BRITISH VIRGIN ISLANDS

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim No. BVIHCV2010/0048

MARY WILLIAMS

Claimant

-and-

ATTORNEY GENERAL

Defendant

Appearances:

Mr. Lewis S. Hunte QC and Mr. Richard Arthur of Hunte & Co. Law Chambers for the claimant
Ms. Karen Reid, Senior Crown Counsel and Ms. Vareen Vanterpool, Senior Crown Counsel, Attorney General's Chambers for the defendant

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2010: October 25
2011: June 22

Constitution - Public Services Commission - Public Service Regulations - disciplinary proceedings - dismissal by Governor - Judicial Review - Certiorari - Revocation of dismissal - Whether Governor has power to revoke - Whether claim academic

Administrative law - Judicial Review - Procedural Irregularity - Error of law - breach of constitutional right - section 16(9) - Hearing within a reasonable time - Independent and impartial authority - Whether guilty of offence not charged - Whether charge based on false premise - Public Authorities and Protection Act - Whether claim statute barred - Undue delay - Restoration to post

The claimant instituted a claim for judicial review seeking an order of certiorari to quash a decision by the Public Service Commission ("the PSC"), which was approved by the Governor and communicated to her by letter dated 20 January 2010 ("the decision") which resulted in her dismissal from the Public Service. The decision has since been revoked and the claimant was so advised by letter dated 21 June 2010. She was also advised that dismissal proceedings are to continue against her in light of her continual refusal to submit the letters of apology as directed. Notwithstanding the revocation of the decision, the claimant persists with her claim for judicial review. She also seeks an order to restore her to her post in the Public Service together with all benefits thereto and costs.

The Attorney General alleged that the claim for judicial review has become academic and it is an abuse of the process of the court and ought properly to be struck out. Further, that the claimant is not entitled to an order for restoration to her post with full benefits.

The claimant submitted that she is entitled to judgment on admission in light of the decision to revoke her dismissal for procedural irregularity.

HELD:

1. The Governor's offer to revoke the dismissal and reconstitute a fresh disciplinary tribunal, if the claimant accepts it, it will put her in the same position the court would be able to if certiorari were to be granted. The court is not required to issue a grant of certiorari where to do so would be a pointless exercise: **Dennis Graham v Commissioner of Police**, Trinidad and Tobago Civil Appeal No. 67 of 2005 (Hamel- Smith CJ (Ag.), Warner JA, Mendonca JA), Judgment 1st December 2006 (unreported).

2. In his defence, the defendant did not plead an abuse of the process of the court. To do so belatedly is improper: **Odgers' Principles of Pleadings and Practice**, 22nd edition, page 120 and **Halsbury's Laws of England**, 4th ed. Vol 37 para. 434.

3. All challenges to the disciplinary proceedings held on 22 April 2008 culminating in and including the decision of the PSC to impose a penalty on the claimant are statute-barred by virtue of section 2 of the Public Authorities Protection Act, Cap. 62 of the Laws of the Virgin Islands: **Quorum Island (BVI) Limited and the Attorney General v Virgin Islands Environmental Council** (HCVAP 2008/004) –judgment delivered on 27 October 2008 and **Ronex Properties Ltd v John Laing Construction Ltd** (1983) QB 398, 404 referred to.

4. The admission of a procedural irregularity does not "entitle" the claimant to judgment on admission. Certiorari is a discretional remedy, not one as of right. CPR 14.1 (2) and 14.4 are inapplicable in these circumstances.

5. Although the claim is borne out on the grounds of improper procedure, the court declines to issue an order of certiorari for the following additional reasons.

    1. The claimant is guilty of undue delay in seeking to avoid the dismissal on the basis of proceedings, which she knew were flawed when they occurred seven months before filing her claim. The court declines to exercise its jurisdiction in her favour: **R v Secretary of State for Education ex parte B (A Minor)** [2001] ELR 333.

    2. There was no unreasonable delay sufficient to amount to a breach of the constitutional right to a hearing within a reasonable time. There was no breach of the right to a hearing before a fair and impartial tribunal. There is no basis for a finding of an error of law or that the charge was based on a false premise.

    3. Quashing the decision of the PSC would not entitle this court to order that the claimant be restored to her post. On a claim for judicial review, the court is limited

to remitting the decision to the decision-maker to make a fresh decision in accordance with the law: **CPR 56.14(2).** Under the Constitution, the Governor, acting on advice of the PSC, is the authority vested with the power to appoint, discipline and dismiss public servants. It is no function of the court to usurp the powers of the Governor and the PSC to determine whether the claimant ought to be dismissed or appointed to a particular post in the public service or on what terms.

JUDGMENT

Introduction

[1] **HARIPRASHAD-CHARLES J:** This is a claim for Judicial Review. The claimant, Mary Williams seeks an order of certiorari to quash a decision by the Public Service Commission ("the PSC"), which was approved by His Excellency Governor David Pearey and communicated to her by letter dated 20 January 2010 ("the decision") which resulted in her dismissal from the Public Service. The decision has since been revoked and Ms. Williams was so advised by letter dated 21 June 2010. She was also advised that dismissal proceedings are to continue against her in light of her continual refusal to submit the letters of apology as directed. Notwithstanding the revocation of the decision, Ms. Williams persists with her claim for judicial review. Ms. Williams also seeks an order to restore her to her post in the Public Service together with all benefits thereto and costs.

[2] The Attorney General, the defendant in these proceedings, enjoins the court to find that (i) the claim has become academic and (ii) it is an abuse of the process of the court and ought properly to be struck out. Further, that Ms. Williams is not entitled to an order for restoration to her post with full benefits and that she should pay the Attorney General the costs incurred subsequent to the filing of his defence.

Factual background

[3] Ms. Williams is a public officer of some 21 years. Most recently, she was assigned to the post of clerical officer in the Department of Inland Revenue. Disciplinary proceedings were instigated against her in respect of an incident which occurred in the office on 13 February 2007. Allegedly, a senior officer asked her to do a task and she refused. Meetings with

senior officials were held and Ms. Williams was asked to apologize to certain officers. She refused to do so because she felt she had done nothing wrong.

