BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

BVIHCV2005/00313

BETWEEN:

WENDELL NICHOLS

Claimant

AND

ATTORNEY GENERAL
COMMISSIONER OF POLICE

Defendants

Appearances:

Mrs. Lorna Shelly-Williams of Farara Kerins for the Claimant
Mr. Arden Warner of the Attorney General's Chambers for the Defendants

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2007: April 17th and June 19th

JUDGMENT

(Contract of employment – claim for wrongful dismissal – Police officer discharged without being given an opportunity to be heard – whether implied term of his contract that he should be given that right – alternatively whether he had a legitimate expectation to be heard prior to his discharge- whether serving at pleasure of the Crown and therefore dismissible at will – Police Act Cap165 s. 161)(d))

[1] JOSEPH-OLIVETTI, J.: The police force of any country is the public's first line of defence against crime. Therefore, much is expected of police officers especially in these times of public declaration of war on crime and the recent incentive undertaken with regional police to fight transnational crime[1]. But, what can a police officer expect of his employers? This is a claim by Mr. Wendell Nichols a Police Officer who was discharged from service with the Royal Virgin Islands Police Force ("the Force") in the British Virgin Islands ("BVI"). He is seeking damages for wrongful dismissal on the basis that the Commissioner of Police ("the Commissioner") acted in breach of contract as he dismissed him from the Force without giving him an opportunity to be heard. The Commissioner says that he was a

[1] A conference on special branch operations - the Caribbean Heads of Special Branches- was held here in the BVI last week with delegates from law enforcement agencies from around the region.

servant of the Crown, holding office at the Crown's pleasure and that the Crown was entitled to dismiss him at will under s. 16(1)(d) of the Police Act.Cap.165 ("the Act").

The Facts

[2] The facts are largely undisputed as the parties properly viewed this case as raising important issues of law only. Mr. Nicholls relied on his witness statement and the Crown on the witness statement of Mr. Reynell Frazer, the Commissioner[2]. Both parties relied on their respective documents contained in the bundle of documents produced at trial which was admitted by consent. The facts as gleaned from this evidence can be summarized as follows. Mr. Wendell Nichols is a citizen of St. Vincent, a ruggedly beautiful country in the southern Caribbean forming part of the English Commonwealth and of Pirates of the Caribbean fame. He was appointed as a Police Constable in the Force on 9th July, 1990[3]. He served well and faithfully and attained the rank of Sergeant on 8th July 2002 and was acting as an Inspector in March 2004. He had up to that date an unblemished record of service. However, in late March 2004 he was accused of incest by his minor daughter. On 27th April 2004 he was arrested and charged with that offence which is an indictable offence.[4] Ironically, this preceded by only a few days a letter of commendation dated 29th April 2004 from the then Commissioner in which he commended him for his "outstanding police action" at an incident at Her Majesty's Prison at Balsam Ghut on 22nd April,2004.[5]

[3] As a result of the charge the Commissioner of Police properly interdicted Mr. Nichols from duty on half pay[6]. Subsequently, the Preliminary Inquiry into the charge commenced but the virtual complainant refused to give evidence after she was sworn and the presiding Magistrate dismissed the case on 28th January, 2005. Thus, there was no decision on the merits and Mr. Nichols did not have an opportunity to refute the charge. Before this court he states, and this was not challenged that he denied the allegations made against him and continues to do so. See para. 7 of his witness statement.

[4] Despite the dismissal of the charge Mr. Nichols was not reinstated as he expected to be and he remained on suspension. In March, 2005 he made inquires of the Commissioner

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[2] Mr. Frazer was subjected to cross-examination but not Mr. Nichols.
[3] See Letter of appointment dated 20th June -Ex. A to amended statement of claim ("AS/C")
[4] Pursuant to section 122 (1) of the Criminal Code 1997.
[5] See Ex. E to AS/C.
[6] The Act in section35 provides for interdiction with pay but it allows for half pay only to a bachelor and and three-quarters pay to a married officer.

and subsequently of Superintendent Duncan as the Commissioner had indicated that he would ask him to look into the matter, but these bore no fruits. The Commissioner did not proffer any disciplinary charges against Mr. Nichols. However, by chance he met the Commissioner in August 2005 at the T.B. Lettsome Airport when he was about to travel to St. Vincent and the Commissioner indicated to him that he would not be getting back into the Force and that he should consider resigning and that he would be wasting his time and money to get a lawyer because the Governor's decision was final. Evidently, Mr. Nichols did not accept that no doubt well-intentioned advice.

[5] On his return from St. Vincent in September 2005 Mr. Nichols received his letter of discharge under the hand of the Commissioner dated 18th Sept. The relevant part simply states[7]:-

> "On behalf of His Excellency the Governor, I have to inform you that you are discharged from the Royal Virgin Islands Police Force with immediate effect in accordance with Section 16(1)(d) of the Police Act Cap. 165."

