IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

CLAIM NO. SU 2019 CV01796

CORAM: THE HONOURABLE MRS. JUSTICE LORNA SHELLY WILLIAMS

THE HONOUABLE MRS. JUSTICE SONYA WINT- BLAIR

THE HONOURABLE MRS JUSTICE TARA CARR

IN THE MATTER OF an Application by **DEANROY BERNARD** for leave for Judicial Review

AND

IN THE MATTER OF Section 126 (1) of the Constitution of Jamaica, 1962

AND

IN THE MATTER OF Section 126 (3) of the Constitution of Jamaica, 1962

AND

IN THE MATTER OF Section 93 (1) of the Constitution of Jamaica, 1962

BETWEEN	**DEANROY RALSTON BERNARD**	**CLAIMANT**
AND	**THE PUBLIC SERVICES COMMISSION**	**1ST DEFENDANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**2ND DEFENDANT**
AND	**THE JAMAI CA CIVIL SERVICE ASSOCIATION**	**INTERESTED PARTY**

FULL COURT

Mr Marc Williams and Mr Duncan Roye instructed by Williams, McKoy and Palmer for the Claimant.

Ms Faith Hall and Mr Louis Jean Hacker instructed by Director of State Proceedings for the 2nd Defendant.

Mr Keith Bishop and Mr Janoi Pinnock instructed by Bishop and Partners for the interested party.

Heard: November 14, 15 & 16, 2022 and March 29, 2023

Constitution - Power to Transfer Permanent Secretary - Legitimate Expectation- Breach of Natural Justice – Damages – Injunction - Certiorari

Sections 1(2)(a), 1(2)(b), 93 and 126 of the Jamaica (Constitution), Order in Council 1962

CARR, J

[1] I have read the decision of my learned sisters in draft and I concur with the judgment of Shelly-Williams, J. There is nothing that I would wish to add.

SHELLY-WILLIAMS, J

BACKGROUND

[2] The Claimant was appointed as a Permanent Secretary on the 3rd of November 2016. His appointment was as a result of a recommendation from the Public Service Commission in accordance with Section 126 of the Constitution. He was assigned to the Ministry of Education, Youth and Development (Ministry of Education) with effect from the 7th of November 2016.

[3] The Office of the Services Commission informed the Claimant, by way of letter dated the 1st of March 2019, that he was to be reassigned to the Ministry of Finance and Public Service ("Ministry of Finance") with effect from the 14th of February 2019. The letter indicated that the Governor General, on the recommendation of the Prime Minister, had approved the re-assignment. The letter detailed that the Claimant was to be designated as Director General.

[4] On the 26th of March 2019, Counsel for the Claimant wrote to the Chairman of the Public Services Commission questioning the re-assignment of the Claimant as being ultra vires, arbitrary and unconstitutional. The letter further requested, among other things, that the Claimant be re-instated to his original position, or be assigned to a portfolio ministry of equal status.

[5] The Office of the Services Commission responded to the letter of the 26th of March 2019 by informing Counsel for the Claimant that a special meeting would be held on the 9th of April 2019, after which the Commission would respond to the concerns raised. On the 25th of April 2019 the Commission wrote to Counsel for the Claimant and informed him that the Claimant was being re-assigned to the Ministry of Finance as a Permanent Secretary with effect from the 14th of February 2019.

[6] On the 25th of April 2019 the Claimant received a letter from the Chief Personnel Officer in the Ministry of Finance, that he was being re-assigned from the position of Permanent Secretary in the Ministry of Education, to Permanent Secretary at

the Ministry of Finance and designated Director General with effect from the 14th of February 2019.

[7] A Gazette Notice dated the 1st of March 2019 was published indicating that the Claimant had been re-assigned from the position of Permanent Secretary in the Ministry of Education to the Ministry of Finance as Director General Designate. A second Gazette Notice was published on the 16th of May 2019 which spoke to the Claimant being re-assigned as a Permanent Secretary in the Ministry of Finance and designated Director General. The position of Director General was created and Gazetted as a new position in the Ministry of Finance on the 1st of December 2020.

[8] Subsequent to being re-assigned to the Ministry of Finance, the Claimant gave evidence that he met with the Financial Secretary in the Ministry of Finance and was assigned tasks that had already been completed. Since then he has been unable to convene meetings with the Financial Secretary despite requesting them, and has not been assigned any further tasks. The Claimant filed a Fixed Date Claim Form on the 16th of October 2019 seeking the following relief: -

1. *"A Declaration that, pursuant to the provisions of Section 126 (3) of the Jamaica (Constitution), Order in Council 1962, the Prime Minister is only empowered by law to recommend to the Governor General the Appointment of a Permanent Secretary on transfer from an office other than that of Permanent Secretary carrying the same salary as that of a Permanent Secretary;*
2. *A Declaration that, Pursuant to the provisions of section 126 (3) of the Jamaica (Constitution), Order in Council, 1962 the Governor General is not empowered to "re-assign" a Permanent Secretary;*
3. *A Declaration that, pursuant to the provisions of Section 126 (3) of the Jamaica (Constitution), Order in Council, 1962, the act of the Governor General acting on the recommendation of the Prime Minister to reassign the*

Claimant to the Ministry of Finance and the Public service as Director General Designate is unconstitutional and null, void and of no effect;

4. *A Declaration that the decision as contained in the letters dated March 1, 2019 and April 25, 2019 served on the Claimant by the 1st Defendant, purporting to re-assign the Claimant to the Ministry of Finance and the Public Service is in breach of Section 126 (3) of the Jamaica (Constitution), Order in Council, 1962 and the said letter is null, void and of no effect;*
5. *A Declaration that the re-assignment of the Claimant as Permanent Secretary in the Ministry of Education, Youth and Information to a Director General Designate or to any other position is unconstitutional;*
6. *A Declaration that the Claimant is still the holder of his office as permanent Secretary in the Ministry of Education, Youth and Information and the status quo, as it then was – prior to the issuance of the letters of March 01, 2019 and April 25, 2019, obtains;*
7. *A Declaration that the Claimant's reassignment to the Ministry of Finance and the public service is in breach of the Claimant's legitimate expectation that he would remain in the capacity of Permanent Secretary of the Ministry of Education, Youth and Information.*
8. *A Declaration that the contractual reassignment of a Permanent Secretary is unconstitutional within the meaning of Section 93(1) and Section 126 (1) of the Constitution of Jamaica, 1962 and not applicable to the Claimant;*
9. *A Declaration that a Permanent Secretary must be permanently appointed within the meaning of section 93(1) and Section 126(1) of the Constitution of Jamaica, 1962;*
10. *An Order of Certiorari quashing the decision of the Governor General, acting on the recommendation of the Prime Minister, to re-assign the Claimant to the Ministry of Finance and the Public Service as Director General Designate, as contained in the letters dated the March 1, 2019 and April 25, 2019;*
11. *An injunction restraining the Defendants, whether by themselves or servants or agents from taking steps to prevent the claimant from returning*

to perform his functions as the duly appointed Permanent Secretary in the Ministry of Education, Youth and Information;

12. *An Order mandating the Public Service Commission to reverse its directive to reassign the Claimant and to give due express recognition to the Claimant as the duly appointed Permanent Secretary in the Ministry of Education, Youth and Information:*
13. *Damages and Aggravated damages;*
14. *Costs to be awarded to the claimant; and*
15. *Such further and other relief as the Court deems just.*

The Grounds on which the Claimant is seeking these orders are;

1. *The Prime Minister had no authority within the meaning of Section 126(3) to recommend that the claimant who holds the office of Permanent Secretary be reassigned to the Ministry of Finance and Public Service as Director General Designate;*
2. *Neither the Constitution of Jamaica nor the Staff Orders contemplate the tool of re-assignment being used to move a Secretary from his appointed position to a lower office as such may be viewed as political interference in the administration of the Public Service;*
3. *Furthermore, an assignment to Director General (Designate) is not provided for under the Constitution of Jamaica and there is no record of such a post recorded in the Civil Service Establishment Act as appropriated to the Ministry of Finance and the Public Service.*
4. *There existed no clear responsibilities, subject matter, resources and authority vested in the designation of Director General to make such a designation equivalent to the post of Permanent Secretary*
5. *Section 93(1) of the Jamaican Constitution outlines the authority of a Permanent Secretary in summary, where such Permanent Secretary was duly appointed under Section 126(1). The authority of a Permanent Secretary being to supervise the work of the portfolio assigned to a Minister as per the Minister's instrument of appointment.*

6. *The claimant's due appointment and assignment to the supervision of the Education, Youth and Information portfolio can be undone by the actions as per Gazetted Notice, OSC Ref# C4835 … 19 dated March 1, 2019 as Section 126 (3) gives the Prime Minister no such authority.*
7. *The reassignment to the designation of Director General was without cause, without due process and tantamount to a demotion given that the Ministry of Finance and the Public Service is headed by a Financial Secretary who for the purposes of the Constitution is a Permanent Secretary, vide Sections 93(2) and 126(4).*
8. *The Section 93 (1) and Section 126(1) of the Constitution of Jamaica 1962 speak to the appointment of a permanent Secretary and appointment in its natural and ordinary meaning does not include a contractual engagement.*
9. *That the recommendation upon which the Governor General acted upon runs afoul to the directive of the provisions of section 126 (3) of the Jamaica (Constitution), order in Council, 1962.*

The Claimant makes this application in accordance with Part 56 of the Civil Procedure Rules 2002."

The Claimant's Submissions

The Appointment of a Permanent Secretary

[9] Counsel commenced his submissions by referring to the procedure in which a Permanent Secretary is appointed in accordance with Section 126 of the Constitution. He referenced the fact that the Claimant had been appointed, as per this procedure on November 3, 2016. Counsel highlighted the responsibilities of a Permanent Secretary as outlined in Section 93 (1) of the Constitution.

[10] Counsel then turned to the issue as to whether or not the Prime Minister is empowered to re-assign a Permanent Secretary once he had been appointed in a Ministry. Relying on the case of ***Arthur Williams v Andrew Holness*** [2015] JMFC 1, Counsel submitted that the Constitution did not vest such powers in the Prime

Minister. Counsel referred to Section 126 (3) of the Constitution and submitted that although this section vested the power in the Prime Minister to recommend the transfer of a person occupying another office carrying the same salary of a Permanent Secretary to the position of Permanent Secretary in another Ministry, it does not so authorize with regards to Permanent Secretaries who are already appointed.

[11] Counsel referred the Court to section 128 of the Constitution that empowers the Governor General to remove or transfer Ambassadors and High Commissioners. He argued that the power to transfer persons in these positions was clearly stated in the Constitution, unlike section 126. He submitted that the recommendation to re-assign a Permanent Secretary was procedurally incorrect and repugnant to the Constitution.

[12] Counsel then turned to the delegation of functions. He highlighted the Public Service Regulations (1961) Guidelines and questioned whether the appointment of Mrs. Grace McLean, who had been subsequently appointed as Permanent Secretary in the Ministry of Education, was contrary to the Constitution. In addition, he pointed to the fact that Mrs. Mclean's salary was less than that of a Permanent Secretary.

[13] Counsel argued that in the alternative, if the Claimant could have been transferred it could be only in the position of a Permanent Secretary, and not as a Director General (Designate). This position, he argued, did not exist in the Ministry of Finance, and in fact was a nullity. Counsel submitted that the Ministry of Finance had one Permanent Secretary, which was the Financial Secretary. There was therefore no such position that was available for him to be appointed to at the Ministry of Finance.

[14] Counsel then turned to the issue as to whether the position of Permanent Secretary included the responsibilities and duties of an accounting officer. Mr. Williams' position is that it did. He submitted that the Claimant had been an

accounting officer at the Ministry of Education but did not hold such a position at the Ministry of Finance.

[15] Counsel submitted that the re-assignment of the Claimant was a breach of natural justice in that he was not granted due process prior to the actions taken by the Prime Minister. He argued that this decision that had been taken affected his rights and he was not given an opportunity to be heard prior to the decision. It was further submitted that the Claimant had a legitimate expectation that he would have remained in his appointed position. Counsel's position was that Mr. Douglas Saunders, as Cabinet Secretary was not authorized to assess a Permanent Secretary. This is the remit of the Public Service Commission.

