IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2009HCV04341

BETWEEN	**KAREN THAMES**	**APPLICANT**
A N D	**NATIONAL IRRIGATION COMMISSION LTD.**	**RESPONDENT**

Mrs. Denise Senior-Smith instructed by Oswest Senior-Smith & Co. for Applicant.

Mr. Wentworth Charles and Mr. Floyd Green for Respondent.

Heard: 7th & 9th June and 11th November, 2011

JUDICIAL REVIEW – PRIVATE CORPORATION LICENSED TO CARRY OUT LEGISLATIVE FUNCTIONS – WHETHER CORPORATION SUBJECT TO JUDICIAL REVIEW – MASTER AND SERVANT – WHETHER CERTIORARI AVAILABLE – DISCIPLINARY PROCEDURES – WHETHER APPLICABLE IRRESPECTIVE OF EMPLOYMENT RELATIONSHIP

CORAM: E. BROWN, J (Ag.)

[1] The applicant, Karen Thames, by amended Fixed Date Claim Form filed on the 25th February, 2011, sought a number of reliefs. In particular, the applicant urged the court to make:

(i) A declaration that the removal of the applicant from the post of Director of Corporate and Legal Services/Company Services (Actg.) is void.

(ii) An order of certiorari to quash the decision of the respondent terminating the employment of the applicant with the respondent.

(iii) An award of damages in a sum equivalent to what the applicant would have earned for the period from the date of her termination to March 2011. This sum should include all allowances that the applicant was in receipt of and sums in lieu of all vacation leave for which she would have been entitled had she been at work during the said period.

BACKGROUND

[2] Miss Thames was first employed to the respondent in February of 1988 as a Personnel Assistant, under a contract terminable at the end of two years. Her employment continued until 1999. In 1999 she was promoted to Manager, Human Resources and Industrial Relations. In January, 2008 Miss Thames was appointed to act as Director of Corporate and Legal Services/Company Secretary. On the 1st August, 2008, Miss Thames proceeded on vacation leave to resume on the 19th instant.

[3] Whilst on vacation leave, Miss Thames received a letter from Mr. Milton Henry, Acting Chief Executive Officer, on behalf of the Board of the respondent, dated 12th August, 2008. In that missive the Board informed Miss Thames that contracts prepared by her were in breach of Government of Jamaica Guidelines. Mr. Henry advised that, "subsequent to the oral enquiry, the Board has established a Disciplinary Committee to carry out a full investigation and conduct the necessary hearings on the issue." To this end, Miss Thames was advised of her interdiction as of the 19th August, 2008, with the concomitant one quarter reduction in salary. Additionally, she was requested to submit

a written report to Mr. Henry by 22nd August, 2008 at 4 p.m. Lastly, Miss Thames was advised, "you will be informed subsequently on the date for the disciplinary hearing."

[4] The requested report was duly submitted and its receipt acknowledged by Mr. Henry by letter dated 22nd August, 2008. Mr. Henry ended his letter of acknowledgement in the following way, "please be advised that you will be hearing from us shortly." Miss Thames says she understood this to mean she would be later advised of the hearing date. Indeed, she did not expressly indicate in her report that she wanted a hearing because of the earlier promise of notification of the hearing date.

[5] That notwithstanding, by letter dated 2nd December, 2008, under the hand of the chairman of the respondent, Mr. Oliver Nembhard, Miss Thames was advised of her dismissal from the employment of the respondent, effective 5th December, 2008. This letter made the claim that Miss Thames had been "cited under Clause 14 of the National Irrigation Commission Limited (NIC) Disciplinary Code for Unsatisfactory workmanship or work performance," by the Board's letter of 12th August, 2008. The breaches were again recited and reference was made to section 7.2 of the NIC's Disciplinary Code.

[6] The chairman's letter adverted to section 7.3 which speaks to the presumption of election for the charges to be dealt with on the basis of the written report in the absence of any election by the employee. The chairman pointed out that Miss Thames had not made any election when she submitted her written report. Consequently, the NIC proceeded with making a determination on the basis of her written report.

[7] Miss Thames swore that under the respondent's Grievance and Disciplinary Code the punishment for unsatisfactory workmanship or work performance is a

reprimand, for a first offence. She asserted in her affidavit that if she is found guilty of the offence, her termination would be in breach of the Code. Further, that the decision to remove her is not proportionate to the charge. However, Miss Thames contends that she committed no breach and that the decision to remove her was "arbitrary, oppressive, unlawful and unreasonable." Further, she was denied the opportunity to be heard.

