



[2013] JMSC CIVIL 19

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CLAIM NO. 2010 HCV 4652**

**BETWEEN                      ANDREW ROBINSON    CLAIMANT**  
**AND                                      NATIONAL IRRIGATION COMMISSION LTD   DEFENDANT**

**Derrick McKoy and Carlton Williams instructed by Williams McKoy & Palmer for the Claimant**

**Wentworth Charles and Floyd Greene instructed by Wentworth Charles & Company for the Defendant**

**Employment – Judicial Review – Internal Enquiry –Whether Natural Justice Applies – Whether Remedy of Judicial Review Available.**

**Heard: 20<sup>th</sup>, 21<sup>st</sup>, 22<sup>nd</sup> November 2012 & February 14, 2013**

**CORAM:        JUSTICE DAVID BATTS**

[1]     By Order of this court dated the 28<sup>th</sup> day of October 2010 leave was granted at an ex parte hearing for judicial review of:

- a.        “The conduct and proceedings of the oral enquiry established by the respondent to enquire into the charges set out in letter dated 24<sup>th</sup> June 2010 laid out against the appellant”;
- b.        “Of the decision of the Respondent made on the 24<sup>th</sup> June 2010 to terminate the employment of the Applicant.”

[2]     Pursuant to that permission, the claimant on the 10<sup>th</sup> November 2010 filed a fixed Date Claim Form in which the following relief was claimed:

1. Certiorari to quash the decision of the Defendant made on 24<sup>th</sup> June 2010 to terminate the employment of the applicant.
2. A DECLARATION THAT THE Defendant's Disciplinary Code, particularly at section 9.4 thereof, and in its failure to provide for a process of appeal from a decision made at an oral enquiry, contravenes chapter 10 Regulation 10.4 of the **Government of Jamaica Staff Orders for the Public Service 2004**, and is therefore void.
3. A DECLARATION that any oral enquiry or proceedings including the oral enquiry which was held on 10<sup>TH</sup> May 2010 into the charges laid against the claimant, and which is based upon the application of the Defendant's Disciplinary Code, is null and void, as being in breach of Chapter 10 Regulation 10.4 of the **Government of Jamaica Staff Orders for the Public Service 2004**.
4. A DECLARATION that the decision by letter dated 24<sup>th</sup> June 2010 to terminate the employment of the claimant was tainted by actual or perceived bias, and is therefore void.
5. A DECLARATION that the proceedings of the oral enquiry set up by the defendant to enquire into the charges laid against the claimant was tainted with bias.
6. A DECLARATION that the decision by letter dated 24<sup>th</sup> June 2010 to terminate the employment of the claimant is null and void, as being in breach of Section 9.1 of the Defendant's Disciplinary Code.
7. A declaration that the purported oral enquiry held on the 10<sup>th</sup> of May 2010 in which the applicant was denied legal representation was in breach of the principles of natural justice and therefore void.
8. Any further order, relief and/or directions as this court deems fit in the circumstances.

[3] That claim is supported by an affidavit of Andrew Robinson filed on the 10<sup>th</sup> November 2010.

[4] On the 29<sup>th</sup> November 2010, the defendant filed an acknowledgement of service by its attorneys-at-law indicating an intent to defend the claim.

[5] On the 9<sup>th</sup> December 2010 at the first hearing date, the Honourable Mr. Justice Brooks made Case Management Orders including among other things an Order for specific disclosure. The defendant was represented at that hearing.

[6] On the 7<sup>th</sup> January 2011, the defendant filed the affidavit of Milton Henry in response to the affidavit of Andrew Robinson. Having responded in detail to each factual averment, the affidavit ends at paragraph 40 with the words:

*“As it (sic) regards to paragraph 2, I humbly ask that this Honourable Court dismiss the application for Judicial Review as I have been advised and verily believe that the application is misconceived and is an abuse of the court’s process.”*

[7] On the 19<sup>th</sup> May 2011, an application for further specific disclosure by the claimant came on for hearing and the court made an Order which vacated an earlier trial date and directed disclosure of certain minutes of Board Meetings. Orders for the filing of skeleton arguments were also made. On the 7<sup>th</sup> October 2011, a second affidavit of Andrew Robinson responding to the affidavit of Milton Henry was filed.

[8] The claimant’s skeleton arguments were filed on the 12<sup>th</sup> October 2011. On the 14<sup>th</sup> October 2011, the defendant filed its skeleton arguments, paragraphs 1 to 20 of which contained as a preliminary issue, the submission that the claim ought to be dismissed in limine because this court has no jurisdiction.

[9] On the 27<sup>th</sup> October 2011, the matter was adjourned to the 9<sup>th</sup> February 2012 when it was further adjourned to the 17<sup>th</sup> May 2012. The Minute of Order discloses no reason. On the 17<sup>th</sup> May 2012 it was again adjourned to the 20<sup>th</sup> November 2012 with a direction that the bundles were to be located and placed on file. On the 20<sup>th</sup> November 2012 it was adjourned to the 22<sup>nd</sup> November 2012. On this latter date the matter commenced before me.