[16] Counsel pointed the Court to a text by Dr. Lloyd Barnett OJ, which noted the importance of the protection of Permanent Secretaries from political interference. Counsel argued that if one interprets Section 126(3) to mean that the Prime Minister can transfer an already appointed Permanent Secretary, it would result in a Permanent Secretary losing the protection from political interference which he argued was enshrined in the Constitution. The Court was urged to intervene to stop this practice as it usurps the authority of Permanent Secretaries, and it is a breach of natural justice.

[17] It was finally submitted that the Claimant had been stripped of the duties outlined by the Constitution. He was no longer supervising a department or subject and he was no longer the accounting officer. The Claimant has no clear responsibility, duties, or any authority within the Ministry of Finance. The Claimant remains in an office with no budget, no portfolio or work tools. He was also no longer a member of the board of Permanent Secretaries as he was no longer invited to attend those meetings. Counsel for the Claimant submitted that he was entitled to the relief sought.

[18] On the issue of damages, it was posited that the Claimant had suffered mental distress due to his being isolated, avoided and sidelined and was entitled to an award of damages.

The Defendant's Submissions

[19] The Director of State Proceedings asked the Court to use a generous and purposive approach when interpreting the Constitution. It was submitted that the Governor General is constitutionally empowered upon the recommendation of the Prime Minister to transfer an individual from an office of Permanent Secretary in one Ministry to the same office in another Ministry. It is Section 126 (3) of the Constitution that confers upon the Governor General this power. When Section 1 (2) (a) of the Constitution is read in the context of Section 126 it is clear that the power to appoint a Permanent Secretary whether under section 126 (1) or 126 (3) includes the power to transfer a Permanent Secretary.

[20] It was submitted that where Section 126 (3) (1) of the Constitution speaks of transfers of persons which have the same emoluments as an office of a Permanent Secretary it should be read to include the transfer of Permanent Secretaries. The Defendants submitted that there is nothing in the wording of Section 126(3) which warrants the exclusion of the office of Permanent Secretary.

[21] It was submitted that Section 126 (3) codified the long- standing power of the Prime Minister in the Westminster system of government to transfer a Permanent Secretary from one Ministry to another. Counsel relied on an excerpt from the text Constitutional Law of Jamaica, by Dr. Lloyd Barnett to support her position. Counsel maintained that this long-standing power is necessary for effective public administration as a Ministry may need to be dissolved or merged and this would result in the transfer of a Permanent Secretary.

[22] Counsel commented on the interchangeable use of the words "transfer" and "reassignment", and asserted that a reassignment is in effect a transfer as one would be taking on the responsibility of one Ministry or Department. Counsel

referred to section 1 (2) (a) of the Constitution, and urged the Court to include in its interpretation of appointment, the power to remove or transfer - reassign, albeit the word reassignment was not used.

[23] In addressing the issue as to whether the Claimant had been re-assigned in the position of a Permanent Secretary, Counsel for the Defendant argued that the Claimant's re-assignment had been confirmed in the Gazette Notice dated April 25, 2019. The designation and or title of Director General does not purport to nor does it place the Claimant in any other office but that of a Permanent Secretary and the transfer can only confer upon him the lawful authority or responsibilities of a Permanent Secretary.

[24] Counsel submitted that the Claimant's allegations and complaints concerning the quality of the tasks assigned to him upon being transferred are immaterial to the question of whether the transfer was lawful as the Claimant has retained the full authority of a Permanent Secretary.

[25] Ms. Hall confirmed that the powers of a Permanent Secretary are detailed in Section 93 of the Constitution. In addressing the issue of whether or not a Ministry could have more than one Permanent Secretary, it was submitted that Section 93 of the Constitution did not prohibit such an occurrence. It was argued that the breadth and scope of the work undertaken in a Ministry may require the assignment of more than one Permanent Secretary. In furtherance of this argument, the Court was asked to consider the meaning and use of the word "a" in the section. It was submitted that the use of the word "a" as opposed to "the" meant that there could in fact be more than one person occupying the role of a Permanent Secretary within a Ministry. The use of the word "a" lends itself to a wider rather than a specific interpretation.

[26] It was contended that a legitimate expectation only arises where there is a promise or assurance made by a public authority or a regular or settled practice that exists in relation to a public authority. Ms. Hall relied on the case of ***R (Bhatt Murphy) v***

Independent Assessor [2008] EWCA Civ 755 paras 28,29, and 32 to support her position. It was further submitted that neither the Claimant nor the interested party had adduced evidence of the existence of such a promise or assurance or such a regular and settled practice.

[27] It was submitted that there was no evidence to support a claim for damages. None of the Claimant's recognizable rights were affected by his transfer. Although the Claimant in his evidence indicated that he has not received a salary increase or emoluments, he had not put forward any evidence in support of this and as such the Court should accept that he was still receiving the salary of a Permanent Secretary. It was also submitted that damages are discretionary and not part and parcel of a judicial review claim. The pleadings did not reflect a claim for increments and it is trite law that a claim for special damages has to be specifically pleaded and proved. The Claimant has therefore failed to establish that he is entitled to an award in damages.

[28] Counsel turned to the next issue which was whether the reassignment or transfer of the Claimant amounted to a breach of natural justice. She relied on the case of ***Baker v Minister of Citizenship and Immigration et al*** 1999 2 R.C.S. 817**,** and argued that the transfer had not jeopardized the Claimants recognizable rights, interests, or any legitimate expectation as he continues to enjoy the same rank, salary, and emoluments of a Permanent Secretary. Counsel submitted that the failure to provide an opportunity for the Claimant to be heard or consulted prior to the transfer, or to provide reasons for same, does not amount to unfair treatment of the Claimant that would render the decision to transfer him unlawful.

[29] Counsel argued that there is no evidence that the transfer of the Claimant was a disciplinary tool. Similarly, it cannot be said that there was political interference. Counsel argued that the Claimant would have to put forward evidence to convince the Court of this.

[30] Counsel, in addressing the issue of whether the Claimant ought to be an accounting officer, argued that the Constitution does not ascribe the role of an accounting officer to a Permanent Secretary. Counsel referred to Section 16 of the Financial Administration and Audit Act and stated that the section specifically dealt with public officers who shall be appointed as accounting officers. Ms. Hall highlighted that the section makes no reference to a Permanent Secretary. Counsel further argued that there are persons who are accounting officers who are not Permanent Secretaries.

[31] Counsel's position is that declarations eight and nine ought not to be granted as the Claimant is not employed on contract. The declarations sought do not arise on the case of the Claimant as he is not directly affected and he has not made any application to act on anyone's behalf in a representative capacity.

[32] Counsel submitted that the injunction cannot be granted as such an act would encroach upon the authority of the Governor General to appoint Permanent Secretaries and to determine how they are to be appointed. Counsel maintained that the law could not envision such a situation where the Court mandates or restricts the discretion of the executive arm of Government.

[33] Counsel argued that the interim injunction previously ordered by the Court should be lifted as it has been in place since 2019, and the government has been unable to take any steps in relation to that post and this runs counter to the good administration of any government.

[34] In closing Counsel submitted that the Claimant has failed to demonstrate that he does not occupy the office or have lawful authority to act as a Permanent Secretary.

Submissions on behalf of the Jamaica Civil Service Association

[35] The first issue raised by counsel for the interested party was whether the Prime Minister has authority to transfer a Permanent Secretary. Counsel argued that this

point will turn on an interpretation of the Constitution. It was submitted that it was the intention of the framers of the Constitution to prevent political manipulation of the Public Service Commission and by extension Permanent Secretaries. Counsel argued that efforts have been made by the framers of the Constitution to protect public officers from political influence. He relied on the case of ***Endell Thomas v Attorney General pc App*** **1980 Page 5** in support of his point.

[36] Counsel submitted that Section 126 (3) speaks to the Prime Minister having the authority to appoint a Permanent Secretary from 'another such office with the same salary.' Counsel argued that the interpretation of that term 'another such office' refers to an officer from another agency who carries the same salary. Counsel asserted that this then begs the question of whether the Prime Minister can make a transfer in good faith in the event that a Permanent secretary may be better suited for another Ministry. Counsel considered that in the case at bar the Claimant has been demoted as he had not been appointed with the regular duties and responsibilities of a Permanent Secretary.

[37] Counsel submitted that a Prime Minister is excused in relation to transfers and reassignment where there is an issue of national security, however this was not borne out on the facts of this case. The Claimant in the instant case was transferred and put into a less than favorable position and as such it is clear that the transfer was done in bad faith.

[38] Counsel asserted that the case at bar therefore raised an issue as to the fairness of the transfer. Reliance was placed on the case of the ***Board of Permanent Secretary, Ministry of Foreign Affairs & Prime Minister Patrick Manning (Appellants) v Feroza Ramjohn (Respondent) and Prime Minister Patrick Manning and the Public Service Commission (Appellants) v Ganga Persad Kissoon (Respondent)*** [2011] UKPC 20, to support this position.

[39] In addressing the issue of natural justice, Counsel submitted that the Claimant ought to have been advised of the reason for the transfer and then given the

opportunity to respond to the allegations against him. Counsel submitted that any departure from this procedure would have breached the principles of natural justice. Counsel urged the Court to rely on the case of ***Derrick Wilson v the Board of Management of Maldon High School and the Ministry of Education*** 2013 JMCA Civ 21 which lays out how the Court should approach breaches of natural justice.

[40] Counsel's position was that the recommendation of the Prime Minister was arbitrary and malicious and the transfer of the Claimant to the Ministry of Finance with Designation as Director General was inconsistent with the Constitution. He maintained that the concept of a Permanent Secretary reporting to another Permanent Secretary is unconstitutional.

[41] The issue of legitimate expectation was then argued by Counsel who submitted that the Claimant had a legitimate expectation to remain in his post as Permanent Secretary. Counsel argued that the Claimant had an expectation like all other Permanent Secretaries that he would remain in his post save for any misconduct on his part. Counsel submitted that based on the evidence, the Claimant had been transferred and subjected to humiliation by the demotion to Director General. This was added to the fact that the Claimant had not been assigned to conduct any tasks which were similar to those he executed as Permanent Secretary in the Ministry of Education.

[42] The next issue raised was the appointment of Mrs. Grace Mclean to the position of Permanent Secretary, which Counsel submitted was null and void. Counsel's position was that although Section 126 (3) contemplates the transfer of a person from another such office carrying the same salary, Ms. Mclean was appointed to act as Permanent Secretary without the commensurate salary with the post. This made her appointment void ab initio.

[43] Evidence had been submitted that alluded to the Cabinet Secretary Ambassador Douglas Saunders, supervising the Claimant. Counsel submitted that after

considering Sections 92 and 124 of the Constitution, there was no provision which enabled the cabinet secretary to supervise or manage Permanent Secretaries or to be “head of the civil service”. Counsel submitted that the Prime Minister is not empowered by the Constitution to make the Cabinet Secretary the head of state. He maintained that Ambassador Saunders is simply in charge of the cabinet office and there was no basis for the Prime Minister to expand his duties to a supervisory one over Permanent Secretaries.

[44] In support of this position Counsel highlighted that: -

i) The role of the Cabinet Secretary is to disseminate information to other Permanent Secretaries not to supervise them.

ii) The exhibited salary scale does not point to the Cabinet Secretary having any special salary scale when compared to that of a Permanent Secretary.

iii) Section 92 of the Constitution also does not refer to the Cabinet Secretary as having a supervisory role.

[45] It was recognized that section 92(2) provides that a Cabinet Secretary shall have all other functions as the Prime Minister may direct, however Counsel questioned whether the additional function he is said to possess gives him supervisory powers to be the head of the Civil Service. Counsel submitted that such duties would be inconsistent with the terms of the Constitution.

ISSUES

[46] There are five main issues in this case which are:

a. Can a Permanent Secretary be transferred by the Governor General based on the recommendation of the Prime Minister?
b. Was the Claimant transferred to a position of a Permanent Secretary?

c. Was there a breach of natural justice in re-assigning the Claimant to the Ministry of Finance?
d. Did the Claimant have a legitimate expectation that he would not be re-assigned?
e. Is the Claimant entitled to the relief being sought?