[8] Miss Thames received a compensation package of three months' salary upon her termination. She has been unable to obtain employment in either the public or private sector since then. The burden of mortgage, personal and educational loans is being borne with the aid of family and friends. This has resulted in a lowering of her standard of living and a deleterious effect upon her health.

[9] Mr. Milton Henry responded to these allegations in an affidavit filed on the 7th June, 2008. After reciting the averments of the applicant concerning his letter of the 12th August, 2008, through to her notification of her termination, he made some pertinent asseverations. First, "that before the decision was taken to dismiss the applicant, the Commission gave full consideration to the Grievance Procedure and Disciplinary Code and also the principles of Natural Justice." Secondly, he was advised and verily believed that the action of the respondent "was not unlawful, unreasonable arbitrary or oppressive and that the allegations made against the applicant were serious breaches of the Government's Rules and Guidelines." Thirdly, he was advised and verily believed that Miss Thames "was reprimanded for her frequent late attendance at work on the 7th February, 1990. Lastly, he was advised and verily believed that the "Commission has not acted contrary to the principles of Natural Justice and that the

applicant's application for Judicial Review is wholly misconceived and an abuse of the process of the Court."

[10] In relation to the nature of the entity, Mr. Henry deposed that the respondent is a body corporate established under the Companies Act as the National Irrigation Commission Limited. The Commission comprises fifteen persons, all appointed by the Minister of Agriculture. The appointments are made pursuant to "nominations submitted by the Customers of the Company, Ministry of Agriculture, Agro 21 Corporation Limited and the Underground Water Authority." These are collectively referred to as the Board of Directors.

[11] Miss Thames rejoined in her affidavit of 19th July, 2010, that the respondent was established or incorporated as the Authority under the Irrigation Act and declared to be a body corporate. The Government of Jamaica owns 99 of its 100 shares and the chairman the remainder. In spite of its status as a body corporate, the Authority operated subject to "the Minister's Orders, the Irrigation Act, policy and procedures from the Ministry of Agriculture." The Authority is mainly financed from the Consolidated Fund and is required to submit an annual budget to the Minister. The Minister appoints the chairman in his own discretion and the Board is appointed at the Minister's leisure. Further, Agro 21 Corporation Limited no longer exists.

[12] Mr. Henry responded in an affidavit filed on the 7th October, 2010. As far as he was aware, Agro 21 existed as a registered entity. Additionally, the NIC in 2001 was licensed to be the Irrigation Authority to carry out the functions of the Irrigation Act. On the question of the Chairman's involvement, Mr. Henry neither admitted nor denied this.

However, he went on to assert that "the matter was deliberated at the level of the Board whereby the decision was taken to terminate the claimant's employment in accordance with her contract."

ISSUES FOR DETERMINATION

[13] The court is therefore called upon to decide, first, whether the NIC, a private corporation licensed to be the National Irrigation Authority, is a body that is subject to judicial review? And that is a question that must be answered by an examination of the source and nature of the power of the NIC. Secondly, if the NIC is found to be amenable to judicial review generally, is the decision which brought the parties to this court similarly susceptible? It has long been the law that the reviewability of a body does not make its every decision subject to review, simply by establishing that it's a body whose decisions come within the court's supervisory jurisdiction. Consequently, to decide if the impugned decision is reviewable, the court must define the nature of the relationship that existed between the parties. Lastly, if the application is refused, how should the court treat with the claim?

IS THE NIC SUBJECT TO JUDICIAL REVIEW?

[14] The first primary question is whether the NIC is a body whose decisions are amenable to judicial review? It has been said that "judicial review is the means by which the courts control administrative action by public bodies (including inferior courts and tribunals)": **Blackstone's Civil Practice 2010**. Consequently, this jurisdiction is of necessity supervisory and not appellate. Under rule 56.1 (2) of the **Civil Procedure**

Rules 2002, "Judicial Review" includes the remedies (whether by way of writ or order) of - (a) certiorari, for quashing unlawful acts; (b) prohibition, for prohibiting unlawful acts; (c) mandamus, for requiring performance of a public duty, including a duty to make a decision or determination or to hear and determine any case. The English equivalent says a claim for judicial review means, "a claim to review the lawfulness of - (i) an enactment; or (ii) a decision, action or failure to act in relation to the exercise of a public function." (CPR 54.1 (2)(a)).

[15] Since the landmark decision of **R v Panel on Take-overs and Mergers, *ex parte* Datafin plc [1987] QB 815**, the courts have been scrupulous to look at the type of function performed by the body sought to be reviewed, and not only the source of its power. Traditionally, the source of the power of the authority was held to be decisive of the question of reviewability. However, Lloyd L.J. in ***ex parte* Datafin**, at page 847, said that it was also helpful to look at the nature of the power. If the body is either exercising public law functions or, functions with public law consequences, that may be enough to bring the body within the bounds of judicial review.