[10] On the 22<sup>nd</sup> November 2012 and prior to the commencement of the hearing both parties pointed out to the court that the law firm at which I had previously been a partner had acted in an advisory position to the 2<sup>nd</sup> defendant prior to the commencement of legal action. Each counsel indicated they did not wish me to recuse myself and urged that the matter be started. I of course had no prior knowledge of the matter and until then had not realized that the National Irrigation Commission Ltd. had been a client of the firm. Given the time since the filing of the action and the fact it had been previously adjourned as well as the remonstrations of both parties, I decided to commence hearing the matter.

[11] The evidence was by affidavit and there was no request by either party for cross-examination.

[12] The claimant's evidence may be summarised as follows:

- a. Until 30<sup>th</sup> June 2010 he had been "engaged" to the defendant as a Director of Finance and Corporate Planning.
- b. Until his termination, his performance had been exemplary. He was employed in 1994 on a contractual basis and in 1995 was appointed to the pensionable post of corporate accountant. He was later promoted to chief accountant and then director finance and corporate planning a position held for 10 years. He has acted as managing director and chief executive officer. In 2009 his last performance appraisal occurred and he was given an overall "above average" rating.
- c. By letter dated 2<sup>nd</sup> August 2009, the defendant's Board of Directors wrote to the claimant as follows:

*"Dear Mr. Robinson,*

*The Board of Directors of the National Irrigation Commission Ltd., at its meeting held on August 12, 2009 unanimously voted on a motion of no confidence in you as Director of Finance and Corporate Planning. With this in mind, I have been instructed by the Board*

*to advise you to proceed on leave with immediate effect August 13, 2009.*

*The Board will communicate with you as soon as all evaluations are finalized and decisions taken.*

*Yours truly  
National Irrigation Commission Ltd*

*Oliver Nembhard  
Chairman"*

- d. On the 17<sup>th</sup> August, the claimant wrote to the Permanent Secretary in the Ministry of Agriculture. He did this he says because the defendant "reports" to the Ministry of Agriculture. In that letter he sought the ministry's intervention.
- e. By letter dated 9<sup>th</sup> November 2009, the defendant wrote to the claimant outlining certain charges against him "in accordance with clause 7.1 of the Commissions Grievance Procedure and Disciplinary Code. The letter requested the claimant's written reply to the charges within seven (7) days, and indicated that a failure to reply within the time-frame will mean:

*"The Board will proceed to make its determination on the matter without considering any input from you."*

This letter was also under the claimant's signature.

- f. On the 16<sup>th</sup> November, the claimant wrote a detailed response to the charges. In addition to answering the allegations, the claimant in that letter requested sight of certain documentation and indicated his intention to rely on sections of the Commissions Grievance Procedure and Disciplinary Code.

- g. The defendant's response was by letter dated 9<sup>th</sup> April 2010 which stated:

April 9, 2010

Mr. Andrew Robinson  
7 Executive Gardens  
Willowdene  
Spanish Town  
St. Catherine

Dear Mr. Robinson

**Re: Disciplinary Action for Alleged Performance Issues**

Reference is made to all our earlier correspondence concerning the above captioned and your response dated the 16<sup>th</sup> November 2009. After reviewing your response and other documentations attendant to the matters at hand, disciplinary proceedings have been instituted in respect of the following charges:

**CHARGES**

1. Unsatisfactory Performance

Particulars: That you failed to advise the Board of the accurate status of the NIC's Fixed Assets.

2. Unsatisfactory Performance

Particulars: That you breached the Procurement procedures by fragmenting the purchase (breaking up of invoices) to avoid the need for approval of the Board regarding NIDP motor vehicle purchases.

3. Unsatisfactory Performance

Particulars: That you used IDB funds to disburse payments in relation to NIDP Motor Vehicles when you were advised to use GOJ funds.

4. Unsatisfactory Performance

Particulars: That you failed to provide the Board with requested information in a timely fashion.

5. Breach of Clause 4.4(v) of the Staff Orders for the Public Service.

Particulars: That on the 12<sup>th</sup> of August 2009 you had discussions with the news media on NIC staff matters contrary to clause 4.4(v) of the Staff Orders for the Public Service

**Oral Enquiry**

As per your election in your response for an oral enquiry to be conducted, I have appointed Mrs. Deirdre English Gosse, Director of Corporate and Legal Services to conduct same. Mrs. English Gosse will inform you of the date, time and place of the hearing once she has concluded those arrangements.

**Interdiction**

In light of the institution of disciplinary proceeding and pursuant to Clauses 1.1 and 1.2 of the Disciplinary Code you are hereby interdicted and shall receive three fourths of your salary with immediate effect until a determination in this matter.

Yours sincerely,  
NATIONAL IRRIGATION COMMISSION LIMITED

Stanley Rampair  
Chief Executive Officer

c. Mr. Oliver Nembhard  
Chairman, NIC

Mrs. Deirdre English Gosse  
Director Corporate & Legal Services, NIC

Encls.

- h. A list of documents enclosed with that letter was attached. Included among them was "copy section 4.4 of the Staff Orders for the Public Services relating to public employees and the media."
- i. By letter date 22<sup>nd</sup> April 2010, Deirdre English Gosse, the director of corporate legal services, wrote instructing the defendant to

attend an enquiry, the purpose of which was to decide whether "disciplinary action is appropriate."