[6] And to show that no ill-will was intended the letter also stated in the last paragraph— "On behalf of the Governor, I thank you for your services with the Royal Virgin Islands Police Force and wish you well in your future endeavours."

[7] Mr. Nichols was aggrieved and sought legal advice. His legal advisors by letter dated 19th September 2005 appealed to the Governor under section 39 of the Act. The undoubted dilemma in which the lawyers apparently found themselves having regard to the baldness of the letter of discharge is reflected in their letter of appeal which states in the material part[8]:-

> "Pursuant to section 39 of the Police Act Cap.165 we hereby appeal against the decision of the Commissioner of Police to discharge Mr. Wendel Nichols from the said Royal British Virgin Islands Police Force. The notice of the discharge was communicated… The letter cites as the ground for the discharge, section 16(1) (d) of the Act.

[7] See bundle of documents ("BD") Tab 20
[8] See Amended Statement of Claim - Exhibit D - Trial Bundle Tab 2.

That provision states: "An inspector…. (the entire sub-section is quoted). At the time of receipt of the letter of discharge Mr. Wendell Nichols held the rank of Acting Inspector."(Emphasis mine)

[8] The Governor by letter dated 24th October 2005 gave short shrift to the appeal. His Excellency stated concisely:-

> "I am afraid that I do not find in your letter of appeal any substantive ground upon which the decision is appealed.
>
> The fact that Mr. Nichols held the rank of acting Inspector has no bearing upon the application of section 16 of the Police Act, as that section also applies to subordinate police officer, and as such he was appropriately dismissed under section16."[9]

[9] And so, Mr. Nichols' appeal through no fault of his was dismissed. One may reflect that it was fated from the start as one cannot lose sight of the fact that the underlying reason for this almost automatic and inevitable dismissal stemmed from the simple fact that the letter of discharge itself gave no reasons for his discharge in the first place. No doubt His Excellency the Governor was not aware of the specific contents of the letter of discharge. Mr. Nichols could only have surmised that it concerned the criminal charge which as far as he was concerned was dismissed and so he could not have assumed without more that that was the basis for the decision to discharge him.

[10] Mr. Nichols gave evidence which was not challenged about the attempts he made to obtain other employment both here and elsewhere after his discharge and the futility of his search and the resultant hardship visited upon him and his family. See paras.13 -16 of his witness statement. And para.16 sums up his present situation in stark terms:-

> "At this present time in my life I feel like a prisoner although I have not been convicted of any crime. I am feeling like I am being punished without being convicted of any wrongdoing. My life is at a total standstill. I am unable to work; I am only allowed to visit the territory as a visitor. I have nowhere to live. I have not been able to do the little things we normally do as a family such as taking my children for a drive, going to the beach, or to even sit and have pizza on Fridays. I am bankrupt and in debt. The bank has already

[9] See Attachment to Claim Form Exhibit "D".

informed me that they are in the process of recovering their money, a scarce commodity for me."

[11] Mr. Nichols filed this claim in the High Court on 21st December 2005 seeking damages for wrongful dismissal. He alleges that the Commissioner[10] wrongfully dismissed him as (a) the criminal charges against him were dismissed and (b) he was not given an internal hearing which is a breach of Natural justice. He claimed for damages including inter alia a claim for loss of earnings until retirement age and pension.[11]

[12] In their Amended Defence (See Tab 3) the Defendants aver that Mr. Nichols was lawfully and properly discharged by the Governor under s. 16(1)(d) of the Act and in para. 5 they set out the basis for the recommendation for the discharge. This is reflected in the Commissioner's witness statement para. 3-12. It can readily be seen that the reasons centre around the same allegation of incest and the effect on the Force if it were to have a serving member against whom unventilated allegations of such a grave and serious nature were made, the strength of the written statement of the complainant and the perceived public interest implications for the Force. In paras. 10 - 11 of his witness statement the Commissioner said "it was the considered opinion that it would not be 'in the public interest' for Sergeant Nichols to remain a member of the Royal Virgin Islands Police Force and that accordingly he recommended to the Governor that he be dismissed in accordance with section 16(1)(d) of the Act."

[13] It is noted that this is the first time that Mr. Nichols learnt exactly why he was discharged from the Force.

Claimant's submissions

[14] Mrs. Shelly-Williams, Learned Counsel for Mr. Nichols in essence submitted that at common law every citizen always has a legitimate expectation of natural justice which includes the right to be heard. See Chief Immigration Officer v. Burnett[12] and A.G. for

[10] The Action ought properly to have been brought against the Governor as emerges from our review of the Police Act but no issue was taken on this and in any event the Attorney General was made a party.
[11] See Amended Statement of Claim Tab 2 – The relief sought:- (a) Damages for wrongful dismissal/wrongful termination of employment, (b) Loss of earnings from dismissal to date $10,475.20 being loss of salary of $2,618.80 for 4 months, (c) Loss of salary for 15 years up to time he would have retired from the force of $471,384.00 (d) Loss of pension for 20 years of $314,256.00 as calculated by Department of Human Resources (e) Gratuity (e) Costs
[12] 1995 50WIR 153

Hong Kong v. Ng Yuen Shiu[13]. Further, that Mr. Nicholls had a legitimate expectation of a hearing based on the provisions of the Police Act Part 111(sections 33-43).

