ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV 2008/0552

IN THE MATTER OF THE DISMISSAL OF GARY NELSON AS COMMISSIONER OF POLICE OF THE ROYAL ANTIGUA AND BARBUDA POLICE FORCE

AND

IN THE MATTER OF THE CIVIL PROCEDURE RULES PART 56 AND THE APPLICATION BY GARY NELSON FOR LEAVE TO INSTITUTE JUDICIAL REVIEW PROCEEDINGS

BETWEEN

GARY NELSON

Claimant/Respondent

AND

THE ATTORNEY GENERAL
COLIN DERRICK, MINISTER OF JUSTICE
AND
THE POLICE SERVICE COMMISSION

Defendant/Applicant

Appearances:

Dr. David Dorsett for the third named Defendant/Applicant
Mr. Dane Hamilton QC for the Claimant/Respondent

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2009: February 20
April 22
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DECISION

[1] Blenman J: This is an application by the Police Service Commission (the Commission) to strike out the claim brought by Mr. Gary Nelson.

[2] Background

Mr. Gary Nelson was the Commissioner of Police of Antigua and Barbuda. By letter dated 28th August, 2008, and during the currency of Mr. Nelson's probation period, he was dismissed by the Commission for unsatisfactory performance of his duties. He alleges that the Commission has improperly terminated his appointment. Accordingly, he has filed a claim against the Attorney General, the Minister of Justice and the Commission, and seeks certiorari together with a number of declarations and orders. He has specifically sought an order to quash the decision of the Commission that terminated his appointment. He also contends that the Commission and the Minister of Justice have failed to exercise their power reasonably or lawfully in terminating his services. He also seeks an order that he had a legitimate expectation to a fair hearing before his services were terminated. In addition, he seeks damages.

[3] The Application

The Commission has filed an application and seeks to strike out the claim. The grounds for the application are:

(a) The conjoined provisions of sections 105, 106 and 107 of the Antigua and Barbuda Constitution Order 1981 set up a Public Service Board of Appeal and mandate that a police officer aggrieved at a decision to "remove him or her from office or to exercise disciplinary control over such member under section 105(1) of the Constitution" shall appeal the decision to the Public Service Board of Appeal under section 107(1) (d) of the Constitution.

(b) Mr. Nelson has alternative remedies and has failed to pursue these mandatory remedies; instead he has proceeded to seek remedies in the realm of public and administrative law.

(c) Any alleged unfairness attending to his dismissal can be cured by him pursuing an appeal to the Public Service Board of Appeal as provided by the Constitution.

(d) That it is clear on the face of the documents filed that Mr. Nelson has not exhausted all of the legal remedies at his disposal before resorting to an application for judicial review.

(e) The decision complained of is an entirely operational matter and is not amenable to judicial review. Further, sufficient reason has been given for Mr. Nelson's dismissal and any further disclosure is likely to compromise national security and be contrary to the public interest.

[4] Issue

The issue that arises for the Court to determine is whether it should strike out Mr. Nelson's claim against the Commission on the grounds stated.

[5] Dr. David Dorsett's submissions

Learned Counsel Dr. Dorsett submitted that the claim against the Commission be struck out on the grounds that Mr. Nelson has alternative remedies available to him that have not been exhausted. He has failed to bring the matter of his dismissal under the Constitution of Antigua and Barbuda. And in any event, the cause of action raised by the claim is that of breach of contract – a private law matter. Furthermore, the action complained of, where the Commission lost confidence in his ability to serve as Commissioner of Police, is an "entirely operational decision" and as such is not amenable to judicial review. See R (Tucker) v Director General of the National Crime Squad [2003] EWCA 2 AT 32.

[6] Mr. Nelson was appointed as Commissioner of Police on 1st March, 2008. He was appointed by the Commission, a public body established by section 104 of the constitution. He was presented with a contract. He refused to sign it. Nevertheless, he accepted the appointment as Commissioner of Police. The terms of his appointment were subject to the Police Act which provides as follows:

> "12(1) Every police officer above the rank of a subordinate police officer shall be on probation during the first two years after his appointment or for such longer period, not exceeding six months, as the Commission may approve, and if during such period or any extension thereof, he is found not to be fitted physically or mentally to perform the duties of his office or to be not likely to become an efficient or well conducted police officer, his services may be dispensed with by the Commission. At the end of the period of probation, or any extension thereof if the services of such police officer have not been dispensed with he shall be confirmed in his appointment".