The enquiry it was pointed out would be conducted under the procedures set out in the NIC disciplinary code. The letter then continued:

*"Pursuant to the code a work colleague or a trade union representative can accompany you at the enquiry. Please note that I am exercising my discretion not to allow you to be represented by an attorney-at-law.*

*At the inquiry you may ask questions, present evidence, call witnesses and raise points about any information provided in the witness statements. If you wish any witness to be available to answer questions (sic) you should notify them in advance of the enquiry."*

- j. By letter dated 26<sup>th</sup> April 2010, the claimant requested certain further information and documentation and then stated:

*"In your letter you indicated that you will exercise your discretion not to allow me to be represented by my attorney-at-law. However, I have already consulted and retain (sic) an attorney-at-law and ask to be represented by my attorney-at-law.*

*In light of the fact that you have and continue to receive instruction from the Chairman and the Board of Directors of the National Irrigation Commission Ltd., on this issue I believe that you cannot be impartial in your findings and I request that the arbitrator in this matter be the Permanent Secretary, Ministry of Agriculture and Fisheries Mr. Donovan Stanbury."*

- k. The response from Deirdre English Gosse, Director of Corporate & Legal Services of the Department came on the 29<sup>th</sup> April 2010 and concluded as follows:

*"Please also note that your retaining counsel is of no moment as I have exercised my discretion based on legal advice not to allow you to be represented by counsel.*



*With regard to your request concerning the appointment of Mr. Stanbury as arbitrator I have been pursuant to Section 9.1 of the disciplinary code and if you recall I have not been personally involved in the matter."*

- I. On the 3<sup>rd</sup> May 2010, the defendant attended the enquiry in the company of his attorney-at-law. On that date Mrs. Deirdre English Gosse stated:

*"Good morning, I have to apologise for the late start. I am going to introduce myself. I am Deirdre English Gosse. I am the Director of Corporate & Legal Services and I am the Chairperson for the enquiry. Well, I have to say that we have to adjourn the enquiry for a number of reasons. The main reason is that I indicated in my letter to Mr. Robinson, that I exercise my discretion under Section 9.4 of the National Irrigation Disciplinary Code not to allow Mr. Robinson legal representation.*

*Mr. Robinson has sought today, to bring his attorney to the enquiry. Now as a result, the matter has to be adjourned for another day.*

*Mr. Robinson just to say that the next time when it is reconvened, it is that you have your attorney, then we will have to adjourn the matter again and review all the information, all the particulars, and make my recommendations to the CEO concerning the matter."*

The attorney-at-law then endeavoured to make certain interventions and prayed in aid the principles of natural justice. However, Mrs. English Gosse did not change her decision not to allow legal representation.

- m. The claimant was by letter dated 3<sup>rd</sup> May 2010 again invited to a hearing on the 10<sup>th</sup> May 2010. That letter stated in part:

*"With regard to legal representation, please be advised that my position remains the same, that is to say, that based on legal advise I am exercising my discretion not to allow you to be represented by your attorney. I will furnish you shortly with my reasoned determination on the matter."*

- n. At the hearing on the 10<sup>th</sup> May 2010, the claimant again attended with his attorney-at-law, Mrs. English Gosse again refused to allow the attorney audience. Her dialogue with the attorney culminated in the following exchange:

*"Mrs. English Gosse: No Mr. Williams. Could you kindly excuse yourself from the meeting?"*

*Mr. Williams: I am excusing myself madam from your meeting but I wish it to be on record that if my client bring an attorney that the matter would be adjourned and not that the matter would proceed."*

- o. The matter thereafter proceeded in the absence of the attorney and the claimant more than once protested his inability to adequately represent himself. At one stage he stated when offered the opportunity to cross-examine a witness:

*"My ability to cross-examine Miss Attalla is impaired because I have been refused representation from my attorney."*

- p. On the 29<sup>th</sup> June 2010, he received "through his attorney" a letter of termination signed by the Chairman of the Board. The letter states:

June 24, 2010

Mr. Andrew Robinson  
7 Executive Gardens  
Willowdene, Spanish Town  
St. Catherine

Dear Mr. Robinson

**Re: Disciplinary Action for Performance Issues**

Reference is made to previous correspondence on the above-captioned matter.

After reviewing your responses, other documentation and the report from the Disciplinary Inquiry, the following are our determination in respect of the charges laid against you:

**1. Unsatisfactory Performance**

Particulars: That you failed to advise the Board of the accurate status of the NIC's Fixed Assets.

Finding: This charge was substantiated  
**Unsatisfactory Performance**

That you breached the Procurement procedure by fragmenting the purchase (breaking up of invoices) to avoid the need for approval of the Board regarding NIDP motor vehicle purchases.

Finding: This charge was substantiated.

**2. Unsatisfactory Performance**

Particulars: That you used IDB funds to disburse payments in relation to the NIDP Motor Vehicles when you were advised to use GOJ funds.

Finding: This charge was not substantiated.

**3. Unsatisfactory Performance**

Particulars: That you failed to provide the board with requested information in a timely fashion.

Finding: This charge was substantiated.

**4. Breach of Clause 4.4 (v) of the Staff Orders for the Public Service**

Particulars: That on the 12<sup>th</sup> of August 2009 you had discussions with the new media on NIC staff matters contrary to clause 4.4 (v) of the Staff orders for the Public Service

Finding: This charge was not proceeded with.

