now seeks relief", and that it would cause a "detriment to the

Applicant" if the orders were not granted, was misconceived. It led her to decide the case based on a dispute that did not exist. There was no unanswered question raised by that period, certainly not in the respondent's claim nor in his affidavits in support of that claim. Neither was it raised as a question of law. As a result of her misconception, the judge ended up granting a declaration in terms the respondent did not even seek. For the respondent sought a declaration that he was at all times a confirmed member of the JCF with effect from 10 September 2014, (when his probation period would have effectively ended). However, the judge granted an order confirming him as a member of the JCF from 9 September 2014, when he would still effectively have been on probation. On that basis alone the declaration cannot be allowed to stand.

[61] If the declaration cannot be allowed to stand, in any event, because of the incorrect date, it begs the question whether it should be varied or set aside altogether. The subject matter of the declaration had no public interest element which would induce the court to make the declaration notwithstanding the fact that it had little or no utility to the respondent (see Zamir & Woolf: "The Declaratory Judgment", 2nd edition, London: Sweet & Maxwell, 1993, edited by The Right Honourable Lord Woolfe, at paragraph 4.116 under "public interest", which was cited in **R v Ministry of Agriculture and Fisheries and Food ex p Live Sheep Traders Ltd**). Whilst it is important that declarations be available to redress wrongs affecting individuals, it should only be granted where appropriate. In the instant case the declaration, in my view, was granted on a wholly irrelevant consideration and, therefore, the judge in exercising her discretion to grant it, failed to properly interpret the effect of the provisions in the regulations and fell into

error. The respondent's enlistment in the JCF having taken effect by operation of law, the declaration was unnecessary, in any event. I would, therefore, set it aside.

[62] Grounds 1, 2 and 3 would therefore, succeed.

Whether the judge erred in making case management conference orders for an assessment of damages hearing to be held in the circumstances of this case (grounds 4 and 5)

[63] A judge of the Supreme Court has the power to award damages in judicial review proceedings in certain circumstances, without the need to issue further proceedings. In particular rule 56.1(4) of the CPR provides:

> "In addition to or instead of an administrative order the court may, without requiring the issue of any further proceedings, grant-
>
> (a) An injunction;
>
> (b) Restitution or damages; or
>
> (c) An order for the return of any property, real or personal."

[64] A claim for damages may, therefore, be joined with a claim for administrative orders or judicial review. Rule 56.10 of the CPR prescribes how such claims are to be made and specifically provides that:

> "(1) The general rule is that, where not prohibited by substantive law, an applicant may include in an application for administrative order a claim for any other relief or remedy that -
>
> (a) arises out of; or
>
> (b) is related or connected to;

the subject matter of an application for an administrative order.

(2) In particular the court may award-

(a) damages;

(b) restitution; or

(c) an order for return of property,

to the claimant on a claim for judicial review or relief under the constitution if –

(i) the claimant has included in the claim form a claim for any such remedy arising out of any matter to which the claim for an administrative order relates; or

(ii) the facts set out in the claimant's affidavit or statement of case justify the granting of such remedy or relief; and

(iii) the court is satisfied that, at the time when the application was made the claimant could have issued a claim for such remedy.

(3)…"

[65] It is, therefore, generally accepted that a claim for damages may be included in a claim for administrative orders, and such damages may be awarded by the court hearing the administrative law proceedings. However, there are riders to this general rule. The first is that the claim for damages cannot be the only claim. The White Book (Civil Procedure Volume 1, 2003) states:

"A claim for damages may be included in a claim for judicial review ... Such a claim may, however, only be included in addition to a claim for one of the prerogative remedies or a declaration or injunction; a claimant may not seek damages alone in a claim for judicial review. **Furthermore, damages**

> **may only be awarded if they could have been awarded in an ordinary claim, that is the claimant must be able to establish a private law cause of action …The judicial review procedure does not create any new right or remedy in damages; it simply provides that, if a claim for damages exist in private law, it may, in appropriate cases, be claimed in the judicial review procedure alongside the claim for a prerogative or other remedy to vindicate a public law right**." (Emphasis added)

[66] Secondly, even where a claim for damages is being made along with other administrative law remedies, the bases of such a claim must be shown. Facts must be shown which justify the award of damages. In other words, the claimant must have a cause of action backed up by evidence to ground the claim. Thirdly, the cause of action must have existed at the time the claim for judicial review was filed. The rules are procedural only and give no substantive right to damages. To recover damages, a recognised cause of action must be pleaded and proved.