[7] Further, by virtue of section 107 of the Constitution, the decision of Mr. Nelson's removal by the Commission is appealable to the Public Service Board of Appeal. Dr. Dorsett said that judicial

review is a supervisory jurisdiction only. The Court does not substitute its own decision for the decision that is under review. As was stated by Lord Brightman in R v Chief Constable of the North Wales Police, ex p Evans [1982] 3 All ER 141 at 154:

> "Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the Court is observed, the Court will in my view, under the guise of preventing an abuse of power, be itself guilty of usurping power".

[8] Learned Counsel Dr. Dorsett said that judicial review is a process to be invoked only after alternative remedies have been exhausted. The House of Lords in Preston v Inland Revenue Commissioners [1985] 2 All ER 327 settled the point of exhausting alternative remedies before seeking judicial review:

> "My fourth proposition is that a remedy by way of judicial review is not to be made available where an alternative remedy exists. This is a proposition of great importance. Judicial review is a collateral challenge; it is not an appeal (per Lord Scarman in Preston v Inland Revenue Commissioners ibid). Judicial review is available where a decision-making authority exceeds its powers, commits an error in law, commits a breach of natural justice, reaches a decision which no reasonable tribunal could have reached or abuses its powers. Judicial review should not be granted where an alternative remedy is available (per Lord Templeman in Preston v Inland Revenue Commissioners ibid)."

[9] Mr. Nelson has failed to bring his grievance to the Board of Appeal as he is required to do under section 107 of the Constitution which provides:

"107 (1) (d) Any decision of the Police Service Commission to remove a member of the Police Force from office or to exercise disciplinary control over such a member under section 105(1) of this Constitution.

(2) Subject to the provisions of this section an appeal shall lie to the Board from any decision to which this section applies at the instance of the police officer or member of the naval, military or air force in respect of whom the decision is made."

[10] Section 108 of the Constitution goes on to provide:

> "Upon an appeal under section 107 of this constitution or any law enacted in pursuance of that section, the Board may affirm or set aside the decision appealed against or make any other decision which the authority or person from which the appeal lies could have made".

[11] Learned Counsel Dr. Dorsett stated that judicial review ought not to have been granted to Mr. Nelson as it is clear that he has willfully and knowingly failed to avail himself of the appeal mechanism specified by the Constitution and made available to him. This basis his claim for judicial review should be struck out with costs. Expanding further, Dr. Dorsett said if Mr. Nelson seeks to challenge the merits of the decision to dismiss him, he must first appeal the decision. The Constitution has in fact provided an avenue for him to do so. The wording of section 107(2) is clear, "an appeal shall lie to the Board". Learned Counsel Dr. Dorsett submitted that Mr. Nelson's failure to appeal is fatal to his claim for judicial review. An alternative remedy is available to him. He must first resort to that remedy before "oppressing" the Commission with a judicial review action. In his application for leave to file the proceedings dated 24th September, 2008 Mr. Nelson acknowledged that he was aware of the Board of Appeal to which he could appeal. He did not state that the Board of Appeal did not exist or was otherwise incapable of properly hearing his appeal. Mr. Nelson expressed no views about the Board of Appeal itself. No inadequacy of the Board of Appeal has been alluded to. It has not been shown that the Board is unable to properly hear and decide Mr. Nelson's appeal in a timely manner.

[12] Dr. Dorsett said that Mr. Nelson claims that his dismissal was unlawful and/or unfair in light of the fact that other than his dismissal letter informing him that the Commission found his performance unsatisfactory, he was not otherwise informed that his performance of his duties did not find pleasure with the Commission. He complains of a denial of the right to a fair hearing, a species of procedural impropriety- a recognised ground of judicial review. Indeed, ground 12 of Mr. Nelson's claim is:

> "At no time during the relevant period March 1st to August 31st 2008 did the claimant meet with the Commission, received any communication from the Commission in relation to the performance of his duties and afforded an opportunity to make any representation on his behalf".