Section 9.7 of the Disciplinary Code of the National Irrigation Commission states:

*The appropriate Director shall consider the findings and shall take action in accordance with the provisions of the schedule.*

Clause 14 of the Schedule for the Disciplinary Code provides that an employee may be reprimanded in the first instance where he/she is found to be operating unsatisfactory, suspended in the second instance and dismissed in the third instance.

In December 2008 you were reprimanded for the offence. In the instant matter three charges have been substantiated against you. In light of the matters set out above we have no alternative but to terminate your contract of employment effective June 30, 2010.

In keeping with section 3(5) of the Employment (Termination and Redundancy) Payments Act you are entitled to eight weeks pay in lieu of notice of termination of your contract of employment. Additionally, you are entitled to a refund of the contributions made to the NIC Pension Scheme. If you wish, these will be paid over to you or you may elect to have the payment deferred until you attain the age of retirement. Please find enclosed our cheque with a breakdown of the calculations that were made.

If you have not already done so, kindly return items belonging to the NIC which you may have in your possession, including your identification and health cards.

Yours faithfully  
NATIONAL IRRIGATION COMMISSION LIMITED

Oliver Nembhard  
CHAIRMAN  
/ON

- q. The letter of termination was sent under cover of letter dated 29<sup>th</sup> June 2010 to the claimant's attorney and had enclosed with it a letter outlining the breakdown of calculations regarding emoluments, pay advice and a cheque payable to the claimant.

- r. The redacted minutes of the defendant's Board of Directors discloses that prior to the enquiry the Board took the decision to send the claimant on leave effective 13<sup>th</sup> August 2009 for the same issues raised in the enquiry. Further, that at a meeting of the Board on the 24<sup>th</sup> March 2010, Mrs. English Gosse provided a report on the claimant's "performance issues." She also at that time requested written statements for the Board among other things. On the 2<sup>nd</sup> June 2010, Mrs. English Gosse advised the Board that three charges had been substantiated and two dismissed.
- s. The decision to dismiss the claimant was taken by the Chairman of the Board after discussions with Mrs. English Gosse, Mr. Charles and Mr. Rampier who were not Board Members. Ratification of the Chairman's decision to dismiss the claimant was sought and obtained at the Board meeting of the 30<sup>th</sup> June 2010.
- t. The claimant contends that the Chairman, the Board and the enquirer in collusion with each other, were "complainant, investigator, prosecutor and adjudicator in their own cause in breach of the principles of natural justice."

[13] The defendant's evidence insofar as it adds to or differs from the claimant's evidence, may be summarised as follows:

- a. The defendant was incorporated in about 1986 and in 2001 was licensed to be the Irrigation Authority to carry out functions of the Irrigation Act.
- b. The defendant consists of 15 persons who are appointed by the Minister of Agriculture in accordance with nominations submitted by the customers of the company, Ministry of Agriculture, Agro 21 Corporation Limited and the Underground Water Authority and are collectively referred to as a Board of Directors.
- c. The defendant's Memorandum of Association enable it to hire a managing director, secretary and any agent necessary to carry out its functions.
- d. As Director of Finance and Corporate Planning, the claimant's duties included:
  - i Organising and administering the functions of procurement, tender and contracts.
  - ii Ensuring the maintenance of adequate and efficient controls over the Commissioner's expenditure and

that funds are spent in conformity with established policies and procedures.

- iii Preparing/coordinating reports to the managing director and the Board in response to their enquiries/instruction.
  - iv. Maintaining day-to-day financial controls by ensuring the timely preparation and submission and other financial reports.
  - v Ensuring the development and implementation of a comprehensive purchasing and supply management programme including control over procurement and distribution of equipment material and supplies.
  - vi Ensuring that specific requirements, terms of loans and grants from funding agencies are met in accordance with agreements signed on behalf of the Government of Jamaica and the defendant.
- e. Nothing in the Defendant's Grievance Procedure and Disciplinary Code precludes the Chairman of the Board from initiating disciplinary proceedings.
- f. At no time did the director appointed to conduct the oral enquiry take any instructions from the chairman of the board with regard to her functions and duties in relation to the enquiry.
- g. The hearing originally set for the 3<sup>rd</sup> May 2010 was rescheduled to facilitate the claimant finding a suitable representative and this was communicated by letter dated 3<sup>rd</sup> May 2010 which stated:

*"Further to correspondence and our subsequent meeting of even date, please be advised that the disciplinary inquiry has been rescheduled for Monday, May 10 at 1:30 p.m.*

*With regard to legal representation, please be advised that my position remains the same, that is to say, that based on legal advice I am exercising my discretion not to allow you to be represented by your attorney. I will furnish you shortly with my reasoned determination on the matter.*

*Please also be advised that after due consideration I have decided to admit in Dwight Clacken's evidence on the mentioned date."*

The letter is signed by Deidre English Gosse, Director Corporate and Legal Services.

