JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 54 OF 1983

BEFORE: The Hon. Mr. Justice Carberry, J.A.
The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice White, J.A.

BETWEEN REGINA

AND The Technical Director of the Scientific Research Council, Dr. A. Binger

AND The Administrative Secretary of the Scientific Research Council, Mrs. N.J. Vaughan

AND The Scientific Research Council : Respondents

Ex parte Chris Bobo Squire, Applicant-Appellant.

Mr. B. Macaulay, Q.C., Mr. W. Charles, Mrs. M.M.Macaulay for the Applicant-Appellant.

Mr. R.N.A. Henriques, Q.C., Mr. A. Wood for the Respondents.

25th - 29th July, 9th & 10th August, 1983 & 9th May, 1984

CARBERRY, J.A.:

This was an appeal from the refusal of the Full Court consisting of Smith C.J., Orr and Theobalds J.J. to grant to the Applicant-Appellant an order for certiorari against the Respondents, two members of the staff of the Scientific Research Council, and the Council itself which had been ordered to be served as a person "directly affected" by the proceedings.

The Applicant (hereinafter called the Appellant) had sought an Order for Certiorari

> "For the removal into the Supreme Court the decisions of the Technical Director of the Scientific Research Council dated the 14th Day of February, 1983, the 3rd and 4th days of March, 1983, suspending the applicant Chris Bobo Squire, a Senior Research Scientist of the Scientific Research Council, and the decision of the Administrative Secretary, Mrs. N.J. Vaughan, communicated to the said applicant terminating the applicant's contract with the Scientific Research Council, TO BE QUASHED...."

The Appellant was an employee working with the Scientific Research Council on a three year contract. The decisions complained of purported first to suspend and eventually to terminate that contract in

accordance with the terms thereof. It was a termination expressed to be in the terms of the contract, upon notice,--- it was not a summary dismissal. The appellant complains: (a) that contrary to the rules of natural justice he was not heard in his own defence by his employers, the Scientific Research Council (hereinafter called the Council), before these decisions were taken; and (b) he also challenges the decisions themselves as having been made by fellow employees, not the Council, and therefore as being void and of no effect. In this case the Appellant has sought his remedy in the field of public law by the use of the prerogative writ of Certiorari. The Respondents, the two named fellow employees whose decisions are complained of, and the Council all appeared by the same counsel, and --- without filing any reply to the Appellant's affidavits -- have challenged the application on two grounds: (a) that certiorari is not the appropriate remedy and is not available to the applicant, this being a case in the field of private law; and (b) that in any event, as the law now stands, persons in the Appellant's position are not entitled to any remedy at all, other than an ordinary action for damages for breach of contract or perhaps an application to the newly created Industrial Disputes Tribunal which has been given the power (not given to the Courts) to order reinstatement of an unjustifiably dismissed worker:
See the Labour Relations and Industrial Disputes Act. Secn. 12(5). Lord Hodson in Ridge v Baldwin (1964) A.C.40 at p.133 said:

> "No one, I think, disputes that three features of natural justice stand out -- (1) the right to be heard by an unbiased tribunal; (2) the right to have notice of charges of misconduct; (3) the right to be heard in answer to those charges."

What is at issue then in this case is the extent, if any, to which these principles of natural justice apply in cases of dismissals from employment, and secondly whether the remedy sought by the applicant, viz an order of certiorari is an apt remedy in the circumstances that exist here.

Some preliminary observations are in order. The growth of the common law has been largely shaped by the development of the remedies that it provides. Judicial control of the process of local government and what we now call administrative law was largely exercised and developed through the use of the prerogative writs, and as much of that local government law was administered by Justices of the Peace it was perhaps inevitable that such attempts as were made to secure uniformity of administration and the proper observance of the limits of the power entrusted to them should have

been exercised by the superior courts, principally by the court of King's Bench. Control tended to be developed through litigation, on a case to case basis, and a principal area of concern was with the issue of jurisdiction. The pre-eminent remedies of this period were the prerogative writs of certiorari, prohibition and mandamus. Halsbury's Laws of England, 1st edn. (1909), Vol 10: Crown Practice, Proceedings on the Crown Side of the King's Bench Division, secn. 7: page 155, para 310: Certiorari: the nature of the writ: states:-

> "The writ of certiorari issues out of a superior court, and is directed to the judge or other officer of an inferior court of record. It requires that the proceedings in some cause or matter depending before such inferior court shall be transmitted into the superior court to be there dealt with, in order to insure that the applicant for the writ may have the more sure and speedy justice.....
>
> The object of the writ, particularly in civil proceedings, is to give relief from some inconvenience supposed, in the particular case, to arise from the matter being disposed of before an inferior court less capable than the High Court of rendering complete and effectual justice."

At page 160 para 320 of the same work: Certiorari to quash:

it is said:

> "Certiorari lies at common law to remove the proceedings of inferior courts or judicial bodies for the purpose of quashing such proceedings where the writ of error did not lie.....
>
> Certiorari also lies to remove for the purpose of quashing, the determination of persons or bodies who are by statue or charter entrusted with judicial functions out of the ordinary course of legal procedure, but within the general scope of the common law. ...."

(emphasis supplied)

No indication is given of the test or touchstone to be applied to see whether the body or the decision in question falls within the reach of certiorari, but , as usual in attempts to define the common law, a number of examples of cases are given. It is apparent that there was at least one common factor, that is that the body was exercising a power in the field of public law, and a second factor (later to be challenged) was that the nature of the power was "judicial" in character, in that it involved the making of a decision to apply the power to an ordinary citizen, and that in the decision making process law was to be applied to facts in a considered

way, and to anticipate, that the person involved in its application should have a chance to be heard by the deciders before or during the decision making process. The courts were concerned with two main aspects: had the decision makers acted within their powers and secondly, was it the sort of decision that required from its nature that the person affected should have a chance to be heard. Certiorari was to lie where the normal process of judicial review did not run, whether by way of the writ of error or by appeal, but certainly whatever the test, there was never any doubt that it lay in the field of public law, as opposed to that of private law where the common law remedies such as the action for damages was available.

As to the early history of the prerogative writs see generally Holdsworth's History of English Law Volume 10 page 243 et seq, and Vol.14 page 245 et seq. It should be observed that in general the courts did not canvass the merits of the actual decisions, but concentrated principally on whether the decision was within the jurisdiction, and on whether the situation was one in which the principles of natural justice, (the opportunity to be heard) should be applied. With regard to the former a considerable volume of learning was built up as to whether the error appeared on the face of the record, or not, and if not as to whether it could be proved aliunde. The courts also refrained from interfering in "administrative" decisions. The test of the difference between "administrative" and "judicial" was on a case to case basis.

By the time of the appearance of the Third Edition of Halsbury's Laws of England, in 1955: Volume 11, still under the title of Crown Proceedings, the writs had become orders (save for habeas corpus), but still issued out of the superior court (usually King's Bench). The nature of the orders remained the same: See Halsbury, 3rd Edn. page 52 para 107: Nature of the three orders:(mandamus, prohibition and certiorari). So far as certiorari was concerned, the scope of the order had widened in respect of the persons to whom the order would issue. More and more cases or situations had been added to the list. An attempt had been made in the celebrated dictum of Lord Atkin in R v Electricity Commissioners, ex parte London Electricity Joint Committee Company (1920) Ltd. (1924) I.K.B. 171 (C.A.) to distinguish those cases which would be treated as vulnerable to certiorari proceedings, and those which would not. In that case the proceedings had been brought to test the validity of a proposed scheme published by the Commissioners

for effecting an improvement of the existing organization for the supply of electricity in the London and Home countries district. The Commissioners were a statutory body set up by Act of Parliament to effect rationalization and formulate schemes for unification of the supply of electricity in various districts (then supplied by a variety of private enterprises). The applicants were existing suppliers of electricity who would be affected adversely by the proposed scheme. They challenged the Commissioners by certiorari, alleging that they had exceeded their jurisdiction by not hearing them before publishing the scheme. The Commissioners replied in effect that they were exercising "administrative" powers, and thus not within the reach of certiorari. At pages 204-205 Atkin L.J. said:

> "The question now arises whether the persons interested are entitled to the remedy which they now claim in order to put a stop to the unauthorized proceedings of the Commissioners. The matter comes before us upon rules for writs of prohibition and certiorari which have been discharged by the Divisional Court. Both writs are of great antiquity, forming part of the process by which the King's Courts restrained courts of inferior jurisdiction from exceeding their powers. Prohibition restrains the tribunal from proceeding further in excess of jurisdiction; certiorari requires the record or order of the court to be sent up to the King's Bench Division, to have its legality inquired into, and, if necessary, to have the order quashed.
>
> It is to be noted that both writs deal with questions of excessive jurisdiction, and doubtless in their origin dealt almost exclusively with the jurisdiction of what is described in ordinary parlance as a Court of Justice.
> But the operation of the writs has extended to control the proceedings of bodies which do not claim to be and would not be recognized as, Courts of Justice.
>
> Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."
>
> (emphasis supplied)

Atkin L.J. then proceeded to give examples of cases in which the courts had held bodies subject to the control of these writs, and others in which they had not. He and the other members of the Court of Appeal decided that prohibition would lie to the Commissioners.

All of these examples came from the field of public law, they related to statutory bodies of one sort or another exercising control of and making decisions which affected individual members of the public. It seems clear that this element is what is being referred to in the first part of the dictum. As to the second part, "having the duty to act judicially",

no clear test was formulated as to when such a duty would arise, and it remained, and still remains, a problem, addressed by Lord Reid, amongst others, in Ridge v Baldwin (1964) A.C. 40 at pages 74 et seq. Lord Reid was of the view that the "duty to act judicially" is to be inferred from the nature of the power, and he was content to indicate certain fields in which from the nature of the power the duty to act judicially would not be inferred, as for instance a considerable body of wartime legislation. Ridge v Baldwin apart from this is of special importance in the case before us, as it dealt with the exercise of the power of dismissal of a chief constable by the local watch committee which had such a power of dismissal, but were held to be obliged to exercise it in accordance with the rules of natural justice.

Apart from a consideration of the general nature and scope of certiorari as a remedy, I would note as another factor from the growth of the remedy of "declaration"; in which the courts are asked to make declarations as to the rights of the parties before them, or to be more accurate "declaratory judgments" a remedy that grew and developed as the result of the amendment in 1883 of the former Order 25 r 5, to the effect that such declarations could be made "whether or not any consequential relief is sought or could be claimed." The learning in regard to this remedy is to be found in the notes in the White Book dealing with 0/r 17, and more recently with those dealing with O 15 r 16. The Jamaican equivalent is to be found in secn.239 of the Judicature (Civil Procedure) Code .

The declaration, or declaratory judgment, together with the injunction have become increasingly popular because they are not hedged about with the restrictions applicable to the prerogative writs or orders: thus no leave is required to bring such an action; it is begun by writ, and has procedural advantages in that discovery et cetera could be obtained. Further the remedy was available in the fields of both public and private law and there was therefore a considerable overlap with certiorari, as it was possible to invoke the principles of natural justice when seeking a declaration. One result has been to assimilate the two remedies to a considerable extent, so that if a declaration can not or ought not to be made a similar ruling is likely to be made in similar circumstances with regard to certiorari. Nevertheless the converse is not true, there are cases in which certiorari will not lie, (because it applies only in the field of public law) but in which

an action for a declaration might have succeeded: see for example Hannam v Bradford City Council (1970) 2 ALL E.R. 690; (1970) 1 W.L.R. 937.

Perhaps one way of looking at the distinction is to observe that in certiorari the applicant is asserting as a matter of general public law that the rules of natural justice apply, whereas in the action for a declaration he tends to be relying on specific contractual provisions arising in the field of private law, which involve the application of the natural justice principles.

One further preliminary comment is to observe that in the United Kingdom the rules of the Supreme Court dealing with the prerogative writs, or rather the obtaining of orders of mandamus, prohibition, and certiorari were substantially amended in 1977. The Jamaican rules dealing with the writs or orders are to be found in the Jamaican Judicature (Civil Procedure) Code see sections 506 et seq (mandamus), and particularly Title 44 sections 564 A et seq. which largely correspond to the provisions of The United Kingdom R.S.C.O 53 as it used to be, for example in the 1970 White Book. In the United Kingdom however the old O 53 has been replaced with a new O 53 Applications for Judicial Review. In the 1982 White Book the comment is made:

> "This Order entirely replaced the former O 53 and it introduced a most benificent reform in the practice and procedure relating to administrative law. It created a uniform, flexible and comprehensive code of procedure for the exercise by the High Court of its supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals or other bodies of persons charges with the performance of public acts and duties."

The main changes made are summarized in the 1982 White Book, at the note 53/1-14/3. Amongst other matters of importance the applicant may apply for any of the prerogative orders either jointly or in the alternative without having to select any particular one, and in appropriate cases on an application for judicial review the Court is further empowered to grant a declaration or an injunction or damages. In short it is no longer as necessary for the applicant in the United Kingdom to select the appropriate remedy in his application for Judicial Review, he will get that which is appropriate; on the other hand the Courts in the United Kingdom will now insist upon the applicant using the new O 53 procedure: see O'Reilly v Mackman (1982) 3 W.L.R. 1096; (1982) 3 ALL E.R. 1124 (H.L.) and the speech of Lord Diplock reviewing the old and new procedures. Two quotations from this speech are germane:

dealing with the dictum of Atkin L.J. in R v Electricity Commissioners (ante) and the effect upon it of Lord Reid's observations in Ridge v Baldwin (ante) Lord Diplock summarized the position thus at page 1104-5:

> "Wherever any person or body of persons has authority conferred by legislation to make decisions of the kind I have described, it is amenable to the remedy of an order to quash its decision either for error of law in reaching it or for failure to act fairly towards the person who will be adversely affected by the decision by failing to observe either one or other of the two fundamental rights accorded to him by the rules of natural justice or fairness, viz. to have accorded to him a reasonable opportunity of learning what is alleged against him and putting forward his own case in answer to it, and to the absence of personal bias against him on the part of the person by whom the decision falls to be made."

Speaking of the position formerly obtaining under the old rules, Lord Diplock at page 1108 observed:

> "Finally rule 1 of the new Order 53 enables an application for a declaration or an injunction to be included in an application for judicial review. This was not previously the case: only prerogative orders could be obtained in proceedings under Order 53. Declarations or injunctions were obtainable only in actions begun by writ or originating summons. So a person seeking to challenge a decision had to make a choice of the remedy that he sought at the outset of the proceedings, although when the matter was examined more closely in the course of the proceedings it might appear that he was not entitled to that remedy but would have been entitled to some other remedy available only in the other kind of proceedings..."

Lord Diplock added, with reference to the new O 53:

> "If what should emerge is that his complaint is not of an infringement of any of his rights that are entitled to protection in public law, but may be an infringement of his rights in private law and thus not a proper subject for judicial review, the court has power under rule 9 (5) instead of refusing the application to order the proceedings to continue as if they had begun by writ..."

We do not in Jamaica have the benefit of the new procedure for "Judicial Review."

The person seeking to challenge a decision that affects him has at the outset to make a choice of the remedy that he seeks; and if certiorari turns out to be the wrong remedy, the Courts here do not under the existing rules have the power to substitute a declaration or declaratory judgment, or to proceed to deal with the appellant's grieviances by granting an injunction or damages for breach of contract, or tort.

The appellant in these proceedings will therefore either succeed in getting an order for certiorari or he will fail: any other remedies that he may (or may not) have for breach of contract, or conspiracy or the like are not before us in this application for certiorari .

It is proposed to look at the facts disclosed in the Appellant's case and affidavits, and the correspondence exhibited, and then to consider the extent to which the case law shows the rules of natural justice being applied to the situation, and then to consider whether the remedy proposed, certiorari, is apt and available in the instant case.

The Facts:-

The Scientific Research Council was set up by an act of the Jamaican Parliament on the 16th June, 1960, modified by a later act of 1963. The Council consists of a number of persons not less than 15 or more than 20 as the Minister may from time to time determine. Members normally hold office for three years and are eligible for re-appointment. One of their number is to be appointed chairman. The Council is a body corporate with the normal powers. Under secn. 4(4):

> "All documents...made by, and all decisions of, the Council may be signified under the hands of the chairman or any other member authorized to act in that behalf or the Technical Director of the Council."

I pause here to note that the section says "... be signified" and not "shall be signified".

Under Section 6 it is provided that the Council "shall" meet at least once in every period of two months, but no provision is made for any sanction attending on a failure so to meet . That section, in sub section 4 provides:

> "(4) The powers of the Council may be exercised at a meeting at which the chairman or the person elected to act as chairman and at least seven other members of the Council are present."

This appears to be a normal provision for a quorum, but no provision is made as to what will happen if there is no quorum. Presumably the normal common law or common sense rules will apply..

Sub section 7 provides:

> "(7) The validity of the proceedings of the Council shall not be affected by any vacancy amongst the members thereof or by any defect in the appointment of a member thereof."

Section 8 of the Act makes provision for the appointment of a Technical Director and other "officers, agents and servants" as is thought necessary

for the proper carrying out of the Council's functions. The "financial" sections of the Act provide for the Council to receive support from Government funds out of the Government's Annual Estimates, and to furnish proper accounts. But it also makes clear that the Council can generate its own funds and or acquire funds elsewhere. The Council is required to furnish the Minister with annual reports on its activities and audited accounts. Discoveries and inventions made by the Council or any of its officers, agents or servants shall be vested in the Council, and with the approval of the Minister the Council may pay out bonuses, royalties to such persons. The Council is exempt from income tax and subject to policy directions of a general character from the Minister. It may, with the approval of the Minister, make regulations "(a) determining generally the conditions of service of officers and servants of the Council."

The Council appears to me to be a fairly typical statutory corporation set up by Government, with the intent that, subject to a certain measure of overall control by Government, it is to carry out the functions set out in Section 5 of the Act. It is not a department of Government but an entity with a life of its own intended to operate like any other corporation or company, liable to sue and to be sued like anyone else. Though it has public elements I would not regard it as being akin to a Government department or operating in the public law field. Such decisions as it might make would be akin to those made by any other corporation, public or private, and do not seem to impinge on the citizen in the way that decisions with regard to slum clearance, demolition orders, or control of building etc. do. It may from time to time get involved in the field of public law, but primarily it was intended to operate in the field of private law with all the flexibility that that implies. During the course of the argument learned counsel for the appellant referred us to a decision of the High Court of Australia, The Sydney Harbour Trust Commissioners v Ryan: (1911) 13 C.L.R. 358. It appears to me that that case illustrates the comments made above with respect to the nature and character of the Scientific Research Council. In that case the issue was whether this statutory corporation set up by the Government was liable to be sued by one of its employees under the Employers' Liability Act, 1897. The Commissioners argued that (a) they were a special type of Government body; that the plaintiff was a fellow officer or servant of the Crown, not an employee of the Commissioners, and that they were merely

a Department of Government, and as a fellow servant not liable to be sued by the Plaintiff. They also argued (b) that the Employers' Liability Act did not bind the Crown. The Plaintiff Respondent, the injured employee, argued that the clear intent of the statue was to appoint a corporate body for the purposes of managing and controlling the affairs of the Port, against whom actions could be brought in the same way as against private individuals engaged in similar operations. They also argued that in any event the Employers' Liability Act did bind the Crown. In his judgment Griffiths C.J. observed at pages 362-364:

> "The system of creating corporations for the purpose of carrying on operation of a public character is now familiar....
> One of the objects of such creation is, in many cases,.....to enable rights and liabilities to be enforced against the Crown in the same way as against individuals engaged in similar enterprises..."

After reviewing the provisions of the statue, he concluded:

> "It results from all these provisions that the Sydney Harbour Trust may be regarded, in one sense, as a Department of the Government of New South Wales. But, in another sense, I think that the Commissioners are an independent corporation created for the purposes indicated in the Arapiles Case.
>
> I think therefore, that, whatever may be the position of those officers of the Commissioners, who, though appointed by the Governor in Council, are subject to the sole control and governance of the Commissioners, the Commissioners are, in point of law as well as in fact, the employers of persons who are in their service at daily or weekly wages. It is admitted that the respondent is such a person."

The Employers' Liability Act had abolished the doctrine of common employment, and Griffiths C.J. observed:

> "For the reasons already given I think that the appellants are the employers of the respondent within this definition."

In response to the second argument, whether the Act bound the Crown, Griffiths C.J. stated at page 366:

> "....I am of opinion that, when the Government of New South Wales engages, either in its own name or through the agency of a corporation created for the purpose, in enterprises which in former times were only carried on by individuals, it is subject to the same liabilities, and is governed by the same laws, to and by which individuals are subject and governed under the same circumstances.

> In my opinion, therefore, the benefits of the Employers' Liability Act extend to workmen employed by the Crown in New South Wales, whether directly or through corporate agents such as the appellants."

The other judgments were to like effect, and apart from the particular point at issue, the case illustrates that a Statutory Corporation once set up, enjoys all the liabilities and rights of ordinary corporations: and as regards its servants it operates in the field of private law, unless any special reason can be found, as in Ridge v Baldwin for holding that the employment is a "public office". I have been unable to find any such reason here. The Appellant was appointed with effect from the 10th May, 1982, to the staff of the Council; it was for a specified term of three years, and he was to be a Senior Research Scientist. There is some difficulty in ascertaining precisely the terms and conditions of his appointment. Following on an interview, he was written to on the 16th April, 1982, by the then Administrative Secretary, in a letter outlining the terms and conditions of service, and which he was asked to sign and return if agreed to. He did so. Clause (e) of that letter provided:

> "(e) The appointment will, as far as possible, be subject to the Council's Terms and Conditions of Service, a copy of which is enclosed."

