

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA**

Claim No. ANUHCV 2008/00552

BETWEEN:

GARY NELSON

Claimant

AND

**THE ATTORNEY GENERAL
COLIN DERRICK, MINISTER OF JUSTICE**

And

THE POLICE SERVICE COMMISSION

Defendants

Appearances:

Mr. Dane Hamilton Q.C. with Mr. Dane Hamilton Jr. for the Claimant.
Mrs. Karen De Freitas Raitt for the 1st and 2nd Defendants.
Sir Gerald Watt Q.C. with Dr. David Dorsett for the 3rd Defendant.

2011: July 4, 5
December 13

JUDGMENT

[1] **REMY J.:** The Claimant Gary Nelson is a Canadian citizen and a former Commissioner of Police in the Royal Police Force of Antigua and Barbuda.

INTRODUCTION

[2] Pursuant to an advertisement in a Police magazine in Canada, on or about October 2007, the Claimant applied for the vacant position of Commissioner of Police in the Royal Police Force of Antigua and Barbuda. His application and recruitment were done

through Alphonse Breau (Mr. Breau) who was acting as agent for the Government of Antigua and Barbuda. Sometime towards the end of December 2007, a draft contract was given to him by Mr. Breau for his perusal, whereupon he sought legal advice from his Attorney in Canada, Ms. Janis Payne. The advice was to the effect that the probationary clause in the draft contract was unfair. Two more draft contracts were delivered to the Claimant, both of which contained the probationary clause.

[3] Notwithstanding the fact that he received no indication or communication that the said probationary clause would be deleted and further that he received communication from Mr. Breau at the airport on the very morning of his travel, that the probationary period would not be changed and "was not negotiable", the Claimant proceeded to travel to Antigua on the 6th February, 2008, using his own funds to purchase his airline ticket. By letter dated 29th February, 2008, the Police Service Commission (the Commission) appointed the Claimant as Commissioner of Police. The Claimant was sworn in on that day – the 29th February 2008, and he commenced duties as Commissioner of Police the very next day, namely on the 1st March 2008. No formal contract had been signed. On April 1st 2008, the Claimant received a letter of appointment signed by the Chief Establishment Officer.

[4] On July 4th 2008, an unexecuted contract was forwarded to the Claimant from the Permanent Secretary in the Ministry of Justice for his signature. The Claimant refused to sign, allegedly "because of the Probationary period of six months." By letter dated 28th August 2008, the Claimant was dismissed by the Commission for "unsatisfactory performance of his duties."

[5] By Notice of Application filed on the 24th September 2008, the Claimant sought leave to apply for judicial review of the decision of the Commission to terminate his appointment as Commissioner of Police.

[6] By Fixed Date Claim filed on the 31st October 2008 and with the leave of Thomas J granted on the 23rd October 2008, the Claimant filed a claim for judicial review against

the 1st Defendant, namely the Attorney General of Antigua and Barbuda, the 2nd Defendant, namely Colin Derrick, Minister of Justice, and the 3rd Defendant namely The Police Service Commission (the Commission), claiming the following relief:-

- (i) An Order of Certiorari quashing the decision of the Police Service Commission dated August 28th 2008 to terminate the appointment of the Claimant as Commissioner of Police.
- (ii) A Declaration that the said Police Service Commission acting singularly and/or together with the Minister of Justice, Colin Derrick failed to exercise their power in respect of the termination of the Claimant's appointment as Commissioner of Police reasonably, rationally and lawfully.
- (iii) An Order that the Claimant has a legitimate expectation either procedurally to a fair hearing prior to termination of his appointment as Commissioner of Police and/or substantially to a contractual benefit conferred by virtue of his appointment as Commissioner of Police to be contractually employed in that capacity for a period of two years.
- (iv) An order that the Claimant is entitled to damages, aggravated and/or exemplary damages for the unlawful breach of his contract of employment.
- (v) Costs.

[7] The grounds of the application are stated as follows:-

1. By letter dated 1st April 2008 under the hand of the Chief Establishment Officer, the Claimant was employed as Commissioner of Police by the Government of Antigua and Barbuda on contract for 2 years, effective 1st March 2008.
2. The appointment was subject to medical fitness (paragraph 4 of the letter), and the Claimant completed his medical examination on or about the middle of March 2008.