ANALYSIS

[47] A preliminary issue that has arisen is whether a transfer is the same as a re-assignment. I do not see any difference in the meaning of these words and as such any reference to re-assignment will be treated as a transfer in this judgment.

[48] The first issue that arises is whether a Permanent Secretary can be transferred after being appointed to a Ministry and, if so, by what means. In addressing this issue I first turned to the Civil Service Staff Orders. The Staff Orders do not mention, refer to, nor have any rules concerning the transfer of Permanent Secretaries. I then turned to the Constitution, in particular sections 1(2)(a), and 126. Section 1 of the Constitution is referred to as the interpretation section, with Section 1(2)(a) referencing, among other things to, appointments, promotions and transfers generally. 1(2)(a) Constitution states that: -

> *Save where this Constitution otherwise provides or the context otherwise requires—*
>
> *(a) any reference in this Constitution to an appointment to any office shall be construed as including a reference to an appointment on promotion or transfer to that office and to the appointment of a person to perform the functions of that office during any period during which it is vacant or during which the holder thereof is unable (whether by reason of absence or infirmity of body or mind or any other cause) to perform those functions and;*

[49] Permanent Secretaries are appointed by virtue of Section 126 of the Constitution which states that: -

1. *Subject to the provisions of subsection (2) of this section, power to make appointments to the office of Permanent Secretary (other than appointments on transfer from another such office carrying the same salary) is hereby vested in the Governor-General acting on the recommendation of the Public Service Commission.*

2. *Before the Governor-General acts in accordance with a recommendation of the Public Service Commission made under subsection (1) of this section, he shall consult the Prime Minister who may once require that recommendation (hereafter in this subsection called the "original recommendation") to be referred back to the Public Service Commission for reconsideration; and if, upon such reconsideration, the Public Service Commission submits a different recommendation, the provisions of this subsection and of subsection (2) of section 32 of this Constitution shall apply thereto as they apply to an original recommendation.*

3. *Power to make appointments to any office of Permanent Secretary on transfer from another such office carrying the same salary is hereby vested in the Governor-General acting on the recommendation of the Prime Minister.*

4. *For the purposes of this section the office of Financial Secretary shall be deemed to be the office of a Permanent Secretary.*

I have found it useful to include Section 126 in its entirety at this time as I will be referencing sections of it throughout the judgement.

[50] The submission of the Claimant appears to be that once a Permanent Secretary is appointed he cannot then be transferred by the Governor General on the advice of the Prime Minister. Counsel had concentrated on Section 126 (3) of the Constitution to justify this position. In deciding the issue as to whether Section 126 (3) allows Permanent Secretaries to be transferred/re-assigned the Court had to decide the approach to be taken as regards the interpretation.

[51] There are four rules of statutory interpretation, these are the literal rule, the golden rule, the mischief rule and the purposive approach. These rules are accompanied by certain rules of language used to aid the interpretation of statutes such as ***ejusdem generis*** (*where a general word or phrase follows a list of specific terms, the general word will be interpreted to include only items of a similar nature to the terms specified),* ***expressio unius est exclusio alterius*** *(the expression of one*

thing is the exclusion of the other) and ***generalis specialibus non derogant*** *(general laws do not prevail over special laws)*. These rules are all designed to arrive at the clear and unambiguous meaning of the words of the statute. They are all available for use and none is automatically excluded. In the ***Commissioner of the INDECOM v Commissioner of the JCF and The AG of Jamaica*** *[2016] JMSC Civ 20 Sykes J* gave this insight.

> *36. The point is that the principles and cannons do not exist in individual silos. They are interconnected. When a statute come up for interpretation, all the principles and cannons are available for use. None is automatically excluded. As the judge reads and studies the statute, he or she may begin with the literal rule. Further examination may suggest that the literal rule is adjusted to give room to other rules. Other principles may also come into play depending on the nature of the statute. The judge comes up with a prima facie meaning but continues the process of examination of the statute to see whether that prima facie interpretation holds true. All this is going on in the mind of the judge. When the judge settles on an interpretation the judge then sets out the principles and cannons that led to the particular interpretation.*
>
> *37.*
>
> *judgment dealing with statutory interpretation is not a shortened form of Bennion on Statutory Interpretation or Maxwell's. The judgment is responding to the statute in the particular case. A judge cannot be expected to refer to just about all major principles of statutory interpretation every time a case is heard. The judge proceeds on the basis that all concerned appreciate the core principles and how they work along with what is called the cannons of interpretation…*
>
> *50. A symbol is a sensible sign (that is perceived by the senses) that has a meaning imposed on it by convention or nature. Unless the writer of the symbol and the reader of the symbol understand what the symbol means effective communication is impossible. In the case of words, the meaning is imposed by convention, that is, the understanding that the word has acquired is such that when it is used, the meaning is known to the user of the word, and if effective communication is take place, the meaning is also known, or at least knowable, to the reader. It is on this basis that the draftsman chooses one word over another to express the thought intended to be communicated. The legislature proceeds on the basis that the interpreter, and in particular, judges, will understand the word used in the same manner the legislature intended. This is the whole basis for saying that when one is interpreting a statute, one starts with the literal meaning, that is to say, the meaning that is ordinarily ascribed to the words at the*

> *time they are used. It (literal approach) is a starting point and not necessarily the end point. Contrary to what some have said, those who advocate starting with the literal approach are not saying that no other approach is possible. It is simply a common sense proposition which means that we start with the meaning that the words carry and we stick with that meaning unless there is some reason to adopt another meaning.* ***[my emphasis]***

[52] The different rules will be discussed below.

THE LITERAL RULE

[53] The Literal rule requires a Court to interpret the statutes in their plain, ordinary, and natural sense. In **Sussex *Peerage Case*** [1844] 8 ER 1034 Tindal CJ described the rule as follows at paragraph 143:

> *… My Lords, the only rule for the construction of Acts of Parliament is that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in the natural and ordinary sense. The words themselves do, in such a case best declare the intention of the lawgiver. But if any doubt arises from the terms employed by the Legislature, it has always been held a safe mean of collecting the intention, to call in aid the ground and cause of making the statute, and to have recourse to the preamble, which, according to Chief Justice Dyer (Stowel v. Lord Zouch, Plowden, 369), is " a key to open the minds of the makers of the Act, and the mischiefs which they intended to redress."*

[54] Under this rule, therefore, regard was only had to the words of the statute. Judges are not required to look outside the statute for assistance in its interpretation. The background to the legislation, its policy, objective and other potential useful tools of meaning are all excluded.

[55] The "*natural and ordinary sense"* was said to be the meaning that would be attached to those words or phrases by the normal sequence of English at the time when the statute was passed.

[56] The literal rule was applied in the case of ***Fisher v Bell*** *[1961] 1 QB 394.* In that case the defendant was convicted for having a flick knife displayed in his shop window with a price tag on it. The defendant appealed his conviction. And his conviction was quashed. Lord Parker CJ stated at pg. 399 that:

> *The sole question is whether the exhibition of that knife in the window with the ticket constituted an offer for sale within the statute. I confess that I think most lay people and, indeed, I myself when I first read the papers, would be inclined to the view that to say that if a knife was displayed in a window like that with a price attached to it was not offering it for sale was just nonsense. In ordinary language it is there inviting people to buy it, and it is for sale; but any statute must of course be looked at in the light of the general law of the country. Parliament in its wisdom in passing an Act must be taken to know the general law. It is perfectly clear that according to the ordinary law of contract the display of an article with a price on it in a shop window is merely an invitation to treat. It is in no sense an offer for sale the acceptance of which constitutes a contract. That is clearly the general law of the country. Not only is that so, but it is to be observed that in many statutes and orders which prohibit selling and offering for sale of goods it is very common when it is so desired to insert the words "offering or exposing for sale," "exposing for sale" being clearly words which would cover the display of goods in a shop window. Not only that, but it appears that under several statutes - we have been referred in particular to the Prices of Goods Act, 1939, and the Goods and Services (Price Control) Act, 1941 - Parliament, when it desires to enlarge the ordinary meaning of those words, includes a definition section enlarging the ordinary meaning of "offer for sale" to cover other matters including, be it observed, exposure of goods for sale with the price attached. In those circumstances I am driven to the conclusion, though I confess reluctantly, that no offence was here committed.*

[57] It is accepted however, that there can be many meanings given to a word. Where this is the case, it has been accepted that the primary meaning of the words of the statute are to be taken unless a secondary meaning is required. This was the position taken by Earl of Selbourne in the case of ***AG (Ontario) v Mercer*** *(1883) 8 AC 767*. He stated at pg. 778 that:

> *It is a sound maxim of law, that every word ought, prima facie to be construed in its primary natural sense, unless, a secondary or more limited sense is required by the subject or the context.*

[58] An exception to this is where technical words are used. In such instances it is assumed the legislator intended that the technical words should be applied only in

their technical sense. In the case of ***Unwin v Hanson*** *[1891] 2 QB* 115 Lord Esher M.R stated the principle at page 119 as follows: -

> *If the Act is directed to dealing with matters affecting everybody generally the words used have the meaning attached to them in the common & ordinary use of language. If the Act is one passed with reference to a particular trade, business or transaction and words are used which everybody conversant with that trade, business or transaction knows & understands to have a particular meaning to it then the words are to be construed as having that particular meaning though it may differ from the common or ordinary meaning of the words.*

[59] In the case of ***Cotton v Vogan & Co*** *(1895) 2 QB 652* the word "grain" brought into the port of London for sale and used in the Metage on Grain Act was said to apply to grain brought in for sale only & not grain brought in to be manufactured into other articles of commerce. Grain brought into the port of London was taken to the mills of the consignees. Part of it was ground into meal between rollers, and then sold by the consignees in that condition. The remainder was crushed and cracked between rollers, and then sifted so as to separate the crushed and cracked grain from the meal resulting from such crushing and cracking, which was sold separately. The crushed and cracked grain was then mixed in certain proportions with other sorts of grain which had been similarly treated, and when so mixed was sold for horse food.

[60] When faced with the interpretation of these words Lord Esher M.R. again ruled that as the statute was dealing with matters of business then its phraseology must be construed according to the ordinary business meaning of the words. The ordinary business meaning of the words "grain brought into the port of London for sale" meant "grain brought into the port of London for sale as grain.

THE GOLDEN RULE

[61] The golden rule is considered a modification of the literal rule. This rule was expressed in ***Grey v Pearson*** *[1843-60] ALL ER Rep 21 pg. 36* by Lord Wensleydale as:

> *I think my noble and learned friend on the Woolsack was right in the construction which he put upon the clause in the will on which the case depends. I have been long and deeply impressed with the wisdom of the rule, now I believe universally adopted - at least, in the courts of law in Westminster Hall, that in construing wills and indeed statutes, and all written instruments the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument in which case the grammatical and ordinary sense of the words may be modified so as to avoid the absurdity and inconsistency, but no further.*

[62] Therefore, under the golden rule if the literal interpretation of the statute produces absurdity or is at variance with the intention of Parliament, then the ordinary meaning of the words could be modified as determined by a judge to avoid that absurdity.