[4] The matter progressed along a certain course and Ms. Williams was placed on administrative leave pending further notice by letter dated 7 May 2007.[1] On 13 February 2008[2], Ms. Williams was informed that she was interdicted from duty at half salary with effect from 16 October 2007. She was provided with specific details of the charges against her namely:

1. General Misconduct Prejudicial to Proper Administration of Government Business and
2. General Misconduct Prejudicial to Discipline.

[5] Briefly, the particulars of Misconduct Prejudicial to Discipline were given as:

(i) You were insubordinate to a senior officer…in that you refused to carry out a duty requested by the said senior officer….

(ii) You were verbally abusive, insubordinate and disrespectful to the Commissioner Inland Revenue in the presence of the Ag. Deputy Commissioner of Inland Revenue …

(iii) You were insubordinate to and disrespectful to your Head of Department in the presence of Ag. Commissioner and Ag. Deputy FS …

(iv) You were verbally abusive and disruptive in the general area of the Department of Inland Revenue in the presence of other members of staff and the general public…."

[6] A hearing before the PSC took place on 22 April 2008. Ms. Williams attended the hearing with her legal counsel, Mr. Lewis Hunte QC. She called witnesses.

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[1] Second Affidavit of Mary Williams, Exhibit MW4.
[2] *Ibid.*, Exhibit MW5.

[7] On 17 June 2008,[3] Ms. Williams was informed that the Governor, after consultation with the PSC, has concluded that **"you did act inappropriately to senior management namely the former acting Deputy Financial Secretary, the Commissioner of Inland Revenue and the Collections Supervisor.**" She was advised that "*you are reprimanded pursuant to section 42(f) of the PSC Regulations which states, "The Penalties which may be imposed on an officer against whom a disciplinary charge has been established is (f) reprimand.*"" She was directed to submit written letters of apology to (i) the former Acting Deputy Financial Secretary; (ii) the Commissioner of Inland Revenue and (iii) the Senior Collections Officer, Inland Revenue on or before 25 June 2008.

[8] On 23 June 2008,[4] Ms. Williams wrote to the Director of Human Resources ("the HR Director") asking which of the four charges, communicated to her on 13 February 2008, she had been found guilty of, since she had not been charged with "inappropriate conduct" and had not had the opportunity to defend against it. She repeated this request for "clarification" in two further letters dated 3 Aug 2008[5] and 21 November 2008[6] respectively. In the latter letter, she also formally requested to be furnished with a "copy of proceedings" of her hearing before the PSC. That request was repeated on 23 December 2008.[7]

[9] The Department of Human Resources ("HR") responded in three letters. The first, dated 28 July 2008,[8] stated that the details of the charges were in numbered para. (i) to (iv). In this letter, she was given an extension of time to 11 August 2008 to submit written apologies. She was also reminded that "*failure to submit the letters of apology by this date will indicate your refusal to submit the requested apologies and further disciplinary action will be taken.*"

[10] The second letter was dated 17 November 2008.[9] In that letter, Ms. Williams was notified that dismissal proceedings were instituted against her for refusal to submit letters of

[3] *Ibid.*, Exhibit MW7.
[4] *Ibid.*, Exhibit MW8.
[5] *Ibid.*, Exhibit MW10.
[6] *Ibid.*, Exhibit MW12.
[7] *Ibid.*, Exhibit MW14.
[8] *Ibid.*, Exhibit MW9.
[9] *Ibid.*, Exhibit MW11

apology as directed. In the third letter, written on 18 December 2008, Ms. Williams was told that she was already in possession of the complete package of the proceedings and a copy of the evidence was previously supplied in advance of the hearing held in March 2008.

[11] There was then a hiatus until 6 August 2009. On that day, she was notified that a Tribunal of three public officers ("the Tribunal") had been constituted to hear the specific charge against her of:

> "You Miss Mary Williams refused to submit letters of apology to the then Ag. Deputy Financial Secretary, Commissioner of Inland Revenue and Collections Supervisor as directed by the Governor."

[12] The hearing took place on 18 August 2009. Ms. Williams was in attendance. Mr. Hunte QC was also present. She asserted that the Tribunal began questioning her in respect of her earlier charges before the PSC. At that stage, her lawyer intervened saying that she was before the Tribunal on a specific charge which should be read to her and to which she should plead after which evidence should be called in respect of that charge. By her account, the interruption was not appreciated. The Tribunal said they would get to that "in due course" and proceeded with questions in respect of the previous disciplinary charges. Ms. Williams deposed that she was then asked to leave. No witnesses were called in her presence.

[13] By letter dated 20 January 2010, the HR director informed Ms. Williams that further to dismissal proceedings instituted in reference to the charge that she had "…*refused to submit letters of apology to the then Ag. Deputy Financial Secretary, Commissioner of Inland Revenue and Collections Supervisor as directed by the Governor ... His Excellency the Governor after consultation with the PSC hereby and pursuant with PSC Regulations 47(2) has directed that you be dismissed from the Public Service of the British Virgin Islands.*"

[14] On 3 March 2010, Ms. Williams filed an ex parte application seeking leave to apply for judicial review of the decision. It was supported by an affidavit of even date. On 25 March

2010, Redhead J (Ag.) granted leave to Ms. Williams to make a claim for judicial review.[10] By Fixed Date Claim Form issued on 26 March 2010, Ms. Williams filed her claim. It was supported by an affidavit filed on 26 March 2010.

[15] By letter dated 21 June 2010, the HR Director informed Ms. Williams that her dismissal from the public service was revoked, that dismissal charges against her were to continue and asked her to provide a response to the charge. Specific parts of the letter read:

> "I have been directed to inform you that His Excellency the Governor, after consultations with the Public Service Commission has revoked his decision that you be dismissed from the Public Service. This decision is based on advice from the Attorney General that notwithstanding that there were grounds for your dismissal, there may have been a procedural irregularity regarding the proceedings before the Dismissal Tribunal held on 18 August 2009.
>
> I am directed to inform you further that His Excellency the Governor, after consultations with the Public Service Commission, has directed that the dismissal proceedings instituted against you and communicated to you by letter dated 17 November 2008 be continued and that a new Tribunal may be appointed to investigate the specific charge that was made against you, namely **You Miss Mary Williams refused to submit letters of apology to the then Ag. Deputy Financial Secretary, Commissioner of Inland Revenue and Collections Supervisor as directed by the Governor**."