3. An "unexecuted contract" was forwarded to the Claimant for his perusal by the Permanent Secretary in the Ministry of Justice on or about the 4th July 2008 and it remained unexecuted by reason of the Claimant's exception to Clause 5 which provided for a probationary period of 6 months.
4. The termination of the Claimant's appointment as Commissioner was in accordance with Section 12 (1) of the Police Act. The said termination was decided, made and prior communicated to the Claimant not by the constitutional authority but by the Prime Minister, the Minister of Justice and Mr. Breau.
5. The Police Service Commission:-
 - (a) Failed to properly exercise its statutory discretion in regard to the Claimant and acted as a "mere rubber stamp for the illegal executive act of termination" of the Claimant's appointment as Commissioner of Police.
 - (b) Fettered its discretion to act fairly towards the Claimant by acceding to the executive act of terminating the Claimant's appointment.
 - (c) Acted in bad faith in that it promoted the desire of the executive to terminate the Claimant's appointment and failed to take into account relevant considerations which attended the Claimant's appointment and the subsequent performance of his duties as Commissioner.
 - (d) Acted unreasonably and irrationally in that it failed to bring to the attention of the Claimant any perceived shortcoming and /or dereliction of his duties and/or highlighting any failure on the part of the Claimant to satisfactorily perform the duties of his office.
 - (e) Failed to allow the Claimant a fair opportunity to make any representation as to why this appointment ought not to be terminated.
6. The Claimant had a legitimate expectation to the benefit of a contract of employment for two years and expected to enjoy that benefit except on the

rational grounds for withdrawing it and/or that it will not be withdrawn without giving him first an opportunity of advancing reasons for contending that the contract should not be withdrawn. The Police Service Commission's decision to terminate the Claimant's appointment is an unlawful breach of this legitimate expectation.

7. The Defendants by their unlawful action have unlawfully breached the Claimant's contract of employment, and that the Claimant has suffered loss and damage as a result of the unlawful action of the Defendants.

[8] The Claimant's claim against the Defendants is for:-

- (a) 18 months loss of salary, allowances and perquisites of office for the period October 1st 2008 to 28th February, 2009:-
- (b) \$ 230,000.00 Canadian dollars or its E.C. equivalent
- (c) U.S. \$30,000.00 as housing allowance for the unexpired period of the contract.
- (d) Costs of return airfares to Canada
- (e) Sundry expenses, inclusive of electricity and two months rental (at \$6,755.00 per month) total amount \$20,201.70
- (f) Legal costs.

ISSUES

[9] Mr. Dane Hamilton, Learned Queen's Counsel for the Claimant stated that the issues to be determined by the Court in this case are as follows:-

- (i) What were the terms and conditions of the Claimant's service contract?
 - (a) Was it wholly set out in the Letter of Appointment dated 1st April, 2008 issued by the Chief Establishment Officer and the Letters of Appointment issued by the Commission on 29th February, 2008?

(b) Is a term to be implied therein that his service would be subject to a probationary period of six (6) months, notwithstanding the parties failed to reach agreement by executing the contract?

(ii) Did the Police Service Commission act within the scope of their power to lawfully dismiss the Claimant as Commissioner of Police.

(iii) If the answer to (ii) is no, is the Claimant entitled to recover damages for the unlawful dismissal and if so how much?

EVIDENCE

[10] The Claimant Gary Nelson testified on his own behalf. Mr. Colin Derrick, the Second Defendant gave evidence; while the Chairman of the Commission Mr. Stephans Winter testified on behalf of the Third Named Defendant, namely the Commission.

THE CLAIMANT'S EVIDENCE

[11] The Claimant, in his Fixed Date Claim filed on the 31st October 2008, pleads that he relies on the Affidavit sworn to on the 24th September, 2008 and filed on that same date. In that Affidavit, the Claimant deposed that, on or about the month of October 2007, having seen an advertisement in a Police Magazine, he applied for the vacant post of Commissioner of Police in Antigua and Barbuda. The application was made to Mr. Alphonse Breau who acted as agent for the Government of Antigua and Barbuda. Towards the end of December 2007, a contract was handed to him by Mr. Breau. He gave the contract to his Attorney Ms. Janis Payne for her perusal and vetting.

[12] The Claimant deposed that "thereafter ensued a period of vacillation and inactivity" and that he responded by email to Mr. Breau on the 29th January 2009, expressing his "reluctance to accept a probationary period of six months during which he could be released on payment of one (1) month's salary." He stated that he had been advised by his Attorney that "the provision was unfair." The Claimant deposed that he later

expressed to Mr. Breau that "he had enough and that he was going back to work", but that Mr. Breau responded that he (the Claimant), along with the three other chosen officers would fly down to Antigua on February 6th, 2008. The Claimant stated that "up to this point there was no concluded contract." He stated that he flew down to Antigua on February 6th 2008 having purchased his own ticket on the firm understanding that he would recoup his expenses from the government.