[16] In a similar vein, Donaldson M.R. said, at page 838:

> *In all the reports it is possible to find enumerations of factors giving rise to the jurisdiction, but it is a fatal error to regard the presence of all these factors as essential or as being exclusive of other factors. Possibly the only essential elements are what can be described as a public element, which can take many forms, and the exclusion from the jurisdiction of bodies whose sole source of power is a consensual submission to its jurisdiction.*

In the case of a private company limited by guarantee, held to be susceptible to judicial review, the tipping point was its relationship with the Hampshire County Council: **Regina (Beer (trading as Hammer Trout Farm)) v Hampshire Farmers' Markets Ltd [2004] 1 WLR 233**. The company was said to have "stepped into the shoes of the council," per Dyson L.J. at page 48. In other words, by virtue of the activities it performed, the private company assumed the public persona of the public authority.

[17] It is clear that judicial review will not be denied simply because a company is registered as a private entity. A further illustration of this is **Griffith v Barbados Cricket Association (1989) 41 WIR 48**. The association was a body corporate, under a private Act of Parliament. Its enabling Act gave it power to promote and organize cricket in Barbados. From this matrix cricketers could progress to the international level. The association could affect the cricketing lives of the members. Insofar as the reviewability of the association was concerned, the court seems to have been impressed by the degree of its public reach, notwithstanding its private incorporation.

IS THE APPLICANT'S DISMISSAL REVIEWABLE?

[18] Even if a consideration of the nature of the power exercised makes the body amenable to judicial review, the application may yet be refused: ***ex parte* Datafin**, *supra*. In the area of dismissal of an employee, it can sometimes be a slippery slope. Cases of dismissal, it has been said, fall into three categories: 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, per Lord Reid in **Ridge v Baldwin [1964] A.C. 40, 65**. In cases falling within the first category, refined

as pure master and servant, there is no right to be heard before dismissal. The rationale for this is, from time immemorial the courts have said there cannot be specific performance of a contract of service. Further, the contract is terminable by the master at anytime, with or without cause. (**Ridge v Baldwin**, *supra*).

[19] Almost a decade later, Lord Reid expressed the point this way:

> *At common law a master is not bound to hear his servant before he dismisses him. He can act unreasonably or capriciously if he 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.* (**Malloch v Aberdeen Corportion [1971] 2 All ER 1278, 1294**)

The rationale for the exclusion of this category from judicial review is eloquently articulated by Lord Wilberforce in **Malloch's** case. He found two reasons supporting this argument. First, "in master and servant cases, one is normally in the field of the common law of contract *inter partes*, so that principles of administrative law, including those of natural justice, have no part to play." Secondly, reiterating that damages is the only remedy, "no order of 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."

[20] The status of the employee was one of two preliminary points the court was asked to decide in a claim for wrongful dismissal in **Eugennie Ebanks v Betting Gaming and Lotteries Commission** C.L. 2002/E020 delivered November 10, 2003 (unreported). The claimant contended that she was a public officer within the meaning

of the Jamaican Constitution. In rejecting this contention, the court accepted the defence submission that 'public service' means persons employed in the civil service and not to a statutory body. Further, appointment to a 'Public Office' can only be done by the Governor General, acting on the advice of the Public Service Commission. Since the claimant had not been so appointed, her appointment was "based on an ordinary contract of service." **Charles Ganga-Singh v The Betting Gaming and Lotteries Commission** M-156/2002 January, 11, 2005 (unreported), followed **Eugennie Ebanks**. It is of significance that both courts relied on ***ex parte Squire***, *infra*.

[21] A good starting point for Lord Reid's second category is 25 **Halsbury's Laws of England** 3rd Edition, paragraph 873:

> *The terms servant and service are in common use in relation to civil employment under the Crown, but, although some of the incidents which the law implies in an ordinary contract of service may be present in the relationship between the Crown and a person in such an employment, there are fundamental differences between that relationship and the ordinary relationship of master and servant. Thus, a person so employed holds his office during the pleasure of the Crown, unless it is otherwise provided by statute, and no action for wrongful dismissal can be brought by a discharged civil servant. It has consequently been said that an established civil servant is more properly described as an officer in the civil employment of Her Majesty, and similarly a police constable, although he may be regarded as in certain senses a servant of the Crown, is more accurately described as a holder of an office than as a servant.*

[22] Cases under the rubric of the second category, account for all servants and officers of the Crown, with a few notable exceptions. These exceptions are judges and others whose tenure is governed by statute. Like the servants in the first category, these employees have no antecedent right to be heard before dismissal. The reason undergirding this is "as the person having the power of dismissal need not have anything against the officer, he need not give any reason." The consequence of this is, since there is no duty to give reason, the court "cannot determine whether it would be fair to hear the officer's case before taking action." (**Ridge v Baldwin** *supra*, 66).