[67] The respondent in this case filed four affidavits in the court below. One was in support of his application for leave to apply for judicial review. The remaining three were in support of the fixed date claim form filed 28 February 2015. In that fixed date claim form, the respondent claimed general damages and vindicatory damages for breaches of his constitutional rights. The claim for vindicatory damages was subsequently abandoned. Although the respondent averred that the 2nd appellant acted ultra vires, irrationally in the **Wednesbury** sense, and in breach of his constitutional rights, no cause of action for the award of general damages was averred in the fixed date claim form.

[68] In his affidavit evidence filed 27 February 2015 in support of the fixed date claim form no mention was made of any cause of action in private law, any breach by the

appellants nor any loss resulting from the actions of the 2nd appellant to ground a claim for damages. In his third affidavit filed 17 November 2015, he averred that his dismissal has had a "devastating, demoralizing and embarrassing impact" on him as well as his family as he is unable to assist them financially having been "relegated" to the unemployment lines". He has gone to bed hungry on some nights and found applying for jobs embarrassing. At paragraph 7, he averred that having been once held in high esteem in his community, based on the allegations against him persons have drawn negative and untrue conclusions against him, resulting in his character and reputation being shattered.

[69] In his fourth affidavit filed 5 February 2016, at paragraph 7, the respondent alleged as follows:

> "My dismissal continues to impact heavily on me and that of my family's quality of life and well being. I am frustrated, disappointed and demoralised by the continued state of Affairs [sic]. My efforts to find a job have redoubled because my girlfriend is currently three months pregnant. As a father to be I do not want to be in the invidious position of being unable to financially support my child."

[70] That then would be the evidence in support of any private law claim to damages the respondent was alleging before the judge in his administrative law claim.

[71] Counsel for the appellant argued that the judge erred in making consequential case management orders for an assessment of damages hearing to be held. This, counsel said, was because the respondent had failed to establish the bases in law upon which the claim for general damages was brought. Counsel submitted further that the respondent had no entitlement in law to damages as there is a fundamental principle that "there is

no general right to damages for public law wrongs" as confirmed in the case of **Berrington Gordon v Commissioner of Police**. Counsel argued that in order for the respondent to properly succeed in a claim for damages in judicial review proceedings, he must establish a separate private law claim.

[72] In **Berrington Gordon v Commissioner of Police**, Sykes J (as he then was), in referencing claims for damages in administrative actions based on unlawful process, determined that for such a claim to succeed there had to be more than just the mere unlawful administrative act. I will repeat what he said at paragraph 2 of his judgment only to the extent that I think it is relevant, as follows:

> "…It is well established that unlawful administrative action does not generally give rise to a claim for damages. It is true that a functionary can be held liable in damages in negligence, breach of statutory duty and misfeasance in public office but that is because the conduct of the functionary goes beyond mere unlawful conduct. Judicial review is about process not merits and an unlawful process does not usually give rise to damages unless there is some other kind of conduct than just, for example, a failure to be fair. Usually, for damages to be claimed because of an unfair process there usually has to be an assertion (supported by evidence) that the decision maker acted out of malice or spite towards the applicant for judicial review. Also, it is my view that if the claimant is seeking damages the pleaded case ought to set out the factual basis for such a claim. To simply state the claim for damages in the fixed date claim form without following up, in the affidavit, with stating the facts on which the claim is based is not sufficient..."

[73] Sykes J dealt with the issue shortly and cited no authority. Indeed, none was necessary, as he simply stated what has become trite law. However, if high authority for the position is necessary, the case of **R (on the application of Quark Fishing Ltd) v**

Secretary of State for Foreign and Commonwealth Affairs [2005] UKHL 57, cited by the appellants, will suffice. In that case, Baroness Hale, at paragraph [96], held that the English law "does not recognise a right to claim damages for losses caused by unlawful administrative action ...[t]here has to be a distinct cause of action in tort…". I dare say that that is the law in this jurisdiction also, and Sykes J was entirely correct.

[74] Although counsel for the respondent is correct in saying that the judge's finding that damages may be claimed in judicial review proceedings is consistent with the CPR, she was incorrect in her assertion that there is no requirement or prerequisite for a separate private law cause of action in administrative proceedings to be made in order for damages to be awarded. Counsel for the respondent's reliance on the Belizean case of **Lois Young Barrow et al v Glenn Tillett** in submitting that there was no need to plead or bring a separate tortious claim in order for the court to award damages is misconceived. That case dealt with the issue of whether it was necessary to approach the court by way of the prescribed procedure for a claim for judicial review in order to make a claim for relief by way of a declaration.