- h. The claimant was given a fair hearing and was at no time deprived of any right or principle of natural justice.
- i. The decision of the enquiry's chairperson was made pursuant to Section 9.4 of the Defendant's Grievance Procedure and Disciplinary Code.
- j. The Defendant's Disciplinary Code and Procedure is in full compliance with criteria in Section 10.4 of the Government of Jamaica Staff Orders and in particular Section 10.4. These Staff Orders are in any event not applicable to the claimant.
- k. The claimant was given the opportunity to present his case at an oral enquiry where he could have questioned the witnesses who gave evidence against him and called witnesses to support his case in the presentation of his own defence with the assistance of a work colleague or a trade union representative and he chose to do none of the aforementioned.
- l. Paragraphs 33-39 of Milton Henry's affidavit filed by the defendant traverses and responds to issues concerning the claimant's alleged misconduct and the matters considered by the enquirer.

[14] Both parties filed written submissions and each counsel also made oral submissions before me. The defendant's written submissions commenced with a preliminary point as to jurisdiction. That is that judicial review is an inappropriate remedy where that which is being considered is an employer-employee relationship.

[15] Given that the evidence was already all in and the submissions on the preliminary and the substantive issue were likely to cover the same ground, I allowed the parties to submit in relation to both the preliminary and the substantive issue at the same time.

[16] The claimant's counsel submitted that the claimant had been deprived of his legal right to legal representation and that the tribunal holding the enquiry was not properly constituted and was tainted with bias. The defendant had a duty in law to act

in accordance with principles of law applicable to public authorities. He cited **Evelyn v Chichester** (1970) 15 WIR 410 and **R v Barnsley ubc exp. Hook** [1976] 1WLR 1052.

[17] The claimant also relied on a passage from **Albert Fiadjoe's Book Public Law** p. 180:

*"The principles of natural justice represent nothing more than the imposition of certain procedural safeguards on a body or person whose decisions may affect the rights interests and legitimate expectations of others."*

It was submitted that the claimant as an employee of the defendant was entitled to a fair hearing and was led to believe he would have a fair hearing prior to dismissal.

[18] Reliance was also placed on the words of Lord Bridge in **Lloyd v McMahon** 1987 AC 625 at 702-3:

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

[19] The duty applies to all stages of the proceedings and the claimant relied on **R (on the application of G) v X School Governors** [2009] EWHC 504 (Admin) to support a submission that the gravity of the allegation and the potential impact on the claimant's working life rendered the applicant entitled to legal representation. The right to legal representation in the form of assistance in cross-examination was supported by **R (on the application of S) v Knowsley NHS Primary Care Trust et al** [2006] EWHC 26 (Admin).

[20] The claimant submitted also that he had a legitimate expectation of fair treatment.



[21] In his oral submissions, the claimant's counsel responded to the defendant's preliminary point by submitting that three categories of relationships were relevant. Firstly, employment at pleasure, secondly a master and servant and thirdly a master and servant relationship to which statutory duties applied.

[22] Service at pleasure (the first category) was now largely redundant and was inapplicable to this case. However, as the defendant was a public body then the case fell within the third category. In any event submitted Mr. McKoy if one were to treat the issues raised as contractual the real issue in the case will have been ignored. The defendant submits Mr. McKoy, was a public body. The claim concerned more than an issue of employment, it has to do with the manner in which public bodies are expected to conduct themselves. They are not expected to act arbitrarily or unfairly and the claimant had a legitimate expectation that he would be so treated. Mr. McKoy submitted that the Government Staff Orders applied and these gave a right to legal representation. He pointed to:

- a. The no confidence vote of the Board which preceded the hearing.
- b. The fact that the sole enquirer had participated in previous deliberations of the Board concerning the matter.
- c. The fact that the sole enquirer, and not a panel as provided for in the Staff Orders, was appointed.
- d. That the claimant's legal representative was excluded from the hearing so advice and representation were both denied.
- e. This was a private company which carried out public functions.

[23] Mr. McKoy submitted that even if this is an employer-employee matter there was sufficient public interest to make judicial review an appropriate remedy. One issue of public interest is how inferior tribunals ought to conduct themselves. Should they have regard to the principles of natural justice? Finally, he submitted that in any event, the court could allow the claim to continue as if begun by claim form and give the appropriate directions. He distinguishes the cases in which such a transition was not allowed on the basis that in those cases certiorari was the only remedy claimed and that

was not available at Common Law. In this case, declarations are being sought and declaratory relief is available at common law. Mr. McKoy distinguished **Karen Thames v National Irrigation Authority** Claim no. 2009 HCV 04341 on the basis that there no hearing was in issue as none was conducted, and it was a pure employer-employee relationship in issue. He relied upon **R v NWC ex parte Reid** (1984) 21 JLR 62 to support the proposition that procedure was reviewable even in the context of employment.

[24] The defendant's skeleton submissions are primarily concerned with the preliminary issue. The Court of Judicial Review they submit has no jurisdiction to hear the matter as it is founded in the private law of contract. Only decisions made in a public law context are amendable to judicial review. The fundamental question submits Mr Charles, is whether the defendant's decision has any public law element to it. Reliance is placed upon **Vidyodaya University v Silva** [1964] 3 AER 865 at 870 as well as **Regina v The Norman Manley Law School ex parte Janet Mignott** suit M9 of 2002 per Daye J:

*"Notwithstanding the public importance of the council, the law school, the principal and their respective public duties this does not per se introduce any element of public law in disputes between them and their staff to attract the remedies of administrative law."*

[25] Justice Daye relied upon a passage in **R v East Berkshire Health Authority ex parte Walsh** [1984] 3 AER 425, that there is:

*"No warrant for equating public law with the interest of the public" because "the interest of the public per se is not sufficient."*

[26] Even if the defendant carries out public functions only decisions or actions made in the public law context are susceptible to judicial review. For this proposition the defendant cites **Blackstones Civil Procedure** 2005 para 74.5 p 889 and **R v Dr. A. Binger et al and Scientific Research Council ex parte Chris Bobo Squire** 21 JLR 118 per Carberry JA at 125-126.