[63] This was the approach taken by Lord Blackburn in ***River Wear Commissions v Adamson*** *(1877) 2 App Cas 743,* page 764-765 where he stated:

> *But it is to be borne in mind that the office of the Judges is not to legislate, but to declare the expressed intention of the Legislature, even if that intention appears to the Court injudicious; and I believe that what Lord Wensleydale called the golden rule is right, viz we are to take the whole statute together and to construe it all together, giving the words their ordinary signification, unless when so applied they produce an inconsistency, or an absurdity or /inconvenience so great as to convince the court that the intention could not have been to use them in their ordinary signification, and to justify the court in putting on them some other signification, which, though less proper, is one which the court thinks the words will bear.*

[64] The mere fact that the literal interpretation of the statute causes inconvenience or hardship/injustice does not mean that the literal meaning is absurd. This was the position in ***Mersey Docks v Henderson Bros*** *(1888) 13 App Cas 595* at pg. 601

> *The words are perfectly intelligible, used in their natural and proper sense, and therefore I cannot give them an artificial and non-natural sense in order to effect what I may consider a more just rule than the statute has enacted.*

[65] This was also the position in the case of ***Canadian Performing Rights Society Ltd v Famous Players Canadian Corporation*** *[1929] AC 456 where* the P.C had to interpret a provision of the Copyright Act that declared void an assignment of copyright unless it was made in duplicate & both copies were registered. The appellant's 'A's title was derived through assignment made at a time when duplicate assignments were almost impossible to get. Notwithstanding the inconvenience of such a situation Lord Warrington stated at pg. 460:

> *Strenuous efforts however have been made by counsel for the Appellant to induce their Lordships to accept a construction other than the literal one, , and it is necessary therefore to consider whether such a construction is the correct one. Great stress is laid by the appellants on the extreme inconvenience of a literal construction. It may, it is said, be practically impossible when occasion arises to register an assignment to obtain a duplicate w/o which as it would appear registration is impossible. One answer to this argument is that it ought to be addressed to the legislature & not to the tribunal of construction whose duty it is to say what the words mean not what they should be made to mean in order to avoid inconvenience or hardship.*

THE MISCHIEF RULE

[66] The mischief rule looks at the gap or the mischief the statute intended to correct. This rule was laid down in ***Heydon's Case*** *(1584) 76 ER 637.* At page. 638 of the judgement the rule was pronounced as follows:

> *And it was resolved by them, that for the sure and true interpretation of all statues in genera (be they penal or beneficial, restrictive or enlarging of the common law, four things have to be discerned and considered: -*
>
> *1. What was the common law before the making of the Act?*
>
> *2. What was the mischief and defect for which the common law did not provide?*
>
> *3. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth? and*

4. The true reason for the remedy;

and then the office of all the judges is always to make such construction as shall suppress the mischief and advance the remedy and to suppress subtle inventions and evasions for continuance of the mischief, and pro privato commodo, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act pro bono publico.

[67] The application of the mischief rule can be seen in the case of ***Smith v Hughes*** **[***1960] 1 WLR 830*. In that case the defendants were prostitutes who had been charged under the Street Offences Act 1959 which made it an offence to solicit in a public place or in the street. The prostitutes were soliciting from private premises in windows or on balconies so they could be seen by the public. The court applied the mischief rule and held that the activities of the defendants were within the mischief the Act was aimed at even though under a literal interpretation they would be in a private place. Lord Parker CJ at page 832 stated that:

The sole question here is whether in those circumstances each defendant was soliciting in a street or public place. The words of section 1(1) of the Act of 1959 are in this form: 'It shall be an offence for a common prostitute to loiter or solicit in a street or public place for the purpose of prostitution.' Observe that it does not say there specifically that the person who is doing the soliciting must be in the street. Equally, it does not say that it is enough if the person who receives the solicitation or to whom it is addressed is in the street. For my part, I approach the matter by considering what is the mischief aimed at by this Act. Everybody knows that this was an Act intended to clean up the streets, to enable people to walk along the streets without being molested or solicited by common prostitutes. Viewed in that way, it can matter little whether the prostitute is soliciting while in the street or is standing in a doorway or on a balcony, or at a window, or whether the window is shut or open or half open; in each case her solicitation is projected to and addressed to somebody walking in the street. For my part, I am content to base my decision on that ground and that ground alone. I think the magistrate came to a correct conclusion in each case, and that these appeals should be dismissed.

THE PURPOSIVE APPROACH

[68] The final rule or approach adopted by the Courts is the purposive approach. This approach was advanced in the House of Lords decision of ***Pepper v Hart*** *[1993] 1 ALL ER 42* where Lord Griffiths stated at page 50 that: -

> *The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted.*

[69] On review of various rules and approaches, it would appear that that the correct approach to interpretation of statute is in determining the natural and ordinary meaning of the words used in their context in the statute. It is only when that ordinary meaning is contrary to the intention of the legislature that it is proper to look for other possible meaning of the word or phrase. The Courts have, however, been cautioned again and again against judicial legislation by reading words into statutes. *(See: **Pinner v Everett** [1969] 3 All ER 257, 258-259; per Lord Reid)*

[70] The learned editors of Cross' Statutory Interpretation, 3rd edition also approved this approach and proffered a summary of the rules to be thus at page 49:

> *1. The judge must give effect to the grammatical and ordinary or, where appropriate, the technical meaning of words in the general context of the statute; he must also determine the extent of general words with reference to that context.*
>
> *2. If the judge considers that the application of the words in their grammatical and ordinary sense would produce a result which is contrary to the purpose of the statute, he may apply them in any secondary meaning which they are capable of bearing.*
>
> *3. The judge may read in words which he considers to be necessarily implied by words which are already in the statute; and **he has a limited power to add to, alter or ignore statutory words in order to prevent a provision from being unintelligible, absurd or totally unreasonable, unworkable, or totally irreconcilable with the rest of the statute**....*

[71] This summary was accepted as the accurate reflection of the major principles governing statutory interpretation by Brooks JA in ***Jamaica Public Service Company Limited v Dennis Meadows and Others*** *[2015] JMCA Civ 1.*

[72] Brooks JA in **Special Sergeant Steven Watson v The Attorney General and others** [2013] JMCA Civ 6 at paragraph 19 of the judgment, also quoted and applied Lord Reid's statement in **Pinner v Everett** [1969] 3 ALL ER 257 and stated:

> *In determining the meaning of any word or phrase in a statute the first question to ask always is the natural or ordinary meaning of that word or phrase in its context in the statute? It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature that it is proper to look for some other possible meaning of the word or phrase.* ***We have been warned again and again that it is wrong and dangerous to proceed by substituting some other words for words of the statute.***

[73] The approach to be adopted when interpreting statues was considered by the Board in ***Misick v Attorney General of the Turks and Caicos Islands*** *[2020] UKPC 30*, where Lord Hamblen and Lord Stephens stated at paragraph 38 that:

> *In interpreting reg 4(6) the first question is what is the natural or ordinary meaning of the particular words or phrases in their context in the Regulations? It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the Governor when making or of the House of Assembly when approving the Regulations that it is proper to look for some* ***other*** *possible meaning of the word or phrase, see Pinner v Everett [1969] 3 All ER 257 at 258–259, [1969] 1 WLR 1266 at 1273. In performing that exercise the text of reg 4(6) has to be read in its context in its widest sense, to include the context of the Regulations as a whole,* ***and*** *the legal, social* ***and*** *historical context,… As stated in Bennion on Statutory Interpretation (7th ed) at para 9.2 context 'is relevant not simply for resolving ambiguities and other uncertainties, but for ascertaining meaning (whether or not there is an ambiguity or other uncertainty), and indeed for identifying whether something is (or is not) ambiguous or uncertain in the first place.*

[74] It follows that today in interpreting statutes the starting point for the court is to examine the ordinary meaning of the words in its context before it embarks on a purposive approach to the interpretation of the statute.

[75] The issue to be resolved is whether a Permanent Secretary can be transferred. In keeping with the approach advocated in ***Misick v Attorney General of the Turks and Caicos Islands*** I will seek to give the words their ordinary and natural meaning. I will be utilizing the literal rule in interpreting the various sections of the Constitution. The Claimant had submitted that once appointed, a Permanent Secretary cannot be transferred. The Claimant had highlighted Section 126 (3) of the Constitution and submitted that it speaks only to the '*Power to make appointments to any office of Permanent Secretary on transfer from another such*

office carrying the same salary'. This section, it was submitted, does not include the transfer of already appointed Permanent Secretaries. The Claimant drew the Court's attention to Section 128 of the Constitution and submitted that unlike section 126, section 128 actually gives the power to the Governor General to transfer persons occupying certain offices such as ambassadors.

[76] The Claimant may have had a feasible argument were it not for Section 1 (A) 2 of the Constitution. Section 1(A) 2 dictates that where any reference is made to power of appointment, it includes the power to, among other things promote and transfer that person. I find that Section 126 (3) of the Constitution when read in conjunction with Section 1(2) gives the power to the Governor General to transfer a Permanent Secretary on the recommendation of the Prime Minister. In addition, I also find that the inability to transfer a Permanent Secretary would lead to absurdity. Practically, this would mean that a Permanent Secretary who would be better suited at another Ministry could never be transferred.

The next issue raised was whether the Claimant had been transferred as a Permanent Secretary?

[77] The Claimant was appointed as Permanent Secretary on the 7th of November 2016 and was assigned to the Ministry of Education. He was re-assigned to the Ministry of Finance, with effect of the 14th of February 2019 in the position of Director General. The Claimant took issue with the re-assignment as well as the title and as a result caused a letter to be written to the Public Services Commission questioning the constitutionality of the re-assignment. The Claimant was later assigned the title of Permanent Secretary designated as Director General. The re-assignment and the change of title were Gazetted.

[78] The evidence of the Claimant is that since the re-assignment, he had a meeting with the Financial Secretary in the Ministry of Finance and was assigned certain tasks. His evidence is that most, if not all, the tasks assigned to him have already

been completed. He has not been assigned any further tasks and has been unable to arrange any further meetings with the Financial Secretary.

[79] Counsel for the Defendant argued that the Claimant had been re-assigned in the position of a Permanent Secretary. In support of her position she has submitted that the Claimant:

(a) was being paid the salary of a Permanent Secretary.

(b) was re-assigned as a Permanent Secretary designated Director General.

[80] Counsel further submitted that the Constitution allowed for the appointment of two Permanent Secretaries to one Ministry. She highlighted Section 93(2) and urged the Court to interpret the word 'a' as taking on a wider meaning and allowing the appointment of more than one Permanent Secretary, as opposed to if there was the use of the word 'the'.

[81] The issue to be decided is whether the Claimant had been re-assigned in the position of a Permanent Secretary? The duties and responsibilities of a Permanent secretary are defined in Section 93 of the Constitution. It states that: -

> *Permanent Secretaries*
>
> 1. *Where any Minister has been charged with the responsibility for a subject or department of government, he shall exercise general direction and control over the work relating to that subject and over that department; and, subject as aforesaid and to such direction and control, the aforesaid work and the department shall be under the supervision of a Permanent Secretary appointed in accordance with the provisions of section 126 of this Constitution.*
>
> 2. *A person may be a Permanent Secretary in respect of more than one department of government.*
>
> 3. *The office of Financial Secretary is hereby constituted and, for the purposes of this section, he shall be deemed to be a Permanent Secretary.*

The office of a Permanent Secretary is mandated to direct, control and supervise the departments assigned to Ministers.

[82] The evidence before the Court is that the Claimant was re-assigned to the Ministry of Finance in the position of Permanent Secretary and he was designated Director General. The live question is whether a Director General is a Permanent Secretary? Ms Jacqueline Mendez, a witness called by the defendant, gave evidence that positions are created periodically in Government by means of the Civil Service Establishment Act. Her evidence is that she was not aware of the position of Permanent Secretary designated as Director General. Counsel for the defendant then produced a Gazette dated the 1st of December 2020 that was admitted into evidence as exhibit 12. That Gazette detailed that a new position of Director General was created in the Ministry of Finance with effect from the 10th of February 2020. This begs the questions, if the position of Director General was only created in February 2020, what position was the Claimant occupying between the period 14th February 2019 to the 10th of February 2020?

[83] The next issue is what are the duties and responsibilities of a Director General? The position of Director General does not appear in the Civil Service Staff Orders, nor is it a position created by the Constitution. The Court, at the conclusion of the evidence and submissions in this case was left with no evidence as to the role and responsibilities of a Director General. It was a new position created in 2020, without the requisite job description.

[84] The evidence of the Claimant, that was not refuted, was that the he was given instructions as to his tasks by the Financial Secretary in the Ministry of Finance. The Financial Secretary, as per Section 93 (3) of the Constitution, is the Permanent Secretary of the Ministry of Finance. If the Claimant is receiving instructions from the Financial Secretary, can it then be said that the Claimant directs, controls and supervises a Ministry as dictated by Section 93 of the Constitution?

[85] I find that the Claimant has not been re-assigned in the position of a Permanent Secretary. He is presently in a newly created position that does not have a defined job description. I find that the re-assignment of the Claimant did not allow him to assume the duties and responsibilities of a Ministry as mandated by Section 93 of the Constitution. I therefore find that the re-assignment of the Claimant to Director General in the Ministry of Finance was unconstitutional.