He was also given at that time "the form of Service Agreement" in quadruplicate for execution. He executed it. So too did the Chairman of the Council. It is dated the 22nd April, 1982, and it seems to me that the intent of the document is that it supercedes the letter of the 16th April, 1982. It states:

> "4. This Agreement is subject to the conditions set forth in the Schedule hereto annexed and the Schedule shall be read and construed as a part of the Agreement."

The Schedule sets out, no doubt more accurately, some of the terms and conditions of employment with relation to items such as Duties, Salary, Passages, Baggage and effects, Health etc. Germane to this case are two particular terms; clauses 7 and 8. They read:

> "7. If the officer shall at any time neglect or refuse or for cause (excepting ill health not caused by his own misconduct as hereinbefore provided) become unable to perform any of his duties or to comply with any order or shall disclose any information respecting the affairs of the Council to any unauthorised person or shall in any manner misconduct himself the Council may dismiss him and on such dismissal all rights and advantages reserved to him by this Agreement shall cease.

> 8. (1) The Council may at any time determine the engagement of the Officer on giving him three months notice in writing, and, if he is in Jamaica at the time, furnishing him with passages and facilities for baggage and effects as hereinbefore set forth. He shall not be entitled to half salary on the voyage home unless specially granted by the Council.
>
> (2) The Officer may, at any time after the expiration of three months from the commencement of service in Jamaica, determine his engagement on giving the Council three months notice in writing. Thereupon the Officer shall repay to the Council a proportion of expenses incurred by the Council for passages and facilities for baggage and effects calculated by subtracting the number of months for which he has actually served the Council under this Contract from 36 and dividing the resultant figure by 36. Thereafter the Officer shall have no further claim upon the Council.
>
> (3) If the Officer terminates his engagement otherwise than in accordance with this Agreement he shall be liable to pay to the Council as liquidated damages three months salary and a proportion of the expenses incurred by the Council in relation to baggage and effects calculated as in the preceding sub-clause."

It should be added that these two clauses form part of a complex: there is an earlier clause, Clause 6, dealing with ill health (not caused by the officer's own misconduct) resulting in the officer having to resign his job, there is a clause 9 dealing with leave of absence, and a clause 10: "Further employment" providing for re-employment on terms to be mutually agreed.

The terms of the contract of employment are to be found then in the "Service Agreement" and the attached "Schedule". The original offer of employment letter had however referred to and enclosed a copy of the Council's "Terms and Conditions of Service", and said that the appointment would be subject thereto "as far as possible". We were told that this document though given to the appellant has never been formally promulgated and adopted by the Council, or approved by Government, whether by design or inadvertence. It was however relied on by the Appellant, and the document, dated 22nd March, 1966, purports to set out a far more elaborate scheme than is contained in the Schedule. Our attention was drawn to the following clauses:

> "10. Misdemeanours Subject to Disciplinary Action
>
> An employee who is absent from duty without permission from the Head of Department or Head of Section, except in cases of absence due to illness as set out in Appendix III, or commits any other misdemeanours shall be liable to disciplinary action.

11 DISCIPLINARY ACTION

The following penalties may be imposed according to the seriousness of the misdemeanour or offence.

(a) Reprimand

(b) Suspension from duty without pay

(c) Dismissal

(d) Summary dismissal

Offences for which summary dismissal may be imposed include:-

(i) Absence from duty seven consecutive working days without permission with effect from the first day of such absence;

(ii) Conviction on a criminal charge with effect from the date of such conviction.

15. TERMINATION OF EMPLOYMENT

(a) A fixed term appointment will terminate in accordance with the terms and conditions of agreement; should the appointment continue after the end of the period without a further period being agreed, it shall then be terminable by three months notice in writing by either party.

(b) Appointments other than for a fixed term are terminable by one month's notice in writing by either party if employment is on a monthly basis; if on a weekly basis by two weeks notice in writing by either party.

(c) The Council may terminate any appointment other than a fixed term appointment for cause without notice on payment of one month's salary in lieu of notice in the case of employees on a monthly basis and two weeks in case of employees on a weekly basis.

(d) Unless otherwise authorised by Council, an employee will on termination of appointment return in good condition all property of Council in his/ her custody; including all note books and other records.

16. APPEAL

There is a right of appeal to Council in relation to any matter affecting appointment.

17. ARBITRATION

It is a condition of employment that employees shall not begin legal action against Council without first having recourse to arbitration."

It might have been a matter for argument how much of this document may be said to be incorporated into the appellant's Service Contract, but the argument before us proceeded on the basis that these terms applied, and it would appear that the Respondents, at least the Technical Director, was relying on them when he purported to suspend the Appellant in his letters of the 14th February, 1983, and those of the 3rd and 4th

March, 1983. We were not informed whether the suspension was without pay, i.e. whether in fact the deductions were or were not made from the Appellant's salary. To continue, on the 14th February, 1983, some nine months after the Appellant's appointment, the Technical Director, (the first respondent), wrote to the Appellant in the following terms:

> "Dear Mr. Squire,
>
> You are hereby suspended from the Council's service for five (5) working days effective February 15, 1983, for the following reasons:-
>
> (i) your unauthorised absence fron duty for the greater part of last week resulting in disruption in the area of work under your supervision. Two technicians were without supervision for the period.
>
> (ii) The general lack of interest displayed by you in your work for a prolonged period.
>
> Unless marked improvement is shown in your performance within the next two (2) months, serious thought will be given to terminating your services.
>
> Yours sincerely,
> Scientific Research Council.
>
> Al Binger, Ph.D
> Technical Director."

The writer clearly was acting under clauses 10 and 11 of the "Terms and Conditions."

The Appellant replied to this letter on the 15th, intimating he was appealing to a "higher authority", and in effect stating that he had before his absence appraised Dr. Binger of the circumstances and that he might be absent. He observed that there had been no previous complaints about his work, and in effect that he had not been heard as to the reasons for his absence, before being suspended. It appears that the Appellant did appeal through the Executive Director to the Council about this decision. It is the first of the decisions which he seeks to quash.

On the 3rd March, 1983, Dr. Binger again wrote to the Appellant. The memorandum in effect complained that due to construction work going on, he had had to arrange for Appellant to share his office with some one else; that though he had spoken to the Appellant about it, the Appellant had ordered the extra desk put into his room to be removed, and had done so a second time after Dr. Binger had supervised its replacement.

This letter purported to suspend the Appellant from duties till further notice. On the 4th March, 1983, Dr. Binger wrote advising that the suspension of the 3rd March, would be for three days only. These decisions are also the subject of the Appellant's motion to quash.

The Appellant replied to Dr. Binger on the 7th March, accusing him of precipitating a crisis. In effect he said that he could not perform his duties if he had to share an office, and that he had been put into the position of either not performing his duty or of being accused of insubordination. He was again appealing "to a higher authority" and seeking an atmosphere in which he could do his job without being subject to the Director's threats.

On the 9th March, 1983, the Executive Director, Mr. Hamilton, replied to the Appellant's intimations of appeal, by advising that there was at present no Council to appeal to, due to a lapse in the appointment of members. The date for the appeal could not be decided until there was a new Council.

Dr. Binger for his part also replied on the 9th March, expressing regret that the appellant could no longer read his novels with feet aloft his desk without someone looking at him, and observing he would be more than happy to answer any queries at the "hearing" you have requested. At that stage both protagonists, the Appellant and the Technical Director, Dr. Bingham, were girding their loins for the "hearing" of the appeal before the Council when it should have been reconstituted.

It appears re-constitution did not come soon enough to defuse the situation. On March 29, 1983, the Administrative Secretary, Mrs. N.J. Vaughan, wrote to the Appellant the following letter:

"Mr. Christian B. Squire
c/o Scientific Research Council
P.O. Box 350
Kingston 6

Dear Mr. Squire

Pursuant to Clause 8 (i) of your Memorandum of Agreement with the Scientific Research Council, your engagement is being terminated on three (3) months' notice effective April 1, 1983. The Council will not require you to work during the period of your notice and accordingly you will find enclosed Cheque No. 050525 in the sum of $2108.69 being payment as follows:-

- Three (3) Months Notice Pay
- Two (2) days Vacation Leave
- Twenty-Eight (28) days Contractual Leave
- Less your outstanding loan balance of $1705.00 for repairs to your motor car

Enclosed also is Cheque No. 050524 in the sum of $4349.65 which represents your gratuity for the period May 10, 1982, to June 30, 1983.

Under the above Clause the Council is obliged to furnish you with your return passage and shipping facilities for your baggage and personal effects to your address in London from which you were recruited.

Please submit estimates of the cost of shipping your effects as early as possible.

Yours sincerely
SCIENTIFIC RESEARCH COUNCIL

/S/ N.J. Vaughan (Mrs.)
Administrative Secretary "

It should be noted that it was not disputed that there were in fact no members of the Council at the time that the decisions complained of were taken. The letter from the Executive Director, Dr. Hamilton, dated March 9, 1983, stated that the membership of the Council had lapsed. The previous members had been appointed for two years on the 16th February, 1981 and their term of office had ended on the 16th February, 1983. The Minister for Science and Technology or the Prime Minister was in process of appointing new members, but this was not done until.....

These letters were therefore written at a time when the Council had not been reconstituted, and there was a lapse or complete vacancy in its composition. There were at that time no members to constitute the Council, and the decisions were therefore taken by persons who were fellow wmployees of the Appellant, though of senior rank. Though the letters are signed on behalf of the Council, they may be said to be conveying decisions of persons who were "usurping" the authority of the Council, assuming that the Council's authority was necessary for these decisions.

It should also be noted that we were not in this case concerned with whether or not the complaints that seem to have been made against the Appellant were or were not justified, and whether the penalties inflicted were or were not disproportionate to the alleged misdemeanours. Certainly it is fair to say that no attempt was made by the Respondents to justify these actions.

An important point that should be made about the letter of the 29th March, 1983, is that in terms it was not a summary dismissal, but a purported termination of the contract under Clause 8 of the Schedule in the

Appellant's Service Agreement. It is not in dispute that all the various items of salary and allowances and so forth that were due under the contract were tendered to the Appellant, and that apart from the questions of the origin and authority from which it emanated, it was in all respects a termination on proper notice. This was a contract for three years certain: it was not a contract of indefinite duration. It had provisions for renewal on its expiry, if the parties so wished; it also had terms governing the determination of the engagement before the expiry of the three years.

The Appellant replied to the letter from the Administrative Secretary, the second respondent, by two letters of the 30th March, 1983. He wrote to the secretary challenging the notice of termination as unauthorised, as the Council had not been re-constituted and so far as he knew there was no Council. The Council employed him and only the Council could terminate this contract. He referred at length to the correspondence and to the outstanding appeals still waiting to be heard by the Council. In addition, he intimated that he was appealing to the Council against this unauthorised termination of his contract. He returned the cheques sent to him, and intimated that he proposed to carry on with his work, and expected his usual monthly salary cheques.

The Appellant also wrote to Dr. Hamilton, the Executive Director, on the 30th March, enclosing a copy of his reply to the Administrative Secretary, and advising that he was appealing to the Council on this last decision also.

The Administrative Secretary on the 31st March replied to the Appellant's letter of the 30th March by returning to him the cheques previously sent, advising him that he would be a trespasser if he returned to work and asked for the return of all property of the Council and his notebooks and other records. Thereafter correspondence was conducted on a different level. The Prime Minister was written to on behalf of the Appellant and was asked in effect to hasten the appointment of the new members of the Council. He did so.

Counsel for the Appellant wrote to the new Council by letter of the 9th May, 1983, informing them that the Full Court had given leave to bring these proceedings, but in effect offering to proceed no further until the appellant's appeal to the Council had been heard. Through its attorneys, the new Council replied on the 12th May, 1983, declining to

hear any appeals by the Appellant, and intimating that it would be defending the motion (for certiorari) filed on behalf of the Appellant.

It is, I think, fair to comment that the Appellant's attitude to the Council itself is ambivalent. The order for certiorari that is sought does not in terms embrace the Council. The Council was made a party because the order if made would affect it. The case as presented by Mr. Macaulay the Appellant's counsel was that he had no quarrel with the Council. His complaint was that it was the Council that employed him and only the Council could terminate his contract. He complained that the decisions, the subjects of the order he seeks, were not made by the Council but by fellow servants or officers who have conspired against him. If this is so, it is hard to see what elements of public law can possibly be involved, and why the appropriate remedy is not some action in tort against them personally. Yet, anxious to secure the remedy of certiorari, the appellant seeks to rely on the nature and character of the Council as affording him a remedy appropriate only to the field of public law.

Apart from the argument as to usurpation of authority, it was also argued that no decision, right or wrong, could be made during the period in which there were no members of the Council. The argument seemed to go so far as to suggest that during this period the Council had ceased to exist, or was at least in a state of suspension. This seems to me to run counter to the provisions of secn. 4(1) of the Scientific Research Council Act. Pressed to its logical conclusion none of the business of the Council could be carried on in any shape or form during such a period, (which will inevitably occur from time to time) and I would wish to reserve any expression of opinion on this point as it seems to me that it is not necessary for the decision of this case.

With the wisdom of hindsight, one is perhaps tempted to wonder if it was not the hiatus in the membership of the Council that was the underlying cause operating on the conduct of the parties involved: on the one hand the feeling that during this period there was no body that could apply the sanction of dismissal, and on the other that the situation had reached such an impasse that termination of the employment was the only solution, whether done according to the legal proprieties or not.

Be that as it may, the Appellant's complaint is that he appealed to the Council both in regard to the suspensions to which he was subjected, and finally as to the termination of the contract. The document of terms and conditions of service provided for an appeal, and this has been denied him. Further, he complains that these several decisions were not decisions of the Council, but were made by those who usurped its powers.

The Case Law :

I turn now to examine the extent to which the rules of natural justice are applicable to the master and servant relationship. Has a servant or employee the right to be heard by his employer and to answer to any charge made against him before he is dismissed? A second question intimately tied up with the first is what is the remedy for dismissal without a hearing? Does it lie in the field of Public Law, are the prerogative writs available? Or does it lie only in the field of private law, by an application for a declaration, or for an injunction, or for an action for breach of contract or in tort?

Dealing with the cases before Ridge v Baldwin, the earliest case that I have seen is that of R v Erasmus Warren(1776) 1 Cowp 370; 98 E.R. 1135. This case seems to have decided that the position of parish clerk was an "Office " from which the incumbent could be removed only on cause being shown to the Courts: he was not dismissable at will. The cause of action was mandamus addressed to the minister who had appointed and dismissed the clerk. What is stressed is the public nature of the office.

Capel v Child (1832) 2 Cr. & J 558; E.R. 235 was in fact a case of assumpsit:there the Bishop of London, acting on his own personal knowledge, purported to find a local vicar incapable of managing all his churches, and appointed a curate to assist him - whose salary was to be paid by deductions made from the stipends of the vicar. When the deductions were made the vicar sued in assumpist to recover them. This brought into issue the legality of the Bishop's original action, as to which the vicar complained that he had been condemned unheard. The Court (Exch. of Pleas) decided that under the Act from which the Bishop derived his authority there should have been an inquiry, and a judgment on it, that the vicar should have had the opportunity of replying to charges made. The Bishop's decision was therefore invalid. Lord Lyndhurst C.B. put the matter thus:

> "Here is a new jurisdiction given --a new authority given: a power is given to the Bishop to pronounce a judgment; and according to every principle of law and equity, such judgment could not be pronounced or, if pronounced, could not for a moment be sustained, unless the party in the first instance had the opportunity of being heard in his defence, which in this case he had not; and not only no charge is made against him which he had an opportunity of meeting, but he has not been summoned that he might meet any charge. On these grounds I am of opinion that the proceedings are altogether invalid..."

The case does recognize the applicability of the audi alteram partem rule. It is not however a case in the field of public law, nor is it really a master and servant case, and in any event, as the next case shows, the post concerned was in those days considered a public office: see R v Archbishop of Canterbury (1859) 1 EL & EL. 545;120 E.R. 1014 where mandamus issued to the Archbishop to order the hearing of an appeal made by a curate whose licence had been revoked by the Bishop of London on unspecified grounds which he had had no opportunity to answer, a decision which the Archbishop had purported to confirm without hearing the curate. The position of the Church of England is however a special one, and the church cases though illustrating the rules of natural justice do not perhaps fall into the field of master and servant.

Osgood v Nelson (1872) L.R. 5 H.L. 636: In this case the Plaintiff in Error was removed from the office of Registrar of the Sheriff's Small Debts Court of the City of London, after an enquiry had been held at which he was represented and evidence taken, and the results of which together with a full transcript of the evidence was submitted to the Lord Mayor, Aldermen and Commons of the City in Common Council, before whom the Plaintiff had a further opportunity of making submissions through his counsel. The Common Council resolved to dismiss him from office. The Plaintiff took out a writ of quo warranto to call upon the Council to show cause for his dismissal. They did so. The Plaintiff then took out an action to recover the fees of his office, on the basis that the result of that action should determine the result of the quo warranto proceedings. The Court of Queen's Bench gave judgment for the Defendants affirming the lawfulness of the dismissal, this was affirmed by the Court of Exchequer Chamber, and now came before the House of Lords. The Plaintiff complained that there had been no specific charges of misconduct filed against him.

A number of other complaints were also made which do not arise in the instant case. The House of Lords invited the Judges to give their opinion. They did so through Martin B., who advised that they were unanimously of opinion that the Plaintiff had been lawfully removed from his office. He observed:

> "There can be no doubt, my Lords, that the Courts of Law in this country would take care that any proceeding of this kind should be conducted in a proper manner; that the person it was proposed to remove should have every opportunity of cross-examining the witnesses brought forward against him, or of otherwise opposing the case against him; that he should have the power of calling witnesses to prove his own case; and that he should have every possible opportunity which a person can have according to the law and constitution of this country of defending himself and of establishing that he is not liable to amotion."
>
> ("amotion" means in this context dismissal of a corporate officer from office".)

Martin B. went on to observe that the Plaintiff had had all the opportunities that could be given. He added:

> "We also think that it is possible, although there is no necessity for giving any judgment upon it, that if a man was removed from an office of this kind from any frivolous or futile cause, and that appeared before a Court of Law, or before your Lordships, you would in all probability be inclined to treat the removal as a nullity, and not permit the man to be removed from such an office for a mere caprice or for a futile cause....
>
> Not that your Lordships would sit as a Court of Appeal upon the decision of the Mayor and Council; but you would take care to see that the cause was a real and substantial cause."
>
> (emphasis supplied)

Lord Hatherly L. Ch. put the matter this way at p.649:-

> "But the main point we have to consider is this: whether a full inquiry had been made by those who have the power of amotion for reasonable cause, whether reasonable cause has been assigned, and, in the judgment of those persons who have the power of removal for reasonable cause has been established.....
>
> I apprehend, my Lords, that, ... the Court of Queen's Bench has always considered that it has been open to that Court.....to correct any Court, or tribunal, or body of men who may have a power of this description, a power of removing from office, if it should be found that such persons have disregarded any of the essentials of justice in the course of their inquiry, before making that removal, or if it should be found that in the place of reasonable cause those persons have acted obviously upon mere individual caprice. There is a power in the Courts of Law..... to examine whether reasonable cause has been assigned.....and then further to see whether

> the accused has had every opportunity of meeting the charge which has been made against him."

He observed that reasonable cause had been assigned and that the person accused had an opportunity to cross-examine and to answer, et cetera.

Lord Colonsay in his speech at page 651 observed:

> "I quite agree that the office held by Mr. Osgood was what may be regarded as a judicial or official office."
>
> ....If they were to remove him for some capricious cause, such as the shape of his hat, or the cut of his beard, I hold that that would be clearly an improper proceeding, and that a supreme Court of Law could correct it...."

The dicta in this case were strongly relied upon by the Appellant; but it is to be observed that the case dealt with a removal from a Public Office,and not merely an employment or job. The dicta relied upon are conditioned by that factor. Do they apply to jobs or employment generally? It should also be noted that the action which was in fact before the courts was an action to recover the fees of office, an action that sounds in private rather than public law.

Fisher v. Jackson (1891) 2 Ch.84, is of some interest. In this case the Plaintiff the master of a school established under an ancient trust deed that provided that the power to dismiss for causes set out in the deed was vested in three trustees, the vicars of three named adjoining parishes, was dismissed by one of them acting on his own, without consulting the other two, though to one he sent a copy of the dismissal notice. The Plaintiff applied for an injunction, to restrain the trustees from removing him from his office, until he should have had the opportunity of being heard at a meeting of all three together, in reply to any charges made against him in respect of his conduct in his said office. The Plaintiff argued that the general rule was that when a judicial authority is exercised against any person, he is entitled to be heard in his defence before a decision is come to. The power of removing the Plaintiff from his office of schoolmaster can only be exercised in accordance with the provisions of the deed of trust that created the power.

North J. granted a limited injunction to the Plaintiff. He said at p.93:

> "I decline to go into the question whether his merits or demerits have been such as to justify the Defendants in giving him a notice to quit. I will assume for the

> present purpose that, if they had taken proper proceedings for the purpose, they would have had a right to determine his office. But the difficulty in the Defendants' way is this, that they have given him this notice without affording him any opportunity of being heard in his own defence before it is acted upon...
>
> 94 .....it appears to me that an elementary principle of justice has been neglected; the person accused has not been told what the charges against him are, and has not had an opportunity of answering them..."