[13] The Claimant further deposed that himself and the other officers were sworn in on the 29th February 2008, and that he began his duties as Commissioner of Police effective March 1st 2008. That on the 1st April 2008, by letter signed by the Chief Establishment Officer, he "was employed by the Government of Antigua and Barbuda on contract for two (2) years as Commissioner of Police effective 1st March, 2008." That according to that letter, the appointment was subject to medical fitness. He had already completed his medical examination "since on or about the middle of March, 2008." The Claimant deposed that on July 4th 2008, "an unexecuted contract" was forwarded to him for "his perusal" by the Permanent Secretary in the Ministry of Justice and that the said contract "remained unexecuted" because he "took exception to Clause 5 which provided for a probationary period of 6 months."

[14] The Claimant deposed that on Thursday 28th August 2008, at approximately 11 a.m., he met with Mr. Breau at the latter's request and was informed that the Government no longer wanted him in their employ, for the reason that "he was not paying enough importance to their directions", and that he was terminated immediately. He requested a meeting with the Government representatives and one was set up for him. At 3 p.m. that day, he attended a meeting at the Prime Minister's Office and that both Minister Derrick and the Prime Minister confirmed to him that he was dismissed. He requested compensation and was told that there would be no compensation. Further, that "the Prime Minister advised that they were offering him the opportunity to quietly resign or be dismissed."

[15] The Claimant stated that on or about 4 p.m. on Saturday August 30th 2008, he was handed a letter of dismissal signed by Stephans Winter, Chairman of the Police Service Commission dated August 28th 2008, which stated that he was dismissed “for unsatisfactory performance of his duties.” The Claimant further deposed that at no time during the period August 1st to 31st August 2008 did he meet with the Commission, or receive any communication from the Commission relative to the performance of his duties, or was afforded an opportunity to make any representation on his behalf. He added that on September 1st 2008, in an address to the nation, the Prime Minister stated among other things, that he (the Prime Minister) was advised that the Claimant’s appointment had been discontinued following a “service review” leading up to the end of the six months probationary period, as a consequence of which “it was decided that the Claimant’s performance during that period was unsatisfactory and would not be extended beyond its expiry date of 31st August... at 12 midnight.”

[16] The Claimant deposed that he was wrongfully dismissed and that this dismissal has caused him “great personal distress and loss of reputation both here and abroad.” He added that those responsible for his dismissal acted “deliberately and callously.”

[17] Under cross-examination, the Claimant testified that Miss Payne, his lawyer in Canada was advising him personally about the draft contract. He acknowledged that all three (3) drafts which he received before leaving Canada, - CD1, CD2 and CD3 - contained provisions that included :-

- (a) a sixth month probationary period
- (b) provisions for early termination.

[18] He testified that he objected to the probationary period several times, but was told that “it was a must”. He added that his last discussion on the point of the probation period in Canada was with Mr. Breau. That Mr. Breau was the one who corresponded with him and that he showed him an email at the airport terminal in Toronto, Canada, and told him of the contents which were that “they would not budge.” He testified that “it was clear

to him before leaving Canada that the Government would not budge.” When asked about the letter of 1st April 2008, the Claimant admitted that there was nothing in the letter that speaks to the return air fare or household effects, or paying for hotel bills. He also admitted that “it was fair to say that the letter did not contain all the terms and conditions of employment which he started on the 1st March.” He agreed that “he thought the letter was an administrative letter to get him paid.”

[19] The Claimant testified that when he started work, it was under the general recommendations of the Police Commissioner to implement the Breau Report, and admitted that it was precisely as contained in the 3rd draft in relation to his duties. He stated that he never agreed to the terms of probation and other minor issues. He however testified that he started work well knowing that up to that point, the Government had no intention of changing the probation clause. Further, that he had in his possession at that point a copy of Mr. Derrick’s email in which he clearly stated that the requirement of the probation period would not be altered.

[20] The Claimant also testified that when he started working from 1st March through August 2008, he was aware that Mr. Breau was continuing as a Consultant to the Government and was going to conduct a review in 6 months. He stated that he “assumed” that the review would have included a review of his role in implementing the “Breau Report.” He Claimant admitted that over the course of his employment, he met with Mr. Winters, the Chairman of the Police Service Commission “several times” and that he also met with the Minister of Justice “many times”. He denied, however, that they raised several issues with him with respect to his performance.