[75] Counsel submitted that there was unchallenged evidence before the court that the respondent suffered undue financial loss and hardship which the judge took note of. Counsel pointed out that a claim was made in the fixed date claim form for damages because his dismissal from the JCF led to undue hardship and emotional damage and that the respondent's claim for damages was pursuant to rule 56.10(2)(c)(i). However, it

cannot be emphasised enough that the rule is procedural only and gives no substantive right to damages.

[76] Counsel for the respondent submitted that the judge, took the view that the best way to dispose of the matter was to make case management directives towards an assessment of damages hearing. This, it was argued, was in keeping with the wide powers afforded to the court at the hearing of an administrative application in order to provide for the expeditious and just hearing of the claim. Counsel submitted that this interpretation of Part 56 was in accordance with the overriding objective in rule 1.2 for cases to be dealt with justly. Counsel further submitted that on 26 October 2017, in accordance with the judge's order, the damages suffered were particularized; outlining the financial and reputational damage suffered by the respondent.

[77] In this case, as counsel for the appellants pointed out, and as I have already shown from a perusal of the fixed date claim form and the affidavits in support, no cause of action was pleaded. It was necessary for the respondent to have identified a cause of action in the claim. The order of certiorari and the declaration did not lead to automatic compensation. Indeed, it could be inferred that no cause of action was pleaded because there was no cause of action arising in private law which entitled the respondent to damages in this case. The respondent was paid over monies due to him, his enlistment was confirmed and there was no allegation that he was slandered or defamed, therefore his reputation would have been vindicated as a result of his reinstatement. I would,

therefore, agree with counsel for the appellants' contention that the judge erred in making the consequential orders to facilitate the assessment.

[78] In my view, the judge's approach cannot be sustained even on a wider and more fundamental basis. In the first place, it is clear that the judge found herself in a position where, on the evidence before her, she was unable to award damages to the respondent. The result was that no order was made awarding general damages for a sum to be assessed. After granting orders of certiorari and a declaration, the judge made case management orders, set out to the extent they are relevant, as follows:

> 1. "The Applicant is to file and serve particulars of claim setting out the details of his claim for damages within thirty days of the date of this order.
> 2. The respondents are to file and serve their defence if any, within thirty days of the date of service of the Applicant's affidavit.
> 3. …
> 4. …
> 5. …
> 6. The issue of assessment of damages is set down for hearing on May 8, 2018.
> 7. …"

[79] In **R (on the application of Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs** it was plainly stated that there must be a claim that can be particularized as the basis of how the damages should be quantified. Therefore, a cause of action must be identified on which general damages may be awarded before it can be set for assessment of the quantum. The whole point of allowing

the joinder of the claim for damages to a judicial review claim is that in making such a claim along with an application for prerogative orders or a declaration, the court will be placed in a position to be able to award damages without further proceedings. In a really difficult case (which this case is not one such) it may be necessary, after general damages is awarded, for further and better particulars to be provided in order to quantify the award. However, if the court hearing the claim finds itself in a position where it cannot make an order that general damages are awarded in a sum to be assessed, it means the claim has not been made out and ought to have been dismissed.

[80] Rule 56.10(3) gives the court the power at any stage to direct that the claim for other relief, in this case damages, be dealt with separately from the claim for administrative orders. This rule is on the basis that the claim for other relief was wrongly joined in the first place (so that the court may order wasted costs "because of the unreasonable use of the procedure") (rule 56.10 (3)(c)). This is not what the judge purported to do in this case.

[81] The judge in this case gave the respondent the opportunity to particularize his claim for damages without making an award for damages and in effect ordered separate proceedings for an award to be made and assessed. She gave no indication as to the basis upon which she thought an award for general damages could be made. What she did was tantamount to ordering a separate claim for damages to be heard and the amount assessed without actually setting a date for the hearing of the claim, before the assessment. The appellants say she was wrong to do so as the respondent had pleaded

no cause of action for damages to be awarded which could be particularized for assessment and simply relied on the unlawful actions of the Commissioner as a bases to claim damages, which in principle, he could not do. Again the appellants are correct.