[23] The duty to give reason was the issue in **R v Civil Service Board, *ex parte* Bruce [1988] 3 All ER 686**. Before going on to deal with the question of the requirement to give reason, May L.J. considered the argument of the reviewability of the decision. The learned Lord Justice concluded that in the absence of a contract of service between the applicant civil servant and the Crown there was a sufficient public law element in the applicant's dismissal, warranting judicial review: ***ex parte Bruce,*** *supra* p. 694. However, he opined that cases where a civil servant alleged unfair dismissal, judicial review should be granted only in exceptional circumstances.

[24] In respect of the duty to give reason, the learned judge suspended a decision. He however referred to what was said on the subject in two earlier cases. First, in **Alexander Machinery (Dudley) Ltd v Crabtree [1974] ICR 120,124**, per Donaldson P:

> *"... in the absence of reasons it is impossible to determine whether or not there has been an error of law. Failure to give reasons therefore amounts to a denial of justice and is itself an error of law ... The overriding test must always be: is the tribunal providing both parties with the material which will*

enable them to know that the tribunal has made no error of law in reaching its findings of fact?'

That statement was contrasted with Lord Lane's critique in **R v Immigration Appeal Tribunal, *ex parte* Khan (Mahmud)** [1982] 2 All ER 420,423:

Speaking for myself, I would not go so far as to indorse the proposition set forth by Donaldson P that any failure to give reasons means a denial of justice and it is itself an error of law. The important matter which must be borne in mind by tribunals in the present type of circumstances is that it must be apparent from what they state by way of reasons first of all that they have considered the point which is at issue between the parties, and they should indicate the evidence on which they have come to their conclusions. Where one gets a decision of a tribunal which either fails to set out the issue which the tribunal is determining either directly or by inference, or fails directly or by inference to set out the basis on which it has reached its determination on that issue, then that is a matter that will be very closely regarded by this court, and in normal circumstances will result in the decision of the tribunal being quashed. The reason is this. A party appearing before a tribunal is entitled to know, either expressly stated by it or inferentially stated, what is it to which the tribunal is addressing its mind. In some cases it may be perfectly obvious without any express reference to it by the tribunal; in other cases it may not be. Second, the appellant is entitled to know the basis of fact on which the conclusion has been reached. Once again in many cases it may be quite obvious without the necessity of expressly stating it, in other cases it may not be.

[25] The absence of a right to be heard in this category was deferentially criticized by Lord Wilberforce in **Malloch v Aberdeen Corporation** *supra*, p. 1296. According to Lord Wilberforce,

> *"the rigour of the principle is often, in modern practice, mitigated for it has come to be perceived that the very 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."*

Consequently, while the court will not look askance at the right to dismissal without assigned reasons, that does not prevent scrutiny of the "framework and context of the employment" to ascertain if the servant has been thereby endowed with basic rights and the limits of those rights.

[26] In the third group of cases, an officer cannot be lawfully dismissed without having first informed him of his infraction or offence and giving him an opportunity to be heard in his own defence. Lord Reid found this proposition to be supported by an unbroken line of authority, an early example being **Bagg's Case** (1615) 11 Co. Rep. 93b, (**Ridge v Baldwin** *supra*, 66). **Ridge v Baldwin** left the line of authority undisturbed. In that case the appellant police officer was summarily dismissed without either having been advised of the charges or given an opportunity to be heard. The House of Lords held that decision to be void.

[27] **Ridge v Baldwin** and **Malloch v Aberdeen Corporation** were both cited, among a long list of other authorities in **R v Dr. A. Binger, N.J. Vaughan, and**

Scientific Research Council, *ex parte* Chris Bobo Squire (1980), 21 J.L.R. 118. The appellant was employed to the Scientific Research Council (the Council), a body corporate established by an Act of Parliament. The Council was neither a government department nor operating in the arena of public law. The appellant was appointed to the Council's staff for a period of three years. His contract of service was terminated, following a period of suspension. The appellant was paid three months salary in place of the three months notice he was entitled to under his contract of employment.