[15] Mrs. Williams argued that the Commissioner acted in breach of the rules of natural justice as he discharged Mr. Nichols from the Force based on the contents of the statements of the virtual complainant and her witnesses taken by the Police without giving him an opportunity to make representations. Mrs. Williams further emphasized that the criminal charge had been dismissed in the Magistrates Court, there was no internal hearing allowing Mr. Nichols to face his accusers and to defend himself and that he had not even been given access to the police statements. Counsel pointed out that the statements are not sworn evidence and that Mr. Nichols alleges that they are untrue. Counsel submitted that Section 16(1)(d) of the Police Act did not give the Commissioner/Governor authority to discharge Mr. Nichols at will as police officers do not serve at the pleasure of the Crown. Counsel relied heavily on Chester Ebanks v R.F. Pocock and the Attorney General[14].

[16] Mrs. Williams also cited a number of authorities apart from those already mentioned including Flannery and another v. Halifax Estate Agencies Ltd.[15], Burroghs v. Rampargat Katwaroo[16] and Thomas v. Attorney General[17].

Defendant's submissions

[17] The gravamen of the arguments of Mr. Warner, Learned Counsel for the Defendants is that Mr. Nichols held office at the pleasure of the Crown and that he could be dismissed at any time and that s. 16(1)(d) implicitly recognized or retained that right. He referred to the historical origin of the 'at pleasure principle', that it pays homage to the master/servant relationship which underscores the holding of office at Her Majesty's Pleasure. Counsel submitted that having regard to the scheme of the Police Act and to the two separate and distinct provisions contained therein for discharge and or dismissal that it was evident that the dismissal at pleasure principle had been retained by section 16(1)(d) and therefore Mr. Nichols was not entitled to be heard before being discharged.

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[13] [1938] 2 A.C..629
[14] (1975) 13 JLR 231
[15] (2000) 1 All ER 373
[16] (1992) 40 WIR 287
[17] (Privy Council) at 32 WIR 375

[18] Mr. Warner explained that the evidence before the Court is that Commissioner perused the police statements and decided that the nature and gravity of the allegations, albeit unproven, were inconsistent with the objects of the Force as set out in s 4 (1) of the Police Act and that these allegations had perceived public interest implications on the reputation and integrity of the Force and as such it would not be in the public interest for Mr. Nichols to remain in the Force and recommended that the Governor discharge him.

[19] Mr. Warner went on to submit further that the court was not entitled to consider the issue of public interest or to question the Governor's decision to discharge him as that decision was rendered final by s. 39 of the Act.

[20] Counsel relied on several authorities including Ryder v. Foley[18], Lewis v Cattle[19], London Artists Ltd. v. Litter Grade Organisation Ltd. v. Same Associated Television Ltd.[20], Shenton v. Smith[21].

Issues Arising

[21] The main issue arising is whether there is an implied term in Mr. Nichols' contract of employment that he would be given a right to be heard before being discharged from the Force. This would necessarily entail determining whether the Police Act, Section 16(1)(d) imposes a legal requirement on the part of the Commissioner to give "*An inspector/ subordinate police officer or a constable"* an opportunity to be heard before a recommendation is made to the Governor for his discharge pursuant to that sub-section. Of course if Mr. Nichols succeeds then the Court will have to access damages as well.

Court's Analysis

[22] The obvious starting point, as this case is one for breach of contract and not for judicial review, is to determine what are the relevant terms of Mr. Nichols' contract of employment and then go on to determine whether the Governor was entitled to dismiss him as he did. The terms are contained in his letter of appointment dated 20th June 1990.[22] The letter states, inter alia, that Mr. Nichols is appointed as a Police Constable, that his appointment is to the permanent and pensionable establishment and that he will be subject to the

[18] (1906) 4 CLR (Pt 1) 422
[19] (1938) All ER 368
[20] (1969) 2 W.L.R. 409, 418
[21] (1895) AC 229
[22] Trial Bundle Tab 2 Exhibit to S/C

Police Act, Force Standing and Routine Orders, Government General Orders, Financial Regulations and such other regulations as the Commissioner of Police and Government may introduce for the conduct of police officers and the dispatch of Government business.

[23] It is under the hand of the Commissioner but we note that under the Virgin Islands Constitution Order 1976 ("the Constitution") the Governor has specific responsibility for internal security including the Police Force and that under the Act he can delegate certain powers including that of the appointment of police officers of non commissioned or non-gazetted rank to the Commissioner.