Was there a Breach of Natural Justice

[86] The Claimant has argued that his re-assignment to the position of Director General in the Ministry of Finance without him being given a hearing is a breach of natural justice. The principle of natural justice has been defined in a number of cases. In the case of ***Derrick Wilson v Board of Management of Maldon High School and The Ministry and Education*** Harris JA in paragraphs 28 and 29 of her decision opined that: -

> *It is well settled that, where the circumstances so demand, the court, by implication, may give consideration to the principle of natural justice despite the absence of statutory guidance. In* ***Wiseman v Borneman,*** *Lord Guest at page 310 had this to say:*
>
> > *It is reasonably clear that on the authorities that where a statutory tribunal has been set up to decide final question affecting parties' rights and duties, if the statute is silent upon the question, the courts will imply into the statutory provision a rule that the principles of natural justice should be applied. This implication will be upon the basis that Parliament is not, to be presumed to take away parties' rights without giving them an opportunity of being heard in their interest.*
>
> *Natural justice demands that both sides should be heard before a decision is made. Where a decision had been taken which affects the right of a party, prior to the decision, in the interests of good administration of justice, the rules of natural justice prevail. In Sir William Wade's Administrative Law (6th Edition) at pages 496 and 497, the learned author placed this proposition in the following context:*
>
> > *"As the authorities will show, the courts took their stand several centuries ago on the broad principle that bodies entrusted with legal power could not validly exercise it without first hearing the person who was going to suffer. This principle was applied very widely to administrative as well as to judicial acts, and to the*

> *acts of individual Ministers and officials as well as to the acts of collective bodies, such as justices and committees. The hypothesis on which the courts built up their jurisdiction was that the duty to give every victim a fair hearing was just as much a canon of good administration as of good legal procedure. Even where an order or determination is unchallengeable as regard its substance, the Courts can at least control the preliminary procedure so as to require fair consideration of both sides of the case. Nothing is more likely to conduce to good.*

[87] In this case we have already found that the Governor General on the advice of the Prime Minister can transfer a Permanent Secretary from one Ministry to another. Generally, the transfer of a Permanent Secretary from one Ministry to another would not require a hearing as it would not entail a change in the status or emoluments. The issue in this case is whether the Claimant's re-assignment was in fact a demotion. If that was the position, then the Claimant would have been entitled to a hearing. There appears to have been an attempt to transfer the Claimant to a Permanent Secretary position, even though it was in name only. There was no change in the salary and emoluments of the Claimant, except for increments.

[88] I do not find that there was a breach of natural justice as it relates to the re-assignment of the Claimant. I do not find that this was a demotion, nor does it amount to a disciplinary action. I therefore find that there would have been no requirement to convene a hearing in these circumstances.

Did the Claimant have a legitimate expectation that he would not have been transferred?

[89] The Claimant has argued that he had a legitimate expectation that he would not have been transferred from his position as Permanent Secretary in the Ministry of Education. His expectation was that he would have remained as Permanent Secretary in the Ministry of Education until retirement, resignation or termination for cause. Wade and Forsyth of Administrative Law 10th ed., 2009 described legitimate expectation as:

> *… It is not enough that an expectation should exist; it must be in addition to be legitimate. But how is it to be determined whether a particular expectation is worthy of protection? This is a difficult area since an expectation reasonably entertained by a person may not be found to be legitimate for some countervailing consideration of policy or law. But some points are relatively clear. First of all, for an expectation to be legitimate it must be founded upon a promise or practice by the public authority that is said to be bound to fulfil the expectation.*

[90] Halsbury's Laws of England, Volume 61A, 2018 defined legitimate expectation at paragraph 50 as:

> *A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though there is no other legal basis upon which he could claim such treatment. The expectation may arise either from a representation or promise made by the authority, including an implied representation or promise made by the authority, including an implied representation, or from consistent past practice, in all instance the expectation arises by reason of the conduct of the decision-maker and is protected by the courts on the basis that principles of fairness, predictability and certainty should not be disregarded.*

[91] In the case of ***Legal Officers' Staff Association & Ors v Attorney General & Ord*** *[2015] JMFC Full 3* where McDonald-Bishop J (as she then was) examined the principles underpinning the doctrine of legitimate expectation. She stated at paragraph 45 as follows:

> *i. The power of public authorities to change a policy is constrained by the legal duty to be fair and other constraints, which the law imposes.*
>
> *ii. A change of policy which would otherwise be unexceptional may be held to be unfair by reason of prior action, or inaction, by the authority.*
>
> *iii. If the authority has distinctly promised to consult those affected or potentially affected, then ordinarily it must consult. This is the paradigm case of procedural expectation.*
>
> *iv. If it has distinctly promised to preserve existing policy for a specific person or group who would be substantially affected by the change, then ordinarily it must keep its promise. This is substantive expectation.*
>
> *v. If, without any promise, it has established a policy, distinctly and substantially, affecting a specific person or group who in the circumstances was in reason entitled to rely on its continuance and did*

so, then ordinarily it consult before effecting any change. This is the secondary case of procedural expectation.

vi. *To do otherwise, in any of these instances, would be to act unfairly so as to perpetrate an abuse of power.*

[92] Legitimate expectation must be based on a policy, practise or procedure established by public authority on which the Claimant is relying. The Claimant has failed to establish the basis he is claiming legitimate expectation. It could not have been based on the Constitution since I have already found that the Claimant can be transferred by the Governor General on the recommendation of the Prime Minister under Section 126 of the Constitution. It could not be based on practice either, as the unrefuted evidence of Ambassador Douglas Saunders was that Permanent Secretaries have been transferred to other Ministries in the past. I find no merit in the submissions of the Claimant in relation to legitimate expectation.

Declarations

[93] The Claimant has sought a number of declarations in this case. The first, second and fourth declarations sought were: -

> *A Declaration that, pursuant to the provisions of Section 126 (3) of the Jamaica (Constitution), Order in Council 1962, the Prime Minister is only empowered by law to recommend to the Governor General the Appointment of a Permanent Secretary on transfer from an office other than that of Permanent Secretary carrying the same salary as that of a Permanent Secretary;*
>
> *A Declaration that, Pursuant to be provisions of section 126 (3) of the Jamaica (constitution), Order in Council, 1962 the Governor General is not empowered to "re-assign" a Permanent Secretary;*
>
> *A Declaration that the decision as contained in the letters dated March 1, 2019 and April 25, 2019 served on the Claimant by the 1st Defendant, purporting to re-assign the Claimant to the Ministry of Finance and the Public Service is in breach of Section 126 (3) of the Jamaica (constitution), Order in Council, 1962 and the said letter is null, void and of no effect;*

I have found that the Governor General does have the power to transfer Permanent Secretaries on the recommendation of the Prime Minister. In light of this finding I will not grant the declarations one, two and four.

[94] The third, and fifth declarations sought were that: -

> *A Declaration that, pursuant to the provisions of Section 126 (3) of the Jamaica (Constitution), Order in Council, 1962, the act of the Governor General acting on the recommendation of the Prime Minister to reassign the Claimant to the Ministry of Finance and the Public service as Director General Designate is unconstitutional and null, void and of no effect;*
>
> *A Declaration that the re-assignment of the Claimant as Permanent Secretary in the Ministry of Education, Youth and Information to a Director General Designate or to any other position is unconstitutional;*

I have found that the position of Director General is a newly created position and is not analogous to a Permanent Secretary and as such the re-assignment of the Claimant was unconstitutional. I will therefore grant the third and fifth declarations.

[95] The eighth and ninth declarations sought were: -

> *A Declaration that the contractual reassignment of a Permanent Secretary unconstitutional within the meaning of Section 93(1) and Section 126 (1) of the Constitution of Jamaica, 1962 and not applicable to the Claimant;*
>
> *A Declaration that a Permanent Secretary must be permanently appointed within the meaning of section 93(1) and Section 126(1) of the Constitution of Jamaica, 1962;*

[96] The eighth and ninth declarations were not considered by the Court as it concerned contractual engagements of Permanent Secretaries that did not arise in this case.

[97] The tenth order being sought was: -

An Order of Certiorari quashing the decision of the Governor General, acting on the recommendation of the Prime Minister, to re-assign the Claimant to the Ministry of Finance and the Public Service as Director General Designate, as contained in the letters dated the March 1, 2019 and April 25, 2019;

I am minded to grant this order in part as we have already stated that the Claimant has not been re-assigned in a position of a Permanent Secretary. We would however, give a three- month period of this to be corrected, so that the Claimant may be appointed to a position of Permanent Secretary.

[98] I am not minded to grant the injunction being sought by the Claimant. The injunction sought was: -

An injunction retraining the Defendants, whether by themselves or servants or agents from taking steps to prevent the claimant from returning to perform his functions as the duly appointed Permanent Secretary in the Ministry of Education, Youth and Information;

The Claimant was appointed to the Ministry of Education, however, this is not a lifelong appointment where he cannot be transferred. His appointment, promotion and transfer is dictated by the Constitution.

[99] The twelfth declaration sought was: -

An Order mandating the Public Service Commission to reverse its directive to reassign the Claimant and to give due expressed recognition to the Claimant as the duly appointed Permanent Secretary in the Ministry of Education, Youth and Information:

[100] The Court is not minded to grant the twelfth declaration. This turns on the ability of the Governor General to transfer the Claimant on the recommendation of the Prime Minister. I have already found that this is allowed based on section 126 of the Constitution.

Damages

[101] The Claimant has sought damages and aggravated damages as part of his claim. The damages sought related primarily to loss of income related to increments. The Claimant's evidence was that he had automatically received annual increments prior to being re-assigned to the Ministry of Finance, however, he had stopped receiving them once he was re-assigned. Counsel for the defendant submitted that government workers were not automatically entitled to increments. Ms. Hall's position was that the Claimant had to establish the method by which these increments were paid as well as the basis on which he received the increments. Her position was that the Claimant had to be assessed to receive the increment.

[102] Although the Claimant made bald statements about non- payment of increments, no evidence, apart from a salary scale, was produced to the Court as to his income at the time of re-assignment and the income he was to be receiving. In addition, the Claimant failed to produce evidence supporting his position that increments were automatically granted.

[103] The Claimant had made mention in his witness statement that the transfer to the Ministry of Finance had led to among other things embarrassment. There are occasions when sums are awarded for breaches of constitutional rights, however I am not minded to award any sums in this case in light of the fact that an order has been made for the Claimant to be assigned to a Ministry. I will therefore not grant any award for the claim for damages.

[104] The final relief sought by the Claimant was aggravated damages. The Claimant failed to advance any pleadings, or to solicit any evidence by which a finding could be made for aggravated damages.

[105] The Claimant is awarded costs in this matter to be agreed or taxed.

Conclusion

[106] The Court finds that the Claimant could be re-assigned based on Section 126 of the Constitution. Section 126 must be read in conjunction with Section 1(2) (a) which is the interpretation section of the Constitution. I find that the newly created position of Director General has no job description and is not commensurate with the position of Permanent Secretary. I find that the Claimant having been re-assigned from the position of Permanent Secretary to the position of Director General was unconstitutional. In keeping with this finding declarations three and five are granted.

Order

a. Declarations three and five are granted.

b. The Claimant to be re-assigned to a Permanent Secretary position within three months.

c. No order made as to declarations one, two, four, six, seven, eight, nine and twelve.

d. No order granted on the application for injunction.

e. The order for Certiorari is not granted

f. No order made for Mandamus.

g. No order made for damages or aggravated damages.

h. Costs to the Claimant to be agreed or taxed.

WINT-BLAIR, J

[107] This matter concerns a claim for constitutional relief commenced by way of fixed date claim form, the contents of which have been set out *in extenso* in the judgment of my learned sister.

The Evidence

[108] The claimant filed a witness statement[1] in which he testified in chief that, he was appointed a Permanent Secretary with assignment in the Ministry of Education with effect from November 7, 2016.

[109] The claimant set out what he described as his stellar record of service, his awards, commendations, appraisals and evaluation reports. He set out his duties, his responsibilities and his efforts at ensuring that his decisions were lawful, transparent as well as his efforts to preserve the integrity of the office he holds.