[13] Dr. Dorsett said that it is arguable that the dismissal of Mr. Nelson was vitiated by some failure to observe the rules of natural justice in not giving him the opportunity to refute the allegations of unsatisfactory performance with respect to his duties. He referred the Court to R v Chief of the North Wales Police, ex p Evans ibid and said that any inadequacy of natural justice can be cured if he proceeds with an appeal as provided by the Constitution and brings his case to the Public Service Board of Appeal, a tribunal which is lawfully bound to give Mr. Nelson a fair hearing. The leading case on this point is the Privy Council case of Calvin v Carr [1979] 2 All ER where their Lordships held that while there was no clear and absolute rule, it was possible to identify a number of typical situations. First, there are contractual cases where the rules, for example of a social club, provide for a rehearing by the same body or an enlarged form of it. Here, it is not difficult to conclude that the first hearing is suspended by the second and that the parties have accepted that arrangement. At the other extreme are cases where the complainant has the right to nothing less than a fair hearing both at the original and at the appeal stage, as in trade union cases where a fair hearing at both branch and national levels might be necessary. Then there is an intermediate position where the question is "whether, at the end of the day, there has been a fair result reached by fair methods" (per Lord Wilberforce). There may nevertheless be instances "where the defect is so flagrant, the consequences so severe, that the most perfect of appeals or rehearing will not be sufficient to produce a just result" (per Lord Wilberforce).

[14] Dr. Dorsett maintained that upon a plain reading of "the documents", filed on behalf of Mr. Nelson, including (1) the without notice application for leave to file a fixed date claim form, (2) the affidavit in support of the without notice application, and (3) the fixed date claim form, it is clear that Mr. Nelson's claim is that for breach of an employment contract.

[15] Next, learned Counsel Dr. Dorsett stated that in all material respects, the case at bar is indistinguishable from that of R v East Berkshire Health Authority ex p Walsh [1984] 3 All ER 425 and that judicial review should be denied since the appropriate remedy is a private law remedy of a complainant to the appropriate industrial tribunal (the tribunal established by the Constitution) the Public Service Board of Appeal of Antigua and Barbuda. The case of R v Derbyshire County Council, ex p Noble [1990] ICR 808 is another case that underlines the legal position that

disputes arising out of the dismissal by a public authority of a person working under a contract is a matter sounding in private law and accordingly not amenable to judicial review.

[16] Dr. Dorsett insisted that Mr. Nelson must seek his remedy in private law as was done by the appellant in McClaren v Home Office [1990] ICR 824. The appellant, in that case, was engaged by the Home Office as a prison officer under a letter of appointment which referred to a special position of civil servants as servants of the Crown. By virtue of section 8 of the Prison Act 1952, a prison officer, while acting as such, had the power, authority, protection and privileges of a police constable. A dispute arose between the appellant and his employer with respect to a new shift system that had been introduced. The appellate refused to work the new shift system, was suspended from work and was not paid for the period in which he did not work. He brought an action in contract and sought; (1) a declaration that he was still employed on the basis of the previous shift system and (2) payment of salary withheld from him.

[17] Woolf LJ in McClaren ibid identified four principles that have to be borne in mind, with respect to the appropriateness of judicial review in employment cases involving public body employers:

> "(a) The starting point was that employees of public bodies should pursue their cases in the normal way by ordinary action for a declaration, damages and the like. This was so even if the particular employee held an office from the Crown, which was dismissible at pleasure. Judicial review was therefore neither necessary, nor appropriate in normal cases.
>
> (b) Judicial review could, however, be sought if the public employee was affected by a disciplinary body established under statute or the prerogative to which the employer or employee was required or entitled to refer disputes affecting their relationship. Provided that the tribunal had a sufficiently public law element then judicial review could be used.
>
> (c) A public employee could also seek judicial review if attacking a decision of general application (i.e. a decision affecting employees at the public body generally) and doing so on grounds of irrationality.
>
> (d) Even where review was not available because the disciplinary procedures were purely domestic in nature, it might still be possible for the employee to seek a

declaration or an injunction outside of the judicial review procedure to ensure that the proceedings are conducted fairly."