[24] The office of Governor is created by the Constitution. The Governor is appointed by Her Majesty by Commission and he is clothe with certain powers and duties pursuant to the Order and instruction of her Majesty for the purposes of administering the Territory. Section 19 of the Constitution details the Governor's special responsibilities which are to be discharged at his sole discretion without reference to Executive consultation. (It is pertinent to note that under s. 2(2) of the Act, 'Governor' means 'the Governor acting in his sole discretion'). By s. 19 (c) the Governor is given specific responsibility for internal security, including the Police Force and (d) the terms and conditions of service of persons holding or acting in public offices.

[25] The letter does not speak directly as to how either the Crown or Mr. Nicholls may terminate this contract. However, it incorporates the Act and therefore one must perforce advert to the Act to see what powers of dismissal and any other relevant provisions bearing on the issue, if any, it contains.

[26] But, first to my mind, it is pertinent to determine whether Mr. Nichols as a police officer is a public officer as this may also have some bearing on the Crown's right of dismissal. Manifestly, Mr. Nicholls was appointed by the Commissioner acting on behalf of the Governor to the permanent and pensionable establishment of the Territory and as such he is a public officer. Any lingering doubt is dispelled by the Act which specifically vests the Governor with authority to appoint, discharge or dismiss members and provides that salaries are as voted by the Legislative Council and that pension is a charge on the

Consolidated Fund[23]. The Governor represents the Crown and any appointment made by him is an appointment to the public service. Hence, Mr. Nichols is undoubtedly a servant of the Crown.

[27] Historically, public officers held office at the pleasure of the Crown. Ryder v. Foley,[24] a case from the Supreme Court of Queensland, Australia is instructive. In that case, Mr. Foley, a police constable, sued Mr. Ryder as nominal defendant on behalf of the State Government for wrongful dismissal. He claimed that the cause of his dismissal was the report of an inquiry held into the circumstances surrounding the death of a man and that at the inquiry no charge was preferred against him nor was he given an opportunity to be heard or to call witnesses. The inquiring magistrate found that Mr. Foley had with other constables combined in insubordination and had given evidence on oath to support false charges against superior officers. The Crown relied on this report as providing sufficient proof of misconduct to justify his dismissal and that both the Home Secretary and the Commissioner of Police had approved the findings as sufficient misconduct warranting dismissal.

[28] In Ryder, O'Connor, J. at p. 14 found that Mr. Foley's case rested entirely upon a contract and that to succeed, he must make out that the Crown had been guilty of a breach of some contract in dismissing him. The Honourable Judge observed:-

> "We start with the assumption, which is the foundation of the plaintiff's case, that the plaintiff has been dismissed by the Government. The question as to whether that dismissal is wrongful or not depends upon whether the terms of the contract, under which the plaintiff was employed, entitled the Government to dismiss him as they did. It is unnecessary for me to repeat the authorities that have already been cited, because the principles of the law to be applied to the case of an employee in the Public Service have been definitely settled for many years, and the statement of those principles will be found in the cases of Shenton v. Smith (1); Dunn v. The Queen (2); and Gould v. Stuart (3). The result of those authorities is this:- That in every

[23] Sections of Act: s. 11 – Governor's power of appointment; s. 44 – pay voted by Legislative Council; s. 48 – pension a charge on Consolidated Fund.
[24] (1906) 4 CLR 422 Tab 2

> case it must be taken to be a condition of service with the Crown that the Crown has the right to put an end to the service at any time, and in any manner that it thinks fit. There is however established by Gould v. Stuart (3) this qualification that the Crown may by Statute, or in any other way, alter the terms of the contract, so that it becomes not a contract giving the Crown the right to dismiss at pleasure, but a contract to dismiss only after certain formalities have been observed". (Emphasis added)

[29] The principles of law stated in Ryder that public officers may be dismissed by the Crown at any time and in any manner that it thinks fit unless the contract of service is altered by statute or otherwise has not been eroded by any authority that has been cited to me and the principle is applicable here[25]. See also Ebanks page 234 E-G where Luckhoo P. cited Lord Hobhouse in Shenton v. Smith 1985) A.C. at p. 234 See also Ebanks p. 233 F Luckhoo J:-.

> "Counsel for the appellant Mr. H. Small has rightly conceded that the appellant is a public servant of the Crown. He recognizes that unless it is otherwise provided a servant of the Crown holds office during the pleasure of the Crown."

[30] Accordingly, Mr. Nichols as a public officer holds office at the pleasure of the Crown and can be dismissed at will by the Crown unless the Police Act lays down any procedural provisions to be observed before his services can be terminated. The breach relied on by Mr. Nichols is breach of the right to be heard before dismissal.

[31] Now to the Act. As can readily be seen from its perusal, the Act constitutes a comprehensive code of law for the Police Force.[26] Under sections 11 and 12 officers are

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[25]See also Halsbury's Laws of England 4th Edition Vol. 36 para 203 – a member of a police force of whatever rank when carrying out his duties as a constable acts as an officer of the Crown.