North J. referred to and followed Capel v Child (supra). Two things are clear: North J regarded the Plaintiff's situation as being equivalent to that of the holder of an "office"; and secondly that the remedy sought and granted was an injunction, a remedy available in both the public and private law field.

Hanson v Radcliffe Urban District Council (1922) 2 Ch 490. This case also relates to a school teacher. New salary scales (The Burnham Scales) had just been introduced for school teachers. While increasing most salaries, they had the effect of reducing those of uncertified teachers apparently regardless of experience. The defendants who were the local educational authority called on the managers of the school where the Plaintiff taught to dismiss her and offer her re-employment at a lower scale. The Plaintiff refused to accept the lower scale. The managers refused to dismiss her whereupon the Defendants purporting to exercise statutory powers exercisable only "on educational grounds" themselves dismissed the Plaintiff. Plaintiff brought an action for a declaration that her dismissal was null and void, and that she was still employed at her old salary. She also sought an injunction. In this case then, the Plaintiff's contract of employment was being terminated by persons who were not her employers, but purporting to rely on statutory powers. Russell J. held that this power of dismissal could be exercised only on "educational grounds" and that the desire to alter her salary to conform with a new salary scale did not fall within "educational grounds". He held that the notice was therefore ineffectual, and that the plaintiff was entitled to sue and to have that fact established by the declaration of the Court. He did not think it necessary to grant an injunction. This decision was affirmed by the Court of Appeal. Lord Sterndale M.R. observed at p. 507:

> "In my opinion, under Order xxv., r.5, the power of the Court to make a declaration, where it is a question of defining the rights of two parties, is almost unlimited; I might say only limited by its own discretion. The discretion should of

> course be exercised judicially, but it seems to me that the discretion is very wide."

Warrington L.J. expressed similar views at p. 508. It is of interest to note that the remedy being sought for dismissal in this case was not one of the prerogative writs, but an action in the field of private law, i.e. for a declaration.

Cooper v Wilson (1937) 2 K.B. 30; (1937) 2 ALL E.R. 726. In this case the Plaintiff, a Sergeant of Police in the Liverpool Police force tendered his notice of resignation - one month - and during discussion about it with his superiors he denied (falsely) that there was any domestic trouble with his wife. On inquiry from the wife it was learned that he had deserted her and failed to adequately maintain her and the children. The Chief Constable thereupon decided to charge him with "discreditable conduct" (deserting his wife) with"falsehood", and "neglect of duty" (in not saying where he was sleeping when on leave), and purported to dismiss him from the force. On appeal to the Watch Committee which alone had power to dismiss, that decision was confirmed, though at the time of that hearing the period of resignation had already expired. The effect of dismissal as against resignation was that the Plaintiff would not be entitled in the former case to recover his contributions deducted from his salary towards the pension fund. The Plaintiff sued for declaration (1) that the Chief Constable had no power to dismiss him, and that (2) the Watch Committee had no power either, as (a) he had already resigned before they purported to dismiss him; and (b) that he did not get before them a fair hearing as the Chief Constable sat with the Watch Committee during the hearing and while it was making its decision: contrary to natural justice, and (3) he sued for the recovery of his pension fund contributions. He succeeded on all the above points before the Court of Appeal, Greer, Scott L.J.J. Macnaghten J. dissenting.

The case is of interest in these proceedings for several reasons: There are observations that the Watch Committee, which had the power to dismiss a constable, was quoad hoc a Judicial committee, and that Certiorari was a remedy that could have been employed. It was not however the only remedy, and Greer L.J. remarked at page 321:

> "....nor do I think that the power which he undoubtedly possessed of obtaining a writ of certiorari to quash the order for his dismissal prevents his application to the court for a declaration as to the invalidity of the order of dismissal."

Greer L.J. then referred to the observations made by Lord Sterndale in Hanson v Radcliffe U.D.C. cited earlier with regard to the power of the Court to grant a declaration. A declaration then may be granted where certiorari might lie. As to whether certiorari would have been available it is to be noted, as appears later from Ridge v Baldwin, that the functions of the Watch Committee in this respect were the subject of a variety of statutory provisions, and it could be called in respect of discipline of policemen a statutory tribunal, and secondly that the Plaintiff was the holder of an "Office" who under the law and regulations could not be dismissed without first telling him what was alleged against him and hearing his defence or explanation. The year 1952 saw two interesting Court of Appeal cases that while not directly in point, nevertheless offer some guidance on the principles at issue: both dealt with the problem of judicial control of domestic tribunals. Both showed that the remedy most apt to meet the situation was the action for a declaration. Both were expulsions from trade unions resulting in loss of employment or livelihood.

The first was the case of Abbot v Sullivan (1952) 1 K.B. 189 Here the Plaintiff after being disciplined by a committee of his colleagues struck a union officer outside in the street. (He had acted as adviser to the committee.) For this he was summoned to a further disciplinary hearing, and on refusing to attend and challenging the committee's right to discipline him on this matter, they struck him off the roll of members. As the union had a "closed shop" this order in effect meant the loss of all future employment in his chosen field as a cornporter. The trial judge, affirmed by the Court of Appeal, held that the committee had no jurisdiction to discipline him for the striking of the union officer. A declaration was made to that effect. The case also considered the possible action that might lie against members of the committee, who, having the knowledge or means of knowledge that they had no jurisdiction in the second hearing nevertheless purported to exercise it to the loss of the Plaintiff. And also the position of the union officer who had initiated the second ultra vires proceedings. On these issues had they been canvassed in the instant case, the Appellant might have raised, in the private law field, matters of great legal interest. Denning L.J., dissenting from his colleagues, was prepared to find "that an invalid usurpation of jurisdiction which

causes damage is itself a wrong". The remedies however lie in the field of private law.

The second case was that of Lee v Showmen's Guild of Great Britain (1952) 2 Q.B. 329. Here the Plaintiff brought an action seeking a declaration that the Guild to which he belonged had wrongly expelled him and an injunction against their posting him as an expelled member. The Plaintiff succeeded. The case established that the Courts will exercise some control over domestic tribunals: it will examine whether they had jurisdiction, and whether or not they observed the rules of natural justice in exercising it. Denning L.J. rested the Court's power on its jurisdiction to protect rights of contract; but that remedy is in the field of private law. He observed at page 346:

> "In the case of statutory tribunals, the injured party has a remedy by certiorari, and also a remedy by declaration and injunction. The remedy by certiorari does not lie to domestic tribunals, but the remedy by declaration and injunction does lie, and it can be as effective as, if not more effective than, certiorari. It is indeed more effective, because it is not subject to the limitation that the error must appear on the face of the record."

The observations made by Lord Denning and cited above, are echoed by similar observations made in R v National Joint Council for the craft of Dental Technicians (Disputes Committee), ex parte Neate (1953) 1 Q.B. 704 in which it was decided by the Queen's Bench Divisional Court that certiorari would not lie to a private arbitrator. In that case Lord Goddard C.J. made two observations as to the use of the prerogative writs that may be useful to recall. He said at page 707-708:

> "But the bodies to which in modern times the remedies of these prerogative writs have applied have all been statutory bodies on whom Parliament has conferred statutory powers and duties, which, when exercised, may lead to the detriment of subjects who may have to submit to their jurisdiction. Where a statute, for instance, gives power for the compulsory acquisition of land, and an arbitrator is set up by Parliament to assess the compensation, or where, as in R. v Electricity Commissioners the tribunal were a body on whom a great many powers had been conferred by Act of Parliament, it is essential that the courts should be able to control the exercise of their jurisdiction strictly within the limits which Parliament has conferred upon them.....
>
> Prohibition is a writ which lies from a superior court to an inferior court. Certiorari lies to bring up the decision or record of an inferior court to this court with a view to it being quashed.

> It is granted and directed to one of the inferior courts, such as magistrates' courts and county courts, and it has been extended to the various bodies which have been entrusted by Parliament with duties of an administrative character and partly of a judicial character in some cases, but cases in which subjects may be affected by their decisions. There is no instance of which I know in the books where certiorari or prohibition has gone to any arbitrator except a statutory arbitrator, and a statutory arbitrator is a person to whom by statute the parties must resort." (emphasis supplied)

It is to be observed that these remarks pointing out that certiorari does not lie to domestic tribunals or to private arbitrators would seem to imply a fortiori that that remedy would not lie against ordinary employers or in the field of dismissal of employees unless in those rare cases where the employee had a status, an "office", from which under the law and or regulations he could not be dismissed without first telling him what was alleged against him and hearing his defence or explanation.

On the other hand the cases show an increasing use of the action for a declaration, even in cases where certiorari might have been used. However, due to exigencies of war and later the growth of the nationalization of areas of hitherto private industry in the United Kingdom there has been a growth of legislation setting up statutory schemes for the control and deployment of the labour force, which in its turn has perhaps increased the number of areas in which an employee may be said to have an "office" from which he can not be dismissed without first applying the principles of natural justice. The situation so created has also led to anxious scrutiny as to whether the power to dismiss had been exercised by a body that in fact and in law had that power, bearing in mind that the exercise of the power could lead to the total exclusion of the employee from a field of activity to which he may have given his entire life. Before the scheme he might have gone to work for some other employer in a similar field, under the new regime there was one employer only, and dismissal would therefore have far reaching consequences. It is proposed to look at two such cases.

In Barnard v National Dock Labour Board (1953) 2 Q.B. 18, - a national scheme for the regulation of employment on the docks which had been established by Parliament as a wartime measure was later extended and modified. There was set up a National Dock Labour Board to regulate the relationships between dock workers and those who employed them, and the Board and its local boards were given disciplinary powers over the workforce. The Board was composed equally of employers and workers representatives. The Plaintiffs had an

Industrial dispute relative to the introduction of bulk sugar loading into the port, and as a result of that received notices of suspension without pay. They sought a declaration that the suspensions were invalid, and shortly before the hearing discovered that they had been suspended not by the local board (which had the power to do so) but by the port manager who purported to exercise disciplinary power delegated by the Board. The Court of Appeal held that the local board had no power to delegate their disciplinary powers (which were judicial in character) to the port manager. His decisions were therefore null and void, nor were they cured by reason of the National Board having confirmed something that was a nullity. It was argued by the Board that as a statutory tribunal their orders could be reviewed only by certiorari and that there was no jurisdiction to make a declaration against them. (It was now too late to bring certiorari, nor would the purported delegation have been discoverable by that process). The Court of Appeal decided that there could be an overlap of both remedies, and that a declaration could and would be granted here, though the Board was a statutory tribunal. The Court relied on its previous decisions in Cooper v Wilson (supra) and Abbott v Sullivan (supra) and Lee v Showmen's Guild (supra) (cases on the use of declarations to control domestic tribunals).

Denning L.J. at page 42 had some pertinent observations on the nullity of decisions given by a person who had, usurped disciplinary powers to which he was not entitled. This case establishes at least three things: the availability of the action for a declaration in the field of employment, and secondly that it is so available even though certiorari might have been brought. Thirdly, implicit in it is that this intervention into the field of employment, and of internal discipline therein, took place because of the public nature of the scheme, which in effect had created an area into which, by Parliamentary regulation, the employee had become entitled not to be dismissed or suspended without first telling him what was alleged against him, and giving him an opportunity to reply thereto. To express this situation in the language of the older cases, the Plaintiffs had in effect been put into an "office", or given a "status".

The scheme for the regulation of employment on the docks again came before the Courts in Vine v National Dock Labour Board (1956) 1 Q.B.

658 (C.A.) and (1957) A.C. 488. (H.L.) Once again at issue was the power of delegating the disciplinary functions of a local Board. On this occasion the local Board had purported to delegate its powers to two of its own members. It was held that they could not so delegate, following Barnard's case (supra). In this case the Plaintiff, a dock worker, had not been merely suspended, he had been dismissed, a decision which meant that while it stood, he could never again work as a dock worker. He brought action to recover (a) for lost wages i.e. damages, and (b) for a declaration that this dismissal was null and void.

Omerod J. granted him both damages and the declaration sought. The Court of Appeal (Singleton and Parker LJJ, Jenkins L.J.) upheld the award of damages and the finding that the dismissal was wrongful as the Board could not delegate, but refused to approve the grant of a declaration. Jenkins L.J. dissenting as to this, was of the view that this was not an ordinary master and servant case (in which damages would have been the only remedy for wrongful dismissal) but that the scheme had created so to speak a status that went beyond the normal master and servant relationship and justified the court exercising its discretion and granting a declaration. (See pages 674-677 of (1956) 1 Q.B.)

Vine's case went on appeal to the House of Lords, which thus had the opportunity of reviewing Barnard's case as well. The argument there raised in sharper focus some of the arguments which have been raised before us in the instant case. The argument for the employee, the dismissed dock worker, stressed that this was not a normal master and servant case, but a scheme the effect of which determined the employee's status. From that two consequences flowed: the Board could not delegate its disciplinary functions, and secondly the remedy of a declaration was the only appropriate remedy to meet the situation. The argument for the Board on the otherhand stressed that this was a normal master and servant relationship that even if the dismissal was wrongful, damages were the only appropriate remedy, and that in view of the vast scope of the scheme delegation of disciplinary authority was both necessary and lawful.

Their Lordships had little difficulty in holding that the Board's disciplinary function could not be delegated, and the exercise of it by those to whom it was delegated was a nullity. However, assuming that the dismissal was wrongful, was a declaration a remedy that should be granted?

Was this not a normal master and servant case? Lord Kilmuir at page 500 answered:

> "This is an entirely different situation from the ordinary master and servant case, where if the master wrongfully dismisses the servant, either summarily or by giving insufficient notice, the employment is effectively terminated, albeit in in breach of contract.
>
> Here, the removal of the plaintiff's name from the register being, in law, a nullity, he continued to have the right to be treated as a registered dock worker with all the benefits which, by statute, that status conferred on him. It is therefore right that, with the background of this scheme, the court should declare his rights."

Lord Keith at pages 507 and 508 observed:

> "This is not a straightforward relationship of master and servant. Normally, and apart from the intervention of statute, there would never be a nullity in the terminating an ordinary contract of master and servant. Dismissal might be in breach of contract and so unlawful but could only sound in damages.
>
> Here we are concerned with a statutory scheme of employment."
> (His Lordship reviewed the scheme and continued:)
>
> "It is impossible, in my opinion, to equate the position of a registered dock worker in relation to the National Dock Labour Board with that of an employee under an ordinary contract of service."

Their Lordships approved the dissenting judgment of Jenkins LJ and held that a declaration could be granted in the circumstances of this case.

Vine's case, I think, establishes three things: that those who have been given by statute a judicial type of function or duty to perform, can not delegate it, unless the statute so permits; secondly that in the normal type of master and servant relationship the only remedy for unlawful dismissal is an action for damages, and that thirdly the discretionary remedy of declaration is not normally available save in cases where the situation or employment had created a status going beyond the normal master and servant relationship.

Pausing here, on the strength of Barnard's case and Vine's case, the appellant can argue with some degree of persuasion that his suspension and dismissal was unlawful, having been effected by "usurpers" that is to say persons who did not have the authority of the members of the Council, as there was at that time no one who could be said to be a member, or at the very least an insufficiency of such members. However, to obtain an order for certiorari or even a declaration, (and he has not asked for one),

he would in my view have to show that the normal rules that damages are the only remedy for unlawful dismissal, and that the courts will not give specific performance of contracts of personal service did not apply to him, because he enjoyed a status of such a nature as to bring him within either those "church" and "office" cases in which certiorari was awarded, or cases such as the type of scheme or situation created by statute or regulation and akin to that of the Dock Workers (Regulation of employment) Order in England, in which the grant of a declaration is both necessary and appropriate.

As far as I can see, the only argument that he can advance to bring himself within this magic circle is to say, as he does, that I am employed by a corporation that has been set up by a Statute and which is funded out of Government funds, (though it has other sources of income), and which is answerable and accountable to government. Is that enough? To continue with the pre Ridge v Baldwin cases.

In McCelland v Northern Ireland General Health Services Board (1957) 2 ALL E.R. 129, The House of Lords, by the narrow margin of 3 to 2, refused to imply into the Plaintiff's contract of employment an implied term that it was terminable on reasonable notice, on the ground that the detailed provisions of the contract were such as to indicate that they were exhaustive, and prevented the implication of a term providing for dismissal on reasonable notice. The Plaintiff here had joined the Health Services when a single woman. The Services later introduced a regulation requiring women who married to give up their job. The Plaintiff who had married subsequently, sought a declaration that the term did not apply to her, and that a notice of termination on that score which was sent to her was null and void. She got her declaration as a result of the construction placed on her contract of employment.

In Barber v Manchester Regional Hospital Board (1958) 1 W.L.R. 181, the Plaintiff, a consultant on the staff of a local authority hospital, continued to serve after it was transferred to the National Health Service Scheme. He refused however to agree to the new service contract tendered to him by the regional hospital board, claiming the right to appeal to the Minister to refer his case to a special professional committee. The Regional Board eventually dismissed him for not accepting its terms, and the Minister refused to refer his case as required by the Statute.

Barry J held that as against the Board, the Plaintiff could be awarded damages only for unlawful dismissal, and refused to make a declaration that the dismissal was null and void; though he made a declaration against the Minister that he was in breach of the statute in refusing to refer the Plaintiff's case to the professional committee. Barry J. observed (at page 192) :

> "The Law, I think is clear: in ordinary circumstances by giving the appropriate notice a master can terminate his servant's employment and no one can question the motives of the master in reaching a decision to do so. The position differs somewhat in relation to statutory bodies which can/act for the purposes for which they are created.
> A statutory body has equally an untramelled right to terminate the services of one of its own employees by giving appropriate notice, provided that the decision is arrived at bona fide....."

/only

Barry J. having decided that the dismissal here was in breach of contract, dealt with the question as to whether a declaration to that effect should be given. After citing the passage from Lord Keith's judgment in Vine's case (supra), he held at page 196:

> "Here, despite the strong statutory flavour attaching to the plaintiff's contract, I have reached the conclusion that in essence it was an ordinary contract between master and servant and nothing more. In those circumstances I feel bound to apply the general rule stated by Lord Keith, and to reach the conclusion here that the plaintiff's only remedy against the Board is the recovery of damages..."

A similar conclusion was reached in the Privy Council decision in Francis v Municipal Councillors of Kuala Lumpur (1962) 3 ALL E.R. 633; (1962) 1 W.L.R. 1411. Acting on the premise that the Plaintiff, an employee of the municipal service of Kuala Lumpur had been technically wrongfully dismissed, the Judicial Committee considered his claim, based on Vine's case, for a declaration to that effect. Delivering the judgment of the Privy Council, Lord Morris at page 637 said:

> "In their Lordship's view, when there has been a purported termination of a contract of service a declaration to the effect that the contract of service still subsists will rarely be made. This is a consequence of the general principle of law that courts will not grant specific performance of contracts of service. Special circumstances will be required before such a declaration is made and its making will normally be in the discretion of the court. In their Lordships' view there are no circumstances in the present case which would make it either just or proper to make such a declaration....."

Lord Morris then observed with respect to Vine's case. "In that case however, the circumstances were very special." His Lordship then referred to several of the passages cited earlier from the judgments in Vine's case, and noted that even if such a declaration were made the employers could (and would) terminate his contract by taking the proper steps to do so, and the only effect of the declaration would be to enable the Plaintiff to claim an extra amount for lost wages.

During the argument before us, Mr. Macaulay for the Appellant relied strongly on the Privy Council decision of Kanda v Government of Malaya (1962) A.C. 322; (1962) 2 W.L.R. 1153. In that case the Commissioner of Police in Malaya purported to dismiss from the police force the Plaintiff, an Inspector of Police. Two main points were argued: (a) whether the Commissioner of Police subsequent to the coming into force of the new Constitution of Malaya still retained the power which he had previously enjoyed to dismiss persons of the Plaintiff's rank, or whether that power had been transferred to the Police Services Commission set up by the Constitution. It was held on a proper interpretation of the new constitution that the Commissioner no longer had that power, and consequently that the dismissal was null and void. (b) The second point argued was whether it could be said that in the proceedings before the Commissioner the rules of natural justice had been observed. It was held that they had not been observed, in that the trier of fact had had a report about the Plaintiff that was never revealed to him and which he had no opportunity to answer. The points at issue in the instant case were not argued, and barely noticed. Giving the judgment of their Lordships, Lord Denning in the penultimate paragraph of his opinion was content to observe (at page 338):

> "Since their Lordships have already reached the conclusion that the dismissal was void on the ground that the Commissioner of Police had no authority to effect it, it is unnecessary for their Lordships to consider whether the setting aside of the proceedings would result also in avoiding the dismissal or merely in rendering it wrongful. Their Lordships notice that, before Rigby J, it was suggested that the only remedy was by certiorari. But their Lordships agree with him that the remedy by way of declaration is available also.
>
> There was some question at one time as to the scope of the declaration, but it was agreed before their Lordships that it should be limited to the date of the dismissal.
>
> Their Lordships will therefore report to the Head of the Federation as their opinion that the

> appeal should be allowed, the order of the Court of Appeal should be set aside, and that it should be declared that the dismissal of the plaintiff from the Federation of Malaya Police Force purported to be effected by .... the Commissioner of Police... on July 7, 1958, was void, inoperative and of no effect. ....."