[28] In ***ex parte Squire***, *supra*, the appellant's letter of appointment made reference to the Council's "Terms and Conditions of Service". His appointment was made subject to that document, "as far as possible". Among the clauses of the Terms and Conditions of Service were several dealing with circumstances warranting disciplinary action, penalties, termination of employment, appeal and arbitration. The Court of Appeal held that the appellant neither enjoyed nor occupied a "Public Office". According to Carberry, J.A., "it was a simple master and servant or employer and employee relationship." Since that was the case, *certiorari* could not be granted.

[29] That the Council appeared to have been acting in accordance with the disciplinary procedure set out in the Terms and Conditions of Service seems to have been of no moment to Carberry J.A. Although it was unclear as to what extent those provisions had been incorporated into the appellant's contract, the arguments proceeded on the basis that they were. So, incorporated or not, the disciplinary procedure did not operate to transform the character of the relationship between the appellant and the Council. That transformation, however, did not go the distance to clothe the employee with public law rights. Indeed, this court is fully persuaded that if

the disciplinary procedure had the capability to so impact the employment relationship, that could not have escaped the perspicuous mind of the learned Justice of Appeal.

[30] Before coming to his decision, Carberry J.A. referred to what Lord Woolf had to say on the point in **R v British Broadcasting Corporation, *ex parte* Lavelle** [1983] 1 W.L.R. 23. At page 31 Lord Woolf said, "judicial review is confined to reviewing activities of a public nature as opposed to those of a purely private or domestic character." Lord Woolf found that the disciplinary procedure set up by the British Broadcasting Corporation was part and parcel of the private contract of employment. However, Lord Woolf went on to hold that the elaborate procedure set up by the B.B.C. had the effect of altering the common law position and endowing the employee with enforceable rights. Lord Woolf seems to have come to this position by adopting the proposition articulated in **Malloch** of subjecting to scrutiny the "framework and context of the employment."

[31] Elaborate disciplinary procedure was the centre piece of the decision in **R v The National Water Commission, ex parte Desmond Alexander Reid** (1984), 21 J.L.R. 62. By the passage of a resolution, the National Water Commission (NWC) established "elaborate procedures for the settlement of grievances with, and for the maintenance of discipline among its employees." The question before the Full Court was whether the tribunal set up to inquire into charges against the applicant was properly constituted under the disciplinary procedures. It was submitted on behalf of the NWC that the disciplinary procedures were "merely administrative internal rules and guidelines" which did not bind the NWC. That submission was predicated on the contention that the

disciplinary procedures were "neither incorporated in the applicant's letter of appointment nor were they approved by the Minister."

[32] This argument was rejected by the court. The reasoning of Smith, C.J. is rather poignant and bears quoting in full; for which the court craves the forbearance of the reader:

> *The Water Commission was a statutory corporation established for public purposes. Having adopted and published procedures to be followed in the exercise of its powers of disciplinary control over its employees, it was,... bound thenceforward by the principles of administrative law to follow those procedures until they were validly altered. Thus, if an employee was dismissed in breach of the procedural requirements he would have a right to challenge the decision by seeking a judicial declaration or an order of* ***certiorari****, as appropriate. The employees to whom the disciplinary procedures applied, therefore, held their employment subject to the observance of those procedures in relation to them without the need for their express incorporation into their terms of employment.*

[33] The learning seems to be, at first blush, where an authority has adopted and published elaborate disciplinary procedures, these become implied terms in the contract of service of the employees to whom they apply. These employees could only be dismissed upon proof of having committed a known breach, and in accordance with the established procedures. If Smith C.J.'s reasoning bears that interpretation with any ease, then the decision seems to fit squarely in Lord Reid's third category, namely, cases where a man cannot be dismissed unless there is something against him. This

would have the effect of transforming a pure master and servant relationship into a kind of hybrid, imbuing the relationship with a bundle of rights, as the reasoning of Lord Woolf demonstrates in ***ex parte Lavelle***. In the understanding of Lord Wilberforce, a pure master and servant case is one 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." (**Malloch**, *supra* p.1294). Once any of these ingredients exists, there will be the likelihood of corresponding "essential procedural requirements". A dismissal in breach of the procedural requirements may carry with it the consequence of annulment.

[34] Sir John Donaldson MR understood Lord Wilberforce to be saying that it is the presence of these legislative provisions which infuses the employment contract with the public law element requisite to invite administrative law remedies: **R v East Berkshire Health Authority, ex parte Walsh [1984] 3 All ER 425, 430**. In ***ex parte Walsh*** the legislative underpinning contended for utterly failed. Walsh sought to rely on legislation which restricted the authority's freedom to employ certain categories of staff. To succeed, the legislation must restrict the authority's freedom to dismiss.