[26]The Act is divided into eleven parts. Part I, of necessity, contains the preliminary sections which include the definitions for terms used in the Act. Part II touches and concerns matters involving the constitution, objects of the Force, appointment of officers, functions of the Commissioner of Police, enlistment and resignation of officers from the Force. Part III deals with the general duties of the Force. Part IV with discipline, Part V – pay and other financial provisions, Part VI – retirement; Part VII – Welfare; Part VIII – Prohibited Associations, Part IX – General Administration, Part X – Auxiliary Force, Part XI – Miscellaneous.

"appointed" to the Force, in the first instance, and thereafter "confirmed" to the Force after successful completion of three years probationary period. Appointments are by the Governor or upon his delegation. The Governor can delegate certain powers to the Commissioner. Police officers do not hold office for any fixed or determined time. Further, they are required, under section 13 to swear an oath of allegiance to her Majesty.

[32] Section 15(1) deals with a police officer's right to terminate his employment. A member of the Force may resign his office at any time upon giving not less than one month's written notice to the Governor submitted through the Commissioner or upon payment of one month's salary in lieu of notice. The Governor has the power to waive the need for notice or shorten the length of notice.

[33] Now to the Governor's powers of discharge or dismissal. These are contained in sections 16 and section 36. I agree with Mrs. Williams that nothing turns on the meaning of either word and that they can be viewed as interchangeable as Parliament used 'discharge' in s. 16 and both 'discharge' and 'dismiss' in s. 36. This view to my mind is supported by the definition of the word "discharge" in The Concise Oxford Dictionary 9th Edn.- "1(a) let go, release, esp. from a duty, commitment or period of confinement; 2. dismiss from office, employment, army commission etc."

[34] Under section 16 members of the Force, including an inspector may be discharged upon the recommendation of the Commissioner for one of four reasons, namely:- where a punishment has been imposed on him under section 37 (that is for offences against the regulations after a hearing and determination of the charge or complaint in accordance with the section); he has been pronounced to be medically unfit; he has been found to be no longer efficient in the discharge of his duties, he has conducted himself or his conduct has been found to be such that it would be contrary to the public interest to retain him.

[35] As we are called upon to construe subsection 16(1)(d) it is imperative to set out the section in toto.

[36] Section 16 provides:-

(1) An Inspector, subordinate police officer or a constable may, on the recommendation of the Commissioner, be discharged from the Force if the Inspector, subordinate police officer or constable –

(a) has had a punishment imposed on him under section 37;

(b) has been pronounced by a medical board to be physically or mentally unfit for further service;

(c) has been found to be no longer efficient in the discharge of his duties; or

(d) has so conducted himself (or it has been found) that his retention in the Force would be contrary to the public interest.(emphasis mine)

[37] The Act lays down no procedure for determining these matters save as to (a) which would follow on a hearing under s. 37.

[38] Section 36 gives the Governor the discretion to dismiss or discharge or order a reduction in rank where the officer has been found guilty of a breach of a disciplinary regulation or has been found guilty of a criminal offence. Section 36 contemplates some formal proceedings, in relation to these matters either internal disciplinary proceedings which are provided for by section 37 or criminal proceedings under the general law.

[39] Section 37 sets out the procedural requirements when an officer is charged with an offence against the regulations (disciplinary charges). These entail the holding of an inquiry by a Gazetted Officer or an Inspector.[27]

[40] It therefore appears from sections 16 and 36 that Parliament specifically adverted to the need for an inquiry in certain circumstances and made express provisions for same only in relation to disciplinary charges. The powers under s. 16 and in particular s. 16(1)(d) are

[27] Section 37 (a) and (b) states –"Any offence against the regulation that relates to the discipline of the Force may be inquired into and dealt with – in the case of an Inspector or subordinate police officer, by a Gazetted Police Officer; and in the case of a constable, by an Inspector, if the Gazetted Police Officer or Inspector, as the case may be, inquiring into the offence is not the complainant or a witness in the matter".

not circumscribed by any express procedural regulation as to a hearing or giving of notice prior to the exercise of the power. However, is that the end of the matter?

[41] When one considers the sub-section it clearly gives the Crown four ways to discharge a member. The first two clearly envisage that the officer would have some input in the matter prior to his discharge as the first relates to a punishment imposed after a criminal hearing and the second to the finding of a medical board. In both cases the officer would be made aware of the grounds on which he was charged and punished or found medically unfit. It cannot be argued either that in both cases it was contemplated that the officer would be given an opportunity to be heard. Was it Parliament's intention then in the third and fourth cases to exclude that opportunity which it contemplated expressly in section 36 and 37 and impliedly in those first two sub-sections of section 16(1)? In the third and fourth cases Parliament used the word "found" – is this of any significance? One of the general principles of interpretation of legislation is that Parliament must be presumed not to have acted in vain and thus in construing the sub-section every word used is important and must be read in context.

[42] The word "found' is defined by the dictionary already referred to – "v 1 tr. a. establish."