Apart from the two express points that Kanda's case decided, as mentioned above, it is clear that the remedy he sought and obtained was a declaration, not a writ of certiorari, but that had he sought certiorari it is more than likely he would have obtained it. Kanda's case did turn on the interpretation of the Constitution, and so it raised serious issues in the field of public law. The Commissioner of Police was a personage operating in the field of public law, and vulnerable to a writ of certiorari, and Kanda's post, as appears from Ridge v Baldwin, decided a few months later, was a "public office". Interestingly enough the report is silent on the effect of the judgment: did Kanda get his job back? or did he merely become entitled to damages for the loss of it? A similar situation arose in Ridge v Baldwin where what was at issue was the entitlement of the Plaintiff to his pension in the normal way, not his actual resumption of duty in the police force. In Kanda's case no argument took place as to the effect of the dismissal and whether his remedy was limited to damages, or whether a declaration could be given. It seems from the passage above from Lord Denning's opinion to have been assumed or agreed on all sides that a declaration was the appropriate remedy. The point was however argued in Ridge v Baldwin (1964) A.C. 40; (1963) 2 ALL E. R. 66 and the observations of Lord Reid have subsequently gained widespread acceptance in this field.

In Ridge v Baldwin the Chief Constable of the Brighton Police Force, then nearly 59, was tried on charges of conspiring to obstruct the course of public justice. He was acquitted, but the trial judge expressed some trenchant criticism of the leadership he had provided to the Borough Police Force. The trial had attracted a great deal of attention in both the local and the national press, and acting on the remarks of the trial judge, the watch committee, which had the power to do so, dismissed the Plaintiff from his post, after two sittings which it was found were in breach of the rules of natural justice: the plaintiff was afforded no opportunity to hear specific charges or to reply to them.

This he was entitled to, both under the relevant Police laws and regulations affecting the force, and under the rules of natural justice. Their Lordships (Lord Evershed diss.) held that the decision to dismiss the appellant -plaintiff was null and void, and granted a declaration to that effect. Dealing with dismissal and the extent to which the rules of natural justice apply, that is to say whether the servant or employee has a right to be heard by his master or employer, to have specific charges made and the opportunity of answering them, Lord Reid at pages 65 et seq. set the matter out thus:-

> "So I shall deal first with cases of dismissal. These appear to fall into three classes: dismissal of a servant by his master, dismissal from an office held during pleasure, and dismissal from an office where there must be something against a man to warrant his dismissal.
>
> The law regarding master and servant is not in doubt. There cannot be specific performance of a contract of service, and the master can terminate the contract with his servant at any time and for any reason or for none. But if he does so in a manner not warranted by the contract he must pay damages for breach of contract. So the question in a pure case of master and servant does not at all depend on whether the master has heard the servant in his own defence: it depends on whether the facts emerging at the trial prove breach of contract. But this kind of case can resemble dismissal from an office where the body employing the man is under some statutory or other restriction as to the kind of contract which it can make with its servants, or the grounds on which it can dismiss them. The present case does not fall within this class because a chief constable is not the servant of the watch committee or indeed of anyone else.
>
> Then there are many cases where a man holds an office at pleasure. Apart from judges and others whose tenure of office is governed by statute, all servants, and officers of the Crown hold office at pleasure, and this has been held even to apply to a colonial judge (Terrell v Secretary of State for the Colonies). It has always been held, I think rightly, that such an officer has no right to be heard before he is dismissed, and the reason is clear. As the person having the power of dismissal need not have anything against the officer, he need not give any reason. That was stated as long ago as 1670 in Rex v Statford-on-Avon Corporation where the corporation dismissed a town clerk who held office durante bene placito."

After citing some authorities on this head, Lord Reid continued:

> "I fully accept that where an office is simply held at pleasure the person having power of dismissal cannot be bound to disclose his reasons. No doubt he would in many cases tell the officer and hear his explanation before deciding to dismiss him. But if he is not bound to disclose his reason and does not do so, then, if the court cannot require him to do so, it cannot determine whether it would be fair to hear the officer's case before taking action. But again that is not this case.

> So I come to the third class which includes the present case. There I find an unbroken line of authority to the effect that an officer cannot lawfully be dismissed without first telling him what is alleged against him and hearing his defence or explanation."

Lord Reid then considered the "unbroken line of authority" including cases such as Osgood v Nelson ,Fisher v Jackson and Cooper v Wilson, which have been mentioned earlier. Lord Reid's statements of the law in Ridge v Baldwin while clear left partially unresolved the question at issue in our present case: when can it be said that an employee falls into the third category, rather than the first two? What is the badge of "office"? This problem has been explored subsequently in a number of cases.

In Vidyodaya University v Silva (1964) 3 ALL E.R. 865; (1965) 1 W.L.R. 77, the council of the university established by an act of the Parliamant of Ceylon terminated the appointment of the respondent, as a professor and head of the department of economic and business administration, by giving him three months salary in lieu of notice. The respondent sought relief in the nature of certiorari and mandamus, complaining that he had never been told of the charges for which he was "dismissed", or given any opportunity of replying thereto. The response of the Council of the university was identical to that of the Council here, and naturally Mr. Henriques, counsel for the Council, relies heavily on this case. That response was substantially that a decision to terminate a contract of employment could not be reviewed by way of certiorari, nor was it a fit case in which to exercise a discretion to grant such a remedy. The Council also said that it was an executive not judicial body, and that it did not make orders capable of being reviewed or questioned by a writ of certiorari. If any wrong had been done to the respondent (which was denied) it could be raised only in an action and not by the remedy of certiorari. Giving the judgment of the Judicial Committee Lord Morris referred to the passages in Ridge v Baldwin and Vine v National Dock Labour Board by Lord Reid and Viscount Kilmuir, which have been cited earlier, and also to Francis v Municipal Councillors of Kuala Lumpur,(supra). He put the problem posed in these words at page 874:

> "In a straightforward case where a master employs a servant the latter is not regarded as the holder of an office and, if the contract is terminated, there are ordinarily no questions affecting status or involving property rights. It becomes necessary,

> therefore, to consider whether in the present case there are any features which suggest a relationship other than that of master and servant...."

Lord Morris proceeded to do that. He examined the statute setting up the university and its council and other elements, the provisions for dismissal and termination of contract, noting the distinction made between "officers and teachers" as against other groups, observing that while it may have been desirable if the Council had given the respondent an opportunity to offer explanation or justification, "the narrow question for their Lordships is whether there was an obligation to take the course of acting judicially. Lord Morris noted that the fact that the university act might refer to "officers" did not necessarily and of itself bring it about that for the purposes now being considered such an "officer" is not within the ordinary relationship of master and servant. Nor did the fact that the university was established and regulated by statute necessarily involve that contracts of employment which were made with its teachers were other than ordinary contracts of master and servant. He cited with approval the passage from the judgment of Barry J. in Barber v Manchester Regional Hospital Board which was cited earlier. The Privy Council reached the conclusion that there was nothing to take this contract of employment out of the range of the normal master and servant relationship, and that the respondent had invoked a procedure which was not available where a master summarily terminates a servant's employment. The procedure was of course the application for the remedy of certiorari.

Subsequent English or Privy Council cases have provided variations on this theme; on the whole trade unionists and members of the police force have been more fortunate in establishing that they had an "office" than have other persons. See for example Taylor v National Union of Seamen (1967) 1 W.L.R. 532.(Trade union official entitled by his status to a declaration); Merricks v Nott-Bower (1965) 1 Q.B.57; (1964) 1 ALL E.R. 717 (C.A.) (Policemen); Re Godden (1971) 3 ALL E.R. 20 (C.A.) (Policeman:medical board); Stevenson v United Road Transport Union (1977) 2 ALL E.R. 941 (C.A.) (Trade Union official gets a declaration) where the plaintiffs got declarations, and contrast them with cases such as Pillai v Singapore City Council (1968) 1 W.L.R. 1278, (P.C.) where dismissed unskilled employees of a city council failed.

School teachers have had mixed fortunes: see Hannam v Bradford City Council (1970) 2 ALL E.R. 690; (1970) 1 W.L.R. 937 (C.A.) (where the teacher failed) as compared with Malloch v Aberdeen Corporation (1971) 1 W.L.R. 1578; (1971) 2 ALL E.R. 1278 (H.L.) (where a Scottish School Teacher succeeded).

Malloch's case might perhaps be mentioned at greater length. It was a case where the House of Lords decided by 3 to 2 that school teachers in Scotland, had, on a proper construction of the relevant statutes, a right to be heard before being dismissed. The teacher here was a certified teacher, a qualification that had hitherto been acceptable and sufficient until the passage of a new act which required that all teachers should be registered. Subsequently, regulations were made requiring that education authorities should dismiss from employment as a teacher all certified teachers who had not registered. A number of certified teachers including the Plaintiff objected to the new requirement of registration, and due to his refusal to register, the Plaintiff was dismissed by the Educational authority on a month's notice. He brought proceedings challenging this dismissal on the ground that he had been dismissed without a hearing, and without any opportunity of making representations. The Education authority replied that the status of teachers fell within the ordinary master and servant relationship; that a hearing would have been pointless as they were bound by the regulations.

Lord Reid was of opinion that the status of teachers in Scotland under the relevant statutes was not one that fell within the master and servant relationship. At page 1581 he said:

> "At common law a master is not bound to hear his servant before he dismisses him. He can act unreasonably or capriciously if he so chooses but the dismissal is valid. The servant has no remedy unless the dismissal is in breach of contract and then the servant's only remedy is damages for breach of contract.
> In my opinion, that is not the present status of teachers employed by Scottish education authorities."

He reached this conclusion after a study of the history of the relevant statutes; he also observed that there was a possibility that the teacher might have persuaded the authority not to dismiss him.

Lord Morris dissented. He observed at page 1586:

> "If the legal basis of the appellant's employment was that of master and servant, then he had no complaint in law if he was not heard; nor could he complain of dismissal even had it been decided

> upon for an inadequate reason or for an erroneous reason or even for no reason."

He reviewed the legislation and came to the view that the teacher's status fell within the ordinary master and servant relationship. He concluded at page 1589:

> "It is true that in the present case the reason for dismissal was in fact known: it was in fact well known to the appellant. It might have been preferable if he had been heard. But if there could have been dismissal even for a bad reason and even for no reason at all I do not think that as a matter of strict legal entitlement there was a right to be heard."

Lord Guest also dissented. He held that the teacher was a servant who was employed during the pleasure of the authority and observed, at page 1593.

> "If that is a true description of the terms of employment, it seems to me that it must be an ordinary contract of service. If he is a servant, then the master can dismiss him and give no reason, provided he gives him his remuneration for the appropriate period of his service. Otherwise the employer will be liable in damages. If this be the position, the employer is clearly not bound to give the servant any reason for his dismissal nor consequently to give him an opportunity of being heard."

Lord Wilberforce, agreed with Lord Reid. Speaking of the common law rule he observed:

> "The argument that, once it is shown that the relevant relationship is that of master and servant, this is sufficient to exclude the requirements of natural justice is often found, in one form or another, in reported cases. There are two reasons behind it. The first is that, in master and servant cases, one is normally in the field of the common law of contract inter partes, so the principles of administrative law, including those of natural justice, have no part to play.
>
> The second relates to the remedy: it is that in pure master and servant cases, the most that can be obtained is damages, if the dismissal is wrongful: no order for reinstatement can be made, so no room exists for such remedies as administrative law may grant, such as a declaration that the dismissal is void. I think there is validity in both these arguments, but they, particularly the first, must be carefully used...."
>
> (emphasis supplied)

After criticising the decision in the Vidyodaya University Council case, Lord Wilberforce came to the conclusion that the statutes and regulations made here did import sufficient to take the appellant's case out of the realm of pure master and servant relationship, and gave him the right

to a hearing by implication.

Lord Simon agreed with Lord Reid, that if the matter fell to be determined purely by common law, the appellant, holding office at pleasure, should not be entitled to a hearing before dismissal; but the common law here had been modified by statute.

I think that Malloch's case shows that there is no doubt what the common law position is, but that there is room for argument as to whether and when that position has been modified by statute which may, expressly or impliedly, give the employee a right to be heard before dismissal.

Hill v C.A. Parsons & Co. Ltd. (1972) Ch. 505; (1971) 3 ALL E.R. 1345 was an unusual case, in which shortly before he was due to retire on pension, an employer reluctantly dismissed an employee of some 30 years service, because he had refused to join a union which had demanded and obtained a "closed shop" agreement with the employer. The Court of Appeal held, in a split decision, that the notice of dismissal was invalid, and contrary to the common law rule that even an inadequate notice determines the contract of employment, held that in the peculiar circumstances of this case the court would make a declaration that the employment had not determined, and grant an injunction to prevent the employer from acting on it. Conceding the observations made in Francis v Kuala Lumpur Councillors and cited earlier that when there has been a purported termination of a contract of service a declaration that it still subsists will rarely be made, the Court of Appeal, by a majority, found it possible to make such a declaration on the facts here. Before leaving the English decisions to consider some from the Caribbean courts, we were pressed with two decisions, the appellant relied on an immigration case from Hong Kong, and the respondent relied on a case involving the British Broadcasting Corporation.

In Attorney General of Hong Kong v Ng Yuen Shiu (1983) 2 ALL E.R. 346, the respondent, an illegal immigrant into Hong Kong, complained that inspite of a public promise made by the government to immigrants to examine their cases individually, and treat each case on its merits, his appeal against a removal order to the immigration authorities had been dismissed without affording him a hearing. Though there was no general right in an alien to have a hearing in accordance with the rules of natural justice before the making of a removal order against him, the Privy Council held that the public undertaking had created a reasonable expectation of such a hearing,

and that provided the undertaking did not conflict with its statutory duty, a hearing should have been granted here, and granted an order for certiorari to quash the removal order, leaving it open for a new removal order and a new hearing to be given to the applicant.

Mr. Macaulay relied on this case to argue that the provisions for appeal to the Council in the document "Terms and Conditions of Service" had created a reasonable expectation of a hearing, on which the appellant had relied, and that consequently there should be in his case an order for certiorari to quash the decisions of which he complained. The answer to this argument, I think, is to be found in a consideration of two factors. In the Hong Kong case the court was dealing with a matter that fell fairly and squarely in the field of public law, and secondly that case did not fall within the field of private law and the position of the master and servant relationship.

Mr. Henriques, for the respondent Council relied on R v British Broadcasting Corporation, ex parte Lavelle (1983) 1 W.L.R. 23 to counter the Hong Kong case. There the applicant, an employee of the B.B.C., had been found, in breach of the rules governing her employment, to have taken home and kept there certain tapes, the property of her employer. The police decided to charge her with larceny of the tapes, while the B.B.C. initiated disciplinary charges which could and did lead to her dismissal. Her contract of employment and staff regulations provided for a series of hearings and appeals. The first such hearing admittedly held at such short notice that the applicant could not secure representation or properly prepare to answer the charges, resulted in her dismissal. She appealed against that finding to the next hierarchy in her department, and after being afforded adequate time and opportunity to make representations, that departmental appeal was dismissed. The appeal had been heard despite an application to adjourn it until such time as the criminal proceedings then in process should have concluded. After taking time to consider the matter, the B.B.C. had decided that independent of whether there had or had not been a theft of the tapes, the departmental charge of having wrongfully taken them home should be proceeded with.

The applicant then appealed to the final appeal tribunal in the B.B.C. staff orders, and at the same time applied for Judicial Review

of the proceedings so far, under the New Order 53 R 1, mentioned earlier in this judgment. As to the remedies sought in the field of public law, viz. Certiorari, Wolf J. observed(at page 30):

> "Those remedies (i.e. the prerogative writs) were not previously available to enforce private rights but were, what could be described as, public law remedies. They were not appropriate, and in my view remain in-appropriate remedies, for enforcing performance of ordinary obligations owed by a master to his servant. An application for judicial review has not and should not be extended to a pure employment situation. Nor does it, in my view, make any difference that what is sought to be attacked is a decision of a domestic tribunal such as the series of domestic tribunals provided for by the B.B.C."

He continued at page 31:

> "I regard the wording of Ord. 53 rl (2) and section 30 (2) of the Act of 1981 as making it clear that the application for judicial review is confined to reviewing activities of a public nature as opposed to those of a purely private or domestic character. The disciplinary appeal procedure set up by the B.B.C. depends purely upon the contract of employment between the applicant and the B.B.C. and therefore it is a procedure of a purely private or domestic character. Accordingly, it is my view that it was inappropriate to seek relief by way of judicial review in the circumstances of this case."

Wolf J. then went on to consider and discuss, as is permitted by the new Order, whether private law remedies such as a declaration or and an injunction should be granted. He considered many of the dicta already cited in cases like Ridge v Baldwin and Malloch v Aberdeen Corporation to the effect that declarations will seldom be made in cases where the relationship is simply one of master and servant. However he noted the elaborate framework set up by the B.B.C. with regard to dismissals and concluded that they did alter the applicant's common law position and give her the right to be heard, and enabled the Court to intervene by way of granting a declaration or injunction. However, he declined to give either remedy in the circumstances of this case. Whatever might have gone wrong with the first hearing, had been cured in the rehearing on appeal, and he did not think that the B.B.C.'s internal hearings should be suspended until the Criminal proceedings going on elsewhere had been concluded.

As to Caribbean Authorities we were referred to the following cases:

Re Gerriah Sarran (1969) 14 W.L.R. 361: This was a case decided by the Guyana Court of Appeal, which always commands respect if not

necessarily agreement. In this case a ward maid employed by the Ministry of Health was charged with being drunk on duty and dismissed. The constitution of Guyana had set up a Public Services Commission, charged inter alia with the duty of exercising disciplinary control over public servants, but with power to delegate its functions. They had done so to the Permanent Secretary of the Ministry of Health. In this particular case he had delegated the duty of inquiry to an assistant secretary. The inquiry was held, the applicant found guilty, and a letter of dismissal sent to her under the hand of the Permanent Secretary. The applicant challenged these procedures and applied for leave to apply for an order of certiorari. The trial judge refused to grant leave, and she appealed. The Court of Appeal was not at this stage hearing the final application for the order, but only whether leave should be granted to apply for it. No argument was therefore put forward by the proposed respondent. The Court of Appeal decided to grant leave; pointing out that a person delegated to conduct disciplinary proceedings can not himself delegate it to another, it seemed prima facie that the applicant had been deprived of her protection under the Constitution. Further the court observed that certain clauses in the constitution purporting to oust the jurisdiction of the courts to enquire into the acts of the Public Services Commission did not necessarily prevent an inquiry as to whether the Commission had in fact acted. There was no argument whatever as to whether certiorari was an appropriate remedy in what may have been a case of the ordinary master and servant relationship; or as to the status of the applicant, and whether she fell into the class of office holders. What was at issue was whether leave should be given to apply for the order, in a case where there appeared to have been an usurpation of authority. I do not therefore derive much assistance from this case.

Re John E. Langhorne (1969) 14 W.I.R. 353: In this case the Guyana Court of Appeal was again dealing with a situation similar to that in Sarran's case. Here the applicant was a hospital dispenser who had been suspended from duty and then put before an enquiry charging him with departmental offences. He was found guilty, but was reinstated, with loss of pay for the period of his suspension. He challenged this ruling of the Public Services Commission: he appears to have raised or the Commission raised the provisions of the Constitution purporting to oust the jurisdiction of the courts. The Court of Appeal reached the same decision that it reached

in Sarran's case as to the effect of the Constitution. It however, went on to consider the merits of the points raised as to alleged breaches of the rules as to natural justice, and dismissed the application. The problem of the common law rules considered in Ridge v Baldwin did not arise: there was no dismissal.

We were also referred to the Guyana Court of Appeal's decision in Evelyn v Chichester (1970) 15 W.I.R. 410. In that case the applicant for certiorari was a deck-hand on a ship operated by the Transport and Harbours Department of the Government of Guyana. Arising out of an incident on board ship, he was charged departmentally for misconduct with a view to dismissal. He was served a copy of the charges (which the Court held to be lacking in sufficient particulars) and required to answer. He replied that he was innocent, and reserved his defence for any inquiry which the General Manager may hold. This was considered an inadequate reply and he was summarily dismissed by the General Manager. He then brought certiorari proceedings challenging his dismissal, alleging that the proceedings were in breach of natural justice, that he was not afforded any opportunity to be heard, that he had been led to expect that an inquiry would be held, and none was held. The General Manager in his reply argued (a) that the applicant was properly dismissed under the regulations. (The Regulations provided a fairly elaborate inquiry procedure, but also contained an option for summary dismissal without inquiry). He also argued (b) that the applicant held office with the crown or government at pleasure, and applying the second category indicated in Ridge v Baldwin,could be dismissed summarily whether rightly or wrongly. The Guyana Court of Appeal, affirmed the trial judge's issue of an order of certiorari and dismissed the appeal of the General Manager. It held that the applicant had been led to expect an inquiry and was never told that none would be held; that the Regulations made in pursuance of the law under which the department operated in terms limited the power of the General Manager to dismiss summarily without an inquiry, and that an inquiry should have been held. As to the second argument, the Court appears to have held that while the applicant held office at pleasure, the common law right to dismiss at will had been curtailed by both (i) the Departmental Regulations and the applicant's reliance on a promised inquiry, and (ii) by a consideration of provisions of the Constitution of Guyana.