[35] Therefore, and to reiterate, the conclusion that an employee is entitled to apply for judicial review rests on the major premise that there is an element of public law and, secondly, the minor premise that there has been a breach of some procedural requirement. So, it is a fallacy to suggest that the mere breach of procedural requirements, by that very fact only, results in the entitlement to administrative law remedies. In fact, the procedures may be "nothing more than guidelines" as was held in **Eugennie Ebanks v Betting Gaming and Lotteries Commission**, *supra.*

[36] Indeed, the real justification of the decision in ***ex parte Reid*** is to be found in the NWC's enabling legislation. The NWC's predecessor had been given the power to appoint and dismiss its employees. That power was carried forward by the saving and transitional clauses of the Act giving birth to the NWC. It was in the exercise of those powers that the Commission had by resolution adopted the procedures to which the court found the NWC bound. In essence, the resolution gave substance to the bare bones of the legislation; the former was grounded in the latter. This appears to be what Smith, C.J. meant when he said the Water Commission adopted and published procedures "in the exercise of its powers of disciplinary control over its employees". (***ex parte Reid***, *supra* p.65)

[37] The distinction between ***ex parte Reid*** and ***ex parte Lavelle*** appears to be the origin of the disciplinary procedures. In the former it sprang ultimately from the enabling legislation, while in the latter it emanated from the contract between the parties. It was this latter fact which led Lord Wolf to classify the tribunal set up pursuant to the disciplinary procedures as private or domestic. Consequently, *certiorari* was held to be inappropriate in ***ex parte Lavelle*** but appropriate in ***ex parte Reid***. In fact, but for the facility under the English rules of going on to treat the matter as one began by writ, the dust would have settled at this point in ***ex parte Lavelle***.

[38] The circumstances in which *certiorari* will issue were compendiously set out by Lord Parker in **R v Criminal Injuries Compensation Board**, ***ex parte Lain*** [1967] 2 All ER 770, 778:

> *The position as I see it is that the exact limits of the ancient remedy by way of* ***certiorari*** *have never been, and ought not to be, specifically defined. They have*

varied from time to time, being extended to meet changing conditions. At one time the writ only went to an inferior court. Later its ambit was extended to statutory tribunals determining a ***lis inter partes****. Later again it extended to cases where there was no* ***lis*** *in the strict sense of the word, but where immediate or subsequent rights of a citizen were affected. The only constant limits throughout were that it was performing a public duty. Private or domestic tribunals have always been outside the scope of* ***certiorari*** *since their authority is derived solely from contract, that is, from the agreement of the parties concerned. Finally, it is to be observed that the remedy has now been extended* (see **R v Manchester Legal Aid Committee, Ex p. R.A. Brand & Co. Ltd** [1952] 1All ER 480) *to cases in which the decision of an administrative officer is arrived at only after an inquiry or process of a judicial or quasi-judicial character. In such a case this court has jurisdiction to supervise that process. We have, as it seems to me, reached the position when the ambit of certiorari can be said to cover every case in which a body of persons, of a public as opposed to a purely private or domestic character, has to determine matters affecting subjects provided always that it has a duty to act judicially.*

APPLICANT'S SUBMISSION

[39] In general review will lie against any body charged with the performance of a public duty or power. Central government and bodies which derive authority from statute are susceptible to judicial review as they derive their powers from the prerogative or statute. The respondent came into existence under the Irrigation Act.

Sections 4, 56 and 57 of the Irrigation Act apply. The respondent is a branch of the public service under the Ministry of Agriculture, the main functions of which are to see to the development and maintenance of land irrigation.

[40] The proviso gives the company a public as opposed to a private or domestic character, having power to determine matters affecting subjects and a duty to act judicially. In essence the respondent is a company that has direct statutory authority and is therefore amenable to the supervisory jurisdiction of this Honourable Court. It is worthy of note as well that 99% of the Shares in the respondent is owned by the Government of Jamaica and every year there is tabled before the Public Accounts Committee of Parliament the accounts of the respondent.

[41] The subject matter of an application for judicial review is either a decision or a refusal by the respondent to make a decision. For this proposition counsel relied on **Council of Civil Service Unions v. Minister for the Civil Service** [1985] AC 374. It was submitted that the decision of the respondent is subject to judicial review based on either the origin of the respondent or the source of the decision-making power. It was also submitted that the decision was made based on a Code of Discipline that has statutory force and the allegation is not one that is contract based but involves a breach of Government Contract guidelines and consequently the Code. In respect of the applicant's eligibility to apply for judicial review, the submission was that pursuant to Rule 56.2 (1) of the **Civil Procedure Rules, 2002** as amended, an application for judicial review may be made by any person, group or body which has sufficient interest in the subject matter of the application. The applicant has sufficient interest as she is

adversely affected by the decision which is the subject of the application, under Rule 56.2 (2)(a), the submission went.