THE SECOND DEFENDANT’S EVIDENCE

[21] The evidence of Mr. Collin Derrick, the Second Named Defendant, is contained in the Affidavit sworn to on the 2nd April, 2009. In that Affidavit, Mr. Derrick deposed that he was the Minister with responsibility for the administration of Justice and Public Safety during the period 14th January 2005 to 11th March 2009. He authorized Mr. Alphonse

Breau, a Police Consultant, to interview applicants for the positions within the police force of Antigua and Barbuda, the advertisements of which were placed in police magazines throughout Canada. Mr. Breau recommended the employment of four individuals, including the Claimant, whom he recommended to fill the post of Commissioner of Police. Mr. Derrick deposed that on or about January 2008, a draft contract was forwarded to Mr. Breau for presentation to the Claimant. The Claimant expressed some concerns with regard to the provision of Clause 15 and the provision of a probationary period in Clause 2. He made it clear to Mr. Breau that these terms were non-negotiable.

[22] Mr. Derrick stated that some minor changes were made to the original draft contract (CD1) resulting in a second (CD2) and then a third and final draft contract (CD3) being sent to Mr. Breau for onward transmission to the Claimant. The Claimant was advised by Mr. Breau of the non-negotiability of the six (6) month probationary period, but continued to make and finalize plans through Mr. Breau to travel to Antigua to commence work under the terms and conditions of the final draft contract (CD3). The Claimant travelled to Antigua on the 7th February 2008, took the statutory oath of office on the 29th February 2008, and commenced duties as Commissioner of Police on 1st March 2008, notwithstanding that a written contract had not yet been executed.

[23] Mr. Derrick further deposed that in an effort to expedite payment of the Claimant's salary and notwithstanding that certain procedural and administrative matters had not been fully resolved, on or about 1st April 2008, the Chief Establishment Officer wrote to the Claimant. He deposed that such letter is required in the case of all new Government employees in order to facilitate the preparation and issue of monthly salary cheques by the Government Treasury. He continued that in or about early July 2008, the Permanent Secretary in the Ministry received from the Chief Establishment Officer a written contract of employment to be forwarded to the Claimant for execution. This contract was substantially identical to the final draft contract (CD3), save for the correction of certain typographical errors. Mr. Derrick stated that he was aware that, in August 2008, the Claimant was advised by the Commission that his tenure as

Commissioner of Police would not be extended beyond the probationary period which would have expired on 31st August 2008.

[24] Mr. Derrick further deposed that he was aware of several incidents of unsatisfactory performance by the Claimant. He added that due to these incidents, he had on various occasions, in his capacity as Minister of Justice, verbally expressed concerns both to the Prime Minister and to the Commission as to the Claimant's unsatisfactory performance, and his ability to be and become an efficient and well-conducted Commissioner of Police. He further deposed that the Claimant, throughout his probationary period, was verbally advised by him on several occasions of his concerns about the various instances of unsatisfactory performance detailed in the Affidavit of Mr. Winters, the Chairman of the Commission. Further, that he is aware and was present on occasions when Mr. Winters and the Prime Minister, in his presence, expressed to the Claimant their dissatisfaction with the performance of his (the Claimant's) duties.

[25] Under cross-examination, Mr. Derrick testified that under the Police Act, he was charged with giving the Commissioner of Police (the Claimant), from time to time, general directions. He testified that initially, probably for about two and a half months, the Claimant reported to him for general directions about once a week. He testified that he did not know whether there was any executed contract between the Claimant and the Government of Antigua and that it was only towards the end of the probationary period that he found out "that the contract had not been executed in accordance with the terms and conditions that were agreed." He stated that he considered the negotiation of a contract between the Commissioner of Police and the Government of Antigua to be a very important matter and that it was "the basis on which he (the Claimant) came." He also testified that he did not know that the contract had not been executed and was not aware that Mrs. Belle, the Permanent Secretary in his Ministry at the time, had sent the Claimant a contract on July 4th 2008.

[26] Mr. Derrick acknowledged that the document stated "for the officer's perusal", but disagreed with the suggestion of Counsel for the Claimant that up to 4th July 2008, nothing was settled between the Ministry of Justice and the Claimant with regards to his contract. He further testified that during his weekly meetings with him during the first two and a half months, the Claimant never raised the question of a probationary period with him, and in fact never raised the issue up to the time of his (the Claimant's) termination. Mr. Derrick testified that it was "administrative lag" which resulted in the non-signing of the contract in a six (6) month period.