[16] The revocation of Ms. Williams' dismissal came about when, according to the Attorney General, it became apparent that the Tribunal appeared to have re-investigated the four charges of which Ms. Williams had already been found guilty and had not formally investigated and put to Ms. Williams the charge relating to her "refusal to submit written apologies." [11]

The issues

[16] The following issues arise for determination namely:

1. Whether there ought to be a hearing in these proceedings at all?

[10] See Order dated 25 March 2010.
[11] See paragraph 8(iii) of the Attorney General's Statement of Defence filed on 23 June 2010.

2. Whether Ms. Williams can maintain a challenge to the disciplinary proceedings held in April 2008?
3. Whether Ms. Williams is entitled to an order of certiorari to quash the decision? and
4. Whether Ms. Williams is entitled to restoration to her post with full benefits?

The Attorney General's preliminary issues

Ought there to be a hearing in these proceedings?

[17] Learned Senior Crown Counsel Ms. Reid, appearing for the Attorney General, raised the first preliminary issue that Ms. Williams' claim is now academic since the decision resulting in her dismissal from the Public Service had already been revoked. Ms. Reid submitted that the Governor has the power to change his mind at any time.[12] Thus, the sole ground for these proceedings has 'fallen away and becomes irrelevant'[13] and an order of certiorari to quash the decision (which has already been revoked) would be a "pointless exercise".[14] She further submitted that the court ought to decline to hear questions of public law where the sole issues are or have become academic or hypothetical.[15] And, that Ms. Williams' claim does not fall within the narrow ambit of academic cases, which should nevertheless be decided because of their great importance to the public interest.[16] Finally, Learned Senior Crown Counsel submitted that Ms. Williams' doggedness to proceed with this claim after having received the identical relief constitutes an abuse of the process of the court.

[18] Ms. Williams has denied receiving communication of the revocation before filing her Reply to the Defence on 30 June 2010. Nonetheless, learned Queen's Counsel, Mr. Hunte, who appeared for Ms. Williams, submitted that Ms. Williams cannot be "undismissed." Mr.

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[12] **R v Hertfordshire County Council ex parte Cheung and others** The Times 4 April 1986; **De Verteuil v Knaggs and another** [1918] AC 557.

[13] **The Queen on the Application of Mohebullah v Secretary for State for the Home Department** [2004] EWHC 1935(Admin).

[14] **Barry v Fitzpatrick and others** Supreme Court Ireland (Hamilton CJ, Blaney J, Denham JJ), Judgment 20 December 1995.

[15] **Dennis Graham v Commissioner of Police**, Trinidad and Tobago Civil Appeal No. 67 of 2005 (Hamel-Smith CJ (Ag.), Warner JA, Mendonca JA), Judgment 1st December 2006 (unreported); R v Secretary of State for Home Department, ex parte Wynne [1993] 1 WLR 115; R v Secretary of State for the Home Department, ex parte Salem [1999] 1 AC 450.

[16] **R v Board of Visitors ex p Smith** [1987] 1 QB 106; **Royal College of Nursing v DHSS** [1981] AC 800; **Gillick v West Norfolk Wisbech AHA** [1986] AC 112.

Hunte QC next submitted that the decision to dismiss was binding and could not be withdrawn or revoked unilaterally in the manner adverted to by the Governor.[17] According to him, any purported revocation when communicated to Ms. Williams would be tantamount to an offer of reinstatement which she would be at liberty to reject. Also, that the revocation was not a true revocation since the letter did not state whether and to what extent any of Ms. Williams' salary or benefits as a public officer were reinstated. Mr. Hunte QC further submitted that double jeopardy attaches to rehearing of the dismissal proceedings and that any new tribunal will be biased. Finally, he contended that the admission of procedural irregularity amounted to a clear admission of the claim[18] and on this discrete ground alone, Ms. Williams is entitled to an order of certiorari.

[19] The primary relief claimed by Ms. Williams is for an order of certiorari. I agree with Ms. Reid that, in these circumstances, it would be a meaningless exercise to grant such an order. For all practical purposes, the decision challenged had already been "revoked", the relief sought had already been offered and there is no further or better relief which this court can order. Mr. Hunte QC insisted that the Governor could not change his mind after the claim had been filed. No judicial authority was cited to bolster this argument, perhaps because none exists. It seems to be an elementary principle of law that parties do have the right to change their minds on any issue in contention at any time and inform the other side of their position to see if an agreement can be reached. Were it otherwise, then matters may never be settled after proceedings had been initiated.

[20] In light of the Governor's decision to reconstitute a different disciplinary tribunal to rehear the matter, Ms. Williams has already been offered the precise relief which she may have gotten from the court. There is really no good reason in the public interest to embark on a hearing to decide hypothetically whether the relief which she had already been offered ought to be granted. To do so would result in a waste of judicial time and resources. The claim for judicial review should have been withdrawn.

[17] Halsbury's Laws of England, Vol 16 (4th ed. 2000 reissue) Employment: 437; **Harris & Russell Ltd v Slingsby** [1973] 3 All ER 31; **Riordan v The War Office** [1959] 3 All ER 552, 557I-558A per Lord Diplock.

[18] CPR 14.1 and CPR 14.4.

[21] As I see it, the claim for judicial review should fail on this preliminary issue alone. However, in the event that this matter goes further, I will proceed with the other issues which have been argued before me.