DEFENDANT'S SUBMISSION

[42] Mr. Charles submitted that the applicant's remedy does not lie in public law as her contract of service is neither protected by statute nor underpinned by statute in anyway. In essence there is no public law element. Counsel cited ***ex parte Bruce***, *supra* for this position. The submission continued, the assumption that the dismissal was unfair does not entitle the applicant to judicial review. The applicant, Mr. Charles said, is neither a public officer nor a part of the civil service. In brief, it is a simple master and servant relationship. The applicant having received all her entitlements upon termination is not entitled to anything further.

[43] Additionally, the NIC is a private company, incorporated in 1986, and not a statutory corporation. It operates by a licence granted by the Minister under section 4 of the Irrigation Act. In this regard, **Griffith v Barbados Cricket Association**, *supra*, is not germane to the issue before the court namely, an employment contract. The submission continued, neither is **Gunton v London Borough of Richmond upon Thames** [1980] 3 All ER 577 applicable. This case was distinguishable as the regulations were incorporated in the employment contract, it was submitted.

[44] In respect of the disciplinary code, Mr. Charles submitted, first, the disciplinary code has no contractual status. The code was never incorporated into the applicant's contract of service and so there was no obligation to act in conformity with it. Secondly,

the code is merely a guideline. For this latter proposition counsel relied on **Ganga-Singh v The Betting Gaming and Lotteries Commission**, *supra*.

[45] In a brief response, Mrs. Senior-Smith submitted that **Ganga-Singh** and **Eugennie Ebanks** are distinguishable on the facts. The submission was that the defendant having put in place a domestic tribunal the defendant was bound to use it. Counsel sought to bolster the point in this way, whatever the characterization of the relationship between the parties, once advised of a hearing, together with the promulgation of the code, administrative law principles apply. ***Ex parte Desmond Reid***, *supra* was cited in support of this proposition. Lastly, counsel sought to distinguish ***ex parte Squire*** on the basis that he was terminated according to his contract of service, not rules of disciplinary procedure.

REASONING

[46] It is a fact that the NIC is not a creature of statute. Its certificate of incorporation speaks eloquently to the fact of its provenance. Therefore, a consideration of the source of its power will yield an answer in the negative to question as to whether the NIC is subject to judicial review. The nature of the NIC's power must now be scrutinized to see if although the NIC speaks with the private voice of Jacob, its hand is the public hand of Esau.

[47] The licence issued to the NIC is to enable it to fulfill the legislative mandate under section 4 (2) of the Act. To be loyal to that mandate, the company must interact with citizens in several notable ways. First, the NIC may impose and collect charges. Secondly, the company may require the occupier of land within an irrigation area to

"maintain, or to keep clean and free from obstruction,... drains". Thirdly, to enter upon private property for the effective carrying out of its mandate and charging the costs incurred to the occupier. These costs the occupier is compelled to pay or face civil action in the Resident Magistrate's Court. In the event of disputes between itself and the citizen, there is no scheme under the Act for their resolution.

[48] On the contrary, provision is made for the airing of grievances in relation to the grant or refusal of licences by the company. An appeal lies to the Minister. The persons having the right to appeal to the Minister extends beyond the applicant to anyone who may be affected by the grant of the licence. The ability to grant licences is itself a public act. That is an act of the state, here delegated under licence. It is a truism to say that this is a function that is usually carried out by departments of either central or local government.

[49] That the Minister's decision would be subject to review by the courts can hardly be in doubt. It would certainly be a legal anomaly if the Minister's decision was reviewable but not that of the company, purely on the basis that it is a private company. What is to become of the citizen in the areas in which no dispute resolution mechanism is recognized by the Act? In the areas of the imposition of charges and requiring the maintenance, or otherwise, of drains, there is no conceivable private law remedy.

[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. First, if the company needs additional sums 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 ahead 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.

[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: ***ex parte Datafin***, *supra*. The court therefore agrees with the submission of learned counsel for the 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.

[52] What is being challenged is the manner of the applicant's dismissal from her employment with the respondent. How is that relationship to be characterized? By virtue of the provisions of section 67 of the Act, employees of a prescribed Authority continue to be employed by the NIC on the same terms and conditions. Those terms and conditions were never disclosed to the court. Indeed, the only evidence of the means by which the applicant came to be in the respondent's employ came from Milton Henry, the acting Chief Executive Officer of the respondent at the time the events giving rise to the present proceedings unfolded.