[110] On February 13, 2019 at about 2:00pm, the claimant said that he received a telephone call from the Cabinet Secretary saying that, he, (the Cabinet Secretary) had been directed to tell me that "I was being reassigned to the Ministry of Justice as Permanent Secretary effective February 14, 2019." Further that Dr Grace McLean, Chief Education Officer would act as Permanent Secretary effective February 14, 2019.

[111] About half an hour later, the claimant said he received another call from the Cabinet Secretary informing him not to "assume" at the Ministry of Justice, as the Prime Minister was still deciding on the shifts.

[112] At approximately 10:00pm on the same night, the claimant received another call from the Cabinet Secretary, advising him that the Prime Minister had directed his reassignment to the Ministry of Finance and the Public Service as Director

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[1] November 3, 2020

General. He was told that the reassignment would not result in any loss of salary. He reported to the Ministry of Finance and the Public Service on February 25, 2019.

[113] This change was reflected in the Gazette[2] dated March 1, 2019. The claimant also received a letter of even date from the Chief Personnel Officer of the Offices of the Services Commission, advising him of his re-assignment to the Ministry of Finance and the Public Service with effect from February 14, 2019.[3]

[114] The claimant's attorney-at-law, wrote to the Chief Personnel Officer requesting a reversal of the re-assignment. In response, the Chief Personnel Officer indicated that the contents of the said letter, would be considered at the next meeting of the Public Service Commission scheduled for April 9, 2019.

[115] The Chief Personnel Officer in a letter dated April 25, 2019, indicated that:

> *"I am directed to inform you that the Governor General upon the recommendation of the Most Honourable Andrew Holness, Prime Minister, ON, MP and in accordance with section 126(3) of the Constitution of Jamaica had given approval for you, Deanroy Bernard, Permanent Secretary in the Ministry of Education, Youth and Information, be re-assigned as a Permanent Secretary, in the Ministry of Finance and Public Service and designated Director General, with effect from February 14, 2019.*
>
> *During the period of your re-assignment, you should continue to receive your current salary and allowances.*
>
> *This supersedes the letter from this Office, Reg. No. C4835 dated March 1, 2019."*

[116] The claimant complains that he has not been given a portfolio commensurate with his office. He has not been invited to meetings of the executive in the new ministry despite numerous requests. He is no longer able to attend meetings of the

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[2] In the Interpretation Act, 1968, section 3, Gazette or "Government Gazette" or "Jamaica Gazette" means the Jamaica Gazette published by order of the Government and includes any Supplements thereto and any Gazette Extra-ordinary so published; ''gazetted" means published in the Gazette;
[3] See DB6

Permanent Secretaries Board, chaired by the Cabinet Secretary as it is his former subordinate who now does so, he having been removed from its WhatsApp group and is no longer invited.

[117] The claimant is aggrieved that the assignment as Director General (Designate), is not equivalent to the position of Permanent Secretary. It is he says, a demotion, as in the Ministry of Finance and the Public Service, the Financial Secretary is the Permanent Secretary and he is now required to report to her.

[118] He stated that in a discussion with the Chief Personnel Officer on February 25, 2019, she stated that there is no record of the post of Director General (Designate), in the Civil Service Establishment Act, in the Ministry of Finance and the Public Service.

[119] In cross-examination, the claimant said he remained at the fourth point on the salary scale and has not advanced on the salary scale since 2019, this is despite obtaining a Masters in Law about which he wrote about to the Financial Secretary. Further, the claimant said he lost his status as an accounting officer, as a Permanent Secretary by all means and practice is an accounting officer.

[120] He denied that increments are discretionary and said that he has lost seven increments since his re-assignment, five annual increments and two for having obtained an advanced degree. He also said he has not received a new assigned motor vehicle. When taxed that he had failed to provide this court with any evidence of loss, the claimant responded that it was a matter of public record.

[121] In response, Mrs Jacqueline Mendez, Chief Personnel Officer in her witness statement,[4] said that the Gazette referred to in the claimant's evidence, dated March 1, 2019 was replaced and superseded by Gazette Notice Ref. No. C4835 dated April 25, 2019. It spoke to the re-assignment of the claimant as a Permanent

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[4] Filed February 26, 2021

Secretary, in the Ministry of Finance and the Public Service and designated Director General, with effect from February 14, 2019.[5]

[122] In cross-examination, Mrs. Mendez testified that the claimant, was no longer invited to the meetings of the Permanent Secretaries Board, having been re-assigned. It was she, who removed him from the WhatsApp group as the group administrator. She did not know of a post in the Civil Service Establishment Act, known as Permanent Secretary designated Director General in the Ministry of Finance and the Public Service. She added that generally, during the year the Establishment Order is tabled in Parliament but not always. The Order consists of all the posts, classifications, ministries, departments, and salary scales. She was unaware of the claimant being on the list which assigned subjects ministries, ministers, and those entities that fall under each ministry.

[123] In re-examination, Mrs. Mendez clarified that emails came from the Cabinet Office, regarding who should attend meetings of the Permanent Secretaries Board, this email is copied to the relevant persons. She said the claimant's name was not on that email list.

[124] In his witness statement[6], Mr. Douglas Saunders, Cabinet Secretary, gave evidence that as Secretary to the Cabinet and Head of the Public Service, he provides support and advice to the government of Jamaica. Among the duties he outlined, he said that it was also his responsibility to oversee human resource management matters and conduct performance reviews, in relation to Permanent Secretaries.

[125] He said that he had requested of the claimant, that he forward his annual performance review forms, as it was he who would evaluate the claimant. This

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[5] JM1
[6] Filed on February 26, 2021

was not done rather, the evaluations were done by the Minister of Education, Youth and Information and submitted to his attention on February 11, 2019.

[126] The witness admitted to calling the claimant on February 13, 2019 at 3:00pm, to explain that the Prime Minister, was reviewing the re-assignments. In respect of the call at 10:00pm, the witness said that it is not true, that he told the claimant he was being assigned as a Director General in the Ministry of Finance. He told the claimant, that the Prime Minister had recommended, that he be re-assigned as a Permanent Secretary to the Ministry of Finance and designated as Director General.

[127] The witness gave evidence that, the claimant asked if this was a demotion and the witness said that he told him it was not as he, the claimant, remained a Permanent Secretary, and that nothing would change regarding his salary and emoluments. The claimant had not been demoted and remains a Permanent Secretary (GMG/EMG1.) There was no cross-examination.

[128] The submissions of counsel have been fully set out by my learned sister therefore, I will only repeat the salient parts in relation to the issues being considered.

The approach to interpretation of the Constitution

[129] The Constitution of Jamaica is set out as the Second Schedule to the Order in Council, 1962. It is to be considered *sui generis*. It is trite that a constitutional instrument is to be given a generous and purposive interpretation. I consider that my approach to the interpretation of the constitutional provisions at issue on this claim, must seek to give effect to the real meaning of the relevant provisions, in the application of a generous and purposive interpretation, giving due regard to the context in which the language has been used by our framers.

[130] I agree with the submissions of both counsel that the Constitution is not to be treated as an ordinary Act of Parliament. In ***Hinds v The Queen***[7] the Privy Council said:

> *"A written constitution, like any other written instrument affecting legal rights or obligations, falls to be construed in the light of its subject matter and of the surrounding circumstances with reference to which it was made…. Nevertheless all these constitutions have two things in common which have an important bearing on their interpretation. They differ fundamentally in their nature from ordinary legislation passed by the parliament of a sovereign state. They embody what is in substance an agreement reached between representatives of the various shades of political opinion in the state as to the structure of the organs of government through which the plenitude of the sovereign power of the state is to be exercised in future."*

[131] The Board continues in discussing constitutions based on the Westminster model on page 213 to state:

> *"The remaining Chapters of the Constitutions are primarily concerned not with the legislature, the executive and the judicature as abstractions, but with the persons who shall be entitled collectively or individually to exercise the plenitude of legislative, executive or judicial powers – their qualifications for legislative, executive or judicial office, the methods of selecting them, their tenure of office, the procedure to be followed where powers are conferred upon a class of persons acting collectively and the majorities required for the exercise of those powers."*

[132] From this pronouncement as far back as 1977, it was made clear that the Constitution deals with the persons who exercise the power set down in the respective provisions and not the offices in abstraction. How the power conferred upon these persons has been exercised, is the subject of the instant claim. The following issues have been raised on the evidence and law:

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[7] [1977] A.C. 195 at 211-212

Issues

1. Whether the decision to re-assign the claimant, is in breach of section 126 of the Jamaica (Constitution) Order in Council, 1962 ("the Constitution") and is therefore null and void.
2. Whether the re-assignment of the claimant to the position of Director General (Designate) is a nullity.
3. Whether there was a breach of the claimant's legitimate expectation that he would remain in the capacity of the Permanent Secretary in the Ministry of Education, Youth and Information.
4. Was there a breach of natural justice.
5. Whether the procedure, when taken as a whole, was objectively fair.
6. Whether there should be the grant of an injunction for the continued restraint of the defendants, their servants and/or agents from taking steps to prevent the claimant from returning to the Ministry of Education, Youth and Information.

Whether the decision to re-assign the claimant is in breach of section 126 of the Constitution and therefore null and void.

[133] Mr. Bishop argued that the Prime Minister does not have the authority to recommend, that the claimant who holds the office of Permanent Secretary, be reassigned to another ministry as Director General (Designate.) This action is tantamount to a demotion and was not within the contemplation of the drafters of section 126(3). Moreover, there was at the material time, no post known to the Civil Service Establishment Act, as Director General (Designate) in the Ministry of Finance and the Public Service.

[134] The claimant relied on Exhibit 12, which is the gazetted Civil Service Establishment (General) Amendment Order, 2020 Resolution, made pursuant to the Civil Service Establishment Act. This Jamaica Gazette Supplement is dated December 1, 2020. It lists an executive office, within the Ministry of Finance and the Public Service

known as Director General, with the classification GMG/EMG1 as a new post, with effect from February 10, 2020. The claimant relied also on the effective date of his re-assignment which was gazetted as with effect from February 14, 2019.

[135] It was further submitted by the claimant, that the words "*another such office",* does not include the office of Permanent Secretary, rather, the language in section 126(3) of the Constitution refers to any office other than that of Permanent Secretary which carries the same salary.

[136] Ms. Hall argued that the Governor General is vested with the power to transfer the claimant by way of section 126 of the Constitution. In section 126(3), the Governor General is vested with the power to make appointments to the office of Permanent Secretary on the recommendation of the Prime Minister.

[137] Ms. Hall cited section 1(2)(a) of the Constitution to bolster her submissions, contending that both sections 1(2)(a) and 126 have to be read together. In so doing, the power of appointment to the office of Permanent Secretary whether by 126(1) or 126(3) includes the power to make transfers to that office.

[138] Ms Hall submitted further, that the mechanism prescribed by sections 126(1) and 126(3) permit the Prime Minister to make recommendations to the Governor General for:

i. The transfer of an individual to an office of Permanent Secretary who was in a post that is not identical to the office of Permanent Secretary, but which has the same emoluments; or

ii. The transfer of a Permanent Secretary from one Ministry to another Ministry as Permanent Secretary.

[139] Counsel contended that, the text of section 126 does not warrant the exclusion of the office of Permanent Secretary, from the meaning of the words "*another such office*". As an office like that of the Permanent Secretary, with the same pay or emoluments is included in the words "*another such office*", *a fortiori* an office which

is identical to that of the office of Permanent Secretary is covered by the words and the section.

[140] Ms. Hall argued that section 126(3) codified the long standing power of the Prime Minister in the Westminster system of government, to recommend the transfer of Permanent Secretaries from the service of one Minister to another.