[18] Dr. Dorsett said that in light of Walsh, Noble and McClaren ibid, the proper course for Mr. Nelson to take is not judicial review proceedings. The issues raised by him are, by their nature, nothing other than private law matters. In the circumstances, the claim for judicial review should be struck out. There is no real prospect of him succeeding on a claim for judicial review and the proceedings constitute an abuse and misuse of the process of the Court, particularly when an alternative remedy, as provided by clear constitutional provisions, is known and available to him.

[19] Further, the circumstances in the case at bar share some similarity to those of R (Tucker) v Director General of the National Crime Squad [2003] EWCA. In Tucker, the appellant was a police officer who had been seconded to the National Crime Squad for a period of five years. His secondment was summarily terminated and he was returned to his local police force without any disciplinary implications. He was informed that "The Deputy Director General no longer has confidence in your ability to carry out your responsibilities". In reviewing the principles on the issue of whether the decision to remove of the appellant from the National Crime Squad was amenable to judicial review, the English Court of Appeal pointed out that an applicant for review had to show that a public law right enjoyed by him had been infringed and whilst a statutory power of dismissal injected the public element necessary to attract the remedies of administrative law, employment by a public authority did not inject any element of public law.

[20] The Court went on to hold that by summarily removing the appellant from the National Crime Squad the Deputy Director General was not performing a public duty owed to the appellant. Dr. Dorsett said, similarly, that in the case at bar, no public law right has been breached by the Commission and it has no public duty to either inform Mr. Nelson of his progress during his probationary period or to provide him with any further reasons with respect to his dismissal other than which has already been provided.

[21] Dr. Dorsett submitted that the dismissal of Mr. Nelson during his probationary period is lawful if, according to section 12(1) of the Police Act, he is "found not to be fitted to perform the duties of his

office or to be not likely to become an efficient and well conducted officer". The Commission, in its dismissal letter to Mr. Nelson, indicated that he was dismissed for unsatisfactory performance of his duties. Dr. Dorsett argued that the requirements of section 12(1) of the Act have been satisfied. He said that the post of Commissioner of Police is a sensitive post. Sensitive and delicate issues of national security are not far removed from the post and in such circumstances where national security is at stake, it would not be proper to disclose in fulsome detail the reasons for his dismissal. Where there is a real likelihood that the disclosure of certain information may compromise national security and would not be in the public interest, the obligations of fairness which might ordinarily arise may have to be modified or dispensed with altogether (see Council of Civil Servants v Minister for the Civil Service [1984] 3 All ER 935). Likewise with "sensitive intelligence information".

[22] Dr. Dorsett said that at the material time, horrific crimes including startling murders, some of which attracted intense negative international media attention and had consequently adversely affected the national international economy based on tourism, had occurred during the tenure of Mr. Nelson. It was hoped that with new leadership at the head of the police force, the rampant crime situation that gripped the country would be abated. This did not occur. The whole situation was unsatisfactory. His performance was not effective to reverse the trend. The circumstances compelled a change of the Commissioner.

[23] Moreover, there was conduct by him that was at times disreputable, at other times unlawful, and in other cases embarrassing to the Commission and the Government and people of Antigua and Barbuda. The Commission had to remove him.