Abuse of the process of the court

[22] Furthermore, Ms. Reid submitted that Ms. Williams ought properly to be under a duty to withdraw her claim for judicial review once it became clear that the decision which she sought to have quashed had been revoked because to continue with proceedings to review a decision which no longer exists ought properly to be construed as an abuse of the process of the court. She relied on the Privy Council case of **Jaroo v the Attorney General of Trinidad & Tobago**.[19] In that case, the applicant filed a constitutional motion seeking relief for infringement of certain of his rights. Following the filing of the respondent's affidavit in response, it was clear that proceeding by way of constitutional motion was no longer appropriate. At paragraph 39 of the judgment, the Privy Council said:

> "Their Lordships respectfully agree with the Court of Appeal that, before he resorts to this procedure, the applicant must consider the true nature of the right allegedly contravened. He must also consider whether, having regard to all the circumstances of the case, some other procedure either under the common law or pursuant to statute might not more conveniently be invoked. If another such procedure is available, resort to the procedure by way of originating motion will be inappropriate and it will be an abuse of process to resort to it. **If, as in this case, it became clear after the motion has been filed that the use of the procedure is no longer appropriate, steps should be taken without delay to withdraw the motion from the High Court as its continued use in such circumstances will also be an abuse."**[emphasis added]

[23] In similar vein, says Ms. Reid, subsequent to the filing of the claim for judicial review, it became apparent that there was no longer any decision to be reviewed by the court; thus the proper course should have been to seek leave to withdraw the claim with an appropriate order for costs. But to continue with these proceedings is an abuse of the process.

[19] Privy Council Appeal No. 54 of 2000. Judgment delivered on 4 February 2002.

[24] In **Trinity Investment Company Limited Orest Bedrij Oksana Bedrij Chrystyna Bedrij Raksana Bedrij v The Proprietors, Condominium Plan No 24/1989 et al**, Joseph-Olivetti J had to deal with the issue of abuse of process. Before her was an application by the defendants to strike out the claim as an abuse of the process of the court pursuant to CPR 26.3 (1). In that case, the defence did not allege that the claim was an abuse of the process. At paragraph 10 of the judgment, Joseph-Olivetti J said:

> " ..The Court has power to prevent the abuse of its process and that "the powers must be used bona-fide and properly. The Court will prevent the improper use of its machinery and will not allow it to be used as a means of vexatious and oppressive behaviour in the process of litigation:" **Odgers' Principles of Pleadings and Practice** 22nd edition page 150; see also: **Halsbury's Laws of England** 4th edition Vol 37 para. 434."

[25] The learned trial judge went on to find that the claim whilst awaiting the decision of Rawlins J [as he then was] in the First Action did not constitute an abuse of the process. In addition, they did not cause the defendants to incur any costs.

[26] In the instant case, in his defence, the Attorney General did not plead an abuse of the process. Ms. Reid sprang this issue for the first time in written submissions. It is imporper to do so. In any event, I bear in mind (although not proved) that Ms. Williams has denied receiving communication of the revocation before filing her Reply to the Defence on 30 June 2010. In addition, Mr. Hunte QC submitted that the revocation was not a true revocation since the letter did not state whether and to what extent any of Ms. Williams' salary or benefits as a public officer were reinstated.

[27] In these circumstances, I am unable to find that there was an abuse of the process of the court.

The limitation challenge

[28] Mr. Hunte QC submitted that there has been an infringement of Ms. Williams' right as guaranteed in article 16(9) of the Constitution which requires a hearing within a reasonable time. This issue will be addressed in depth later in this judgment.

[29] But, with forceful tenacity, Ms. Reid submitted that all challenges to the disciplinary proceedings held on 22 April 2008 culminating in and including the decision of the PSC to impose a penalty on Ms. Williams of a reprimand under regulation 42 of the PSC Regulations, which decision was communicated to Ms. Williams by letter dated 17 June 2008[20] are out of time and cannot be raised. Further, she submitted, that all parts of the claim relating to those matters ought properly to be struck out as statute-barred.

[30] Section 2 of the Public Authorities Protection Act ("the Limitation Act")[21] provides as follows:

> "Where any action, prosecution, or other proceeding is commenced against any person for any act done in pursuance or execution or intended execution of any Act or Ordinance, or of any public duty or authority or of any alleged neglect or default in the execution of any such act, duty, or authority, the following provisions shall have effect
>
> (a) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof;
> (b) ….
> (c) ….
> (d) ……"

[31] It cannot be disputed that section 2 of the Limitation Act is mandatory in that once a cause of action accrued more than six months prior to filing the claim for judicial review, the latter claim will be statute-barred. In **Quorum Island (BVI) Limited and the Attorney General v Virgin Islands Environmental Council**[22], the Court of Appeal held, among other things, that section 2(a) of the Limitation Act simply requires that whatever is the manner prescribed by rules of court for a person to commence proceedings to obtain the court order that he seeks, the proceeding must be commenced within the specified time. It was further held that the application for leave to apply for judicial review, having been filed within the six-month limitation period, was commenced in time, as required by that section.

[20] See Exhibit MW7"
[21] Cap. 62
[22] HCVAP 2008/004 –Judgment delivered on 27 October 2008 [unreported].

[32] In the present case, the incident of alleged insubordination occurred on 13 February 2007. Ms. Williams was notified of the details of the charges on 13 February 2008.[23] The matter was heard by the PSC on 22 April 2008 and its decision was communicated to Ms. Williams by letter dated 17 June 2008. Therefore, for Ms. Williams to challenge the unreasonableness, unlawfulness or otherwise of the decision, she would have had to mount her claim for judicial review within six months thereafter, i.e. by 16 December 2008.[24] I therefore agree with Ms. Reid that all challenges to the disciplinary proceedings held in April 2008 and communicated to Ms. Williams on 17 June 2008 are statute-barred and ought properly to be struck out.

[33] Mr. Hunte QC asserted that, notwithstanding the decision, Ms. Williams could not craft her appeal and/or file her claim for judicial review because she was seeking clarification of the letter of 17 June 2010. This, to my mind, is irrelevant. The whole tenor of the Limitation Act is that claims made against public officers must be instituted promptly.

[34] As I scrutinized the letter of 17 June 2008, by which Ms. Williams seeks clarification (bearing in mind that she has a lawyer, no less than a learned and respected Queen's Counsel), it appears to me that Ms. Williams was simply being provocative. She seeks the clarification of ordinary words "inappropriate behaviour". This I believe was only done with the intention of poking fun at a humourless beast.