[141] She relied on the eminent text, Constitutional Law of Jamaica by Dr Lloyd Barnett, who said regarding section 126(3) of the Constitution:

> *"The recommendation of the Public Service Commission for an appointment to the office of Financial Secretary or Permanent Secretary may not be acted on by the Governor General without first consulting the Prime Minister who may require that each new recommendation be referred back once to the Commission for reconsideration. This provision was designed to ensure that while the Prime Minister could not control the promotion of Permanent Secretaries he would be able, because of the need for close collaboration between the Ministers and their Permanent Secretaries, to ensure that the Permanent Secretaries are assigned to a Minister with whom they are temperamentally capable of co-operating. Since the prestige of the Permanent Secretaries varies in accordance with the importance of their respective Ministries and they may acquire a personal attachment to particular assignments this power to transfer provides an instrument by which the Prime Minister may in fact 'discipline' them."*[8]

[142] Section 126(3) of the Constitution prescribes:

> *"Power to make appointments to any office of Permanent Secretary on transfer from another such office carrying the same salary is hereby vested in the Governor General acting on the recommendation of the Prime Minister."*

[143] I will start with section 126(3) of the Constitution which vests the power to make appointments to ***any*** office of Permanent Secretary in the Governor General, acting on the recommendation of the Prime Minister. The words "*any office of Permanent Secretary"* means that the power relates to all of the offices of

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[8] Page 117

Permanent Secretary wherever these offices may be assigned throughout the various ministries within the island of Jamaica.

[144] Included in these appointments, which the Governor General is entitled to make upon the recommendation of the Prime Minister are, "*transfers from another such office carrying the same salary*." In respect of transfers, section 1(2) of the Constitution prescribes:

> *"Save where this Constitution otherwise provides or the context otherwise requires –*
>
> *a) any reference in this Constitution to an appointment to any office shall be construed as including a reference to an appointment on promotion or transfer to that office and to the appointment of a person to perform the functions of that office during any period during which it is vacant or during which the holder thereof is unable (whether by reason of absence or infirmity of body or mind or any other cause) to perform those functions; and*
>
> *b) any reference in this Constitution to the holder of an office by the term designating his office shall be construed as including a reference to any person for the time being lawfully performing the functions of that office."*

[145] To my mind, the Governor General pursuant to section 126(3) has the power to make appointments to any office of Permanent Secretary whether by appointing someone, promoting someone to the office from one with the same salary or by lateral transfer from one ministry to another. These appointments are made on the recommendation of the Prime Minister.

[146] There is no merit to the submission that the Prime Minister cannot make recommendations as to the appointment of Permanent Secretaries, as that would lead to an absurdity. The Prime Minister has the power to re-shuffle his Cabinet and to re-organize the ministries of government as he sees fit. This of necessity leads to the movement of Permanent Secretaries.

[147] I find the submissions of Ms. Hall rather attractive and agree with them on this issue. The provisions of the Constitution cannot be read in isolation; it is trite that

the Constitution is to be read as a whole and the scheme within which the instrument was drafted considered in its construction.

[148] In the instant claim, the claimant claims a breach of specific provisions, namely sections 93(1) and 126(3) of the Constitution designed to protect those who, like him, were appointed to public office and for whom when aggrieved would find relief difficult to access.

[149] I make this point as counsel for the claimant argued, that the Prime Minister did not have the power to recommend the transfer, which would mean that the applicable section would be section 126(1), where this is a procedure for relief to be accessed. That submission fails on the interpretation of section 126(3) which is the section applicable to the claimant.

Whether the re-assignment of the claimant to the position of Director General (Designate) is a nullity

[150] Whether the transfer was a nullity and constituted a demotion, seems to me to depend on the construction of the words "***to any office"*** as well as the words "***from another such office"*** and the word **"*salary"***. The key words are *to*, *from and salary*. It would seem to me that the office "***to"*** which the transfer is being made and "***from"*** which the transfer is being made are the focus. The words "***to"*** and "***from"*** when applied to a Permanent Secretary are words which connote a lateral move, they mean equivalence. There could be no diminution in "**salary"**, for the person being transferred "***to"*** any office of Permanent Secretary, nor could there be a diminution in salary for the person being transferred "***from"*** any such office to the office of Permanent Secretary. The word **"*such"*** again, connotes equivalence, the salary is the same, the duties are not, the office is not. In my view, a Permanent Secretary can only be transferred laterally or vertically within the public service.

[151] In this claim, the claimant was transferred at the same classification on the salary scale. The letter from Mrs. Jacqueline Mendez, Chief Personnel Officer[9], exhibited by the claimant states that, he should continue to receive his current salary and allowances. The uncontroverted evidence of the Cabinet Secretary was also to this effect.

[152] I find that the claimant can be transferred to any ministry. He can be required to perform the duties for which he is qualified and for which he is entitled to the salary and benefits for the office he holds commensurate with the current classification on the salary scale.

[153] At trial, the claimant said that he has suffered a loss in salary and has exhibited his salary scale[10]. However, he has failed to produce any evidence of actual loss. The claimant gave evidence at trial that his loss is a matter of public record. He has failed to advert the attention of this court to that public record. The pleadings did not reflect a claim for increments and it is trite law that a claim for special damages has to be specifically pleaded and proved. As it could not have been seriously suggested, that the court should take judicial notice of matters which must be proven in evidence, I therefore find that no evidence was adduced by the claimant in proof of a loss of salary or emoluments.

Was the claimant demoted

[154] The claimant said that on transfer, he had been put in charge of a program which was at an end, he was no longer supervising a department or subject and was no longer an accounting officer. He had no clear responsibilities, duties, or any authority within the Ministry of Finance. He is in an office with no budget, no portfolio or work tools. He was also no longer a member of the board of Permanent Secretaries, as he was no longer invited to attend those meetings. The claimant

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[9] Exhibit 9
[10] Exhibit 10

said he was assigned tasks by the Financial Secretary, who is equivalent in status to himself and was not invited to executive management meetings of the new ministry.

[155] It was submitted that this was a demotion, as the position of Director General, did not exist in the Ministry of Finance and the Public Service at that time. In addition, the Financial Secretary is the Permanent Secretary in that ministry. There was therefore no office of Permanent Secretary for the claimant to be transferred to.

[156] In response, Ms. Hall submitted that as a matter of fact and law the claimant had been transferred to the Ministry of Finance and the Public Service in the retained office of Permanent Secretary. The lawfulness of this transfer did not depend on the designation of Director General or the duties assigned to him. The claimant retains the full authority to act as a principal policy adviser to the minister. Further, that under section 93 of the Constitution, more than one Permanent Secretary may be assigned to a minister or ministry.

[157] It is noted that exhibit 7, is a letter from counsel for the claimant to the Public Services Commission on March 26, 2019. It sets out the following uncontroverted facts:

a. The claimant was notified of the transfer on the night before it took effect.

b. The title of Director General was not one provided for in the Civil Service Establishment Act as assigned to the Ministry of Finance.

c. There is no equivalence in the post of Director General to that of the post of Permanent Secretary as there is no job description.

d. The Director General would be supervised by the Financial Secretary.

[158] All of these matters were brought to the attention of the Public Service Commission, albeit after the claimant had been transferred for more than a month.

There was a letter from the Commission, it having met to consider the facts, which stated that the claimant had been:

> *"re-assigned as a Permanent Secretary, in the Ministry of Finance and the Public Service and designated Director General, with effect from February 14, 2019. During the period of re-assignment, you should continue to receive your current salary and allowances."*

[159] A look at the letter from Mrs. Jacqueline Mendez, Chief Personnel Officer[11] suggests that the Public Service Commission had taken section 1(2)(b)[12] of the Constitution into account. The letter refers to the claimant as a Permanent Secretary in the Ministry of Education, Youth and Information and re-assigned him as a Permanent Secretary in the Ministry of Finance and Public Service and designated Director General.

[160] The claimant was first referred to in the letter, as the holder of the office of Permanent Secretary in the Ministry of Education, Youth and Information. This means that the claimant was lawfully performing the functions of that office, up to February 14, 2019. There was an express indication in the letter that, the claimant was the holder of the office of Permanent Secretary. It is here, that I recall the dicta of the Privy Council in ***Hinds v The Queen***, when the Constitution refers to an office it does not do so in abstraction but refers to its holder.

[161] The second reference in the letter, to the office of Permanent Secretary is in relation to the re-assignment. The claimant was reassigned as a Permanent Secretary "**and designated**" Director General. The use of the word "*designating"*

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[11] Exhibit 9 dated April 25, 2019

[12] Section 1(2)(b) of the Constitution prescribes: *"Any reference in this Constitution to the holder of an office by the term designating his office shall be construed as including a reference to any person for the time being lawfully performing the functions of that office."*

needs to itself be construed for it appears in the Constitution and in particular in the definition section at section 1(2)(b). In Black's Law Dictionary:[13]

> *"Designate means "1. To choose (someone or something) for a particular job or purpose…2. To represent or refer to (something) using a particular symbol, sign, name etc."*
>
> *Designation means "1. The act of choosing someone or something for a particular purpose or of giving the person or thing a particular description…2. A name or title."*
>
> *Designee means "Someone who has been designated to perform some duty or carry out some specific role. Also termed designate."*

[162] In construing the words "***and designated Director General***", it would seem to mean the act of choosing the claimant, for a particular purpose or of giving the claimant a particular description. This is aligned with what the claimant says, were duties and functions which he did not perform in his last ministry. The claimant was being given particular duties and a particular description of those duties by the use of the words designated Director General. Whether the claimant was demoted is answered later on.

Error of Law

[163] The Civil Service Establishment Order, in evidence does not show an order creating a post for a Permanent Secretary, in the Ministry of Finance and the Public Service. It would seem to me that this was a minimum requirement before the claimant could have been said to have been transferred to that ministry. The Public Service Commission did not cause the post of Permanent Secretary to be added to the establishment order, so that the claimant could have been transferred to it. The procedure for transferring the claimant was therefore flawed, is ultra vires.

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[13] 10th Edition

[164] In ***Anisminic Ltd v Foreign Compensation Commission***,[14] the House of Lords decided that the ouster clause in the Foreign Compensation Act did not prevent the court from reviewing the decision of the tribunal. A court is always able to enquire into whether there has actually been a valid decision. If there is no legally valid decision, then the purported decision is legally a nullity. In this claim, the transfer of the claimant is invalid and of no legal effect. He remains the holder of the office of Permanent Secretary.

Was there a breach of natural justice

[165] Counsel for the claimant submitted that the re-assignment of the Claimant, was a breach of natural justice in that, he was not granted due process prior to the actions taken by the Prime Minister. He argued that this decision that had been taken affected his rights and he was not given an opportunity to be heard prior to the decision.

[166] The procedure the Public Service Commission is to adopt, is not prescribed for Permanent Secretaries falling under section 126(3), therefore it is the *"master of its own procedure."* This means a high degree of fairness is to be incorporated into its processes. Under the head of fairness/procedural impropriety, Ms. Hall submitted that fairness depends on the particular circumstances of the case, and the court should employ a flexible approach.

[167] Fairness is to be determined on a case by case basis on the facts presented. What constitutes fairness has been prescribed by Lord Mustill in ***R v Secretary of State for the Home Secretary, ex parte Doody***[15]. His speech was cited with approval by Lord Brown in ***Barl Naraynsingh v The Commissioner of Police***[16], a judgment of the Privy Council.

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[14] [1969] 1 All ER 208 at page 213
[15] [1994] 1 A.C. 531
[16] [2003] UKPC 20

[168] As an office holder under the Constitution, a Permanent Secretary enjoys its protection. The clear words of section 126(3) and the silence in the Constitution and elsewhere in respect of Permanent Secretaries recommended by the Prime Minister, are factors to be taken into account in the assessment of fairness. The absence of guidance (for we have not been directed to any), may have been an influence on the Public Service Commission in its consideration of the matters raised by Mr. Bishop in his letter to them. That body may well have concluded that the intentional absence of language such as that found in section 126(1) left no room for it to manoeuvre in respect of the express directive of the Prime Minister.

[169] Viewed objectively, the letter from Mr. Bishop demanded that action be taken. The Public Service Commission held a meeting to consider the matter, there was a change in posture. The replacement letter set out that the office holder remained in the office of Permanent Secretary and was in keeping with section 1(2)(b) of the Constitution.

[170] What is clear is that there was a demonstrated failure on the part of the Public Service Commission, to acknowledge that there was no post to transfer the claimant to. Consequently, it failed to take into account as a relevant factor something which was material, and which it ought to have known, and which it ought to have taken into account. This impaired its decision and renders it a nullity.

[171] In the circumstances of this case the claimant was treated unfairly by the failure of the Public Service Commission to exercise its power to effect the transfer rationally or in a lawful manner. This constitutes a breach of natural justice.