THE THIRD DEFENDANT'S EVIDENCE

[27] The evidence of Mr. Stephans Winter, Chairman of the Police Service Commission (the Commission) is contained in an Affidavit dated 6th May 2010. In that Affidavit, Mr. Winter deposed that the duties of the Claimant were, among other things:-

- (a)
- (b) To provide leadership that will greatly improve the efficiency and effectiveness of the services provided by the Royal Police Force of Antigua and Barbuda;
- (c)
- d)
- (e) To ensure the efficient and effective implementation of the recommendations contained in the Alphonse Breau Report.

[28] Mr. Winters deposed that "the Claimant accepted the position of Commissioner of Police notwithstanding that fact that he failed to sign off on a written contract with respect to his appointment." He said that the Claimant's position was subject to a probation period of six months and that within six months the Commission had come to the conclusion that the Claimant's performance as Commissioner of Police was unsatisfactory. Mr. Winters stated that the Commission based its findings on a number of issues and instances. Among these is the Claimant's lack of performance during a critical period of

investigation of the "Mullany" murder investigations, namely the horrific murder of a honeymooning couple in July 2008.

[29] Mr. Winters also deposed that at its frequent meeting with the Claimant, it was found that the Claimant appeared unable to answer questions put to him with respect to developments within the Police Force, and which his Deputies were able to answer quite easily. He stated that other instances of dissatisfaction with the Claimant included his "penchant" for not accurately conveying to the Prime Minister and other parties matters occurring between himself and the Commission and which the Commission had to correct by reference to the Commission's minutes. He said that "this action bordered on at best subterfuge and at worst dishonesty, which caused the Commission much embarrassment." Mr. Winters deposed that other actions by the Claimant included the fact that he knowingly and deliberately usurped the authority of the Commission with respect to promotions by proceeding to promote officers from Inspector upwards which he knew he had no legal authority to do. He stated that the Claimant put up or caused to be put up, without the knowledge of the Commission or the Government, a web site that solicited firearms and other crime fighting equipment which effected negatively and was a serious embarrassment to the Commission and the Government.

[30] Mr. Winters deposed that "the decision to dispense with the services of the Claimant was an operational and managerial one." He stated that "the Commission took a management decision to dispense with the services of the Claimant on account of his unsatisfactory performance." He added that "there are other matters that relate to the Claimant's performance that impinge on national security and in the circumstances the Commission is reluctant to disclose the full details of those matters at this particular time." He added that, upon his dismissal, the Claimant made statements to the press with regard to his dismissal, with the result that the Prime Minister deemed it necessary to address the nation on the matter of the Claimant's dismissal. Mr. Winters further deposed that he, as Chairman of the Commission, on divers occasion, including in the presence of the Prime Minister and the 2nd Defendant, "communicated with the Claimant

relative to the performance of his duties and in so communicating indicated the Commission's grave concern and displeasure."

[31] Under cross-examination, Mr. Winters testified that the Commission requested a meeting with the Prime Minister and consulted with him with regard to the termination of the Claimant. He stated that prior to holding this discussion with the Prime Minister, the Commission did not invite the Claimant to a meeting of the Commission to discuss the possible termination of his appointment as Commissioner of Police. He stated that prior to its decision to terminate the Claimant, the Commission had no explanation from him regarding any alleged misconduct. Mr. Winters testified that he did not think he owed the Claimant an obligation to dismiss him only for reasonable cause as a probationer. He also testified that he did not think he ought to have given the Claimant a hearing as to the alleged unsatisfactory performance of his duties and that he did not think it was necessary to hear whatever explanation he had about the alleged unsatisfactory performance of his duties, prior to dismissing him.

[32] Mr. Winters testified that prior to dismissing the Claimant, the Commission reviewed his performance over all the months of his employment. He stated that based on the Commission's knowledge of the Claimant during these meetings, he felt that the Commission was in a good position to determine how satisfactory his performance was. That from what they had deduced from the monthly meetings, the Commission brought to bear its own deliberate judgment based on what it had observed over the six months regarding the Claimant's performance. He stated that although Mr. Breau had made a recommendation that the Claimant should be dismissed, that recommendation was not made to the Commission; further that he had not seen the recommendation, although he had seen the review.

CLAIMANT'S SUBMISSIONS

[33] Learned Queen's Counsel Dane Hamilton submitted that based on Section 105 (ii) of the Constitution, the Police Service Commission (the Commission) exercises the

constitutional right to appoint police officers and to exercise disciplinary control and powers of removal of such officers from office. He argued that whilst the Constitution requires the Commission to consult with the Prime Minister on the appointment of a person as Commissioner of Police, it does not require such consultation and approval on removal. That power vests in the Commission to the exclusion of anyone and in so executing this power the Commission must do so lawfully, reasonably and rationally.