[43] And "establish" in its turn means, "4. a. validate; place beyond dispute (a fact etc.) b. find out; ascertain"

[44] These words as used in both sub-sections to my mind connote the idea of some fact finding inquiry. In my judgment by employing the word "found" in s. 16 (1)(c) and (d) Parliament intended that the Commissioner hold some form of inquiry before acting under those sections. The Act therefore gave Mr. Nichols a right to be heard before he was discharged. In contradistinction one can have regard to the use of the words "in his opinion" or "as he thinks fit" which are often used in legislation which usually signify that the decision maker is to act in his sole discretion without having to hold any form of inquiry beforehand.

[45] This decision to my mind is buttressed by the reasoning in Ebanks, a case from the Cayman Islands on which Mrs. Williams looked to for support whilst Mr. Warner sought to distinguish it. The facts of that case may be summarized as follows. The Appellant was a

corporal in the Cayman Islands Police Force ("C.I.P.F."). One morning he informed the Superintendent of Police that he noticed that he was put down for the guard of honour but could not make it because his tunic was too tight. The Superintendent refused to accept that excuse and informed the Appellant that he would still be on guard of honour. Later that same day the Superintendent received a medical certificate in respect of the Appellant issued on the same day which stated that the Appellant was suffering from bronchitis and was unfit to carry on his occupation for a certain period.

[46] The Superintendent caused the Appellant to be informed that the Commissioner of Police was not accepting the medical certificate and that the Appellant was required to return to work and prepare himself for the guard of honour failing which he was to bring in his stripes. The Appellant, upon receipt of that message, considered himself dismissed and on the same day he handed in his badge of office. In due course the Commissioner of Police wrote to the Appellant informing him that he was dismissed from the C.I.P.F. with effect from that date but gave no reasons for the dismissal. And the Commissioner of Police did not respond to two letters requesting the reasons for dismissal.

[47] Mr. Ebanks brought an action seeking a declaration that he was still a member of the C.I.P.F. and consequential relief and in the alternative damages for wrongful dismissal. The learned judge held that Mr. Ebanks had no cause of action for wrongful dismissal as the Crown had an unrestricted right to dismiss at will. Mr. Ebanks appealed.

[48] The arguments on appeal centred on the meaning of section 10(b)(i) of the Police Force Law[28]. Mr. Ebanks argued that section10(b)(i) limited the powers of dismissal to cases where the officer had had a charge against him preferred, heard and adjudicated upon, and dismissal was the form of punishment or sentence that had been imposed. For the Crown it was argued that the section merely enabled the Commissioner of Police to

[28] The whole of s. "10 reads:-"Any member of the Force of non-gazetted rank may at any time during the currency of any term of engagement – be discharged, when he –has been pronounced by a medical officer to be physically or mentally unfit for further service; or has been generally inefficient in the discharge of his duties; o r has applied for his discharge under subsection (22) of section 9 or has been permitted by the Commissioner of Police to resign; (b) be dismissed when he – (i) **has been sentenced** either by the Commissioner of Police or the Administrator to be dismissed form the Police Force, or (ii) has been convicted of any criminal offence before ay Court of law exercising criminal jurisdiction whether within or without the Islands."

exercise the powers of the Crown however unfair those powers appeared to be and that the Appellant had no legitimate complaint against his dismissal.

[49] It was held[29]– "the Appellant was entitled to damages for wrongful dismissal for the reason that the provisions of s. 10(b)(i) were manifestly intended for the protection and benefit of an officer of non-gazetted rank and were, likewise, inconsistent with importing into his contract of service the term that the Crown could put an end to it at pleasure; and as no charge against him had been preferred, heard and determined his dismissal by the Commissioner of Police could not be justified."

[50] In Ebanks the deciding factor to my mind on which the court founded its decision that the provision was inconsistent with the Crown's right to dismiss at pleasure was the presence of the word 'sentenced' in s. 10. See Luckhoo p. 235 G:-

> "I agree with the interpretation given the word "sentenced" by Mr. Small and hold that the provision of s. 10(b))(i) contemplates that a charge shall be preferred against the officer and an examination made into the truth of the charge."

[51] It is noted that this word is not present in our s. 16(1)(d) but as already observed the word, "found" is. The approach of construing the legislation narrowly adopted in Ebanks in my judgment supports my view that Parliament is presumed not to act in vain and that all the words used in s. 16 (1)(d) must be given their ordinary and natural meaning and that no word should be overlooked in construing the section. In the context of the Act as a whole it strikes me that Parliament intended whilst retaining the Crown's common law right to dismiss its servants at will to circumscribe it with certain procedural formalities, namely the right to a hearing, to safeguard the rights of the members of the Force. And, it cannot be gainsaid that the impending loss of one's livelihood is not a matter to be taken lightly and doubtless Parliament recognized that and made the formal strictures aforementioned albeit impliedly by the considered use of the word "found" and its connotations. This in my judgment is a classic example where the

[29] See case the Headnote.