Consequently, it held that the applicant was not dismissable at pleasure, an inquiry should have been held which would comply with both the Regulations and the rules of natural justice. So far as our own case goes, though this case was cited en passant, the argument before us concerned whether the appellant fell into the first or the third category of relationships described in Ridge v Baldwin by Lord Reid. No attempt was made to canvass the second category, Crown servants holding office at pleasure, nor was any argument addressed to us as to whether the common law rules had been affected by any of the provisions of the Constitution of Jamaica. In these circumstances I do not derive much assistance from this decision, interesting as it may be.

Finally we were referred to two decisions made by the Full Court in Jamaica. Both concerned the discipline of members of the Police Force of Jamaica, both were brought against the Commissioner of Police, and in both cases orders for certiorari were made. The first was R v Commissioner of Police, ex parte Reid (1975) 14 J.L.R. 14; Though no authorities were cited in Reid's case, it was clearly decided on the basis of Kanda v Government of Malaya. It decided that since the coming into force of the new Constitution and the setting up of the Police Services Commission the Commissioner of Police no longer had the authority he previously enjoyed to set up Courts of Inquiry, and to act on their report, and that his purported exercise of his old powers was null and void. Disciplinary control over the members of the police force may be exercised only by the Governor General acting on the advice of the Police Services Commission or by a person to whom such power had been validly delegated. It should be remembered that police officers would in the event be holders of an "office" vide Ridge v Baldwin.

The second was R v Commissioner of Police, ex parte Tennant: (1977) 15 J.L.R. 84; 26 W.I.R. 457. In this case the applicant for certiorari was a special constable who had been summarily dismissed without ever having been charged with an offence, much less having an opportunity to be heard in his own behalf. The applicant relied on Ridge v Baldwin and the respondent Commissioner on Nakuda Ali v Jararatne (1951) A.C. 66. (dealing with the revocation of a licence) and R v Metropolitan Police Comr. ex parte Parker (1955) 2 ALL E.R. 717 (revocation of a taxi driver's licence). The Full Court preferred to follow Ridge v Baldwin and

R v Barnsley Metropolitan Borough Council, ex parte Hook (1976) 3 All E.R. 452; (1976) 1 W.L.R. 1052.

Neither decision assisted in the determination of the problems posed in this case. The conclusions to which I have come after looking as carefully as I can at the cases which have been referred to are as follows:

1. That the prerogative writs in general and certiorari in particular lie only against the decisions of persons who by statute or charter have been entrusted with the power to make decisions affecting the public at large, and these decisions are made in a situation in which the courts will impute a duty to exercise natural justice principles. So far no certain formula has been evolved which will show conclusively whether or not the courts will impute the duty to act judicially in any given situation, but it is clear that if the nature of the duty requires the decision maker to act "judicially" or act only after hearing the party affected, the courts may, in their discretion, order certiorari to issue. Apart from the nature of the duty and the situation involved, it is a sine qua non that the situation must involve and fall in the field of public law, and that the person or body whose decision is being challenged must be exercising a public duty or function, whether he is doing so rightly or perhaps wrongly.

2. There have been cases in which the person whose decision is challenged in fact or law did not possess the power or authority to make that decision, but for certiorari to issue against him the person must purport to have been exercising a duty vested in him by Statute. This occurred for example in Kanda v Government of Malaya (dismissal of Police Inspector by Commissioner of Police who no longer had this authority). It happened also in the two Jamaican Full Court cases, R v Commissioner of Police, ex parte Reid, and R v Commissioner of Police, ex parte Tenant. It happened also in Re Gerriah Sarran (1969) 14 W.I.R. 361 (where a non delegable duty to discipline was delegated).

3. Where the person whose decision is being challenged possesses no such official status or authority, certiorari will not issue: this will be because it is unnecessary, as in Re Daws (1838) 8 Ad & EL 936; 112 E.R. 1095 (where a coroner's clerk took it on himself to conduct an inquest, and to sign it as if he were the coroner: a complete nullity); or simply because the proceedings, not being official in any way are beyond the reach of the courts

through certiorari. See Lord Denning's dictum in Lee v Showmen's Guild of Great Britain (1952) 2 Q.B.329 at 346 that certiorari does not lie to domestic tribunals; referred to earlier, and similar remarks by Lord Goddard C.J. in R. v National Council for the craft of Dental Technician, ex parte Neate (1953) 1 Q.B. 704 at page 708: certiorari does not go to private arbitrators, also cited earlier. See also Re Clifford and O'Sullivan (1921) 2 A.C. 570 at 583 (Prohibition will not lie against a body that is not a court at all and does not claim to be such - here an ad hoc military committee set up in a martial law area by the military commander). See also Turner v Kingsbury Collieries Ltd. (1921) 3 K.B. 169. (Prohibition will not lie against a county court judge sitting merely as an arbitrator under the Workmen's Compensation Act of 1906). See also R v British Broadcasting Corporation, ex parte Lavelle. (ante)

4. Because of the limitations of certiorari and the prerogative writs in this respect, over the course of time the courts have developed the use of "declarations" as a means of controlling or reviewing the decisions of domestic tribunals who are normally beyond the purview of the prerogative writs.

5. A declaration will often be made in a situation in which certiorari also might have issued.

6. In so far as dismissals from employment go, unless there is present the "public element" certiorari will not issue, and the appropriate remedy if any is the action for a declaration. Further, declarations as to a dismissal being unjustified and that the contract still subsists will seldom be made. They will not be made in a simple case of master and servant; nor in a case where an office is held at pleasure; but may be made where the person is an "officer", or the holder of a public office.

7. In this last category, holders of "Public Office", both certiorari and a declaration may lie: See the "church" cases; and see also Cooper v Wilson (ante) (Police Sergeant dismissed by the Watch Committee after he had already resigned; an action for declaration but certiorari would have issued); Ridge v Baldwin (1964) A. C. 40 per Lord Reid at pages 65 et seq.

8. As to the authorities that "declarations" will not be made in simple master and servant cases, see Vine v National Dock Labour Board (1957) A.C. 488 per Lord Kilmuir at p 500 and Lord Keith at 507-508; Francis v Municipal

Councillors of Kuala Lumpur (1962) 633 at 637 per Lord Morris; Ridge v Baldwin (ante); Vidyodaya University v Silva (1964) 3 ALL E.R. 865 at 874 per Lord Morris (ante); Malloch v Aberdeen Corporation (ante)

9. To decide whether a servant or employee is the holder of a 'Public Office' in the sense in which that terms is used in this context, as distinct from being a servant in a simple master and servant relationship, there must be some element of a public nature that marks out the office. It is not enough that the employer is a statutory corporation: see Barber v Manchester Regional Hospital Board (1958 :ante); Vidyodaya University v Silva (ante). But it may be sufficient if the effect of the statute is to create a special status: Barnard v National Dock Labour Board (1953) ante; Vine v National Dock Labour Board (ante).

In the argument before us Mr. Macaulay for the appellant conceded most of the propositions indicated above, with perhaps one or two exceptions. He expressly conceded that if there is an ordinary master and servant relationship and the master decides to and does terminate the contract, the servant or employee can not obtain an order for certiorari. His remedy if any must lie in damages for breach of contract.

He sought however, to avoid this principle, or set of principles being applicable in the present case by arguing: (a) that the principle applies only to masters or employers, it does not apply to those who usurp their authority; and (b) that the appellant was the holder of a "public office". This assertion appears to be based on a consideration that the employer here was a statutory corporation.

As to the argument at (a) I have already remarked that there was an ambivalence in the Appellant's attitude in this case to his employer the Council. Only the Council is capable of fulfilling the requirement in propositions 1 and 2 above, yet the argument is that this was not a decision of the Council, but one made by fellow workers. If that be so, those workers do not possess the necessary "status" to be sued in certiorari; they are not persons who by statute or charter have been entrusted with the power to make decisions affecting the public at large. The remedy against them must be sought in the field of private law, by appropriate actions. Further if it is not a decision of the Council on what ground will certiorari sue against it? It could only be on the ground that the Council was responsible for the decision though it did not take it. If the Council is

responsible for the decisions, then the ordinary rule as to the master and servant relationship must apply, and certiorari will not issue. It appears to me that the appellant is so to speak caught in an inescapable trap on this point: if the decision is that of the Council, he can't bring certiorari; if the decision is that of his fellow workers, they are not vulnerable to certiorari. On either view, the only appropriate remedy must be found in the field of private law, and not in that of the order of certiorari.

As to the argument at (b) I have already discussed the status of the Council: it is an ordinary statutory corporation set up to do the job of fostering and co-ordinating scientific research in this island: (secn. 5 (1). The appellant's contract of employment lacks even the "statutory flavour" existing in a case such as Barber v Manchester Regional Hospital Board and the mere fact that it is a statutory corporation does not give to its employees any particular status: See the Vidyodaya University case. I have been unable in this case to find anything that would lead to the conclusion that the appellant enjoyed or occupied a "Public Office" within the meaning in which those words are used in this context. It was in my view a simple master and servant or employer and employee relationship. The result is that neither certiorari nor a declaration could be made in this case. And I therefore see no reason to disagree with the judgment of the Chief Justice who decided the case on this issue. So too did Orr J. though for the reasons indicated above I do not find it necessary to decide that the decision to terminate the contract was that of the Council. Whether it was or was not, certiorari will not issue.

There are two further points to be made. The first is that as the Rules of the Civil Procedure Code in Jamaica now stand, we do not have the new English version of Order 53, which allows the applicant to seek both certiorari or a declaration or other relief in the same proceeding. The applicant could seek only the one remedy or the other, and in these proceedings he sought that of certiorari. The expression of views about the availability or non availability of the remedy of a declaration has been due to the fact that the two remedies run hand in hand in the English cases, and if he would not have been entitled to a declaration, then a fortiori he would not be entitled to certiorari either.

The second is that we have been content to treat this as a case of dismissal, because it was so argued by the Appellant, and the Respondent

were concerned with the larger point as to whether the whole proceedings were misconceived. I have in this connection read with interest an article that appeared in the Modern Law Review Vol.30 (1967) at page 288 et seq. entitled "Public Law principles applicable to dismissal from employment" by Mr. G. Ganz, and which is referred to in De Smith's Judicial Review of Administrative Action 3rd Edn. p 200 (48). The writer of the article advances the proposition that Notice is tantamount to dismissal at pleasure after a lapse of time, and that there is very little substantial difference between losing a job after notice and being summarily dismissed. The argument is interesting, and I should wish to reserve an opinion on it so far as it relates to an employment of indefinite duration. But in this case we have a contract for a fixed term of three years, with an express provision that it may be determined by either side if they so wish, and here the termination of this contract has been made, as I understand it, in compliance in every respect with the contractual provision governing termination. Can this be possibly equated with a wrongful dismissal? Assuming for the moment that the decision to terminate was that of the Council, could an order for certiorari be made quashing that decision and requiring them to prefer charges and hear a reply from the appellant, when the contract itself says that they can terminate it by giving the appropriate notice, or salary in lieu of notice, and fulfilling all the requirements that the parties themselves agreed to on entering into the contract? I can not for myself see how this could possibly be so. Be that as it may, the appellant is not entitled to certiorari: he must seek his remedy, if any elsewhere.

For these reasons I would dismiss the appeal and affirm the Judgment of the Full Court, with the usual order that the Respondents should have the costs of the appeal, to be taxed or agreed.

CAREY, J.A.:

The appellant moved the Full Court of the Supreme Court (Smith, C.J., Orr and Theobalds, JJ.) for orders of certiorari to remove into the court -

> "the decisions of the Technical Director of the Scientific Research Council dated the 14th day of February 1983, the 3rd and 4th days of March 1983, suspending the applicant CHRIS BOBO SQUIRE, a Senior Research Scientist of the Scientific Research Council, and the decision of the Administrative Secretary, Mrs. N. J. Vaughn communicated to the said applicant terminating the applicant's contract with the Scientific Research Council,"

so that these decisions could be quashed. That court dismissed the application and ordered costs in favour, not only of the respondents, viz., the Technical Director and the Administrative Secretary, but also the Scientific Research Council who had been ordered to be served with the proceedings. It is not without significance that all the respondents were represented by the same counsel, both before us and in the Full Court. This appeal is against that judgment, dated the 17th June, 1983. The expedition with which this matter has come before us, is a matter of commendation for all those responsible for its achievement.

Although the matter occupied a number of days of protracted submissions forcefully made by learned Queen's counsel on behalf of the appellant, for my part, I am constrained to say that the point at issue is neither complex or difficult, but involves a discussion of some aspects of natural justice principles as they affect the relationship of master and servant. The question raised in this appeal may be shortly stated thus: does certiorari lie to quash decisions taken by fellow officers against another, where the power to so act does not reside with them? This, in effect, encapsules the arguments of the appellant.

Before endeavouring to provide an answer, it would, I think, be helpful to outline the essential facts. The appellant was employed by the Scientific Research Council, a statutory corporation created by the Scientific Research Act as a senior research scientist. On the evidence it is plain that the Technical Director, the first respondent, became quite disenchanted with the conduct of the appellant and accordingly suspended him from the Council's service, in the first instance from 15th February,

1983, for five days and in the second instance, for three days from 3rd March. Finally, by a letter dated 29th March, 1983, under the hand of the second respondent, the services of the appellant were terminated in accordance with the terms of his contract. Clause 8 is the relevant provision and is set out below.

It was these decisions which, it was prayed, should be quashed. We were told that there was no question of the appellant wishing to foist himself or his services on the Council, but his earnest desire was to have his name cleared and the record put right, as such decisions might affect his chances of future employment. I think it is right to record that the appellant was not "dismissed," but his services were "terminated" as was provided in his contract of employment. "Termination" was dealt with in this way:

> "8. (1) The Council may at any time determine the engagement of the Officer on giving him three months notice in writing, and if he is in Jamaica at the time, furnishing him with passages and facilities for baggage and effects as hereinbefore set forth. He shall not be entitled to half salary on the voyage home unless specially granted by the Council."

The clause providing for "dismissal" was in this form:

> "7. If the officer shall at any time neglect or refuse or for any cause (excepting ill-health not caused by his own misconduct as hereinbefore provided) become unable to perform any of his duties or to comply with any order or shall disclose any information respecting the affairs of the Council to any unauthorised person or shall in any manner misconduct himself the Council may dismiss him and on such dismissal all rights and advantages reserved to him by this Agreement shall cease."

In accordance with clause 8, the Administrative Secretary sent him cheques representing three months pay in lieu of notice, two days vacation leave, 28 days contractual leave, less an outstanding loan balance and gratuity for the period of his employment. He was requested to furnish estimates of the cost of shipping his effects to London. The appellant returned these cheques to the Administrative Secretary and intimated that he intended to carry on with his job. The cheques were duly returned to him, and he was advised that he would be regarded as a trespasser if he returned on the Council's premises. I am not clear whether these cheques were again returned to the Council's offices, but the Prime Minister, who was written to by the counsel for the appellant, was advised that the appellant did not propose to encash

these cheques.

I can now return to the question posed. A century ago, in Re Daws (1883) 8 Ad. & El. 936, it was held that certiorari did not lie in circumstances where the "inferior tribunal" was not vested with any authority, in any shape or form, to act as it did. In that case, an inquest was held on the body of a deceased person in the coroner's absence, by one Charles Arnold, his clerk, who signed the inquisition as coroner. On an application by the father of the deceased, eight months after the inquest, to have the inquisition brought up by certiorari to be quashed to enable a new inquest to be held, the court refused to interfere. The facts are clear, that there was a plain usurpation of authority by a person who was not clothed with any vestige of legal authority; his conduct was wholly void. In the instant case, as I apprehend the argument of Mr. Macaulay, neither the Technical Director nor the Administrative Secretary had any authority to suspend or dismiss the appellant. Seeing that their decisions were entirely nugatory, they could not be ratified by the Council when new members were appointed by the Minister. The appellant had not been dismissed by his employers.

In my view, the validity of the principle to be extracted from Re Daws (supra) has not been doubted. It was cited with approval by Lord Evershed in Ridge v. Baldwin & Ors. (1963) 2 All E.R. 66 at page 89 where the learned Law Lord said this:

> "On the other hand, it has also been held that certiorari will not be granted where the proceedings in the inferior tribunal are not merely voidable but altogether void - e.g. where the person purporting to act in a judicial capacity had in truth no authority so to do."

If that is then the effect of Mr. Macaulay's argument, in my judgment, both on principle and authority, he has no case, and his appeal should be dismissed. But in my view, reality does not permit so facile a resolution of the problem. It seems to me, plain beyond argument that the appellant's services had been terminated by officers of the Council acting ostensibly on behalf of the Council. To categorise such conduct as a usurpation of authority, I venture to think, is to be guilty of a misuse of language. The decision to suspend or terminate, would at all events, lie in the hands of the first respondent. It is the order for termination which would be the Council's. The evidence was clear that after new members had been appointed to the Council, nothing was

done by it to demonstrate that the appellant's services had not been terminated. He had not in fact carried out any duties pursuant to his contract after the purported termination of his services nor has he been paid by the Council. When the appellant endeavoured to pursue his appeals against his fellow officers' decisions to the Council, he was advised in the most uncompromising terms by the Council, that the appeals would not be entertained. There cannot then be the least doubt that the services of the appellant have de facto been terminated by the Council. Orr, J., in the Full Court regarded the dismissal of the appellant as the act of the Scientific Research Council. I am of the view that it matters not whether the termination of the appellant's services is said to be the act of the Council or of its servants acting ostensibly on behalf of the Council, for the basis of the relationship which was broken was that of master and servant. Further, that relationship was not governed by any statutory or other regime which prescribed the terms and conditions of employment in a restrictive manner. I hasten to add that in this regard, I do not leave out of consideration, section 8 of the Scientific Research Council Act which empowers the Council to appoint and therefore to terminate the services of staff recruitted by its officers.

In Ridge v. Baldwin & Ors. (supra), Lord Reid considered the applicability of proceedings by way of certiorari to three categories of dismissal in a master and servant situation:

> "dismissal of a servant by his master, dismissal from an office held during pleasure, and dismissal from an office where there must be something against a man to warrant his dismissal."

He pointed out that dismissal of a servant by his master can resemble dismissal from an office:

> "Where the body employing the man is under some statutory or other restrictions as to the kind of contract which it can make with its servants or the ground on which it can dismiss them."

Certiorari applied in respect of the third category only, and Ridge v. Baldwin & Ors. is a typical example. The appellant in that case became Chief Constable of Brighton in 1956, after serving in the Brighton Police Force for some 33 years. In October, 1956, he was arrested and subsequently tried on a charge of conspiracy with other senior members of his force and others to obstruct the course of justice and was suspended from duty on October 26. He was

subsequently acquitted, but his fellow accused were convicted. In imposing a sentence on these men, the trial judge made a statement which included grave reflections of the appellant's conduct. He was indicted on another charge of corruption and again acquitted, no evidence being offered against him. The same trial judge made further observations about the conduct of the appellant. On the next day the watch committee met and summarily dismissed the appellant. It had powers of dismissal conferred by statute, viz., The Municipal Corporation Act 1882, which set out the grounds therefor. Their Lordships held that in these circumstances, the watch committee were bound to observe the principles of natural justice. The appellant in that case had not been charged with any specific offence nor informed of the grounds on which they intended to proceed and had not been given any real opportunity of being heard in his defence.

In so far as the applicability of certiorari to the relationship of master and servant, the following statement of Lord Reid at page 71 remains good law:

> " The law regarding master and servant is not in doubt. There cannot be specific performance of a contract of service and the master can terminate the contract with his servant at any time and for any reason or for none. But if he does so in a manner not warranted by the contract he must pay damages for breach of contract. So the question in a pure case of master and servant does not at all depend on whether the master has heard the servant in his own defence: it depends on whether the facts emerging at the trial prove breach of contract. But this kind of case can resemble dismissal from an office where the body employing the man is under some statutory or other restriction as to the kind of contract which it can make with its servants, or the grounds on which it can dismiss them."

This principle as stated by the learned Law Lord was followed in Vidyodaya University of Ceylon & Ors. v. Silva (1964) 3 All E.R. 865. There the power of appointment of professors was in the University Council by virtue of an Act (The Vidyodaya University and Vidyalankara University Act 1958, (No. 45 of 1958)) which provided that such appointment was to be by agreement in writing between the University and the professor for such period and upon such terms as the Council might resolve. The respondent had his services terminated. He was not told of any accusations against him nor was he offered any opportunity of being heard in his defence. The respondent sought and was granted a writ of certiorari to quash the order of dismissal on the ground that there had been a breach of the "audi alteram partem" rule. On appeal to the Privy Council,

It was held that although the University was established and regulated by the statute, that did not involve that contracts of employment made with their teachers were other than ordinary contracts between master and servants. This case would thus seem to fall into Lord Reid's first category to which certiorari would not apply.

Although the validity of the principle is not in doubt, as Lord Wilberforce in Malloch v. Aberdeen Corporation (1971) 2 All E.R. 1278 at page 1294 pointed out its application does lead to some apparently illogical results if a comparative list of situations was to be made. As he himself identified:

> "A specialist surgeon is denied protection which is given to a hospital doctor; a university professor, as a servant, has been denied the right to be heard, a dock labourer and an undergraduate have been granted it; examples can be multiplied (see Barber v. Manchester Regional Hospital Board [1958] 1 All ER 322, [1958] 1 WLR 181, Palmer v. Inverness Hospital Boards 1963 SC 311, Vidyodaya University of Ceylon v. Silva [1964] 3 All ER 865, [1965] 1 WLR 77, Vine v. National Dock Labour Board [1956] 3 All ER 939, [1957] AC 488, Glynn v. Keele University Page 89, ante, [1971] 1 WLR 487."