[34] Learned Queen's Counsel argued that the decision to terminate the Claimant's service as Commissioner of Police was unlawful, null and void. He further submits that the Commission could only dismiss the Claimant for reasonable cause after exercising this right in accordance with proper procedure that adhere to the principles of acting fairly and in accordance with natural justice. This duty was owed whether the Claimant was subject to probation or not. Counsel contends that "there was a clear breach of this duty." Learned Counsel contends that the Claimant was never told in writing or otherwise what were the unsatisfactory qualities about his performance as Commissioner of Police. He was never given an opportunity to respond and justify whatever case he may have had before the Commission. Their decision was rendered unlawful, null and void. Counsel further submits that when the Commission purports to act in the exercise of its constitutional powers, it exercises quasi judicial powers which is subject to the supervision of the Court and amenable to judicial review. Counsel further submitted that the Commission is amenable to applications for certiorari and declarations.

[35] Learned Queen's Counsel cited a number of authorities in the course of his submissions, including **Thomas v Attorney General**¹; **Fraser v Judicial and Legal Service Commission**²; **Panday v Judicial and Legal Service commission**³; **Mc Laughlin v Governor of the Cayman Islands**⁴; **Public Service Commission v Davis**⁵.

¹ (1981) 32 WIR 375

² [2008] UKPC 25

³ [2009] 4 LRC, 340

⁴ [2007] 1 W.L.R 2893

⁵ (1984) 33 WIR 112

FIRST AND SECOND DEFENDANTS' SUBMISSIONS

[36] The submissions of Mrs. Karen de Freitas Rait, Learned Counsel for the 1st and 2nd Defendants were first and foremost that the 2nd Defendant is improperly joined as a party to the claim. Learned Counsel submitted that the only proper party in any matter against the Crown is the Honourable Attorney General of Antigua and Barbuda. Counsel cited the case of **Glentis W. Goodwin v Hon. Winston B. Spencer and Hon. Justin Simon**⁶ as authority for her submission.

[37] The rest of Learned Counsel's submissions may be summarized as follows:-

- (a) Judicial review "is limited to an assessment of whether the limits of a particular power were exceeded and whether the decision-making process was reasonable or fair." That the court's supervisory jurisdiction in determining reasonableness or fairness of the process does not extend to any review of the merits of the decision itself.
- (b) The Claimant's appointment was terminated by the Commission in accordance with the Constitution. That the Commission's decision to terminate the Claimant's appointment was a lawful decision well within the constitutional authority vested in the Commission, particularly Section 105 (1) and (3). Counsel submitted that the Claimant has led no evidence of irrationality in respect of the Commission's decision. Counsel further submits that Section 12(1) of the Police Act does not apply. That it follows that if Section 12 is not applicable, then there can be no breach of same either by the Crown as the party with whom the Claimant had contracted employment, or by the Commission as the body with statutory responsibility for the Claimant's appointment and removal.
- (c) Judicial review is not an appropriate course of action for the Claimant to have followed. That the Claimant failed to avail himself of an alternative remedy in

⁶ Civil Appeal No. 25 of 2005

private law available to him which was more appropriate in all the circumstances.

THIRD DEFENDANT'S SUBMISSIONS

[38] Learned Queen's Counsel Sir Gerald Watt and Dr. David Dorsett, Learned Counsel for the 3rd Defendant submitted that :-

- (a) The Claimant's Affidavit falls short of supporting his claim for Judicial Review. The Claimant's Affidavit is silent as to his reasons for not exhausting other alternative remedies before resorting to an application for Judicial Review and has failed to justify his failure to bring his grievance to the Board of Appeal as he was required to do under Section 107 of the Constitution.
- (b) The Claimant's claim is that of breach of an employment contract. Learned Counsel further submitted that judicial review should be denied to the Claimant "as the appropriate remedy is a private law remedy of a complaint to the appropriate industrial tribunal i.e. the tribunal established by the Constitution – the Public Service Board of Appeal of Antigua and Barbuda, and to the High Court on a claim for breach of a contract of employment."
- (c) Judicial review is always discretionary and in the circumstances it is respectfully submitted that the Court in the proper exercise of its discretion should deny judicial review to the Claimant.

[39] The Court is of the view that before dealing with the issues identified by Counsel for the Claimant (in paragraph 9 above), it should first address the issues of (a) whether the 2nd Defendant is improperly joined as a party to the suit and (b) whether the Claimant's claim for Judicial Review should be dismissed on the ground that the Claimant has brought legal proceedings without exhausting all existing alternative remedies and whether the claim is properly within the realm of private law, namely the law of contract, and not one that required the intervention of the Court by way of Judicial Review.