[24] Learned Counsel Dr. Dorsett said that Mr. Nelson relied on the decision in R v Chief Constable of the Merseyside Police, ex p Calveley [1986] 1 All ER 257 to support his position that the Court rightfully exercised its discretion in granting leave for judicial review in the presence of an alternative remedy. Dr. Dorsett said that the Calveley case does not support Mr. Nelson's position. Calveley is an application of the legal principle pronounced by both Lord Scarman and Lord Templeman in Preston v IRC [1985] 2 All ER 330 p 337-338. The principle laid down in Preston is that judicial review will not be granted in the presence of an alternative remedy except in

exceptional circumstances. Both Lord Scarman and Lord Templeman in Preston pointed to the presence of exceptional circumstances in that case which made it appropriate to proceed by judicial review. In Calveley, special circumstances were present which made it appropriate to grant judicial review even though a statutory scheme providing an alternative remedy was available to the aggrieved police officers. The alternative procedure would have been too slow. The statutory procedure would have given the police officers the opportunity to appeal within days of the complaints made against them, but it transpired that the officers had no notice of the complaints lodged against them for two years. In those exceptional circumstances it was held that, "this is so serious a departure from the police disciplinary procedure that, in my judgment, the court should, in the exercise of its discretion, grant judicial review and set aside the determination of the chief constable" (Calveley at 263d per Sir John Donaldson MR). May LJ in Calveley at 265b warned against readily resorting to judicial review on account of the alternative remedy being more inconvenient:

> "I think that one must guard against granting judicial review in cases where there is an alternative appeal route merely because it may be more effective and convenient to do so."

[26] When one considers the matters enumerated in R v Hallstrom, ex p W, taken together with what was said and decided in Calveley, Dr. Dorsett submitted that Calveley, taken in round, is no authority for the position advanced by Mr. Hamilton QC and that the case at bar is not a case where the rule laid down by Lord Scarman and Lord Templeman in Preston should not be applied and adhered to.

[27] Lord Woolf's CJ statement in R (Cowl) v Plymouth City Council [2001] EWCA 1935, [2002] 1 WLR 803, Dr. Dorsett urged, is on point to the case at bar. Lord Woolf CJ stated that litigation should be avoided wherever possible, and that maximum use should be made of alternative dispute resolution and complaints procedures. Given the alternative remedy available to Mr. Nelson under the Constitution of Antigua and Barbuda, and in the absence of exceptional circumstances, Mr. Nelson's claim for judicial review ought to be struck out.

[28] The actions of the Commission are in keeping with section 12(1) of the Police Act. His removal as Commissioner of Police was an operational decision and clearly not the exercise of disciplinary

control, as section 107(1) (d) of the Constitution makes a clear distinction between the two measures. Dr. Dorsett stated that the decision to remove Mr. Nelson from the post of Commission of Police is an "entirely operational decision" and not amenable to judicial review. It is the duty of the Commission to see to it that the Police Force is headed by an efficient and competent leader. Once the Commission reached the conclusion during the currency of the probation period that Mr. Nelson would not make a suitable Commissioner of Police; there was no purpose in leaving him in the post of the Commissioner past the probationary period. Dr. Dorsett said that the decision of the Commission is not one to be interfered with by the Courts.

[29] Finally, Dr. Dorsett argued that the Commission is not a proper party to the claim.

[30] Therefore, the claim against the Commission should be struck out.

[31] Mr. Dane Hamilton QC's Submissions

Learned Queen's Counsel Mr. Hamilton submitted that the Court that granted leave to Mr. Nelson to bring the judicial review proceedings was entitled to exercise its discretion on the issue of granting leave to apply for judicial review. Learned Queen's Counsel said that the true scope of the rule goes to the exercise by that Court of its discretion which is clearly mirrored in CPR 56.3(3) (c) and 56.3(4). The interrelationship between remedies by way of judicial review on the one hand and appeal procedures on the other is not to be regarded or construed as a statute. There is no hard and fast rule that the jurisdiction will not be exercised where other remedies were available and have not been used. Nor is it an insurmountable proposition of law that judicial review is not available where there is an alternative remedy by way of appeal. The issue goes to the discretion of the Court: R v Chief Constable of the Merseyide Police ex parte Calveley [1986] 1 A.E.R 257 at 261-262 letter (h) to (j).

[32] Learned Queen's Counsel Mr. Hamilton said that Mr. Nelson clearly satisfied that Court that he had an arguable case for judicial review on the ground of illegality, irrationality, unreasonableness: Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 A.E.R 680 and procedural impropriety (conducting a review with enabling him to make representation which certainly cannot be an operational decision) Council of Civil Service Unions v Minister for the

Civil Service [1984] 3 A.E.R 935 AT 950. Or indeed that he had a legitimate expectation to be heard.