[82] The respondent in order to get an award of damages must show that he had a cause of action against the appellants and plead the facts in support of his assertions in the claim. The respondent averred financial loss, but he was paid all his salary. He made assertions of emotional distress and embarrassment but no cause of action arises from that. As to loss of reputation, no averment was made as to publication of any slanderous or defamatory material by the 2nd appellant to sustain such a claim, and as said before, any damage to his reputation would have been vindicated by his confirmed enlistment in the JCF. It cannot be over emphasized that a claim for damages based solely on the unlawful act of the 2nd appellant cannot succeed.

[83] Grounds 4 and 5 would, therefore, succeed.

The counter notice of appeal

Analysis and decision

[84] All courts have a discretion with regard to costs. It is a discretion which must be exercised judicially like all others. In judicial review cases, the courts have taken a flexible approach with regard to the general rule that costs follow the event, especially where the matter raises issues of general public interest. The CPR also allows, in Part 56 as well as in Part 64, for the court to make no orders as to costs, if the justice of the case requires it and to deny parties their costs if they had acted unreasonably or because of their

conduct in the claim. So in **R (on the application of Valentines Homes & Construction Ltd) v HM Revenue and Customs** [2010] EWCA Civ 345, the claimant was able to recover costs for the commencement of judicial review proceedings only because to do so had not been unreasonable, even though the claim later became academic. No costs were recovered for the continuation of the claim after the issue was settled. Also, in **R (on the application of Rusbridger and another) v Attorney General**, the unsuccessful claimant was denied his costs in the courts below and was made to pay costs on the appeal because the claim was unnecessary. As was said in that case, at paragraph 47, "…if unnecessary litigation is commenced in order to obtain obvious results, the claimant must expect to have to pay the costs of the exercise". Both these cases are cited in Halsbury's Laws of England (2018), Volume 61A, para. 85.

[85] In this case, the judge made no order as to costs. This means that each party would bear their own costs in the court below. The judge gave no reason for this decision in her oral judgment. No objection, it would appear, was taken to the order at the time it was made. The award of costs being at the discretion of the court, the issue in this counter-notice of appeal is whether the judge was wrong to order no costs against the appellants in favour of the respondent, who was the successful party in the court below.

[86] Rule 56.15(4) gives the court the power to award costs in administrative proceedings after a hearing. It states:

> "The court may, however, make such orders as to costs as appear to the court to be just including a wasted cost order."

[87] Rule 56.15(5) states:

> "The general rule is that no order for costs may be made against an applicant for an administrative order unless the court considers that the applicant has acted unreasonably in making the application or in the conduct of the application.

[88] Those rules relate specifically to administrative law matters. The starting point in those rules is that an award of costs is at the discretion of the judge and an order for costs may be made where it appears to the court to be just. This starting point is subject only to the rule that no order may be made against an unsuccessful applicant for administrative orders unless it was unreasonable for him to bring the claim or his conduct was unreasonable during the application process.

[89] CPR 64.6 states:

> (1) "If the court decides to make an order about costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party.
>
> (2) The court may however order a successful party to pay all or part of the costs of an unsuccessful party or may make no order as to costs.
>
> (3) In deciding who should be liable to pay costs the court must have regard to all the circumstances."

[90] Rule 64.6(4) lists the factors that the court must consider. These include the conduct of the parties, and the level of failure or success in the matter.

[91] Therefore, both under Part 56 and Part 64, the court may properly make no order as to costs, at its discretion. If in Part 56 matters it appears just that costs are to be awarded, then the general rule in 64.6(1) that the unsuccessful party must pay the costs of the successful party would be applicable. This general rule is qualified, however, by

rule 56.15(5) where costs orders against an unsuccessful applicant for administrative orders are prohibited unless he acted unreasonably in bringing the claim or in his conduct of the application.

[92] In **R (John Smeaton on behalf of Society for the Protection of Unborn Children) v The Secretary of State for Health and others** it was agreed that if a public body acted unlawfully, it was generally right that it should pay the costs of a claimant who bears the burden of establishing that fact. However, the rules encourage parties to be sensible in their approach in the light of the ever increasing costs of litigation. In determining the issue as to whether or not the judge was correct to make the order she made, the court has to consider whether it was just not to exercise her discretion to make any order, in the circumstances of the case.

[93] Citing **Branch Development Limited (t/a Iberostar) v the Industrial Disputes Tribunal and the University and Allied Workers Union** [2016] JMCA Civ 26, counsel for the respondent argued that the judge was wrong to make the order she did with respect to costs as the respondent was the successful party and was entitled to his costs. Counsel submitted that there was nothing which would have caused the court to deviate from the general rule enshrined in Rule 64.6(1) that the unsuccessful party pays the costs of the successful party.