WAS THE SECOND NAMED DEFENDANT IMPROPERLY JOINED AS A PARTY TO THE SUIT?

[40] Learned Counsel for the 1st and 2nd Defendants, Mrs. De Freitas Raitt has submitted that:-

“The second defendant is named as ‘Colin Derrick, Minister of Justice’ and the only claim directed against him is the claim for a Declaration of unreasonable, irrational or unlawful exercise of power by the Police Service Commission either singularly or together with the Minister of Justice. Thus it is clear that Mr. Derrick has been joined, not in his persona, but rather, in his then capacity as a Minister of Justice and servant of the Crown.”

[41] Learned Counsel further submitted that “this issue was raised, en passant, by the legal submissions of the Third Defendant filed on the 5th February 2008, but the Court did not rule in respect of same and the matter was, regrettably, not actively pursued in limine by the Second and Third Defendants.”

[42] The Court is of the view that its ruling will in effect address the issue of the proper parties.

SHOULD THE CLAIMANT’S CLAIM FOR JUDICIAL REVIEW BE DISMISSED ON THE GROUND THAT THE CLAIMANT HAS BROUGHT LEGAL PROCEEDINGS WITHOUT EXHAUSTING ALL EXISTING ALTERNATIVE REMEDIES AND FURTHER THAT THE CLAIM IS PROPERLY WITHIN THE REALM OF PRIVATE LAW NAMELY THE LAW OF CONTRACT, AND NOT ONE THAT REQUIRED THE INTERVENTION OF THE COURT BY WAY OF JUDICIAL REVIEW?

[43] It is the submission of both Learned Counsel for the First and Second Defendants Mrs. Karen de Freitas Raitt, as well as Learned Queen’s Counsel Sir Gerald Watt and Learned Counsel Dr. Dorsett for the Third Defendant that the Claimant’s claim ought to be dismissed on the ground that Judicial Review is a process to be invoked only after alternative remedies have been exhausted and that the Claimant failed to bring his

grievance to the Board of Appeal as he was required to do under Section 107 of the Constitution. Further that the Claimant failed to avail himself of an alternative remedy in private law available to him which was more appropriate in the circumstances.

[44] Both Counsel for the First and Second Defendants as well as Counsel for the Third Defendant acknowledge that an earlier application was made by the Third Defendant in respect of striking out the Claimant's application for leave to file a claim for Judicial Review on the ground that, among other things, the Claimant had failed to pursue alternative remedies. Blenman J. in a decision given on April 22nd 2009, ruled against the said application. In paragraph 53 of her Judgment, the Learned Judge stated that:-

"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 utilized 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 (the Claimant'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."

[45] The Court notes that the Third Defendant, namely the Police Service Commission, appealed the decision of Blenman J. The appeal was dismissed. Gordon J.A. in paragraph 6 of his judgment had this to say:-

"To put it shortly, an unsuccessful litigant is provided, within the rules, a procedure for appealing any decision with which the litigant disagrees. In this case there were two approaches that the appellant might have availed himself of. Firstly, as the order granting leave invited, he might have challenged the grant of leave by an application for an inter partes hearing. Secondly, he might have appealed the order granting leave. Having chosen to use neither method, the appellant cannot now mount a collateral attack on the original grant of leave. In effect, by the strike out application the appellant is asking the High Court to sit in appeal on itself. This cannot be done."

[46] In De Smith's Judicial Review it is stated that:-

"Questions as to whether a claimant should have used another type of redress process should arise on the application for permission and not at or after the substantive hearing of the judicial review claim. Once the court has heard arguments on the grounds of review, there is little purpose in requiring the parties to resort to some other remedy."

[47] In light of the above authorities, the Court is of the view that no further adjudication on the above issue is necessary. The Court is also of the view that the issue as to whether the Claimant failed to avail himself of a remedy under private law has already been addressed in the above judgment of Blenman J. The learned Judge, in paragraph 40 of her Judgment had this to say on the issue:-

"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."

[48] Further, in paragraph 41 of the Judgment, Blenman J. goes on to say:-

"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... I do not share the view that the matters of which Mr. Nelson complains fall within 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."

[49] The Court is therefore also of the view that no further adjudication on that issue is necessary.

[50] I will now go on to consider the issues stated in paragraph 9 above.

ISSUE # 1 - Were the terms and conditions of the Claimant's service contract wholly set out in the Letter of Appointment dated 1st April, 2008 issued by the Chief Establishment Officer and the Letter of Appointment issued by the Commission on 29th February, 2008?