[27] The defendant submitted that the claimant was an employee and not the holder of a public office, and the defendant is not a government department but derives its power to employ and dismiss staff as a private company under the Companies Act. The words of Mangatal J in **Charles Ganga Singh v The Betting Gaming & Lotteries Commission** suit M 1567 of 2002 at paragraphs 13 are preyaed in aid:

*“It seems clear to me that the letter of November 12, 2001 which was signed by Mr. Ganga Singh constituted a contract of employment between the Commission and the applicant. He was an employee of the Commission and was not the holder of any public office. Persons holding public office are appointed by the Governor General acting on the advice of an independent body, in the case of civil servants, by the Public Services Commissions and they enjoy certain constitutional protection for their post, see Section 125 of the Constitution and the Public Service Regulation 1961. The Commission is a typical Statutory Corporation and is not a department of government.”*

[28] The defendant submitted in conclusion on the preliminary issue that:

*“It is therefore respectfully submitted that the relationship between the claimant and the defendant is governed by a simple contract of employment which is not buttressed by any statutory procedures as to how he is to be dismissed, nor is it injected or underpinned by any public law element and as such does not give rise to the exercise of the court’s discretion in relation to the administrative law remedies of certiorari and declaration that have been sought by the claimant. Further, any issues of unfair dismissal have to be dealt with by the Industrial Disputes Tribunal and cannot be dealt with by the Supreme Court. Consequently, the court should not exercise its power under CPR Rule 26.9(3) and/or 56.10.”*

[29] On the substantive issues, the defendant’s written submission averred that the Government of Jamaica Staff Orders for the Public Service 2004 (Staff Orders) do not

apply to the claimant who is not a public officer. In any event the Defendant's Grievance Procedure complies with the main tenets of the Staff Orders.

[30] The defendant submits that the issue is not whether the dismissal was fair but whether it was in accordance with his contract of employment. The case is, in the words of Lord Reid in **Ridge v Baldwin** [1964] AC 40:

*"So the question is 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."*

[31] The defendant's counsel submitted in the further alternative that even if applicable the principles of natural justice were adhered to because the claimant was given full particulars of the allegations against him along with all witness statements. He was given a fair hearing and had the opportunity to question all witnesses and an "unconnected and disinterested" party was duly appointed as adjudicator.

[32] Finally, the defendant submitted that the denial of legal representation does not contravene the principles of natural justice.

[33] In the first place, the Defendant's Grievance Procedure and Disciplinary Code at Section 9.4 states:

*"At an oral enquiry the responsible director may in his discretion permit the person or authority preferring the charges or the employee to be represented by an officer or other employee in the service of the National Irrigation Commission or by an attorney-at-law or trade union representative."*

[34] Legal authority relied upon was **Enderby Town Football Club Ltd v The National Football Association Ltd** [1971] 1 AER per Lord Denning MR:

*"The case thus raises this important point: is a party who is charged before a domestic tribunal, entitled as of right to be legally represented? Much depends on what the rules say about it. When the rules say nothing, then the party has no absolute right to be*

*legally represented? It is matter for the discretion of the tribunal. It is master of its own procedure; and, if it, in the proper exercise of its discretion, declines to allow legal representation the courts will not interfere. Such was held in the old days in a case about magistrates. See **Collier v Hicks**. It is the position today in the tribunals under the Tribunal of Inquiry (Evidence) Act 1921. I think that the same should apply to domestic tribunals."*

[35] Finally, the defendant posited that the Grievance Procedure was not an edict of law nor was it part of the claimant's contract of employment.

Reliance was placed on **Charles Ganga Singh v Betting Gaming & Lotteries Commission** M156 of 2002 per Mangatal J:

*"That the Commission was not obliged to have a hearing and that the applicant was accorded more rights than were contracted for. Secondly, Parliament did not require the Commission to contract with its employees upon any particular terms of the Act. There is no evidence to suggest that the procedure as to hearings adopted by the Commission became a part of the applicant's contractual entitlement or affected the clear power of dismissal set out in the letter of the 14<sup>th</sup> November 2001 in anyway and therefore such procedures as were used were in the nature of internal guidelines and had no contractual status."*

[36] In his oral submissions, Mr. Wentworth Charles elaborated upon the written submission. He conceded that the defendant is 99% owned by the Government of Jamaica but that it is a private company operating by way of a licence under the Irrigation Act. He regarded as settled in law that:

- a. The disciplinary code is a guideline with no legal effect.
- b. The code was never incorporated in the claimant's contract of employment.
- c. The Staff Orders are not applicable as the claimant is not a public servant.