[52] Crown has by statute, "altered the terms of the contract, "so that it becomes not a contract giving the Crown the right to dismiss at pleasure, but a contract to dismiss only after certain formalities have been observed". See once more the ruling in Gould v. Stuart referred to para. 28 hereof.

[53] Mrs. Williams relied in the alternative on Mr. Nichols having a legitimate expectation to be heard based on the Act. For completeness and in case I am mistaken on the meaning of s. 16 (1)(d) I shall refer to the cases relied on briefly. First, with all due respect to Mrs. Williams the dicta in Burnett relied on as establishing that every person has a legitimate expectation of natural justice must be put in the factual context of the case and on closer examination does not support such a broad principle.

[54] Burnett is an 'Immigration case' in which the relief sought was certiorari to quash the decision of the Chief Immigration Officer to refuse to allow Mr. Burnett to enter the Territory of the BVI to visit his minor children, access to whom had been granted to him by the courts. It is not a case in contract. The court found that in the special circumstance of the case although Mr. Burnett did not have a legal right to enter and remain in the Territory, he had legitimate expectations that he would be granted permission to do so and that at least some of the requirements of the audi alteram partem rule of natural justice would have been observed before he was refused permission. See Sir Vincent Floissac p.161 para a. The special circumstances was the order of the court granting him access to his children and the letter of the Deputy Governor confirming that the acting Chief Immigration Officer was aware of his planned visit and that his wife would be allowed to enter the Territory when accompanying him on his visits.

[55] The other case prayed in aid was Ng Yuen Shui. This case was likewise an immigration case for certiorari and prohibition. Again, the nature of the case and the facts are wholly different from the instant case. In Ng Yuen Shui it was held that where a public authority charged with the duty of making a decision promised to follow a certain procedure before reaching that decision, good administration required that it should act by implementing the promise provided the implementation did not conflict with the authority's statutory duty.

[56] However, what is important is that apart from the Act Mrs. Williams has pointed to no other fact on which a legitimate expectation to a hearing could be said to arise. It must also be

noted that the concept of legitimate expectation arises in judicial review of administrative actions and not in contract. In, De Smith Woolf and Jowell 5th edn, Judicial Review of Administrative Action the concept is examined and explained in Chapter 7 part c. At para. 8-037 the authors observed:– "Since the early 1970s one of the principles justifying the imposition of procedural protection has been the legitimate expectation. Such an expectation arises where a person responsible for taking a decision has induced in someone who may be affected by the decision a reasonable expectation that he will receive or retain a benefit or that he will be granted a hearing before the decision is taken. In such cases the courts have held that the expectation ought not to be summarily disappointed."

[57] This concept was recently addressed again in HMB Holdings v. Attorney General of Antigua and Barbuda[30] by Lord Hope of Craighead para. 31 –

> "Then there is legitimate expectation as an additional ground of review. As Lord Fraser of Tullybelton explained in *Attorney General for Hong Kong v Ng Yuen Shin* [1983] 2 AC 629, 636E-F, the concept of legitimate expectation is capable of including expectations created by something that falls short of an enforceable legal right, provided they have some reasonable basis. But if the public body has done nothing or said nothing which can legitimately have generated the expectation that is contended for, the case must end there: *R (Bibi) v Newham London Borough Council* [2002] 1 WLR 237, para 21. (Emphasis added)

[58] In short, neither the commissioner nor the Governor has done anything to have led Mr. Nichols to believe that he would be granted a hearing prior to his discharge and the alternative challenge must fail.

[59] I note also for completeness that Mrs. Williams in referring to the alleged breach of the Commissioner to follow the rules of natural justice made reference to the Flannery line of authorities which deal with the duty to give reasons. The learning in Flannery was expressly adopted by the Court of Appeal in IPOC International Growth fund Limited v. LV Finance and others[31]. In these cases the courts made it clear that one of the reasons

[30] Privy Council Appeal No 18 of 2006 (delivered 5th June 2007)
[31] BVI Civil Appeal 20/2004 Gordon J.A. para 11.

for requiring a judge to give reasons for his or her decision is to ensure that a litigant could prosecute his appeal in a meaningful manner. In IPOC Gordon J.A. observed at para. 10(iii)- "the first principal aspect recited above, that the parties be left in no doubt as to why they have lost or won, "implies that want of reasons may be a good self-standing ground of appeal, if it is impossible to tell whether the trial judge has gone wrong on the facts or the law, the losing party would be deprived of his chance of appeal unless the appellate court entertains an appeal based on the lack of reasons itself."

[60] And, in R. v. Secretary of State for the Home Department ex parte Fayed[32] the House of Lords extended this duty to give reasons to decision-makers in administrative capacities where the decision involved the exercise of discretion. In that case it was held that they were under a duty to exercise that discretion reasonably and accordingly was not relieved of the obligation to be fair in arriving at the decision. The Home Secretary was required to give the applicant for British citizenship sufficient information as to the subject matter of his concern in terms as to enable him to make appropriate representations. The court also held that where this would involve disclosing matters not in the public interest that he must indicate that that was the position so that the applicant could challenge the justification for the refusal before the courts.