[35] The decision to reprimand Ms. Williams for "acting inappropriately" was communicated to her on 17 June 2008. She received that letter on 19 June 2008. Instead of prolonging the matter, she should have resorted to bringing proceedings within the six-month period prescribed by statute if she felt that she was found guilty of an offence for which she was not charged. Ms. Williams should have taken prompt action from the time she received the decision. Her failure to do so within the six-month limitation period bars her from doing so now.

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[23] See Affidavit of Mary Williams, Exhibit "MW5"

[24] Public Authorities Protection Act, s.2.

[36] In **Ronex Properties Ltd v John Laing Construction Ltd**,[25] Donaldson L.J. said:

> "The matter is not in fact free from authority. It was considered in *Riches v Director of Public Prosecutions* [1973] 1 W.L.R. 1019, in which the earlier cases are reviewed. There the grounds put forward in support of the application to strike out included an allegation that the claim was frivolous and vexatious and an abuse of the process of the court. Accordingly, the court was able to consider evidence and it is understandable that the claim could be struck out. Of the cases referred to, it seems that only in *Dismore v Milton* [1938] 3 All ER 762, was an attempt made to strike out solely upon the ground that the Limitation Acts applied and accordingly no cause of action was disclosed. Greer L.J. and Slesser L.J. held that such an application must fail for the reasons which I have already indicated and contrasted the effect of the Statute of Limitations with that of the Real Property Limitations Acts. That being a two-judge court, we are not strictly bound by its decision, but I have no doubt that it was right. **Where it is thought to be clear that there is a defence under the Limitation Acts, the defendant can either plead that defence and seek the trial of a preliminary issue or, in a very clear case, he can seek to strike out the claim upon the ground that it is frivolous, vexatious and an abuse of the process of the court and support his application with evidence…."**[emphasis added]

[37] In this case, Ms. Reid has correctly postulated that no application to strike out has been made as no relief is claimed with respect to the decision communicated to Ms. Williams by letter dated 17 June 2008. There has been no challenge to that decision nor is it sought to be quashed. In any event, not only is Ms. Williams prohibited by the statute from challenging that decision but those matters are irrelevant to these proceedings, which concern a discrete decision of the PSC, based on a finding on a different charge.

Undue Delay

[38] The Attorney General submitted that, in any event, Ms. Williams is not entitled to any relief for those matters as she is guilty of undue delay. In **R v Secretary of State for Education ex parte B (A Minor)** [26], Collins J refers to a passage from the Court of Appeal in **Nichol v Gateshead Metropolitan Borough Council** (1998) 87 LGR 435:

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[25] (1983) QB 398, 404.

[26] **[2001] E.L.R. 333;** cited in De Smith's Judicial Review, 6th ed., para. 3-028: "A decision may be part of a two-tier process, so that an initial determination is superseded by a later one, with the effect that the first decision may not be reviewable."

"It seems anomalous and certainly regrettable that an aggrieved party can believe a council to have made a flawed decision very early in a lengthy procedure but instead of challenging it promptly can allow time, effort and money to be spent on further steps and years later can challenge the result of a final decision by harking back to the original flaw. Yet that seems to be the effect of Order 53 Rule 4, and thus far I think Mr. Carnwath's argument is correct.

But that is not the end of the matter. The court has an overall discretion as to whether to grant relief or not. In considering how that discretion should be exercised, the court is entitled to have regard to such matters as the following:

(1) The nature and importance of the flaw in the decision

(2) The conduct of the applicant

(3) The effect of administration in granting relief.

[39] Collins J continued:

"That is the right approach… [T]he reality is that the decision of the Secretary of State should never have been allowed to come about, in the sense that the challenge should have been made at a far earlier state to the allegedly flawed proposal… Therefore an applicant who chooses to wait must run the risk of the court deciding that he ought to have gone earlier…. It is not proper to wait until the Secretary of State's decision."

[40] In **R v Herrod, ex parte Leeds County Council**,[27] Lord Denning MR considered a delay in applying for leave to seek an order of certiorari which, under the old Order 53, should have been brought within six months. He said:

"The truth is, of course, that certiorari is not an appeal at all. It is an exercise by the High Court of its powers to supervise inferior tribunals; see: *R v Northumberland Compensation Appeal Tribunal, ex parte Shaw* [1952] 1 K.B. 338 at pages 346, 347. The time limit of six months is not an entitlement. It is the maximum rarely to be exceeded. Short of six months, there is the overriding rule that the remedy by certiorari is discretionary. If a person comes to the High Court seeking certiorari to quash the decision of the Crown Court - or any other tribunal for that matter - he should act promptly and before the other party has taken any step on the faith of the decision. Else he may find that the High Court will refuse him a remedy. If he has been guilty of any delay at all, it is for him to get over it

[27] [1976] QB 540 at 557.

> and not for the other side. In support, I would refer to *R v Sheward* (1880) 5 QBD 179; 9 QBD 741, where five months had elapsed. And in *R. v Glamorgan Appeal Tribunal, ex parte Fricker* (1917) 33 TLR 152, Lord Reading CJ said at page 153: "…the applicant could not succeed because he had allowed more than two months to elapse before raising any objection to what had happened. If anything wrong had taken place, the party aggrieved should move at once.""

[41] The relevant law has also been considered in **Virgin Islands Environmental Council v The Attorney General and Others**[28].

[42] In the instant case, the proceedings for the alleged disciplinary infraction were concluded by 17 June 2008 and the sanction to apologize for "inappropriate conduct" was imposed. Ms. Williams failed to appeal or take any action to set aside those proceedings before fresh proceedings were initiated for failure to comply.

[43] Additionally, Ms. Williams knew full well that the procedure before the Tribunal was fatally flawed. She was aware of this since 18 August 2009: the date of the hearing. She attended the hearing with counsel who advised the Tribunal of the improper procedure which had been adopted. But she waited until after the Governor had made his decision on 20 January 2010 to apply for certiorari in March 2010; nearly seven months after the flawed procedure took place.