He emphasized that the exclusion of principles of natural justice and hence the ability to invoke certiorari proceedings, should be confined to -

> ".... cases in which there is no element of public employment or service, no support by statute, nothing in the nature of an office or a status which is capable of protection."

He further went on to say -

> "If any of these elements exists, then, in my opinion, whatever the terminology used, and even though in some inter partes aspects the relationship may be called that of master and servant, there may be essential procedural requirements to be observed, and failure to observe them may result in a dismissal being declared to be void."

It is right to note that Lord Wilberforce doubted the correctness of the decision in Vidyodaya University of Ceylon v. Silva (supra), but I do not think that it could properly be asserted that he disagreed with the principle of law which was applied. We, in this Court, are bound by decisions of the Privy Council, but would accord the very greatest respect to the opinions of distinguished and eminent Law Lords expressed in the House of Lords.

It would seem that on the authorities noticed herein, the principles of natural justice cannot be invoked where the relationship, albeit one of master and servant, is governed wholly by terms and conditions agreed between

the parties. A dismissal wrongfully made would fall to be resolved by common law remedies. Where, however, the terms and conditions of such a relationship are governed by statute, or regulations or terms which provide a regime for investigation and ruling on charges made, then certiorari might lie.

Mr. Macaulay has acknowledged that a dismissal wrongfully made in the pure master and servant situation, the rules of natural justice cannot be prayed in aid. The thrust of his argument was that the present case fell outside the ambit of such a rule, for no such relationship existed between the appellant and respondents; they were co-workers. I have earlier in this judgment expressed the view that if the effect of Mr. Macaulay's argument is that the action of the appellant's colleagues was null and void, then certiorari does not lie. Nevertheless, it is necessary to consider whether the exclusionary rule with respect to a pure master and servant situation in relation to certiorari proceedings, still applies in the present case. In other words, into which of Lord Reid's categorizations, do the facts of this case fall?

In my view, the Privy Council decision in Francis v. Municipal Councillors of Kaula Lumpur [1962] 3 All E.R. 633 provides some help. I take the facts from the headnote. The appellant entered the employment of the respondent council, and eventually was taken on to their permanent staff. The respondents were his employers, but by virtue of certain statutory provisions, only the president had power to dismiss. The appellant was dismissed, but there was an irregularity in that dismissal which was held to be technically a wrongful dismissal. He sought a declaration that the termination of his employment was wrongful and that he had the right to continue in the employment of the respondents. The declaration sought was refused by the trial judge. Upon his appeal to the Court of Appeal of the Federation of Malaya, the court allowed the appeal to the extent of awarding him damages for wrongful dismissal. Before the Judicial Committee of the Privy Council, it was argued on his behalf that in as much as his purported dismissal had been found to be ultra vires, it should be held that his dismissal was null and void and that he was and still is, employed by the respondents and that it should be so declared. Lord Morris of Borth-y-Gest who delivered the opinion of the Board said this at page 637:

> "when there has been a purported termination of a contract of service, a declaration to the effect that the contract of service still subsisted would rarely be made and would not be made in the absence of special circumstances,

> "because of the principle that the courts would not grant specific performance of contracts of service (see p. 637, letter H, post); in the present case there were no special circumstances, the appellant's remedy lay in damages for wrongful dismissal, and the declaratory judgment sought would not be made (see p. 638, letter I, post)."

It is plain that the remedy sought in that case, was that of a declaration and in the present case, the remedy to which the appellant asserts he is entitled, is an order of certiorari, but in my judgment, the result of allowing certiorari to go in the present case would be to declare that the appellant was and still is employed to the Council. The remedies are both discretionary and both governed as the cases show, by the rule, that the courts will not grant specific performance of contracts of service, and one must now add, "In the absence of special circumstances." Special circumstances which could be relied on, in the one case or the other, could be the same Lord Morris identified Vine v. National Dock Labour Board [1956] 3 All I.R. 939, as a proper case for the grant of a declaration. The basis of the order in that case, was that the appellant, a dock labourer, was subject to a statutory scheme, viz., Dock Workers Regulations of Employment Order (1947), which conferred rights on him and the court would intervene by way of a declaration where the provisions of the scheme were not followed. Of the courts, it has been said by Professor DeSmith in his book Judicial Review of Administrative Action (2nd edition) at p. 509:

> "it is the function of the courts to keep public authorities within the limits of their statutory powers."

The special circumstances thus identified, may take the form of statutory rules, regulations or provisions prescribing a scheme before dismissal can take effect. In Kanda v. Government of Malaya [1962] A.C. 332, where the appellant had sought a declaration that his dismissal was a nullity, Lord Denning pointed out that in the circumstances of that case, certiorari also lay. The appellant was an Inspector of Police. In July 1958, the Commissioner of Police purported to dismiss him on the ground that in an inquiry before adjudicating officer, he had been found guilty on a charge of failing to declare evidence at a criminal trial. Matters of appointment and discipline were, under the constitution, in the hands of the Police Service Commission,

but in the hands of the Police Commissioner prior to Independence. In reversing the decision of the Court of Appeal of Malaya, it was held by the Privy Council that the failure to supply the appellant with a report of the Board of Inquiry, which contained matter prejudicial to him but which had been read by the adjudicating officer before he sat to inquire into the charge, amounted to a denial of natural justice, because he had not been offered a reasonable opportunity of being heard. The Board also held that his dismissal was a nullity. The special circumstances here were provisions in the constitution with respect to the powers of the Police Service Commission. It seems to me to follow that in a master and servant situation, in which a declaration would not be granted, neither would certiorari.

There was some argument that because the appellant held a public office, therefore, natural justice principles applied. In other words, the present case was not the "pure master and servant relationship" in the contemplation of Lord Wilberforce. I must confess that I found this contention somewhat illogical. It was being maintained that the appellant had not had his services terminated by his employers, nor was it his employers, who had failed to comply with any rule of natural justice. Indeed, there was not in existence any relationship of master and servant between the parties in this matter. Lord Wilberforce in Malloch v. Aberdeen Corporation (supra), at page 1294 had said that if there was some element of public employment or service capable of protection, then there -

> "may be essential procedural requirements to be observed, and failure to observe them may result in a dismissal being declared to be void."

Essential to this argument was (i) some procedural requirement which had not been observed and (ii) the existence of the relationship of master and servant. As to the first, in my opinion, that basis was not demonstrated by any manner or means, as to the second, counsel said it did not exist. Accordingly, I was not able to accept that contention.

In my judgment, in the present case, the appellant was subject to an ordinary contract of service, vittressed neither by statutory or procedural requirements as to dismissal or termination. His services were terminated pursuant to the terms of his contract albeit irregularly. His action thus sounds in damages. He was offered in keeping with the terms of his contract,

all his monetary entitlements which in the event, he refused to accept. The remedy he sought, was entirely discretionary. What harm has he suffered? I can find no justifiable basis for interfering with the order made in the court below for refusing certiorari.

It was said that the recourse to those proceedings was on the footing that no other remedy was available to the appellant and further that no other action lay for damages for breach of contract or wrongful dismissal nor a declaration that his services had not been terminated, for the Council had not terminated his services, but his co-workers had. It is a matter of record that at the time the decisions were taken to suspend and later to terminate his services, the appropriate Minister had not yet appointed members of the Council, but the Technical Director and the Administrative Secretary purported to dismiss him. Their action was plainly unauthorised. But the Council would be responsible for actions of its officers acting ostensibly on its behalf. An action would therefore lie at the instance of the appellant either for breach of contract or wrongful dismissal against the Council. The dilemma of the appellant is that once it is conceded that he was dismissed by the Council, he realised he would be bound to fail. As Francis v. Municipal Councillors of Kuala Lumpur (supra) indicates, even where the dismissal was, as in the present case, irregular, the remedy lay in a claim for damages for wrongful dismissal, not in certiorari.

For reasons, therefore, which are substantially the same as those of the court below, I would dismiss the appeal with costs.

WHITE, J.A.:

This appeal sought to have this court overrule the decision of the Full Court (Smith, C.J., Orr and Theobalds, JJ.) which ordered that -

> "the application for certiorari to quash the decisions of the Technical Director of the Scientific Research Council dated the 14th February, 1983, the 3rd and 4th days of March, 1983, suspending the applicant, Chris Bobo Squire, a Senior Research Scientist of the Scientific Research Council, and the decision of the Administrative Secretary of the Research Council, Mrs. N. J. Vaughn, communicated to the said applicant terminating the applicant's contract with the Scientific Research Council, is misconceived and be dismissed."

This order was made following arguments on a preliminary objection relating to the jurisdiction of the Full Court to grant certiorari in a matter in which the status of Chris Bobo Squire, the appellant, was canvassed, particularly in the light of the contract of employment dated 22nd April, 1982, between the appellant and the Scientific Research Council (the Council).

Before this court, Mr. Macaulay's submissions raised the question whether any administrative decision taken by officers of the Council against another officer is subject to the jurisdiction of the courts.

The Memorandum of Agreement under which the appellant was employed to the Council provided by clause 8 for the "Determination of the agreement." Pursuant to this clause, Mrs. N. J. Vaughn, the Administrative Secretary to the Scientific Research Council, purported to dismiss the appellant when she informed him by letter dated March 29, 1983, that "your engagement is being terminated on three (3) months' notice effective April 1, 1983." The letter further informed that "The Council will not require you to work during the period of your notice." Accordingly, cheques were forwarded to meet the three months' notice pay, vacation leave pay, contractual leave pay, and gratuity for the period May 10, 1982, to June 30, 1983. This computation took into account the amount owing by the appellant on a motor car loan. This was in keeping with the terms of the said clause 8 (1). On 30th March, 1983, he responded to this information by letter to Dr. M. O. Hamilton, Executive Director of the Scientific Research Council pointing out that "Under clause 16 of the Terms and Conditions of Employment for Staff of the Research Council, I hereby appeal to Council through you against the Administrative Secretary's decision as outlined in her letter dated March 29, 1983. Further, I hereby request /Council through you

"that this appeal be heard at the same time as my first two appeals."

These last words refer to the appeals by the appellant against his suspension from the Council's service intimated by memoranda on the 14th February, 1983, and March 3, 1983, and March 4, 1983. These suspensions were ordered by Dr. A. L. Binger, Technical Director. The last suspension on March 4, 1983 was a reduction of indefinite suspension to a determinate period of three days "based on anticipated cooperation and display of team spirit by you." This comment is indicative of the dissatisfaction which the administrative hierarchy of the Council felt with regard to the performance by the appellant of his duties. Indeed, the appellant himself recognised this hierarchy when he wrote by letter dated 21st February, 1983 to Dr. Hamilton, the Executive Director of the Scientific Research Council, requesting him - "that the matter be taken to Council. I am reliably informed by Mrs. Vaughn that any such appeal would have to be channelled through you."

The Technical Director occupies a most important position, vis-a-vis, the Council. By s. 8 of the Act the Council is empowered to appoint and employ at such remuneration or on such terms and conditions as it thinks fit a Technical Director and such other officers, agents, and servants as it thinks necessary for the proper carrying out of the provisions of this Act. He is one of the persons authorised to have custody of the seal of the Council, a body corporate having perpetual succession and a common seal. The seal may be affixed to instruments pursuant to a resolution of Council and in the presence of the Chairman or one other member and the Technical Director, who is one of the persons who may authenticate the seal of the Council. All documents, other than those required by law to be under seal, made by and all decisions of the Council may be signified under the hand of the Chairman or any other member authorised to act in that behalf or the Technical Director of the Council. He is the official designated by statute upon whom service is to be executed where the Council is sued in its corporate name. It was this post which Dr. A.L. Binger occupied, and under which title he was sued.

It was contended that Dr. A. L. Binger and Mrs. Vaughn, the respondents in their respective official capacities, did not have a locus standi to suspend from, or terminate, the employment of the appellant. Much stress was laid on the fact that at the time of the events complained of, there was no body of persons appointed by the appropriate Minister for the purpose of discharging

any of the functions of Council under the Act, which are generally stated in s. 5 to be "to foster and co-ordinate scientific research in this Island and to encourage the application of the results of such research by the exploitation and development of the resources of this Island." It was said that the respondents acted outside their jurisdiction not only when they suspended the appellant, but also when the contract of employment was terminated. The appellant himself contended in his letter of the 30th March, 1983 to Mrs. Vaughn, whom he addressed as "Administrative Secretary, Scientific Research Council," that - "It is clear from my Memorandum of Employment that I was employed by Council and that the then chairman signed the Memorandum on behalf of Council." The Memorandum of Agreement was in fact signed by the Chairman on behalf of the Council, although by s. 4 (4) of the Act the decision to appoint could have been otherwise signified by a member authorised by the Council or by the Technical Director. The argument ran further, that no officer of the Council has any power under the Act to make an appointment, or any power under the Interpretation Act s. 35, to remove an officer, such as the appellant. S. 35 of the Interpretation Act reads:

> "Where by or under any Act a power to make an appointment is conferred, then, unless the contrary intention appears, the authority having power to make the appointment shall also have power to remove suspend, reappoint or reinstate any person appointed in exercise of the power."

Mr. Macaulay submitted that the respondents nor either of them had any power to dismiss the applicant. They had no original power in this regard. Equally, there would be no delegated authority considering that in fact there was no board actually in existence at the time. Mr. Macaulay examined the structure of the Scientific Research Council Act. More particularly, by s. 8 of the Act the power of appointment of agents, and servants of the Council is vested in the Council itself. The decision to appoint is signified under s. 4 (4) of the Act as already mentioned. The Memorandum of Agreement having been signed by the Chairman of the Council complied with the terms of s. 4 and s. 8. Since only the Council has the power to appoint, it was argued, no officer of the Council has any power under the Act to make an appointment or any power under the Interpretation Act to remove a fellow officer. Not even a Committee of Council has any power to exercise the powers under s. 8 (1). Although the Council possesses power under s. 14 of the Act "with the approval of the Minister to make

"regulations determining generally the conditions of service of the officers and servants of the Council," no such regulations have been made. It must be pointed out that the letter dated 16th April, 1982 offering an appointment to the appellant indicated, inter alia, that this appointment "will as far as possible be subject to the Council's Terms and Conditions of Service, a copy of which is enclosed." The heading of this document states that it has been "Formulated under Section 8 of the Scientific Research Council Law No. 30, 1960." There is no evidence that these terms and conditions were made with the approval of the Minister nor that the document was ever published in the Jamaica Gazette. The letter of appointment advised that the terms and conditions are incorporated into the contract in so far as they are applicable.

It was submitted to us that the appellant is a contract officer holding a fixed term appointment, and the Terms and Conditions are inconsistent with the Memorandum of Agreement. In fact, in its relevance to the employment the document "Terms and Conditions of Employment etc.," by paragraph 2 (iv) and (v) under the rubric "Letters of Appointment," provides that - "(iv) a new member of staff prior to beginning of work shall be given a copy of these terms and conditions of employment and a letter of appointment setting out any section of these terms and conditions that are not relevant; (v) in the case of temporary or fixed term appointments any special provisions that may be agreed." There were no such direct references to any excluded terms or specially agreed terms in the particular contract. In so far as the contract of employment is concerned, the powers of "Dismissal" and "Termination of Engagement" in clauses 7 and 8 of the Schedule to the Memorandum of Agreement, and clause 15 of the "Terms and Conditions of Employment" are noteworthy.

Under the Schedule, clause 7, the Council may dismiss an officer for stated reasons. For example, if the officer shall at any time neglect or refuse, or for a cause (excepting ill-health not caused by his own misconduct as hereinbefore provided) become unable to perform any of his duties, to comply with any order, or shall disclose any information respecting the affairs of the Council to any unauthorised person or shall in any manner misconduct himself. "On such dismissal all rights and advantages reserved by this Agreement cease." Clause 15 declares that -

> "(a) A fixed term appointment will terminate in accordance with terms and conditions of agreement, ..."
>
> (b) Appointments other than for a fixed term are terminable by one month's notice in writing by either party if employment is on a monthly basis; if on a weekly basis by two weeks notice in writing by either party.
>
> (c) The Council may terminate any appointment other than a fixed term appointment for cause without notice on payment of one month's salary in lieu of notice in the case of employees on a monthly basis and two weeks in case of employees on a weekly basis."

The striking feature of these contrasting provisions is that they draw a clear distinction between officers on fixed term appointments, and officers whose employment is not for fixed term but is monthly or weekly. These powers, whether of dismissal or termination of contract are stated to be in the Council.

In the light of the foregoing, Mr. Henriques argued that where clause 16 gives a right of appeal to Council in relation to any matter affecting appointment, this refers only to appointment and does not refer to dismissal and suspension. He did argue that there is no right of appeal when there is termination under the terms of a contract for a fixed term. The appellant's contract contains powers of termination by notice. In this regard, I unhesitatingly repeat the words of the learned Chief Justice in his judgment in the Full Court. He says:

> "It is true that there are provisions of the documents which are inconsistent the one with the other but the conclusion seems inescapable that such of the terms and conditions of the documents of March 1966 as are not expressly provided for in the agreement of 22 April 1982 are incorporated in the document of March 1966, which are relevant. Clause 10 provides that an employee who is absent from duty without permission from the head of the Department or head of section or commits any other misdemeanours shall be liable to disciplinary action. Clause 11 sets out the penalties which may be imposed for disciplinary offences and included among them is the suspension from duty without pay. Clause 16 as already stated gives a right to appeal to Council in relation to any matter affecting appointment. It is quite clear that officers of the Council regarded these provisions as applicable to the applicant because he was apparently suspended by the Technical Director under cl. 11 for an offence under cl. 10, and the Executive Director expressly acknowledged the right of the applicant to appeal to Council in respect of the disciplinary action taken against him. I shall therefore treat those clauses as forming part of the applicant's agreement with the Council."

I respectfully accept this discussion and conclusion of the learned Chief Justice in so far as it specifically dealt with the apparent rights of the appellant where it is simply a question of suspension. But I go on to say that in my view the appellant's position is different when one considers the termination of his contract. For one thing, the decision, assuming that it was legally effected, did not affect any right of the appellant which needed to be protected as a right of property. If the termination was legal, it is my view that the appellant was not deprived of any right which was violated by the termination of his employment; as I have already pointed out he thereupon obtained all that he was entitled to.

Mr. Macaulay endeavoured to equate the employment of the appellant to that of a public officer, in competition with the argument of Mr. Henriques that the appellant was not a public officer, enjoying a statutory right or privilege conferred upon him by the Memorandum of Employment or the Terms and Conditions of Employment. Whereas Mr. Macaulay argued that the appellant being a public officer could not be dismissed without a proper enquiry not only according to his interpretation of the contract but also by public law; to Mr. Henriques what the appellant enjoyed was merely a right under a contract between the parties which is the realm of private law and not of public law, considering that the Court is not here discussing the exercise of a statutory power but merely the exercise by the Council of a contractual right under a contract of employment.

This puts in neat focus a question posed by Lord Evershed, in delivering his judgment in McCelland v. Northern Ireland General Health Service Board [1951] 1 W.L.R. 594 at p. 610:

> "Whether in a contract of service made in the twentieth century with a statutory body ..... it is correct to regard the common law right, of a master to determine his servant's engagement as of so well established and paramount a character that the contract should be interpreted as necessarily subject to that right (and a corresponding right on the part of the servant) so that only the clearest express terms will exclude it."

First of all, it is well to bear in mind that statutory bodies may enter into private contracts. As was submitted by Mr. Henriques, and I agree with him, though a body is created by statute it does not necessarily follow that the relationships between itself and its servants or agents are necessarily statutory and so creates a public office. The relationship between the statutory

body and its servants, or agents is a matter of a private contractual agreement. In this case, the appellant was no more than an employee, whose relationship with the Council was established by the relevant documents. I should add that as I see it, there were no procedural limitations which prevented the Council from dismissing him. A relevant quotation is from the advice of the Privy Council in Vidyodaya University of Ceylon v. Silva [1964] 3 All E.R. 865 at p. 875 C - F. Lord Morris there defined the position of the respondents in these words:

> "It seems to their Lordships that a 'teacher' who has an appointment with the University is in the ordinary legal sense a servant of the University unless it be that s. 18 (e) [of the University Act, 1958] gives him some altered position.
>
> "The circumstances that the University was established by statute and is regulated by the statutory enactments contained in the Act of 1958 does not invoke that contracts of employment, which are made with teachers and which are subject to the provisions of s. 18 (e) are other than ordinary contracts of master and servant."

He compared the Vidyodaya case with Barber v. Manchester Hospital Board [1958] 1 All E.R. 322.

In Barber v. Manchester Hospital Board (supra), one of the grounds on which the plaintiff based his claim was the ground of mala fides. Before dealing with this ground, Barry, J., made the following preliminary remarks at p. 329 F - I:

> "The law I think, is clear, in ordinary circumstances, a master can terminate his servant's employment and no one can question the motives of the master in reaching a decision to do so. The position differs somewhat in relation to statutory bodies who can, of course, only act for the purposes for which they are created. A statutory body has, equally, an untrammelled right to terminate the services of one of its own employees by giving appropriate notice, provided that decision is arrived at bona fide. As I understand the meaning of the word, it is that the decision must be reached, and honestly reached, in the belief that it is a decision made in the best interests of the objects of the statutory body, namely, in this case, the administration of the health services in the region under the control of the regional hospital board, and not made for some wholly extraneous reason; an obvious extraneous reason would be shown if it could be proved that a decision to terminate the employment of a servant was made, not because it was genuinely or perhaps mistakenly thought by the statutory authority that the termination of his service was in the best interest of the service which they were administering, but because while knowing that they were not furthering the interests of that service by dismissing him, the statutory authority dismissed the servant owing to personal spite against him.