[61] From this it can readily be deduced that the Commissioner had a duty at common law to give reasons to Mr. Nichols for his decision to recommend his discharge as in the exercise of his discretion the Commissioner and/or the Governor had a duty to act fairly. Further, Mr. Nichols had a statutory right of appeal which was rendered illusory as the Commissioner/Governor failed to give him reasons for his discharge.

[62] Mr. Warner argued that in any event the Governor's decision was made final by section 39[33] of the Act and therefore was not subject to challenge by the courts and further that

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[32] [1997]1AllER228

[33] Section 39 provides:-

"(1) A subordinate police officer or a member of the Force of lower rank in respect of whom the Commissioner has decided to recommend-

(a) reduction in rank or loss of seniority;
(b) discharge; or
(c) dismissal,

the question of "public interest" was not a justiciable issue. And, I must add here Mr. Warner's well intentioned expression of sympathy to the effect that it is unfortunate that Mr. Nichols did not make good use of his right to appeal strikes a hollow note. One cannot exercise a right to appeal if one has not been told of the reasons for the decision.

[63] This to my mind is not such a simple proposition as it first appears having regard to the case law on finality of decisions by administrative bodies. The governing principles were recently adverted to in HMB Holdings v. Attorney General of Antigua and Barbuda. Lord Hope of Craighead when considering that the Land Acquisition Act of Antigua and Barbuda made the decision to acquire land for a public purpose final had this to say at para. 3- "But this does not mean that the decision is immune from judicial review. The Attorney General conceded that the door was not closed entirely. He accepted that the decision could be challenged on the ground that it was manifestly without foundation. He was right to do so, but the principle extends further than that: *Vanterpool v Crown Attorney* (1961) 3 WIR 351, per Lewis J at pp 366-367. As Lord Wilberforce explained in *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147, 207D-F, however widely the field in which a decision-maker operates is defined by statute, there are always certain fundamental assumptions which necessarily underlie the remission, or delegation, of a power to decide such as the requirement that a decision must be made in good faith. An examination of its proper area is not precluded by a clause which confers finality on its decisions. Clauses of that kind can only relate to decisions which have been given within the field of operation that has been entrusted to the decision-maker. This means that all three grounds for judicial review which Lord Diplock identified in *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1AC 374, may be invoked – illegality, irrationality and procedural impropriety. (Emphasis added).

[64] It follows than that Mr. Nichols also has a right to directly challenge the Governor's decision if any had been taken on the merits in the courts but only after he had exhausted

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may, within **seven days** from the date on which the decision has been communicated to him, appeal in writing to the Governor against the finding that resulted in the decision or against the decision only or both; and the governor may confirm or set aside the finding or confirm, set aside or vary the decision and **the decision of the Governor is final"**.

his statutory remedies. Mr. Nichols did exhaust his statutory right of appeal given to him by the Act before he approached the courts and he could not be faulted on this ground.[34]

Damages

[65] The court has to determine what if any damages resulted from the breach. Mr. Nichols gave the factual basis already. However, the Court requires further assistance from both Counsel in particular Mrs. Williams as to the governing principles especially as they relate to the heads of damages claimed for pension/gratuity and to loss of earning until retirement. I will hear Counsel as to when it will be convenient to do so.

Conclusion

[66] For the reasons given Mr. Nichols' claim succeeds as the court has found that he had a right to be heard prior to his dismissal and he was not afforded that right neither was he given any reasons for the decision thus rendering his right of appeal given by the Act illusory. These terms were incorporated in his contract by the Act and by common law. Accordingly, the Crown acted in breach of contract in dismissing him in the manner that it did. He is entitled to damages for wrongful dismissal and to his prescribed costs having regard to the amount recovered as damages which amount would be the value of his claim for the purposes of ascertaining the prescribed costs.

[67] In closing I wish to highlight the curious element in this case which is that it concerns issues of private law as well as public law. (I am aware that the Master heard arguments on this earlier and allowed the claim to proceed as it was filed – a claim in contract.) This duality, I must confess, posed some difficulties which I have endeavoured to resolve in the light of general principles. De Smith op. cit. on public employment – para. 3-060 – 3-061 was useful. The learned authors observed that an employee of a public body may have rights both in public and in private law and that if conditions of employment 'as in the case of police and prison officers' are controlled by statute, the conditions may be reviewable by way of judicial review. And, a claimant may choose which course to adopt, that is, a claim for wrongful dismissal or one for judicial review depending on the remedy sought.

[34] De Smith op.cit. para. 15-023

[68] The Court expresses its appreciation for the invaluable assistance rendered to it by both counsel.

Rita Joseph-Olivetti
High Court Judge
British Virgin Islands