[53] According to Mr. Henry, the applicant's employment commenced with a contract for the duration of two years. The basis on which the applicant's employment continued to the date of termination was not laid out in the affidavits. However, Mr. Henry in his affidavit filed on 7th October, 2008 says the applicant was dismissed in accordance with her contract. The applicant asserts in her affidavit filed on 19th July, 2010, that she's a worker in the Public Service.

[54] There is no evidence that the applicant was appointed to the civil service in the manner contemplated by **Ganga-Singh**, *supra* and ***ex parte Squire***, *supra*. Consequently, the applicant does not fall within Lord Reid's second category of cases of dismissal: **Ridge v Baldwin**, *supra*. Neither is there any evidence of any legislative underpinning of her employment. There is no statutory restriction on the manner in which the applicant's employment may be terminated. Therefore, the applicant's dismissal does not fall within Lord Reid's third category of cases of dismissal, adumbrated in **Ridge v Baldwin**, *supra*. The conclusion then is that this case falls squarely within Lord Reid's first category, as counsel for the defendant submitted.

[55] Having concluded that the relationship between the applicant and the respondent was that of pure master and servant, is the applicant still entitled to judicial review as her counsel submitted? First, for the court to agree with that submission, the court would have to be able to say the law as is was declared in **Malloch** is wrong. That is, by virtue of the very nature of a pure master and servant relationship, public law remedies do not apply: no element of public law, no statutory underpinning and neither office nor status to protect. Even if there was justification for so holding, *stare decisis* (more precisely r*ationibus decidendis* – keep to decisions of past cases) restrains a judge at

first instance from so acting. Although **Malloch** is a decision of the House of Lords, that decision has been cited with approval by the Jamaican Court of Appeal, ***ex parte Squire***.

[56] Secondly, and to be absolutely fair to counsel for the applicant, the court cannot hold that the characterization of the relationship between the parties is irrelevant, against the background of the published disciplinary code. Two reasons impel the court to this conclusion. First, contract being the only evidence of the applicant's engagement with the respondent, the most favourable position for the applicant is to say that the disciplinary code was incorporated into the applicant's contract. Although neither of the parties adopted this position, the evidence is that both were acting in reliance on its provisions. The consequence of that is, the disciplinary tribunal was a purely domestic or private tribunal. Therefore, the public law remedy of *certiorari* is not available to quash its decision: ***ex parte Lain***, *supra*.

[57] The final reason for rejecting this submission is that, with all due deference to the applicant's counsel, the submission is misconceived. The events which resulted in litigation in ***ex parte Reid*** are deceptively indistinguishable from the instant case. However, the resolution inaugurating the disciplinary code in ***ex parte Reid*** had the requisite legislative underpinning. In the case before this court, the disciplinary code stands alone; more precisely, there is no evidence of its provenance. Without that legislative authentication, the submission of learned counsel for the respondent that the code is only an internal guide, commands agreement. Indeed, that is what the court held in **Eugennie Ebanks**, *supra*. So, ***ex parte Reid*** is distinguishable on the law. And being so distinguishable, does not support the proposition of the applicant.

[58] The applicant having failed to wrap herself in the judicial blanket of ***ex parte Reid***, her application is left exposed to the prevailing temperatures of a pure master and servant relationship. That being the case, the applicant had no right to be heard before dismissal: **Malloch v Aberdeen Corporation**, *supra*. Although the applicant is of the view that the NIC was unreasonable and capricious in the manner of her dismissal, that does not entitle the applicant to public law remedies. Even if it is accepted as a fact that the NIC so acted, the applicant's remedy is in the field of private law, that is, a claim for breach of contract: **Malloch v Aberdeen Corporation**, *supra*. Consequently, the application for judicial review must be refused, notwithstanding the finding that the NIC is a private company with a public reach.

[59] Having refused the application, the remaining issue is how to treat with the claim for damages. Under **Civil Procedure Rule, 2002**, Rule 56.10 (3), the court may "direct that any claim for other relief be dealt with separately from the claim for an administrative order." This is something the court is competent to do at any stage. A court, however, should not act in vain. The evidence is that the applicant received three months' salary instead of the requisite notice of dismissal. With that there was no quarrel. That was the applicant's entitlement upon dismissal. Therefore, there is nothing to litigate. Accordingly, the court declines to give the directions contemplated by Rule 56.10 (3). In keeping with the general rule encapsulated in Rule 56.15 (15), the court makes no order for costs.