[33] Mr. Hamilton QC submitted that that Court considered the application for leave without hearing the applicant as the Court was entitled to do under the CPR 56.4 and granted leave. It must be shown that the exercise of the discretion was flawed in the Wednesbury sense or that the Court took into consideration matters it ought not to or irrelevant matters.

[34] Mr. Hamilton QC said that the application of the Commission challenging the leave which was granted is ill-conceived. Such challenges are appropriately raised at the appellate level. What this application amounts to is asking one High Court Judge to review the exercise of a discretion by another High Court Judge which is not permissible. Of course the point as to alternative remedies can be taken at the judicial review hearing where the Court would be in a better position having heard and seen all of the evidence to assess the validity of that argument. In Sharma v Browne Antoine [2006] UKPC 57 page 22 Lord Bingham applied the principle (in the context where leave to apply for judicial review was set aside by the Trinidad and Tobago Court of Appeal). In R v Secretary of State for the Home Department ex parte Chinoy (1991) 4 Admin 457, 462 it was held that where leave to move for judicial review has been granted, the Court's power to set aside the grant of leave will be exercised very sparingly but it will do so, if satisfied on an inter partes argument that the leave is one that plainly should not have been granted.

[35] Learned Queen's Counsel Mr. Hamilton said that the existence of a remedy in contract is not a bar to an application for judicial review. A claim for judicial review may be brought against any person or body performing public duties or function including those who perform duties derived from statute. The Commission is a constitutional body which performs public functions/duties derived from statue such as section 12(1) of the Police Act Cap 330. In respect of its functions and duties under that Act it exercised the power of appointment and dismissal in respect of Police Force (Part 1 of Cap 330). Matters of contract are dealt with by the Government through the Establishment Division. Mr. Nelson's removal as Commissioner of Police was a purported exercise of its statutory power by the Commission and that exercise is amenable to judicial review.

[36] The argument is raised by the Commission that the dismissal of Mr. Nelson is an operational command decision. That characterization is ill-conceived. Command of the force inheres in the Commissioner subject to general directions of the Minister. Operational decisions are made by the Commissioner. The true question is whether the remedies sought by Mr. Nelson arose out of a private right in contract between him and the Commission or upon some breach of the public duty placed upon the Commission which related to the exercise of the powers granted by statute to it to engage and dismiss Mr. Nelson in the course of providing national service to the public.

[37] It has been submitted on behalf of the Commission that it is not a proper party. This point was settled by the decision in Newlin Dyer v Public Service Commission [1997] E.C.L.R 154 where in a similar argument Mitchell J ruled that the Public Service Commission is not a branch of the Crown for the purposes of the Crown Proceedings Act. It is a creature of the Constitution placed there to supervise the relations between the Crown and its employees and it can be sued. This principle applies with equal force to the Commission.

[38] Finally, Mr. Hamilton QC submitted that the issue can be resolved in the following manner:
Was the Commission a public body exercising statutory powers? The answer is clearly yes. It exercised a statutory power of dismissal in respect of Mr. Nelson. Was the function being performed in exercise of those powers public or private? The answer is that it is clearly public; given to the Commission by statute, Mr. Nelson's contract was with the Government and was in the process of negotiation. However, he was appointed by the Establishment Division to the post of Commission thereafter becoming subject to the Commission and the Police Act. In Horace Fraser v The Judicial and Legal Services Commission Privy Council Appeal No. 116 of 2006 Lord Mance speaking for the Board at paragraph 15:

> "In Thomas v Attorney General of Trinidad and Tobago Lord Diplock giving the Board's judgment emphasised the constitutional importance of the autonomous commission established under Westminster style constitutions with powers of discipline and removal relating to specific officers. The Board said of a provision providing security of tenure for police officers that "To remove" from office in the police force in the context, embraces (not being a contract for a specified period) is terminated against his own free will, by whatever euphemism the termination may be described".