> "Then I think their decision could be impugned in the courts.
>
> "One thing is quite clear: the discretion of the authority must be the governing factor in cases of this kind, and the court cannot substitute its views whether or not a servant should, in certain circumstances, have been dismissed, for the views of the authority, provided the views of the authority were bonafide held. I need not cite a great deal of authority on this point. The law is most fully explained in the judgment of Warmington LJ in Short v. Poole Corpn. [1926] Ch. 66 at pp. 90, 91."

The occasion for those remarks was the termination by a regional hospital board of the employment of a consultant, which was effected in non-compliance with a clause of the contract which was subject to terms and conditions of service issued by a Minister, and under which there should have been a reference to the Minister before the employment was terminated by the hospital board. Barry, J., held that the termination was not a nullity as was contended for on behalf of the plaintiff in that case. He quoted from the judgment of Lord Keith of Avonholm in Vine v. National Coal Board [1956] 3 All E.R. at p. 978, who said that Vine's case -

> "Is not a straightforward case of master and servant. Normally and apart from the intervention of statute, there would never be a nullity in terminating an ordinary contract of master and servant. Dismissal might be in breach of contract and so unlawful but could only sound in damages."

At page 331, he indicated the following distinguishing characteristic of Vine v. National Dock Labour Board and Barber v. Manchester Hospital Board:

> "Giving this matter the best consideration that I can, I am unable to equate this case to the circumstances which were being considered by the Court of Appeal and the House of Lords in Vine v. National Dock Labour Board. There the plaintiff was working under a code which had statutory powers, and, clearly, in those circumstances, all the Lords of Appeal who dealt with the case in the House of Lords took the view that the case could not be dealt with as though it were an ordinary master and servant claim in which the rights of the parties were regulated solely by contract. Here, despite the strong statutory flavour attaching to the plaintiff's contract, I have reached the conclusion, that in essence it was an ordinary contract between master and servant and nothing more. In those circumstances I feel bound to apply the general rule stated by Lord Keith of Avonholm in the passage which I have just read, and to reach the conclusion here that the plaintiff's only remedy is the recovery of damages, subject of course, to any question relating to some declarations which have been asked for."

He therefore refused declarations asked for and in the event denied the plaintiff's claim that his employment with the regional hospital board had never been validly terminated.

In endeavouring to equate the position of the appellant with that of a public officer, Mr. Macaulay insisted that certain cases which he cited strongly supported his contention that the respondents had no authority delegated or otherwise to terminate the contract of employment of the appellant. These cases were Kanda v. Government of Malaya [1965] A.C. 322; Re Genlah Saran (1969) 14 W.I.R. 361; Evelyn v. Chichestor (1970) W.I.R. 410; Re Langhorne (1969) 4 W.I.R. 313. A careful reading of those cases discloses that they were concerned with the question of whether a public officer (as the court so found was the status of the employee in each of those cases) could be dismissed at pleasure without the authority exercising the power of dismissal first properly observing the procedural steps set out by Regulations, and whereby the power to dismiss at pleasure was circumscribed. In each case, the court was concerned to enquire whether the power to dismiss could be delegated, also whether the delegated power was properly exercised within the terms of the Regulations giving the power to delegate.

Mr. Macaulay suggested that the words of Lord Denning when he delivered the judgment of the Judicial Committee in Kanda v. Government of the Federation of Malaya [1962] A.C. 322 at p. 332 underlines the provisions of s. 35 of the Interpretation Act. Lord Denning said:

> "In order to see who had power to dismiss him [Inspector Kanda] it is necessary under Art 135 (4) [of the Constitution of the Federation of Malaya, August 31, 1957] to ask who had power at that time to appoint an officer of his rank for no one could dismiss who could not appoint."

The Judicial Committee in Kanda v. Government of Malaya [1962] 322 P.C. considered the dismissal of a police inspector by the Commissioner of Police for Malaysia, when on the interpretation of the extant and relevant provisions of the Constitution of the Federation of Malaya, it was decided that since Merdeka Day it was the Police Service Commission and not the Police Commissioner who had the power to appoint and dismiss members of the police service. The dismissal of the appellant by the Commissioner was therefore void. It should be noted that in fact, the Privy Council stressed that there could not be two authorities with concurrent power to appoint members

of the police service. Their Lordships of the Privy Council were satisfied that the Police Service Commission had lawfully made the necessary appointments:

> "Their Lordships do not overlook the argument of the Government that there was no conflict [between the existing law and the constitution]. The jurisdiction of the Police Service Commission, they said, would be satisfied by entrusting them with the power to appoint gazetted police officers, leaving the Commissioner to appoint all others. Their Lordships cannot accede to this argument. Under Article 140 [of the Constitution of the Federation of Malaya] the jurisdiction of the Police Service Commission extends to all persons who are members of the police service; and their functions under Article 144 apply to all of them also. The commission has the duty, and therefore the power to appoint all members of the police service, and not merely the gazetted police officers, The Police Service Commission can, of course, delegate any of its functions under article 144 (b), but still it is its own duty and its own power that it delegated. It remains throughout therefore the authority which has power to appoint, even when it does it by a delegate.
>
> "The result is that on July 7, 1958, the Police Service Commission was the authority to appoint an officer of the rank of Inspector Kanda; and therefore under article 135 (1) it was the authority to dismiss him. The Commissioner of Police had no authority to dismiss Inspector Kanda as he did. The dismissal was therefore void."

Re Saran (supra) was an appeal from an order of a judge of the High Court of Guyana refusing an order nisi upon application for the issue of a writ of certiorari. The Guyana Court of Appeal held that the procedural requirements prescribed by the Constitution of Guyana for dismissal of a public servant had not been followed. So that where the Public Service Commission had delegated to a Permanent Secretary the power of holding an enquiry into the conduct of a public officer, the Permanent Secretary could not properly delegate that power to another officer. Crane, J.A., opined - "It is therefore lawful for the Public Service Commission, with the Prime Minister's consent, to delegate its function of removing public officers from the service to the Permanent Secretary of Health, and consequently, quite competent within the doctrine of implied powers, for the latter to hold an inquiry with respect thereto. It must be conceded that the Assistant Secretary has no power of removal or discipline, so it must follow he would have no incidental power to hold an inquiry." (p. 363 I to p. 364 A.) And Cummings, J.A., at p. 372, pointed out that the Constitution expressly vests the power to remove persons holding or acting in public offices in Guyana in the Public Service Commission. It makes provision for the delegation of those powers, but such delegation must be to specified persons and in a specified manner. Again at page 372 I -

"The judgment of the learned trial judge does not disclose that he gave any real consideration to the question of the jurisdiction of the Permanent and/or Assistant Secretary to perform a duty reposed in the Public Service Commission."

In Re Application by John Langhorne the Guyana Court of Appeal was again concerned with disciplinary proceedings against public officers, and the particular role of the Public Service Commission; more especially by confirming the quasi-judicial nature of the power to remove and exercise disciplinary control over public officers. Be it noted that in the oral judgment delivered by Luckhoo, C., there is the following passage at page 359 F: "Administrative action will not be invalidated merely by reason of an ostensibly trivial departure from the rules governing procedure and form, unless it is shown (and I repeat shown) that the error has caused the individual affected to suffer substantial detriment. Nothing of this kind has been shown in this case, apart from a bare statement that the appellant has suffered prejudice."

J. W. Evelyn v. William Chichester (1970) 15 W.I.R. 410 was a case in which a government employee was charged departmentally. It was held that the ensuing departmental enquiry was in breach of Departmental Orders in that the relevant procedure was not followed. The court examined the powers of dismissal vested by statute in the General Manager of the Transport and Harbours Department and how it was exercised in the circumstances. Luckhoo, C., set out the rival contentions at p. 418 C - F:

> "But the Solicitor-General in arguing the case for the appellant, contended that on a true construction of the provisions of the Transport and Harbours Ordinance the respondent was a servant of Government serving at pleasure, and that such a person had no legal right to complain of his dismissal without a hearing. (The argument was not raised in the Court below nor in the grounds of appeal but was still heard). In contending for Crown Immunity he said it was enough for him to make good, the proposition that the tenure of the respondent's office was at pleasure and if this succeeds then he would invite the Court to conclude that if an officer is serving at pleasure he could be dismissed at will, even in defiance of some other provision which requires that he be heard.
>
> "Counsel for the respondent in replying in his argument said that the General Manager in this case did not have the power to dismiss at pleasure because he was in law obliged to conform with aforesaid Orders made under statutes. The General Manager of the Transport and Harbours Department was vested with the power to appoint employees and to dismiss them. Such power being subject to such Departmental Orders as may from time to time be made by the Governor."

Although the General Manager had by virtue of statute, the power to dismiss, this was not so absolute that a public officer could be dismissed at pleasure without observing the procedure established by statutory orders. According to Luckhoo, C., "From the very nature of this express provision relating to the General Manager's powers, it would be wholly inconsistent to imply or attribute to him the absolute power to dismiss at pleasure when at every stage the limitation of the powers which he enjoys is made manifest." Persaud, J.A., at p. 435 did not see the case as one of master and servant within the three categories formulated by Lord Reid in Ridge v. Baldwin [1963] 2 All E.R. at p. 71. On the same page of the report of his judgment in Evelyn v. Chichester, Persaud, J.A. described the case before the Guyana court as one in which the proceedings taken against the respondent purported to follow a procedure prescribed by what amounts to delegated legislation, rather than action being taken to dismiss the respondent at pleasure, and if there has been a breach of the procedure in any form as a result of which the respondent was precluded from being heard, it does not now do credit to the argument of the appellant, that he relies on the Crown's right to dismiss at pleasure."

In stating his position, Mr. Macaulay maintained that he was not seeking certiorari to quash the decision of the employer, the Council, eo nomine. His attack concerned the ability of one employee to dispense with the services of another employee, and thus terminate the employment. Acknowledging that certiorari will not lie against the master where it is a clear case of master and servant relationship, Mr. Macaulay took his stand on the contention that certiorari will lie in the other situation because the immunity of the employer will not extend to the employee, who terminates the employment of a fellow employee. The doctrine of vicarious liability is unknown in certiorari proceedings.

Although the letter from the Administrative Secretary was written under the letterhead "Scientific Research Council" and was ended "Yours sincerely, Scientific Research Council," Mr. Macaulay argued for the appellant that she did not say on whose authority she signed, bearing in mind also that she does not come within the category of persons mentioned in s. 4 (4) of the Act who can sign documents conveying the decision of the Council.

Mr. Macaulay's criticism that the maxim delegatus non potest delegare applied in this case, carried his argument to the point that the Council could not ratify what the respondents had done, because the Council itself had no power to delegate the exercise of the power of dismissal to these persons. I am not at all sure that the position is as absolute as that. Of course, as Lord Kilmuir said in Vine v. National Dock Labour Board Relations [1956] 3 All ER. 939 at p. 943, it is necessary to consider the importance of the duty which is delegated and the people who delegate. "In this case, the duty is to consider whether a man is to be outlawed from the occupation of a lifetime - ... my view is that this duty in this scheme is too important to delegate unless there is an express power." In the same case, Lord Somervell spoke thus at p. 951:

> "The question in the present case is not whether the local board failed to act judicially in some respects in which the rules of judicial procedure would apply to them. They failed to act at all unless they had power to delegate. In deciding whether a person has power to delegate one has to consider the nature of the duty and the character of the person. Judicial authority normally cannot, of course, be delegated, though no one doubted in Arlidge's case [1915] A.C. 120 that the local government board could act by officials duly deputed for that purpose, whether or not the act to be done had judicial ingredients. There are on the other hand, many administrative duties which cannot be delegated. Appointment to an office or position is plainly an administrative act. If under a statute a duty to appoint is placed on the holder of an office, whether under the Crown or not he would normally have no authority to delegate. He could take advice of course, but he could not by a minute, authorise someone else to make the appointment without further reference to him."

Denning, L.J., also, said in Barnard v. National Dock Labour Board [1953] 1 All E. R. 1113 at p. 1119 A:

> "While an administrative function can be delegated, a judicial function rarely can be. No judicial tribunal can delegate its function unless it is enabled to do so or by necessary implication. In Local Govt Board v. Arlidge the power to delegate was given by necessary implication, but there is nothing in the Scheme authorising the board to delegate its function ..... Next it was suggested that even if the board could not delegate their functions, at any rate they could ratify the actions of the port manager, but if the board have no power to delegate their functions they can have no power to ratify what he has already done. The effect of ratification is to make it equal to a prior command, but as a prior command in the shape of delegation would be useless, so also is a ratification."

In Barnard's case the port manager was treated as a usurper exercising powers which the board had no authority to delegate to him. In Vine's case the dismissal was also without proper authority. Both cases raised the question of the delegation of quasi-judicial powers under the scheme for the employment of dock workers.

At first reading the foregoing remarks by high judicial authority would seem to support the contentions of Mr. Macaulay which would nullify the termination of the employment of the appellant. Except that the forgoing remarks were made in relation to special circumstances, that the statutory scheme had given the employees a status of which he could not be deprived unless the statutory powers were strictly exercised. Indeed, reference to the advice of the Judicial Committee in Francis v. Municipal Councillors of Kuala Lumpur [1962] 3 All E.R. further exemplifies this. There the appellant alleged that he was wrongfully dismissed, and claimed a declaration that the termination of his employment was unlawful and that he was entitled to continue in the employment of the respondents. The respondents were the employers of the appellant, but by virtue of s. 16 (5) of the Municipal Ordinance, 1948 of the Federation of Malaya it was the President of the Council who had power to dismiss him. In the view of Lord Morris at p. 633 I:

> "For the purposes of this appeal it must be accepted that the dismissal of the appellant was irregular; the letter of October 1, 1957 shows that the dismissal was by the council and was not the result of an exercise by the president of his power of dismissal. It is apparent however that the argument for the appellant rests on a technicality. The president was a party to the decision of the establishment committee at their meeting on Sept. 18. So also was he a party to the decision of the full council at their meeting held on Sept. 30, at which he presided. .... It appears .... both that the president would have been prepared either before or on Sept. 30 to remove the appellant from his office and also that he concurred in the decision of the council to terminate the applicant's services. Accepting the decision of the Court of Appeal, the position on Oct. 1, was that the removal was by the council and not by the president. The council were his employers but having regard to the provisions of the ordinance the termination of his service constituted wrongful dismissal."

Consequently, the remedy of the appellant was damages for wrongful dismissal. In holding that there were no special circumstances which would attract the declaration sought, Lord Morris expressed the inappositeness of the ratio of Vine's case to the facts with which the Judicial Committee was then dealing. His views at p. 638 B - C were:

> "Even if, as counsel for the appellant submitted the terms of the appellant's service could by reason of the ordinance be regarded as statutory, that formula does not, in their lordships view, make the present case at all analogous with Vine's case. It could not be suggested that, in the absence of the declaration, which is sought, the appellant would be disabled from working as a clerk or clerical assistant. A declaration as sought in the present case would inevitably amount to or involve specific performance of the appellant's contract of service - if it were practically effective."

In Vine's case the declaration was to establish the value to the employee of his being in the scheme.

On the maxim delegatus potest non delegare I quote from two leading text books on administrative law. Firstly, the view of S. A. deSmith is expressed in the 4th edition by J. M. Evans of his monumental work "Judicial Control of Administrative Discretion" at p. 301:

> "The maxim delegatus non potest delegare does not enunciate a rule that knows no exception; it is a rule of construction to the effect that 'a discretion conferred by statute is prima facie intended to be exercised by the authority on which the statute has conferred it and by no other authority, but this intention may be negatived by any contrary intention found in the language, scope or object of the statute. But the courts have sometimes assumed that the maxim does lay down a rule of rigid application, so that devolution of power cannot in the absence of express statutory authority be held to be valid unless it is held to fall short of delegation. In this way, an unreasonably restricted meaning has often been given to the concept of delegation."

Secondly, from "Administrative Law" by H. W. R. Wade. In the fifth edition of that valuable work he points out (page 319) -

> "The maxim delegatus non potest delegare is sometimes invoked as if it embodied some general principle that made it legally impossible for statutory authority to be delegated. In reality there is no such principle and the maxim plays no real part in the decision of cases, though it is sometimes used as a convenient label. The proper home is in the law of agency, where it expresses the point that a principal who must accept liability for the acts of his agent will not accept it for the acts of his agent's agent; but even here there are wide exceptions. In the case of statutory powers the important question is whether, on a true construction of the Act, it is intended that a power conferred upon A may be exercised on A's authority by B. The maxim merely indicates that it is not normally allowable."

Generally speaking, the nature or classification of the power can be important. It being cons
It being considered that neither legislative nor judicial power can be delegated, whereas administrative power is delegable and may be acted upon though not

expressly delegated. The necessary authority to delegate can be implied. In Nelms v. Roe [1969] 3 All E.R. 1379 Lord Parker, C.J., pointed to the relationship which obtains between a Minister of Government and the officials in his Ministry:

> "It has always been a principle in this country that a Minister being responsible to Parliament for acts of officers of his department and having to act through others, an act done by the proper officer of his department is the act of the Minister, the proper responsible officials are the alter ego of the Minister, and accordingly no question of delegation arises."

In Nelms v. Roe, a police inspector had signed a request for information under the Road Traffic Act 1960, s. 232 (2) (a) (e). He had received oral authority from his immediate superior, the superintendent of police for the police sub-division in which the offences were committed. The inspector signed the form "on behalf of the Commissioner of Police for the Metropolis." The superintendent himself had no written authority from the commissioner to act in the matter, nor had the inspector any such authority from the commissioner. Lord Parker, C.J., did not apply the above quoted and well-known principle, which he had earlier expounded, to the facts of the case then before the Queen's Bench Division. At p. 1382 he said:

> "It is not, I think, sufficient to say that it is a principle which is applicable whenever it is difficult or impracticable for a person to act himself, in other words that whenever he has to act through others the principle applies. I see grave difficulties in going that far, and accordingly as it seems to me Superintendent Williams was not, by reason of his position the alter ego of the Commissioner but merely had implied delegated authority from the Commissioner."

The response of the Lord Chief Justice to the further argument that there could not be any further delegation from the superintendent to the inspector, is now quoted:

> "For my part, I have come to the conclusion that in this case it would be proper to infer that the delegation which I find exists from the Commissioner to Superintendent Williams includes power for him to get a person in his unit in a responsible position in the case of Inspector Hicks to deal with the matter .... the proper inference to be drawn from the facts here is that the further delegation to Inspector Hicks was one which was done with the implied authority of the Commissioner, the original delegator."

In 1975 it had been held in R. v. Post Office, ex parte Byrne (1975) 119 Sol. Jo. 341, [1975] I.C.R. 221 that there can be no order for

certiorari where a domestic tribunal derives authority under a contract. The applicant, a telephonist, employed by the defendants, was given a suspended dismissal for 12 months by the general manager under the defendants' written disciplinary code. The Queen's Bench Division (Lord Widgery, C.J., Ashworth and Bridge, JJ.) adjudged that the general manager derived his authority over the applicant by virtue of the contract of employment, and not by the law of the land. According to Bridge, J., the authorities emphasised the still subsisting limitation that private domestic tribunals had always been outside the scope of certiorari, since their authority derived solely from contract. The only legal authority which a superior employee could exercise was through a contract of employment. A superior officer did not affect the applicant's rights as a subject but merely as an employee.

I hold that due to the heirarchical structure of the administration of the Council, the respondents would have in the circumstances of the case the implied authority to terminate the contract of employment of the appellant with the Council. It cannot be said, and it was not shown that terminating the employment was done arbitrarily. They have not usurped any functions of the Council pertaining to the continued employment of the appellant, especially when it is recalled that after the new Council was appointed it is clear from the following fact that the Council accepted and ratified their terminating the contract. On the 10th May, 1983, subsequent to the ex parte order by the Supreme Court, Mr. Macaulay wrote the Chairman of the newly appointed Council complaining: "The Administrative Secretary had usurped the powers of the Council by terminating the contract of my client." He also expressed the hope "that Council will have no objections to the request of my client to be afforded the opportunity of appearing with a legal adviser before the Council in the prosecution of his appeal." On behalf of the Council, Messrs. Livingston, Alexander and Levy, Attorneys-at-Law, replied in the following terms: "The Scientific Research Council will not be dealing with the Appeal on behalf of your client, and accordingly, the Motion filed by you for hearing on the 30th May 1983 will have to be finally dealt with at that time." This unequivocal reply could not be regarded otherwise than an acceptance and ratification of the action by the respondents. It was a clear indication that the Council did not intend to re-employ the appellant. Indeed, if one follows the trend of the authorities the Council was taking the stand that they could not be compelled to retain the appellant under contract.