[44] This is clearly a case where the Governor's decision should never have been allowed to come about. In the circumstances, the court declined to exercise its discretion in Ms. Williams' favour.

The claimant's preliminary issue

Judgment on admission

[45] In commencing his submissions seeking for an order of certiorari, Learned Queen's Counsel, Mr. Hunte raised a preliminary issue. He submitted that since the Attorney General had admitted paragraph 7 of the Statement of Claim, by reason of that admission alone, judgment must be entered for Ms. Williams with costs. Learned Queen's Counsel relied unconditionally on CPR 14.1 (2) and 14.4.

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[28] BVIHCV 2007/0185 (Hariprashad-Charles J), Judgment 21 September 2009.

[46] This preliminary issue can be succinctly answered. The admission of a procedural irregularity does not "entitle" a claimant to judgment on admission. Certiorari is a discretional remedy, not one as of right. Thus, CPR 14.1 (2) and 14.4 are inapplicable in these circumstances.

[47] Rehearing of the charge by a fresh disciplinary tribunal does not place Ms. Williams in peril of double jeopardy. That principle is not applicable to civil proceedings: **Kenrick Bell v Commissioner of Police and AG**[29].

Grounds for judicial review

[48] Learned Queen's Counsel, Mr. Hunte argued that "where a body errs in law in reaching a decision or making an order, the court may quash that decision or order".[30] He advanced six grounds to support Ms. Williams' case for a grant of the order of certiorari.

(1) Hearing within reasonable time

[49] Article 16(9) of the Constitution speaks to the entitlement of a person to a "fair hearing within a reasonable time" for the determination of the existence or extent of his "civil rights and obligations". It says:

> "For the determination of the existence or extent of his or her civil rights and obligations, **every person shall have the right to a fair hearing within a reasonable time before an independent and impartial court or other authority established by law**." [emphasis added]

[50] Mr. Hunte QC submitted that the failure of the PSC to conduct a hearing within a reasonable time to determine the charges brought against Ms. Williams amounts to an infringement of her constitutional rights and the court must frown upon these protracted delays. Learned Queen's Counsel next submitted that Ms. Williams was suspended on ½ pay for a full year before any charges were preferred against her and her dismissal came almost three years later.

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[29] BVIHCV 2007/0142 (Joseph-Olivetti J), Judgment 31 October 2007.

[30] Atkin's Court Forms, Vol. 1, page 108.

[51] Whether or not there has been unreasonable delay on the part of a public authority is a question of fact taking into account all the relevant circumstances including "complexity of the factual or legal issues raised by the case; the conduct of the applicant and the competent administrative and judicial authorities; and what is "at stake" for the applicant."[31] **In the Application of Anthony Leach**, a delay of 4 years between an alleged breach of discipline and the preferment of charges by the Public Service Commission was held to be unreasonable. In **Regina v Board of the School of Physical Therapy ex parte Christopher Edwards**, a delay of 3 years between the alleged breach of discipline and the preferment of charges by the Board was also held to be unreasonable.[32]

[52] In the present case, Ms. Williams was interdicted from duty at ½ pay from 16 October 2007. She was provided with specific details of the charges against her. A hearing before the PSC took place on 22 April 2008. By letter dated 17 June 2008, Ms. Williams was informed that the PSC found that she acted inappropriately and she was directed to submit apologies. Subsequently, a series of correspondence ensued between Ms. Williams and the HR Director. Ms. Williams instigated the chain of correspondence alleging that she was simply seeking clarification of the words "inappropriate conduct." Five months later, on 17 November 2008, Ms. Williams was notified that disciplinary proceedings were instituted against her for her refusal to submit letters of apology. Some days later, Ms. Williams formally requested a "copy of proceedings" of the hearing before the PSC. On 18 December 2008, Ms. Williams was told that she already had the complete package of the proceedings. On 6 August 2009, Ms. Williams was notified that a Tribunal had been set up to hear the charge of "refusal to submit letters of apology." The matter was heard on 18 August 2009. Ms. Williams was dismissed with effect from 20 January 2010; this was approximately 5 months after the hearing took place; 14 months after being charged with refusing to apologize and 19 months after the directive to apologize was given. The details of what transpired between 13 February 2007 (the date of Ms. Williams' interdiction) and

[31] Henry Liu and others v The Attorney General of Dominica and others Commonwealth of Dominica HCVAP 2006/001 (Alleyne, CJ [Ag.], Rawlins JA, Thomas JA [Ag.]), Judgment 22 September 2008; See also De Smith's Judicial Review, 6th ed., para 7-126.
[32] Trinidad and Tobago HCA No 1002 of 2004 (Jones J); and (1989) JLR 400 cited in Ramlogan, R., *Judicial Review in the Commonwealth Caribbean* (Routledge-Cavindish 2007), 105, 107.

20 January 2010 (the date of the decision) are more expressly set out in the affidavit and contemporaneous documentary evidence of Nolma Chalwell, Secretary of the PSC.[33]

[53] There is no doubt in my mind that the process of dismissing a public servant in the British Virgin Islands is far too slow and protracted. I believe that this is because of the many different bodies seeking and/or giving advice. That said, a good bit of the delay to have a hearing within a shorter period of time was caused by Ms. Williams herself. Had she not sought clarification of ordinary words from 23 June 2008, this matter might have come to a resolution a long time ago.

[54] In the circumstances, I am unable to find that the PSC failed to conduct the said hearing within a reasonable time as contemplated by article 16(9) of the Constitution.

(2) Fair and impartial tribunal

[55] Mr. Hunte QC challenged the composition of the PSC. He submitted that public officers in active service with specific instructions to conduct dismissal proceedings do not constitute a fair and impartial tribunal to which Ms. Williams was entitled under article 16(9) of the Constitution. He submitted that there are two limbs to this argument namely (1) the Tribunal, having been directed to conduct dismissal proceedings could not consider any of the alternative sanctions provided in Regulation 42 of the PSC Regulations and (2) the Tribunal, consisting as it did of persons who worked daily under the aegis of the body that gave them their directive, namely, that the proceedings were to be dismissal proceedings, could not be considered independent and impartial. To be succinct, this is a sweeping submission. As a matter of fact, learned Queen's Counsel could find not a single authority to augment this submission.