The Commission was performing a public duty owed to Mr. Nelson vis-à-vis his removal as Commissioner of Police.

[39] In the circumstances, Mr. Hamilton QC submitted that the Commission's application should be dismissed without costs.

[40] Court's analysis and conclusions

I have given careful consideration to the submissions made by both learned Counsel and have also reviewed the pleadings in their entirety. With respect, I am not at all persuaded, as urged by Dr. Dorsett, that the matters in the case at bar are matters exclusively of a contractual nature. To the contrary, I am satisfied that the matters complained of by Mr. Nelson fall within the realm of public law.

[41] In the substantive matter, Mr. Nelson seeks several administrative orders which are akin to the orders that are in judicial review proceedings. In fact, one of the orders that is sought is that of certiorari to quash the decision of the Commission to terminate his appointment; he also seeks an order that he has a legitimate expectation to be treated fairly, both of which are orders that are clearly within the exclusive purview of public law and have no relevance to private law. I do not share the view that the matters of which Mr. Nelson complains fall within private law. Certiorari is one of the other prerogative remedies which was always available against public bodies and officers of the state. While it is true that an application for damages would generally indicate that the claim is one of private law, looking at the pleadings in the round, it is apparent that the substantive claim is one that is based on allegations of breaches of public duties. It has always been the law that the actions of public or statutory bodies are amenable to judicial review.

[42] Accordingly, and with respect, as stated earlier, I do not accept the submissions advanced by Dr. Dorsett that this is not a matter that falls within the ambit of the public law. By way of emphasis, most of the issues raised in the case at bar, fall within the parameters of public law. See: R v Civil Service Appeal Board exp Bruce [1988] 3 All ER 686 in which May LJ stated that "there was a sufficient public law element behind the applicant's dismissal from appointment with the Inland Revenue and the hearing of this appeal by the Board to entitle him to apply for judicial review."

[43] I have no doubt that the Commission is a public functionary and public law consequences flowed from its decision which can impact on the rights of the Commissioner. See: R v Panel on Take-overs and Mergers exparte Datafin Ltd (1987) QB 815 in which it was held that once the activities of a body were of a public law character the body was susceptible to judicial review. In my judgment, the decision of the Commission is susceptible to administrative review.

[44] It is well settled that judicial review is the procedure by which the Court exercises supervisory jurisdiction over tribunals and public bodies. It is also the means by which the Court controls the exercise of governmental powers. The Court in the exercise of this jurisdiction is not concerned with the merits of the decision of the body or tribunal but seeks to ensure that the body or tribunal has acted properly or within the ambit of its power in arriving at its decision; in a word the Court is concerned with the legality of the decision made.

[45] Applicants for judicial review can properly challenge decisions of public bodies on three well recognized grounds (though they are not exhaustive) namely: illegality, irrationality and procedural impropriety. See Lord Diplock 1196 in Council of Civil Service Unions v Minister of Civil Service [1984] 3 W.L.R 1174.

[46] Judicial Review has also been approached from the following three bases namely:

(1) Abuse of jurisdiction
(2) Abuse of discretion
(3) Violation of the Rules of natural justice

[47] Grahame Aldous and John Adler in their Treatise – Applications for Judicial Review Law and Practice of the Crown Office Second edition State at page 163 that "*the purpose of judicial review is not to provide an appeal procedure against decisions of public bodies on their merit but to control the jurisdiction of public bodies by ensuring that they comply with their duties or by keeping them within the limits of their powers*." Judicial review proceedings is discretionary and it is for the officer to persuade the Court on the basis of the evidence that the case for its consideration is one that is fit for the exercise of its discretion in favour of the officer. The remedies that are available in judicial review proceedings are also discretionary. Even though the Court has the power to enjoin

or compel bodies to do their duties properly, once the Court comes to the conclusion that a body has the power to do a particular act the Court cannot require that body to exercise its power in any particular way it can only require that the discretion lying behind the decision to exercise a power be lawfully used. See: R v Hall University Visitor; exp Page [1991] 4 ALL ER 747 at 751 per Lord Donaldson MR.