[37] He referred in detail to the evidence and submitted that in any event all requirements of natural justice were observed. The evidence that the defendant acted on legal advice demonstrates an absence of animus. He submitted that the motion of no confidence did not detract from the fact that the hearing was fair. He went through in detail the cases contained in the Bundles of Authorities which were helpfully provided to the court. **R v East Berkshire Health Authority ex parte Walsh** [1984] 3 AER 425 was relied on as authority for the proposition that judicial review was inappropriate and a conversion of procedure should not be allowed.

[38] In answer to the question as to how would his client be prejudiced if the court were to order that the matter continue as if commenced by claim, he responded:

- a. That that process required witness statements.
- b. There was other evidence they would wish to call from the Chairman and the head of the tribunal.

[39] In his reply Mr. McKoy for the claimant submitted that it was fundamental to our legal system that persons not be deprived of the opportunity to have legal advice. He distinguished the cases cited and relied on by the defendant on the basis that in none was there an oral hearing which was being challenged for unfairness. Furthermore, there would be no prejudice to the defendant if the matter were continued as if commenced by claim because the remedy of a declaration was the same.

[40] I understood that it was common ground between the parties that payments in lieu of notice had been made at the time of dismissal. The claimant was primarily interested in a declaration and not damages or re-employment as his concern was for his reputation.

[41] At the close of submissions on the 22<sup>nd</sup> November 2012 at 11:40 a.m., I adjourned to consider my decision. I have done so and express gratitude to both counsel for the thoroughness of their respective presentations and the authorities provided.

[42] The remedy now known as Judicial Review was the Court's method of exercising its supervisory jurisdiction over inferior or administrative tribunals. As related by the Honourable Mr. Justice E. Brown in **Karen Thames v National Irrigation Commission** Claim 2009 HCV 04341 (unreported judgement dated 11<sup>th</sup> November 2011), it was once thought that only public bodies could be reviewed. However, the modern trend has allowed for review of both public and private bodies where public functions are involved. In his judgment Justice E. Brown cites two (2) cases where private bodies were reviewed judicially, **Regina Beer (trading as Hemmer Trout Farm) v Hampshire Farmers Markets Ltd** [2004] 1 WLR 233 and **Griffith v Barbados Cricket Association** [1989] 41 WLR 48.

[43] I would add to that list cases cited by the claimant: **R (Molinaro) v Kensington and Chelsea RLBC** [2001] EWHC Admin. 896 and **R on the application of G v The Governors of 'X' school** (18 March 2009) [2009] EWHC 504 [Admin.], in which public bodies were judicially reviewed for conduct in the context of private law contracts. See also the dictum of the Master of the Rolls Lord Donaldson, in **R v Panel on Take Overs and Mergers ex parte Data Fin Plc** [1987] Q B 815 at 838, which further supports Justice Brown's conclusion that:

*"It is clear that Judicial Review will not be denied simply because a company is registered as a private entity."*

[44] Having completed an exhaustive review of the cases most if not all of which have also been cited before me, Justice Brown stated, paragraph 50:

*"If it is not already apparent that this Limited Liability Company is an extraordinary creature a closer look at its profile should make this pellucid. Firstly, if the company needs additional sum for its activities, these sums may be granted from the Consolidated Fund. Secondly, the company is required to submit an annual budget to the Minister a head of the new financial year. Thirdly, the company must submit to the Minister a financial statement of the past year's revenue and expenditure. Fourthly, a report of all its activities for the previous calendar year must be*

*submitted to the Minister. All the foregoing documents are in due course tabled in the Houses of Parliament. Paragraph 51 in consequence of the foregoing, the conclusion that the NIC is a private entity with a public reach is as irresistible as it is inexorable. It is crystalline clear that in the performance of its functions the NIC is imbued with the identity of the Executive and being so imbued by the nature of the power given to it under the Act, its decisions are subject to Judicial Review: exparte Datafin, supra. The Court therefore agrees with the submission of learned counsel for applicant that the NIC is an entity whose decisions ought to be subject to review. However, that the body is subject to review does not mean that the impugned decision is similarly susceptible.”*

[45] The respondent in that case was the same entity which is the defendant before this Court. Having said all that, however, Justice E. Brown refused Judicial Review. He did so because he concluded that the issue before the Court was whether or not the respondent had been lawfully dismissed. Since therefore the relationship was one of employer and employee and applying **Ganga Singh (above), Malloch v Aberdeen Corp.[1971] 2 AllER 1278 and Bobo Squire(above)**, he decided that there was no jurisdiction to grant Judicial Review of the decision to dismiss. Justice E. Brown also considered that the disciplinary code applied by the respondent was not the result of legislation but rather was applied by agreement of the parties. This fact distinguished **exparte Reid (above)**. The learned Judge therefore decided that judicial review as a remedy was not available and that the applicant's remedy lay in a civil action for breach of contract. Justice E. Brown contemplated making an Order pursuant to Rule 56.10 (3) to allow the applicant to seek a remedy at common law. However, he exercised his discretion to refuse it as the applicant had received the requisite payment in lieu of notice and therefore was entitled to no other remedy. Interestingly no Order was made as to Costs.

[46] I respectfully agree with and adopt the reasoning of the Honourable Mr. Justice E. Brown in the cited case. The legal position in relation to the defendant and its status can be regarded as settled.