[56] The PSC Regulations (1969)[34] provides in s. 47 - Proceedings for Dismissal. Upon reading the regulation, Ms. Williams' first limb seems wholly misconceived. The Tribunal itself does not make any determination of dismissal. The sole function of the Tribunal is to determine

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[33] See Affidavit of Nolma Chalwell filed on 23 June 2010 with Certificate of Exhibits filed on even date.
[34] S.R.O. 29/1969, See Vol 8 1999 Revised Laws of the Virgin Islands 1655. Kept in force by section 67 of the Virgin Islands Constitution Order 1976 and section 115 of the Virgin Islands Constitution Order 2007.

whether there is sufficient evidence to substantiate the charge: see Regulation 42(2)(g) and (h). The PSC is the body which determines whether to recommend dismissal or some other sanction. At no time is the PSC prevented from recommending a sanction other than dismissal even where a Tribunal is appointed: see Regulation 42(2)(j).

[57] In addition, mere employment in the public service, without more, does not mean that a tribunal, which is comprised of public officers, will be lacking in objectivity, impartiality and independence. Public authorities are often empowered by statute to discipline their own employees.[35] In the absence of direct pecuniary, proprietary[36] or a principled interest[37] in the outcome of the proceedings, the issue is whether an adjudicator on the tribunal has any close personal relationship or any interest that is directly involved in the subject matter of the proceedings.[38]

[58] Ms. Williams has not alleged any specific cause for bias against any member of the Tribunal which adjudicated the charge against her, nor is it possible to allege any specific cause for bias against the members of a differently constituted Tribunal in advance of its selection.

[59] This ground of challenge fails. There has been no breach of the right to an independent and impartial authority.

(3) Error of law

[60] Mr. Hunte, QC submitted that the PSC erred in law when it imposed a sanction on Ms. Williams when it clearly did not find her guilty of the charges with which she was charged. Learned Queen's Counsel trenchantly submitted that a tribunal should only concern itself

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[35] *Ibid.* para. 10-049.

[36] Porter v Macgill [2001] UKHL 67; [2002] AC 357.

[37] **R v Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte (o. 2)** [2000] 1 AC 119, per Lord Browne-Wilkinson at 132-133, held "promotion of a cause" cause for disqualification bias.

[38] De Smith's Judicial Review, 6th ed., para. 10-045 citing **R v Handsley** (1882) 8 QBD 383 (member of local authority not disqualified for likelihood of bias from adjudicating in proceedings brought by the authority); **Allinson v General Medical Council** [1894] 1 QB 750 (members of GMC hearing charges of professional misconduct against doctors were members of the Medical Defence Union which had initiated the proceedings, but themselves have taken no part in initiating them)

with the matters before it and it was so obvious that the PSC wandered away from the real charges when it found Ms. Williams guilty of "acting inappropriately."

[61] According to Learned Queen's Counsel, as far as the charges are concerned, the PSC did not find Ms. Williams guilty of any one of them. Nevertheless, it imposed a sanction. In imposing the sanction, it stated that Ms. Williams "acted inappropriately." He submitted that there was no such charge before the PSC and therefore, that finding was erroneous and ought to be quashed.

[62] It is an elementary principle of criminal law that conviction for an offence not charged is a good ground for an order of certiorari.[39] However, these are not criminal proceedings; they are administrative proceedings. Decisions are binding until they are set aside. The decision to impose a sanction for "acting inappropriately" was communicated to Ms. Williams in a letter dated 18 June 2008 which she said she received on 19 June 2008. By the tone of her letter of 23 June 2008, Ms. Williams was aware early on that she had a difficulty with accepting the decision. Ms. Williams cannot now apply for judicial review to quash a decision made in June 2008. Any such challenge is statute barred. The time for appealing has also elapsed.

(4) Charge was based upon a false premise

[63] Mr. Hunte QC argued that the charge before the Tribunal was based on a false premise, namely that, Ms. Williams "refused to submit letters of apology …as directed by the Governor." He insisted that Ms. Williams was not refusing to apologize. She was merely requesting to know what offence she was found guilty of so that she could craft her apology appropriately. Mr. Hunte QC also submitted that had this clarification been provided, this case would not have reached thus far. He reprimanded the PSC for this unfortunate turn of events.

[64] It is well established that judicial review is not an appellate process. It is merely a review of the manner in which a decision is made by a public officer exercising administrative or

[39] R v Manchester Crown Court, ex parte Hill (1985) 149 JP 257.

other powers conferred by statute. In other words, the court does not and cannot pronounce on the correctness or veracity of the substance of the decision *per se* but rather put the decision-maker to the test as to the methodology or process that was employed to arrive at that decision.[40]

[65] Other than noting that the letter directing Ms. Williams to submit letters of apology is very unhappily worded and none of the later correspondence improved in this respect, whether or not Ms. Williams refused to submit letters of apology as requested, is a question that falls to be determined by the Tribunal appointed by the PSC. In the instant case, it is admitted that no such determination has in fact been made by the Tribunal. Accordingly, the issue is premature and the court declines to express any view except to note that any challenge to the veracity of this decision should first be raised before the proper appellate authority.[41]

(5) Improper procedure

[66] Mr. Hunte QC argued that not only was the Tribunal constitutionally flawed and the charge before it based on a false premise but the procedure which it adopted was highly improper. He said that, at the hearing before the Tribunal, Ms. Williams was questioned about the previous hearing before the PSC. He intervened and requested that the charge be read but it was not done. Ms. Williams was never asked to plead or to defend herself. No witnesses were called to substantiate the charge and as such, there was a procedural irregularity.

[67] The Attorney General has conceded that there was a procedural irregularity insofar as it is admitted that the Tribunal failed to inquire into the charge that Ms. Williams had "refused to submit letters of apology" and instead re-inquired into the charges of misconduct previously determined. In addition, two exhibits[42] were not included in the materials provided to Ms. Williams after several requests for a copy of the proceedings.