Due Process

[172] Salary being money is regarded as property[17] (see ***A-G of St Christopher and Nevis v Lawrence[18]; Inland Revenue Commissioner v Lilleyman and Others[19]*** *and* ***Barnwell v A-G and Another[20]***). The requirement for a hearing would arise on the evidence that the property rights of the claimant had been affected. The claimant was paid as a Permanent Secretary, that evidence is uncontroverted.

[173] The Public Service Commission is the repository of the statutory power and is accountable in law for the exercise of that power. The claimant was effectively demoted when he arrived at the new ministry and was given no tasks which are expected to be performed by a Permanent Secretary. This was further compounded by the failure of the Public Service Commission to give legal effect to the transfer of a Permanent Secretary by adding the post of Permanent Secretary to the establishment before making the assignment.

[174] The Public Service Commission in the face of the caution set out in the letter to them from Mr Bishop, did not add a position which could be considered one which was lateral for a Permanent Secretary. Rather, the position which was added was that of Director General. The post of Director General within the meaning of section 126(3) of the Constitution could be construed as "*another such office carrying the same salary*." It is plain that a Permanent Secretary cannot be transferred ***to*** "*another such office carrying the same salary*."

[175] In addition, the evidence of Mrs Mendez was that she knew there was no post of Director General on the establishment at the Ministry of Finance and the Public Service. The manner of the purported transfer constitutes the movement of a Permanent Secretary from that office to another office carrying the same salary

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[17] Williams v AG of Guyana (2001) 71 W.I.R. 219
[18] (1983) 31 W.I.R. 176
[19] (1964) 7 W.I.R. 496
[20] (1993) 49 W.I.R. 88

which is unlawful for the reasons stated above. The actions of the Public Service Commission which led to this state of affairs, gave rise to a hearing. There was no opportunity afforded to the claimant for a hearing, this failure amounted to a breach of natural justice.

Whether the procedure when taken as a whole, was objectively fair

[176] It was stated by Lord Evershed in **Ridge v Baldwin**[21]:

> *"… it is not the decision as such which is liable to review; it is only the circumstances in which the decision was reached…"*

[177] The reasonable inference can be drawn from the undisputed facts that there was not to be a second Permanent Secretary in the Ministry of Finance and the Public Service. Were this otherwise, when the post of Director General was added to the Civil Service Establishment Order, 2019, this ought to have been when the post of Permanent Secretary was added to that ministry. Instead, of the post of Permanent Secretary it was the post of Director General which was added almost an entire year after the effective date of transfer of the claimant. It can be inferred that there was no demonstrated intention on the part of the Public Service Commission to add the post of Permanent Secretary to the establishment of the Ministry of Finance and the Public Service and I so find.

[178] In looking at all the circumstances of the case, the claimant was intentionally removed from the ministry to which he had been assigned. I find that the circumstances surrounding the lawfulness of that action, had been pointed out to the Public Service Commission by his counsel at an early stage and the claimant was nevertheless transferred to a post in a manner not provided for in law. The language used in the letter to the claimant does not change the position under the Constitution for the transfer of a Permanent Secretary.

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[21] [1963] 2 All ER 66 at 91

[179] While the Prime Minister does have the power to recommend the transfer of a Permanent Secretary, such as the claimant, there had to be an available office to which the claimant could be transferred. The instructions of the Prime Minister have to be carried out in accordance with the law. This was not done. The procedure cannot be described as a whole as being objectively fair.

Whether there was a breach of the claimant's legitimate expectation that he would remain in the capacity of the Permanent Secretary in the Ministry of Education, Youth and Information

[180] It was further submitted, that the Claimant had a legitimate expectation, that he would have remained in his appointed position at the former ministry. Counsel's position was that Mr. Douglas Saunders, as Cabinet Secretary, was not authorized to assess a Permanent Secretary. This is the remit of the Public Service Commission.

[181] Counsel for the claimant pointed the Court to a text by Dr. Lloyd Barnett OJ, which noted the importance of the protection of Permanent Secretaries from political interference. Counsel argued, that if one interprets Section 126(3) to mean that the Prime Minister can transfer an already appointed Permanent Secretary, it would result in a Permanent Secretary losing the protection from political interference, which he argued was enshrined in the Constitution. The Court was urged to intervene to stop this practice as it usurps the authority of Permanent Secretaries, and is a breach of natural justice.

[182] Ms. Hall submitted that as a matter of law, the claim of legitimate expectation has not been made out on the evidence. There was no evidence of the existence of a promise or assurance or of such a regular or settled practice. The defendants deny that any promise or assurance was made by any public authority with respect to the claimant remaining at the previous ministry, in the absence of consultation, retirement, resignation or termination for cause or that there is any regular or settled practice of Permanent Secretaries that supports such an expectation.

[183] Further, that the claimant was not deprived of any benefit or advantage, nor were any of his recognizable rights affected by the transfer. The circumstances did not give rise to any reasonable expectation that any form of consultation, or a hearing or the identification of some form of misconduct would be necessary or warranted, prior to the impugned decision. The only legitimate expectation the claimant could properly entertain, is that he would be transferred to another office of equivalent grade within the public service in which he is not in any way disadvantaged. The claimant suffered no loss of benefits, salary nor status.

[184] Having reviewed the law, it is reasonable to say that the legitimate expectation of the claimant, emanated from his belief that he has lost status, reputation, position, power and prestige.

[185] In the leading case of ***Francis Paponette and Others v The Attorney General of Trinidad and Tobago***[22], the appellants were members of the Maxi-Taxi Association in Port-of-Spain, Trinidad. In 1995, the Minister of Works and Transport who is responsible for the operation of all taxi stands in Trinidad, held discussions with members of the Association regarding the proposed move of the taxi stand from routes two (2) and three (3) from Broadway to City Gate. City Gate is situated on land owned by the Public Transport Service Corporation ("PTSC"), a statutory body. The maxi-taxi operators regard the PTSC as a competitor.

[186] The Minister made certain representations regarding the proposed move which were reluctantly agreed to by the Association. Following the relocation, the government decided that the PTSC should take over the management and control of City Gate. Regulations No. 227 of 1997 were introduced which gave the PTSC, the responsibility for managing City Gate and the power to charge members of the

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[22] [2011] 3 WLR 219

Association for its use. The regulations also required the maxi-taxi owners and operators to apply to the PTSC for a permit to operate from City Gate.

[187] Initially, members of the Association were not charged for its use, but after August 2001, they were required to purchase a card which was used to activate barriers at the exit and to pay a fee of $1.00 for each exit journey. Three-quarters of the user fee was retained by the PTSC and one-quarter was given to the Association.

[188] The maxi-taxi owners and operators on routes two (2) and three (3) were the only ones required to pay a fee to use their taxi stand. They were also the only ones who were required to apply to the PTSC for a permit and who were required to satisfy the PTSC that they were fit and proper persons to use the taxi stand.

[189] The appellants filed a constitutional motion in the High Court, claiming that the actions of the state had frustrated their legitimate expectations of a substantive benefit, in a way which affected their property rights protected under section 4(a) and also their rights under 4(d) of the Constitution, in that their circumstances were not materially different than owners and operators of routes one (1), four (4) and five (5), so the difference in treatment was not justified.

[190] The trial judge granted the declarations, ordering the executive arm of the State to permit exit without a user fee, and to pay monetary compensation for the infringement of their fundamental rights, assessed as a refund of three quarters of the user fees that had been paid by them from the respondents to the appellants and their representatives, with costs to the appellants.

[191] On appeal to the Court of Appeal, the appeal was unanimously allowed on the basis that there was no breach of section 4(a), because there was no interference with property or any property right and if there was, it was by “due process of law” within the meaning of section 4(a), since there was no frustration of any substantive legitimate expectation. The court also held that there was no breach of section 4(d) as the circumstances of the owners and operators of routes one (1), four (4) and five (5) were materially different from those of the appellants.

[192] On appeal to the Privy Council, it was held that:

> *"In a case where the legitimate expectation is based on a promise or representation, a useful summary of the relevant principles was given by Lord Hoffmann in R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2) [2008] UKHL 61, [2009] AC 453, at para 60:*
>
> *"It is clear that in a case such as the present, a claim to a legitimate expectation can be based only upon a promise which is 'clear, unambiguous and devoid of relevant qualification': see Bingham LJ in R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd [1990] 1 WLR 1545, 1569. It is not essential that the applicant should have relied upon the promise to his detriment, although this is a relevant consideration in deciding whether the adoption of a policy in conflict with the promise would be an abuse of power and such a change of policy may be justified in the public interest, particularly in the area of what Laws LJ called 'the macro-political field': see R v Secretary of State for Education and Employment, Ex p Begbie [2000] 1 WLR 1115, 1131."*
>
> *…*
>
> *What are the circumstances in which a public authority is entitled to frustrate a substantive legitimate expectation?*

[193] The leading case is **R v North and East Devon Health Authority, Ex p Coughlan** [2001] QB 213. Lord Woolf MR, giving the judgment of the Court of Appeal said, at para 57:

> *"Where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy."*

This test as set out in **Coughlan** is the applicable test in the case at bar.

[194] Having considered the case of **Paponette**, and the test in **Coughlan**, the court must determine the following:

1. Is there a lawful promise or practice made out on the evidence.

2. Has a substantive not procedural expectation of a benefit been established by the claimant;

3. Has the claimant established the legitimacy of his expectation.

4. Is this a proper case for a court to decide whether to frustrate the expectation was so unfair that to take a new and different course has amounted to an abuse of power.

Burden of proof

[195] The Board in **Paponette** discussed the burden of proof in this way:

> *"37 The initial burden lies on an applicant to prove the legitimacy of his expectation. This means that in a claim based on a promise, the applicant must prove the promise and that it was clear and unambiguous and devoid of relevant qualification. If he wishes to reinforce his case by saying that he relied on the promise to his detriment, then obviously he must prove that too. Once these elements have been proved by the applicant, however, the onus shifts to the authority to justify the frustration of the legitimate expectation. It is for the authority to identify any overriding interest on which it relies to justify the frustration of the expectation. It will then be a matter for the court to weigh the requirements of fairness against that interest."*

1. Is there a lawful promise or practice made out on the evidence

[196] The evidence of the claimant on this point is non-existent. His performance in the office of Permanent Secretary does not establish the promise. It may well be precisely because of performance that a Permanent Secretary is transferred elsewhere. The absence of evidence is not evidence. Having set out what the court was prepared to consider, the claimant has failed to discharge both the burden and standard of proof as required by the Privy Council in **Paponette.**

Whether there should be the grant of an injunction for the continued restraint of the defendants, their servants and/or agents from taking steps to prevent the claimant from returning to the Ministry of Education, Youth and Information.

[197] Reinstatement is not as of right. In this claim, the orders of the court are that the office of Permanent Secretary is one retained by the claimant. The grant of an injunction would encroach upon the authority of the Governor General to appoint Permanent Secretaries. In the doctrine of the separation of powers, the executive is not restricted in the management of the administration of government by the Court. The interim injunction previously ordered by this Court should be discharged.

Damages and costs

[198] The finding that a decision of a public authority is flawed as a matter of public law and the right of a claimant to a remedy in private law to damages is not straightforward. Having found that the decision taken by the Public Service Commission was without legal authority does not mean that the decision was not taken after deliberate and careful consideration. There is evidence that there was a meeting at which the representations of the claimant were considered.

[199] There was no indication in the pleadings that we were to consider a relationship between the grounds relied on and a cause of action for damages at private law. Such a cause of action would have had to have arisen on the facts. In light of that failure to plead and adduce evidence on this point, the issue of damages does not arise in private law.

[200] In the public law arena, the failure of a public authority to abide by the principles of natural justice does not automatically give rise to a cause of action in damages. The claimant has to prove that the unlawful action also constituted a breach of a statutory duty, or a civil wrong.

Orders

[201] I make the following declarations:

1. The claimant, Deanroy Bernard is the holder of the office of Permanent Secretary.

2. The actions of the Public Service Commission constitute procedural ultra vires in failing to ensure that the position of Permanent Secretary was added to the Civil Service Establishment Order, 2019 for the Ministry of Finance and the Public Service before effecting the transfer of the claimant to that ministry.

3. The Public Service Commission failed to afford the opportunity of a hearing to the claimant, having transferred him to an office which was not that of Permanent Secretary.