[48] Over the years, Parliament has conferred upon various government departments, administrative bodies and tribunals – powers which must be exercised within the "four corners" of the legislation. While most of the rules applied by administrators will be statutory, the Court has also under common law developed rules which will apply to decision makers over and above statutory rules.

[49] The gravamen of Mr. Nelson's complaint is that his termination was unlawful since the Commission breached well established principles of natural justice. These are matters that will have to be fully ventilated at the trial. There is no doubt that they fall squarely within public law and are amenable to judicial review.

[50] In addition, I am equally not persuaded that in the present case, Mr. Nelson had an obligation to exhaust the remedies he had at private law before invoking the public law jurisdiction of the Court. One needs only to examine the nature of his claim and the reliefs that he seeks in order to put paid to that argument. Mr. Nelson's main grievance is stated to be based on his allegations that the Commission acted illegally, irrationally and unreasonably in dismissing him. These allegations form the bedrock of judicial review proceedings, in public law. In Thomas v Attorney General of Trinidad and Tobago [982] AC 113, 128 Lord Diplock said:

> "The functions of the Police Service Commission fall into two classes: (1) to appoint police officers to the public service, including their transfer and promotion and confirmation in appointments and (2) to remove and exercise disciplinary control over them."

[51] Mr. Nelson has sought a number of public law remedies. I do not hold the view that Mr. Nelson was obligated to appeal to the Public Service Appeal Board instead of filing the claim for Judicial Review. The law has moved on and there is no absolute duty to exhaust his other rights before instituting public law proceedings; this is particularly so where as in the case at bar, the private law

remedies that may be available to a complainant are unable to address some of the alleged infractions of public rights. Accordingly, I refuse to accede to the Commission's request to strike out Mr. Nelson's claim on that ground. If any further reason is needed to support this view, it is found in the exceptional circumstances that are present in this case which warranted the Court to exercise its discretion by giving him leave to bring the claim.

[52] Indeed, the matter of the grant to proceed with judicial review is a matter for the discretion of the Court. See R v Lambeth LBC Exp Cookes (1997) HLR 28. The presence of alternative remedies does not, without more, determine whether judicial review is available to a claimant. R v Crown Prosecution Service Exp Hoss [1994] 6 Admin LR 77.

[53] It is clear that the effect of the Commission's application, in part, is to challenge the leave that the Court granted to Mr. Nelson to institute the claim. I agree that if the Commission was of the view that that Court had improperly exercised its discretion in granting Mr. Nelson leave to institute the proceedings, it ought to have utilised the correct procedure to challenge the order of that Court. It is not open to the Commission, to indirectly challenge the leave that was granted by that Court by seeking to have Mr. Nelson's claim struck out. This is not the correct procedure for the Court to embark on an examination as to whether the leave was properly granted. In any event, I do not share the view that leave was improperly granted.

[54] In view of all of the circumstances, I accept the arguments advanced by learned Queen's Counsel Mr. Hamilton and refuse to strike out Mr. Nelson's claim.

[55] Finally, there is no basis on which the Court can properly conclude that the Commission is not a proper party to the claim.

[56] Conclusion

In the foregoing premises, The Police Service Commission's application to strike out Mr. Nelson's claim is dismissed.

[57] The Order of this Court is as follows:

(a) In order to expedite the matter, 21 days leave is granted to the Police Service Commission to file and serve its Affidavit in Answer.

(b) The matter is fixed for Pre-trial Review hearing on 22nd May 2009 at 9 am.

(c) The Court Administrator is to notify the other parties of the Pre-trial Review hearing fixed for 22nd May, 2009 at 9 am.

(d) The parties are to file Pre-trial Memorandum which contains statement of Facts, Issue and Law together with photocopy of the authorities on which they rely. The Memorandum must state matters that have been agreed.

(e) All parties or their representatives must attend the Pre-trial Review hearing.

[58] I gratefully acknowledge the assistance of both learned Counsel.

Louise Esther Blenman
High Court Judge
Antigua and Barbuda