The administrative act of terminating the contract, contended Mr. Macaulay, can be quashed by certiorari, on the strength of cited dicta in the judgments delivered in R. v. Commissioner of Police, ex parte Tennant (1977) 15 J.L.R. 79, by Vanderpump, J., at p. 81 I, and by Wright, J., at 85 I, in which the Full Court held that the regulation under which the Commissioner of Police purported to dismiss the applicant did not give him a power of peremptory dismissal, and therefore the rules of natural justice applied. These learned judges founded their opinions on the remarks of Lord Denning, M.R., in R. v. Barnsley, Metropolitan Borough Council [1976] 3 All E.R. 452, at p. 457, that in that case the action which was being considered was an administrative decision "but even so, the court has jurisdiction to quash it. Certiorari will lie to quash not only judicial decisions, but also administrative decisions." It must be recalled, however, that R. v. Barnsley, ex parte Metropolitan Borough Council addressed the grant of a licence to erect a stall by the authority having statutory power to regulate the market. The gravamen of the judgments was that since the decision to terminate the licence of the applicant in that case affected his common law rights as a stall holder, the authority had a duty to act judicially in deciding whether to terminate the licence. This they had failed to do when they took evidence at the relevant enquiry from the prosecuting party in the absence of the applicant, and allowed the prosecutor to be present at their deliberations. The rules of natural justice had been breached, so that certiorari would lie. Interestingly, Scarman, L.J., thought that as between the owner of the market and the stall-holder there is a contractual element, yet "there is also an element of public law; the enjoyment of rights conferred on the subject by the common law. I think, therefore, on analysis, it is clear that the corporation in its conduct of this market is a body having legal authority to determine questions affecting the rights of subjects. I think also it must follow that it is under a duty to act, in the broadest sense of the term, judicially because, although the end product of a negotiation between the corporation and a would-be trader is a contractual licence, that licence is available in accordance with the discretion conferred by a statute which regulates a common law right." (p. 458 h-I)

Incidentally, in that case reference was made to Lord Reid's opinion at p. 73 D in the report of Ridge v. Baldwin [1963] 2 All E.R. 66 (H.L.) referring to cases which "deal with decisions by ministers, officials and bodies

"of various kinds, which adversely affected property rights or privileges of persons who had no opportunity or no proper opportunity of presenting their cases before the decisions were given." Lord Reid, in adverting to those cases, made the point that what the watch committee had to consider was not a simple question whether or not the appellant should be dismissed, especially when "it is now clear that the appellant's real interest in this appeal is to try to save his pension rights." The administrative action impinged on the rights of the chief constable against whom no charge had been made before the watch committee, nor any enquiry held into charges of negligence.

In R. v. Liverpool Corp. exp. Taxi Fleet Operators [1975] 2 All E.R. 589, Lord Denning, M.R., said at p. 591 c-d:

> "It is perhaps putting it a little high to say they are exercising judicial functions. They (the corporation) may be said to be exercising an administrative function. But even so in our modern approach, they must act fairly; and the court will see that they do so."

And Roskill, L.J., at p. 596 said:

> "The power of the Court to interfere is not limited as was once thought to those cases where the function in question is judicial or quasi judicial. The modern cases show that this court will intervene more widely than in the past. Even where the function is said to be administrative, the court will not hesitate to intervene in a suitable case if it is necessary in order to secure fairness."

It thus becomes clear that merely to say that this was a case of an administrative decision for which certiorari lies to quash is not an accurate statement of law. Such administrative decision must affect some right or property which needs to be protected upon due enquiry. In the instant case, the appellant cannot sucdessfully complain that he had lost any contractual rights when his engagement with the Council was terminated, according to the contractual terms. Although this initial stand by Mr. Macaulay was abandoned by him after conceding to Mr. Henriques' argument that the concept of natural justice does not arise in cases of termination of employment according to contract, I think the matter sufficiently important to consider in greater detail the complaint in Ground 4 of the Grounds of Appeal which challenged, "firstly, assuming that Council or Committee of Council existed at the time those decisions were taken unfairly because (I) the applicant was led to believe that he would be heard and (II) was in fact not given an opportunity to dispute or challenge any allegations

"which affected his appointment and tenure of office; secondly, these decisions were not made in good faith." This suggestion of lack of bona fides has not been proven and must, in my view, properly be shown by the appellant.

It is not enough to indicate that the respondents had, by terminating the contract of the appellant deprived him of the opportunity to exercise a right to appeal. The specific complaint was that the two respondents had led the appellant to believe that his appeals against suspension would be heard, but by terminating his employment they took steps to see that his appeals were not heard. Supportive of this argument, Mr. Macaulay placed heavy reliance on the principle lately reiterated by the decision of the Privy Council in Attorney General of Hong Kong v. Ng Yuen Shim [1983] 2 All E.R. 346. The principle is, that where a public body or official had raised legitimate or reasonable expectations that a hearing would be held before any official action would be taken against a person in the particular circumstances of the case, the court should intervene by certiorari if the official or public body acts contrary to the announcement or declaration which raised those legitimate or reasonable expectations. Lord Fraser of Tulleybutton envisaged that "the expectations may be based on some statement or undertaking by, or on behalf of the public authority which has the duty of making the decision if the authority has, through its officers, acted in a way that would make it unfair or inconsistent with good administration for him to be denied such an enquiry." (p. 350 h) He further said at p. 351 g - h:

> "The justification for it is primarily that, when a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty. The principle is also justified by the further consideration that, when the promise was made, the authority must have considered that it would be assisted in discharging its duty fairly by any representations from interested parties and as a general rule that is correct."

The Privy Council applied the stated principle to the complaint by an illegal immigrant to Hong Kong, that despite the Government's announcement that the case of each illegal immigrant would be dealt with on its own merits, a "removal order" had been made against him as an illegal immigrant without the Hong Kong immigration authority giving him a hearing.

The Privy Council in Attorney General of Hong Kong v. Ng. Yuen Shim discussed the case of Re Liverpool Taxi Owners Association [1972] 2 All E.R. 589, which had earlier explored the application of the principle. In Re Liverpool

the Court of Appeal allowed an appeal against the refusal of an order of prohibition directed to the local authority prohibiting it from granting an increased number of taxicab licences, without first hearing any representations by the applicants or others having interest in the matter of the grant of such licences. This was because of a previous undertaking in that regard by the council. It is important to observe that the court order was limited to ensuring that the corporation followed a fair procedure by holding an enquiry before reaching a decision; provided such procedure was followed, the decision of how many licences should be issued was left with the corporation to whom it had been entrusted by Parliament.

What is singularly clear at this point is that those cases were eminently concerned with the relationship between a public authority and the members of the public whose rights had to be considered because those rights were affected by the decision of a public authority. So long as the public authority carried out in a fair manner the policy which had been determined upon the consonant discharge of its public duties would not be restricted by the courts. Speaking of the principle that a corporation cannot contract out of its statutory duties, Lord Denning, M.R., remarked in his judgment in Re Liverpool Taxi Owner's Association at p. 594:

> "But that principle does not mean that a corporation can give an undertaking and break it as they please. So long as the performance of the undertaking is compatible with their public duty, they must honour it."

While Roskill, L.J., saw no need and necessity for the Court to determine the numbers of taxi licences which was a matter of policy for the council, he nevertheless insisted that -

> "This Court is concerned to see that whatever policy the corporation adopts is adopted after due regard to all the conflicting interests." (p. 596)

These cases addressed the situation in which it was sought to redress the complaint by the citizen with remedies for the infringement of rights protected by public law. This redress is and has always been available on an application for judicial review whereby the superior courts exercise their supervisory jurisdiction over statutory tribunals. Lord Diplock in the course of his judgment in O'Reilly v. Mackman [1982] 3 W.L.R. 1096, distinguished the exercise of powers by a statutory tribunal "as contrasted with a domestic tribunal upon which powers are conferred by contract between those who agree to

to submit to its jurisdiction." (p. 1101 D) At p. 1100 G - p. 1101 B, he put the question in perspective as follows:

> "It is not, and could not be contended, that the decision of the board (of Visitors of Hull Prison) awarding him (the appellant) forfeiture of remission had infringed or threatened to infringe any right of the appellant derived from private law, whether common law right or one created by a statute. Under the Prison Rules remission of sentence is not a matter of right but of indulgence. So far as private law is concerned all that each appellant had was a legitimate expectation, based upon his knowledge of what is the general practice, that he would be granted the maximum remission, permitted by rule 5 (2) of the Prison Rules, of one third of his sentence if by that time no disciplinary award of forfeiture of remission had been made against him. So the second thing to be noted is that none of the appellants had any remedy in private law.
>
> "In public law, as distinguished from private law, however, such legitimate expectation fave to each appellant a sufficient interest to challenge the legality of the adverse disciplinary award made against him by the board on the ground that in one way or another the board in reaching its decision had acted outwith its powers conferred upon it by the legislation under which it was acting; and such grounds would include the board's failure to observe the rules of natural justice, which means their decision-making process, and I prefer so to put it."

The case itself was concerned with whether judicial review was the only remedy to bring the prisoners' claims against the prison visitors before the Court. In fact, their claims had been brought, as to three of the plaintiffs, by writ in the Queen's Bench Division of the High Court against the Board alleging that it had acted in breach of the Prison Rules and the rules of natural justice, and claiming a declaration that the Board's findings against them and the penalties awarded were void and of no effect. As to the fourth plaintiff, he started proceedings in the Chancery Division against the Home Office and the Board of Visitors alleging bias and claiming a declaration that the Board"s adjudication was void for want of natural justice. The context of the judgment of Lord Diplock (the other Law Lords concurring) was the new procedure for judicial review introduced by R.S.C. Ord. 53; what was at issue was whether such review could properly be sought by proceedings begun by writ or by originating summons instead of using the new procedure laid down by R.S.C. Ord. 53. The House of Lords dismissed the plaintiffs' appeal, in the terms of the headnote, that since all the remedies for the infringement of rights protected by public law could be obtained on an application for judicial review, as a general rule

it would be contrary to public policy and an abuse of the process of the Court for a plaintiff complaining of a public authority's infringement of his public law rights to seek redress by ordinary action and that, accordingly, since in each case the only claim made by the plaintiff was for a declaration that the Board of Visitors' adjudication against the plaintiff was void, it would be an abuse of the process of the court to allow the actions to proceed and thereby avoid the protection afforded to statutory tribunals. To quote Lord Diplock, at p. 1108 G-H:

> "So Order 53 since 1977 has provided a procedure by which every type of remedy for infringement of the rights of individuals that are entitled to protection in public law can be obtained in one and the same proceeding by way of an application for judicial review, and whichever remedy is found to be the most appropriate in the light of what has emerged upon the hearing of the application, can be granted to him. If what should emerge is that his complaint is not an infringement of any of his rights that are entitled to protection in public law, but may be an infringement of his rights in private law, and thus not a proper subject for judicial review the Court has power under rule 9 (3) instead of refusing the application to order the proceedings to continue as if they had begun by writ. There is no such power under the R.S.C. to permit an action begun by writ to continue as if it were application for judicial review ....."

The real emphasis by this case in our present circumstances is that the writ of certiorari is not to be sought otherwise than where a decision of any body of persons having legal authority to determine questions affecting the rights of citizens is questioned. It is not available to determine those rights where they are solely derived from contract. In all the cases where the last has to be decided the only, if not the principal remedy sought, was a declaration that the decision was null and void. Interestingly enough, as Lord Diplock pointed out at p. 1106 G-H:

> ".... from the 1950's onwards, actions for declaration of nullity of decisions affecting the rights of individuals under public law were widely entertained, in parallel to applications for certiorari to quash as means of obtaining an alternative remedy."

Further:

> ".... of those cases in which this practice was approved, Vine v. National Dock Labour Board [1957] A.C. 488 and Ridge v. Baldwin [1964] A.C. 40 involved as well as questions of public law, contracts of employment which gave rise to rights under private law."

To this I would add the case of Stevenson v. United Road Transport Union [1977] 2 All E.R. 941. A trade union official had been dismissed from an office which

he held under a union rule that an official of the union held office so long as he gave satisfaction to the executive committee of the union. The official was not informed before the hearing of the charges against him, so that he could deal with those charges. At the hearing a request for the charges and the evidence to be put into writing was refused. The question was whether the executive committee was bound to comply with the rules of natural justice. The Court of Appeal (Buckley, Orr and Goff, L.JJ.) dismissed the appeal of the union who contended -

> "... that the principles applicable here are those applicable to the dismissal of a servant by his master, whereas Lord Reid pointed out in Ridge v. Baldwin, the master is under no obligation to hear the servant in his own defence (and see Malloch v. Aberdeen Corpn. [1971] 2 All E.R. 1278 at 1282, [1971] 1 W.L.R. 1578 at p. 1581). Counsel for the union contends there is no circumstance in this case which elevates the plaintiff's position to that of an officer whose tenure of his office or whose status as an officer cannot be terminated without his being given an opportunity to answer any charges made against him or any criticism of him or of his conduct."

This summary by Buckley, L.J., of the pertinent questions raised on the case led him to say that -

> "In our opinion, it does not much help to solve the problem to try to place the plaintiff in the category of a servant, on the one hand, or of an officer, on the other. It is true that in Ridge v. Baldwin Lord Reid divided cases of dismissal, into three classes: (1) dismissal of a servant by his master; (2) dismissal from an office held during pleasure, and (3) dismissal from an office when there must be something against a man to warrant his dismissal, but he goes on in the next paragraph to point out, that although in a 'pure master and servant case,' the master need not hear the servant in his own defence, dismissal of a servant by a master can resemble dismissal from an office where the body employing the man is under some statutory or other restriction as to the grounds on which it can dismiss its servants. Moreover, the problem is not confined to termination of contracts of employment, it may arise in relation to the termination or denial of a privilege as in Russell v. Duke of Norfolk [1949] 1 All ER. 109, or of an office which does not involve any contract of employment as in Green v. Amalgamated Engineering Union [1971] 1 All ER 1148; [1971] 2 QB 175. In our judgment a useful test can be formulated in this way. Where one party has a discretionary power to terminate the tenure or enjoyment by another of an employment or an office or a post or a privilege is that power conditional on the party invested with the power being first satisfied on a particular point which involves investigating some matter on which the other party ought in fairness to be heard or to be allowed to give his explanation or put his case? If the answer to the question is yes, then unless, before the power purports to have been exercised, the condition has been satisfied after the other party has been given a fair opportunity of being heard or giving his explanation or putting his case, the power will not have been well exercised."

In Stevenson's case, the contractual nature of his employment gave the plaintiff a status which rendered dismissal a serious matter for him. It necessitated the union executive committee advising the union official in what way they thought his performance of his duties was unsatisfactory. He was not so informed, and the hearing was held without his representations being heard. In the instant case, the appellant had been informed in the course of internal correspondence between himself and the officers abovementioned of the charges against him. In his letter of the 14th February, 1983, the Technical Director had pointed out to the appellant: "Unless marked improvement is shown in your performance within the next two months, serious thought will be given to terminating your services." The appellant replied in writing refuting those grave charges and expressing his intention to appeal. The question therefore arises whether the appellant in this case can show a right over and above the rights created by the contract of employment? Is this a case of a "pure master and servant" which term Lord Wilberforce in Malloch v. Aberdeen Corpn. [1971] 1 W.L.R. 1578 H.L. at 1596 A took to mean "cases in which there is no element of public employment or service, no support by statute, nothing in the nature of an office or a status which is capable of protection."? It was the further view of Lord Wilberforce that "If any of these elements exists, then, in my opinion whatever the terminology used, and even though in some inter partes aspects the relationship may be called that of master and servant, there may be essential requirements to be observed, and failure to observe them may result in a dismissal being declared to be void." Lord Wilberforce indicated that the case with which he was then dealing had "incidents of the employment laid down by statute or regulations, or code of employment, or agreement," other than the fact that the officer was appointed at pleasure. There the officer or servant normally has no right to be heard before being dismissed. Notwithstanding, Lord Wilberforce indicated that the Courts would have to examine "the framework and context of the employment to see whether elementary rights are conferred upon him expressly or by necessary implication and how far these extended." Malloch was an instance in which there were strong indications that the school teacher had a right to be heard in appropriate circumstances.

At the same time, note the dissenting Judgments of Lord Morris of Borth-y-Gest and Lord Guest. Lord Morrison of Borth-y-Gest expressed his opinion on the basis that although the appellant held the necessary qualifications

as a teacher he had failed to register as required by statute. The contention for the appellant that the resolution of the education authority to dismiss him was contrary to natural justice should be looked at with regard to the terms upon which the appellant was employed. In this light, Lord Morris said:

> "If the basis of his service was such that the relationship of master and servant was established, then subject to compliance with statutory requirements and subject to the giving of appropriate notice (or to appropriate payment in lieu thereof) there could be dismissal for good reason or for bad reason or for no reason. It is clear that the education authority proceeded on the basis that they could not lawfully continue to employ the appellant."

Later in his judgment Lord Morris opined:

> "If the legal basis of the appellant's employment was that of master and servant, then he had no complaint in law if he was not heard; nor could he complain of dismissal even had it been decided upon for an inadequate reason or for an erroneous reason or even for no reason." (P. 1586 E)

According to Lord Guest the appellant had no right to be heard:

> "Under the terms of the appellant's employment the respondents were entitled to dismiss him for any or for no reason and were therefore not bound to give him a hearing before they dismissed him..... It was at one stage of the argument suggested as I understood it, that because the respondents were a public body they were bound to give the appellant a hearing before dismissing him. This really is unsupportable and, if right, would involve that any public corporation would be bound to give every employee a hearing before dismissing him. This is not in my view, the law of Scotland, and, so far as I am aware, has never been suggested on the other side of the border."
> (P. 1592 A)

None of the foregoing opinions vitiate the observations of Lord Wilberforce at p. 1597 B - D. He cautioned:

> "The vigour of the principle (of dismissal without notice where employment is at pleasure) is often in modern practice mitigated for it has come to be perceived that every possibility of dismissal without reason being given - action which may vitally affect a man's career or his pension, makes it all the more important for him in suitable circumstances to be able to state his case, and, if denied the right to do so, to be able to have his dismissal declared void."

The divergent judgments in Malloch were based on the interpretation of the particular statute although there was agreement on the basic principles. In the instant case, Mr. Macaulay intimated that the proceedings were brought to achieve erasure from the record of suspensions referred to in the motion; also to remove from the record of a statutory body an unlawful decision of a purported termination consequent on these suspensions. He contended that these were within the foregoing views of their Lordships. I do not agree.

But has he chosen the proper medium to achieve his objective? Yes, he said. Because where a body of persons such as the respondents, seeks to act without authority or in excess of jurisdiction, and have so acted, the appropriate remedy is application for certiorari, and the fact that no objection is taken is irrelevant because in such a case, certiorari goes ex debito justitiae. Certiorari is the only effective and convenient remedy, even assuming that there are other remedies. He discounted the efficacy of an application for a declaration against the Council on the ground that the applicant would have to allege that his employment had been terminated by the Council. Were the Council to plead that it did not terminate the employment that would be a complete answer to the application. As I have already pointed out, in the event and in the circumstances of this case, the Council when eventually appointed had, in effect, ratified the decision of the respondents, and the Council was in fact represented by the same attorneys-at-law, who have argued against this appeal. This representation at all times was on the basis that procedurally, the Council was a party interested. Additionally, argued Mr. Macaulay, the applicant would not be granted a declaration against the respondents, because such a declaration would be ineffective. The same argument would apply to an action for damages for wrongful termination of employment. He did not mention the force of applying for an injunction to prevent them from taking such action as would deprive him of the right to exercise his appeal.

All this, of course, underscores the rule that contracts of employment are beyond the scope of certiorari and prohibition. This was stressed in Regina v. British Broadcasting Corporation, exp Lavelle [1983] 1 W.L.R. 23, where Woolf, J., at p. 25 made two pertinent remarks. The first -

> "An application for judicial review has not and should not be extended to a pure employment situation. Nor does it, in my view, make any difference that what is sought to be attacked is decision of a domestic tribunal such as the series of disciplinary tribunals provided for by the B.B.C."

Secondly -

> "Notwithstanding the present wording of Order 53 r. 1 and s. 31 of the Act of 1981., the position remains the same, and if this application had been confined to an application for an order of certiorari, in my view, there would be no jurisdiction to make the order sought."

These remarks were expressed during the consideration of a contract of employmnet, whereunder there was a restriction on the termination of the employment of the applicant. The contract provided for an enquiry before dismissal and there was a

right of appeal. The question was whether the employee's common law right not to be wrongfully dismissed had been infringed. And, of course, the cognate question was whether there was jurisdiction in the court to enforce contractual obligations by injunction and certiorari. Woolf, J., answered those questions by dismissing the application on the ground that the prerogative orders of mandamus, prohibition and certiorari had never been used to enforce private rights and they were inappropriate for enforcing the performance of an employer's obligations to his employee. Although the provisions for judicial review in Ord. 53 r. 1, and s. 31 of the Supreme Court Act 1981, affected the Court's procedure and extended the remedies available to the court so that its orders were not confined to the prerogative orders, the jurisdiction of the Court had not been extended to reviewing decisions of private or domestic tribunals by this means.

The beneficent amendment of the law introduced by the English legislation and Rules of the Supreme Court do not apply in Jamaica law, but the cases referred to do stress the rules governing the distinction between the particular principle of administrative law contended for and the terms of a mere contract of employment which circumscribes the rights of the employee. Absent the concession by Mr. Macaulay, I would have been constrained on the authorities and on the interpretation of the relevant contractual documents to conclude that his application on the basis of a breach of natural justice could not be maintained.

The foregoing express the reasons why I agree with the Court's decision that this appeal be dismissed.