[47] There are however two (2) important points of distinction between the case I have to consider and the case decided by Justice E. Brown:

- a. In the **Karen Thames** case there was no disciplinary hearing held prior to dismissal, and hence no inferior tribunal to review.
- b. The claim in **Karen Thames** was for a declaration, certiorari and damages, related to dismissal whereas in the instant matter counsel for the claimant has made it clear that the claimant is interested primarily in declaratory relief related to the conduct of the enquiry.

[48] These distinguishing features enable this court to exercise its supervisory jurisdiction and review the conduct of the inferior tribunal established by the respondent. The remedy sought in that regard is not for breach of contract of employment but rather the exercise by the Supreme Court of a supervisory jurisdiction over the conduct of an inferior tribunal established by a public body or a body charged with public duties.

[49] In this regard the court will be concerned that the tribunal appointed was without bias (real or apparent) and that the defendant received a fair hearing. Insofar as the question of bias is concerned it is manifest that Mrs. English Gosse was involved in the matter. She had prior to her appointment as sole enquirer, been instrumental in the collection of statements and had even been privy to the vote of no confidence. I hold that her appointment was in breach of the principles of natural justice, and there was a real likelihood of bias.

[50] Further, the sole enquirer refused the claimant access to legal advice and representation. This is most troubling and contravened the constitutional right of the citizen to a fair hearing. There are informal associations in which ones livelihood or great material benefits are not at stake in which "legal representation" may lawfully be declined. However, where one's livelihood or professional reputation is at stake, the Court has not recognized that such an exercise of power is lawful. It is unfair and infringes essential principles connected to the rule of law if legal representation in such a context is to be denied.

[51] Even if legal representation might be lawfully denied, there is no case with which this Court is familiar that a person was denied the right to legal advice. That is although the lawyer may not actively participate, the individual is entitled to his lawyer's presence and advice. In this matter which concerned the claimant's livelihood and professional reputation the lawyer was expelled from the proceeding. Certainly, this denial of access to legal advice offends basic principles of individual rights and contravenes the constitutional right to a fair hearing. Any purported rule or contract which excludes access to legal advice would be void for being against public policy.

[52] Furthermore, on a true construction of the relevant code, which is to be interpreted in the manner most likely to preserve a right than to depart from it, there is no jurisdiction to refuse legal advice. The rule quoted in this judgment at paragraph 33 above is clearly giving discretion to:

*"Permit ... [the applicant] to be represented by [an officer, other employee, attorney-at-law or trade union representative]."*

The important words are "be represented by,". By expelling the lawyer from the meeting, the enquirer precluded the applicant receiving advice while he represented himself. The rule does not go that far. In this regard the case of **R(on the application of DrS) v Knowsley NHS Primary Care Trust** [2006] EWHC 26 (Admin.) (All England Official Transcripts (1997 – 2008) cited by the claimant is instructive. In a context where the relevant rule was silent as to the question of legal representation, the chairman informed the claimant, that he could have a legally qualified person present to advise him but "such a person will not be able to question or cross examine witnesses or address panel members directly."

The court decided that "It may be that in many cases legal representation would be unnecessary but the question in each case must be whether the doctor can reasonably be expected to represent himself or whether legal representation is necessary in order to enable him to be able properly to present his case. I do not see

that this can be a matter of presumption but must depend on the circumstances including particularly the complexity of the allegations and the evidence.”

[53] For the above-stated reasons therefore I hold that this Court has jurisdiction to exercise its supervisory control over the inferior tribunal appointed by the defendant.

[54] This court will exercise its discretion to refuse certiorari because the recommendations of Mrs. Gosse have already been acted upon and the claimant has been dismissed. In any event the enquirer made no decision to which certiorari could attach. Certiorari would therefore be ineffective and the Court will not act in vain. Similarly, declarations related to the lawfulness of the dismissal are refused as in judicial review proceedings the court is not making a determination of private contractual issues. In any event remedies related to “fairness” of dismissals in employer and employee matters are the exclusive preserve of the Industrial Disputes Tribunal which has that statutory jurisdiction (as per the judicial construction of “unjustifiable”).


[55] This court would, had it been necessary, exercised its discretion pursuant to Rule 56 (10) (3) and order that the matter be treated as if commenced by Claim and Particulars of Claim. Declaratory relief is known to the Common Law Courts and is useful where litigants need matters of law or practice clarified.

[56] The evidence on affidavit covers all relevant issues. In this regard it is manifest that the provisions of the disciplinary code applied and were incorporated in the claimant’s contract of employment. Further, on a true construction of the rules, the refusal of legal advice was not contemplated even if self representation was. In the result therefore upon the matter continuing as if commenced by claim and the affidavits standing as pleadings the undersigned would for the reasons, stated above have granted the same declaratory relief.

[57] It is therefore, (in accordance with paragraphs 5 and 7 of the Fixed Date Claim as amended to accurately reflect the decision of the court), Declared :

1. That the oral enquiry set up by the defendant to enquire into charges laid against the defendant was tainted with bias.
2. That the oral enquiry held on the 10<sup>th</sup> May 2010 and from which the applicant's legal adviser was excluded, was unfair and in breach of the principles of natural justice.

[58] Costs are awarded in favour of the claimant to be taxed if not agreed.

  
.....  
David Batts  
Puisne Judge