[94] Counsel argued that it was essential that the issue of costs in judicial review matters be addressed by the court. Counsel argued also that, although the 2nd appellant later reversed his decision, it came after steps were taken to, amongst other things,

document an intention to defend the claim. The appellants, although commended by the judge for conceding, had previously been combative and adversarial, counsel stated.

[95] Counsel argued further that the general rule that costs follows the event applies to public law as well as private law cases. It was submitted that the appellants' conduct as well as their relative limitless resources in defending the claim should be considered by the court in the respondent's counter-notice of appeal in granting costs, as he has had to incur "mountainous legal expenses" in order to "seek justice". Counsel submitted further that it was wholly unfair and "reeks almost of a despotic environment" to cause him in seeking justice against his employer, the Government of Jamaica – to be forced to expend legal costs without compensation as the system of the recovery of costs is based on the notion that in addition to any other remedy, parties should be fairly compensated for the legal costs which they are forced to expend in prosecuting their claim or defending their rights.

[96] Counsel contended that rule 56.15, governing orders for costs in the CPR, in no way relates to a successful claimant's claim for costs. This rule it was argued is for an unsuccessful claimant who, although unsuccessful, brought an action that was properly prosecuted. Counsel implored the court to follow the general rule that costs should follow the event. Counsel relied on a number of authorities in support of her contentions.

[97] Counsel for the appellants submitted that the order of the judge in relation to costs should be upheld and that there be no order as to costs for the proceedings. Counsel cited rules 56.15(4) and (5), 64.6(3) and (4) of the CPR. Counsel submitted that although

the judge did not indicate or outline the basis upon which she made no order as to costs, it was, nevertheless, an appropriate order to make in the circumstances. Counsel pointed to the fact that the appellants' approach to the application for judicial review was non-adversarial, with a clear aim to have the matter settled without further recourse to the courts. This, counsel for the appellants submitted, was clearly stated in the letter to counsel for the respondent, dated 29 February 2016.

[98] Counsel argued further that the respondent was re-instated as a constable of police shortly after that letter was sent. Consequently, counsel submitted, it would have been prudent and appropriate, and in keeping with the overriding objective, for the respondent to have discontinued the application for judicial review as it had become a purely academic issue.

[99] Counsel submitted that it was wholly unreasonable and unjustifiable for the respondent to have proceeded with his application for judicial review and to pursue damages in circumstances where the law does not permit. This, it was argued, is an important and critical factor that this court should not ignore and, based on the respondent's unreasonable pursuit of damages and the compromise approach adopted by the appellants, the order with regard to costs was properly made.

[100] In this matter the judge made no order as to costs as she had the discretion to do. In her discretion, she was clearly of the view that the justice of the case indicated that the respondent was not entitled to costs. In **Branch Development Limited t/a**

Iberostar v Industrial Disputes Tribunal and another, Morrison P, at paragraph [11], held that:

> "... the starting point must be for the court to determine whether it is appropriate to make any order at all for the costs of these proceedings. For, if the answer to this question is no, then rule 64.6(1), by its very terms, will have no application ..."

[101] In **Roald Henriques v Hon Shirley Tyndall et al** [2015] JMCA Civ 34 this court held that the appellant was entitled to his costs of the appeal, and that the respondents would have to show special or exceptional circumstances for a departure from the general rule in rule 64.6(1) where they had conceded the appeal during submissions. The court held that, even though the concession rendered it unnecessary to fully hear the substantive issue raised in the appeal, this does not necessarily absolve them from liability in costs. Counsel asked this court to extrapolate the fundamental principle from that case, which is that, even where a party concedes, he is still liable to pay costs.

[102] Counsel also relied on Mangatal J's interpretation of rule 56.15(4) and (5) in **University of Technology Jamaica v Industrial Disputes Tribunal and another** (unreported), Supreme Court, Jamaica, claim No 2009 HCV 1173, judgment delivered 23 April 2010, following a similar interpretation in the case of **Toussaint v Attorney General Saint Vincent & The Grenadines** [2007] UKPC 58 of rule 56.13 of the Eastern Caribbean Civil Procedure Rules 2000 which is mutatis mutandis to rule 56.15(5) of the CPR. Both cases held that rule 56.15(5) was to protect unsuccessful applicants for judicial review from cost orders against them and was not meant to protect a public body or the state from paying costs when it was unsuccessful in defending an administrative law

claim. In that case, Mangatal J awarded the University of Technology, the successful applicant, 75% of its costs.