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[40] **In the Application of Chandresh Sharma** Trinidad & Tobago HCA No. S109 of 2005 (Pemberton J).
[41] **R v Chief Constable of North Wales ex p Evans** [1982] UKHL 10, [1982] 1 WLR 1155.
[42] Exhibits NC 21 and NC 22.

[68] In **The National Water Commission ex parte Desmond Alexander Reid**, [43] at para. 65, the court said:

> "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, in my judgment, 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."

[69] Based on the law, the court is entitled to find that there was a failure by the Tribunal to give effect to PSC Regulation 47(2)(c) and (d) and to the rules of natural justice. I so find.

Post and benefits

[70] In granting an order of certiorari, the court is limited to remitting the decision to the decision-maker to make a fresh decision in accordance with the law: CPR 56.14(2). Under the Constitution, the Governor, acting on advice of the PSC, is the authority vested with the power to appoint, discipline and dismiss public servants. It is no function of the court to usurp the powers of the Governor and the PSC to determine whether Ms. Williams ought to be dismissed or appointed to a particular post in the public service or on what terms.

[71] Further, and or, in the alternative, Section 92 of the Constitution on the power to appoint, etc, to public office states:

> **92.**—(1) Subject to this section and to the other provisions of this Constitution, **power** to make appointments to public offices and **to remove** and to exercise disciplinary control over persons holding or acting in such offices **shall vest in the Governor, acting in accordance with the advice of the Public Service Commission**; **<u>but the Governor, acting in his or her discretion, may act otherwise</u>** than in accordance with that advice if he or she determines that compliance with that advice would prejudice Her Majesty's service.

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[43] (1984) 21 JLR 62 (Smith CJ).

(2) **Before** exercising the powers vested in the Governor by subsection (1), the Governor may, acting in his or her discretion, once refer the advice of the Public Service Commission back to the Commission for reconsideration by it.

(3) If the Public Service Commission, having reconsidered its original advice under subsection (2), substitutes for it different advice, subsection (2) shall apply to that different advice as it applies to the original advice.

[72] Ms. Williams has applied for an order to quash "the decision of the PSC…resulting in her dismissal"; and restoration to her post. However, the PSC clearly does not have the power to dismiss her, merely to advise the Governor. Once he has received their advice, the Governor is empowered to act in his own discretion.[44] Quashing the "so-called" decision of the PSC does not entitle this court to order that Ms. Williams be restored to her post. The Governor's decision to dismiss remains valid and effective unless and until declared otherwise by the court: **R v Panel on Takeovers ex p Datafin**.[45] However, Ms. Williams has not sought any further or alternative relief against the PSC or the Governor. More specifically, she has not sought any declarations of this court.

[73] In **Dilbert v Public Service Commission and The Attorney General**,[46] the applicant applied for orders of certiorari and mandamus to (a) quash a recommendation of the Public Service Commission that she be dismissed from the public service, and (b) direct a re-hearing or, alternatively, her reinstatement. Similar constitutional provisions vested the authority for the appointment, discipline and dismissal of public servants in the Governor acting on the advice of the Commission. The court refused to issue the orders stating (at pages 40-41:

"It is evident from that analysis that no decision dismissing the applicant either was or could validly have been made by the Public Service Commission. That decision was made by His Excellency the Governor after consideration of advice received from the Commission, which he was not obliged to follow."

[44] See also section 40(4) of the Constitution.
[45] [1987] QB 815 at 840; See also De Smith's Judicial Review, 6th ed. at
[46] [1988-89] Cayman Islands Law Reports 33.

[74] The court refused to allow an amendment to the application to issue the orders towards the Governor following authority that "certiorari and mandamus will not issue out of any colonial court directed to the Governor of the territory concerned."

[75] The court agreed that the Public Service Commission was subject to observe the rules of natural justice because the disciplinary functions it exercised over the applicant had a statutory source in the Constitution and the Public Service Regulations made pursuant thereto. However, it concluded:

> "…in a future case in which a breach of the rules of natural justice is alleged in respect of the conduct of such a disciplinary board of inquiry, it will be open to an aggrieved applicant to seek [from] this court prerogative orders of prohibition, certiorari or mandamus as appropriate, provided that these are applied for before and not after the Governor has acted upon the advice of the Public Service Commission and announced his determination. Once that point is reached, the alternative remedy of a declaration is the only one open to the applicant concerned."

[76] That seems to be exactly the situation here. In light of these considerations, it is not at all clear that an order of certiorari directed towards the PSC, without more, would serve any useful purpose or be effective to give Ms. Williams the relief she seeks.

Conclusion

[77] Upon consideration of all of the evidence in this case, in particular the affidavit of Nolma Chalwell and the contemporaneous exhibits attached thereto, it seems to me that Ms. Williams may have been the author of her own demise.

[78] Although the claim for judicial review is made out on the grounds of improper procedure, the court declines to issue an order of certiorari. First, the Governor's offer to revoke the dismissal and restore her to her post as a suspended officer, interdicted on duty at ½ pay, if she accepts it, puts Ms. Williams in the same position the court would have been able to if the proper relief had been sought. Secondly, the grant is insufficient to give Ms. Williams the relief she seeks. I have made this determination on the basis that, as the Attorney General has maintained, the claim is academic, the offer remains open until a reasonable

time after the conclusion of these proceedings. Thirdly, Ms. Williams is guilty of undue delay in seeking to avoid the dismissal on the basis of proceedings, which she knew were fundamentally flawed when they occurred seven months before she filed her claim. Finally, none of the other grounds of challenge are made out.

[79] For all of these reasons, I will dismiss the claim for judicial review.

Costs

[80] I make no order as to costs. While Ms. Williams' claim suffered from delay, it was not frivolous or without merit and her continued prosecution of the matter was in no way an abuse of the process of the court. Ms. Williams is entitled to have the existence or extent of her civil rights determined by a court of law. It is a constitutional right guaranteed to every citizen to ensure the supervision of administrative bodies that make decisions affecting their rights.

[81] Lastly, I am grateful to all Counsel for their patience in awaiting this judgment which was long overdue.

Indra Hariprashad-Charles
High Court Judge