[103] In this case, the respondent was the successful party in the court below. As a general rule, he was entitled to his costs, although the judge may make a different order. The order that parties should bear their own costs or no order as to costs appears to have been the order seen by the judge to be most just in this case. That is an order she can properly make at her discretion. However, it may be that it was made based on a misunderstanding of the effect of rule 56.15(5). Without reasons for the judge's decision, it is difficult to say for certain. The respondent having appealed that order, and the judge having given no reason for taking the position that she did, this court must consider, in assessing this counter-notice of appeal, whether it was indeed just and appropriate to make that order. Although the question of whether to award costs is within the judge's discretion, it is still a discretion which must be exercised judicially.

[104] This was a case where the appellants conceded and took steps to re-instate the respondent before the hearing of the merits of the application. Nevertheless, the respondent pursued the orders in a case where they had become largely academic. The question is whether the appellants should have borne the costs of this academic pursuit. It is possible that the judge thought not. I cannot say, looking at this case in the round, that the justice of the case would not warrant such an approach. On the one hand, the respondent asserts that the judge erred in principle. On the other hand, the respondent pursued a purely academic claim. There was no issue of public importance or any legal

ambiguity that required clarification in the public interest. The purely factual issues in the case were pursued in the respondent's own personal interest and it cannot be said that the judge was wrong to find that it would not be just to visit the costs of this academic pursuit on the appellants.

[105] However, the respondent's case was not always academic. The unlawful decision of the 2nd appellant resulted in the respondent having had to file an application for leave to apply for judicial review and to seek relief by way of prerogative orders. The costs in that application were ordered to abide further orders of the court. The respondent, therefore, received no costs for that application which he was forced by the unlawful conduct of the 2nd appellant, to make. After the fixed date claim form was filed it was defended by the appellants and the concession came on 29 February 2016 (approximately one and a half years after the application for leave was filed). That concession came with an offer to settle the issue of costs up to that point. The 2nd appellant rescinded his decision but instead of the respondent withdrawing the claim and settling the issue of costs, he proceeded with the claim from 21 November 2016 to judgment on 27 September 2017.

[106] The question is whether it was just, in the light of the respondent's conduct in continuing to pursue the claim, to deny him his costs up to the point of the concession. I for my part believe this to be a relevant consideration. The appellants clearly considered they were obliged to pay costs up to that point. They wrote to the respondent's attorneys indicating same. In my view, the judge ought to have considered that at least the

respondent's costs up to that point were due to him and whether it would have been just to deny him of them. It was an error in judgment for her not to so consider or to expressly give a reason why the respondent should have been deprived of it. Whilst it is clear on the facts, even without reasons from the judge, why she could have considered that the respondent was not entitled to costs of the hearing itself, there is nothing on the facts of the case which would warrant a denial of the award of costs to the respondent up to the point at which the appellants threw in the towel and offered to settle the issue of costs.

[107] As a result, the appeal against costs must succeed. The respondent was entitled to at least half his costs in the court below. Grounds a and b of the counter- notice of appeal, therefore, succeeds.

[108] As a result, I believe the costs order in this case should also allow for the respondent to recover half his costs on the counter-notice of appeal. Having been given relief by the judge in the court below, it cannot be said that the respondent acted unreasonably in defending the appeal such that costs should be awarded against him.

Disposition

[109] In the result, I would allow the appeal with no order as to costs. I would set aside the orders of Wint-Blair J made 27 September 2017 on the judicial review claim granting certiorari and a declaration. I would also allow the counter-notice of appeal and set aside the costs order of Wint-Blair J made on 27 September 2017, and substitute therefor an order for the respondent to receive half his costs against the appellants. The respondent is to have half his costs in the counter-notice of appeal.

PHILLIPS JA

(1) The appeal is allowed.

(2) The orders of Wint-Blair J made 27 September 2017 are set aside. Substituted therefor is an order that the fixed date claim form is dismissed.

(3) No order as to costs in the appeal.

(4) The counter notice of appeal is allowed.

(5) The costs order made by Wint-Blair J on 27 September 2017 is set aside and substituted therefor is an order that the applicant is entitled to half his costs to be taxed if not agreed.

(6) The respondent is entitled to half his costs in the counter notice of appeal to be taxed if not agreed.