[51] It is not in dispute that there was no formal contract signed between the Claimant and the Defendant.

[52] It is the submission of Learned Queen's Counsel for the Claimant Mr. Dane Hamilton that the letter dated 29th February 2008 "does not contain the terms and conditions of his (the Claimant's) appointment. Learned Queen's Counsel submits that the letter of 29th February 2008, when taken together with the letter dated 1st April 2008 from the Chief Establishment Officer, "such terms and conditions as are therein becomes effectively the basis of an executed contract of the Claimant's effective appointment as Commissioner." It is the further submission of Learned Queen's Counsel that the letter of 1st April "confirmed the Claimant's appointment on contract for a period of two (2) years:- 1st March 2008, to February 28th, 2010." Further that "that letter sets out his (the Claimant's) emoluments and entitlements and only conditioned his appointment as being subject to medical fitness." Learned Queen's Counsel further contends that with respect to the letter of 1st April, 2008:-

- a) The probationary period was omitted from the terms and conditions of that letter;
- b) The letter said "correspondence will be addressed to you regarding the execution of your contract", which was never executed and or finalized.

[53] The Court finds it necessary to reproduce the said letters in their entirety. The letter of 29th February 2008 is addressed to the Permanent Secretary, Ministry of Justice & Public Safety, and reads thus:-

"Dear Madam,

The Appointment of Officers

Royal Police Force of Antigua and Barbuda

In reference to your letter dated 28th February, 2008.

The Police Service Commission having reviewed the recommendations made by Cabinet on Breau's Report and the CV's of the individual Officers mentioned. With the powers vested in the Police Service Commission under the 1981 Constitution of Antigua and Barbuda, the Commission has approved the appointment of the following officers:

1. Gary Nelson - Commissioner of Police
2. Michael O'Neil - Deputy Commissioner
3. Thomas Bennett – Deputy Commissioner
4. Ronald Scott – Assistant Commissioner

Please be guided accordingly,

Respectfully,

Stephans Winter
Chairman
Police Service Commission"

[54] The letter of 1st April, 2008 is addressed to the Claimant and reads thus:-

"Mr. Gary Nelson

Dear Sir,

I am to inform you that the Government of Antigua and Barbuda has decided to employ you on contract for two (2) years with effect from 1st March, 2008 as Commissioner of Police, Police Division.

2. During the period of your employment, that is, 1st March 2008 to 28th February, 2010 you will receive the following:-

- | | | |
|------------|---|---|
| i). Salary | - | \$ 150,000.00 per annum
(Canadian Dollars) |
|------------|---|---|

ii).	Housing Allowance	-	\$ 64,800.00 per annum (Eastern Caribbean Dollars)
iii).	<u>Utilities</u>		
	Electricity	-	free
	Water	-	free
	Telephone	-	free (limited to local calls)
iv).	Vacation Leave	-	27 days per annum (in accordance with regulations)
v).	Sick Leave	-	a maximum of thirty (30) calendar days during any period of twelve (12) months
vi).	Duty Free Concession	-	exemption on duty, consumption and sales tax on the purchase of a vehicle for your personal use or for your spouse
vii).	Gratuity	-	upon satisfactory completion of the contract of employment, twelve and a half percent (12 ½ %) of aggregate salary will be drawn.

Payment of your salary and allowances will be met from Head 50 10 Police.

3. You are required to contribute towards the Medical Benefits, Social Security, Education Levy and the Personal Income Tax Schemes.

4. Your appointment as Commissioner of Police is subject to medical fitness and therefore you are asked to make early arrangements through the Chief Medical Officer who will arrange for you to be medically examined at the earliest possible date. (Enclosed is P/5 form which must be completed).

5. Upon the completion of your medical, a further correspondence will be addressed to you regarding the execution of your contract.

6. With best wishes.

Yours faithfully,

.....
Chief Establishment Officer"

[55] It is not in dispute that the Claimant flew down to Antigua from Canada on the 6th February 2008, having purchased his own airline ticket. It is not in dispute that the Claimant took the oath of office and was sworn in on the 29th February 2008. It is not in dispute that the Claimant commenced duties as Commissioner of Police on 1st March 2008.

[56] With respect to the draft contract which was forwarded to the Claimant on July 4th 2008 (which was identical to the previous draft contracts forwarded to the Claimant), Learned Queen's Counsel Hamilton submits that "it is clear that the purported contract (which ever of the four exhibited) was never executed by the parties (relevant)". He further submits that "the proper inference to be drawn from the evidence is that the Claimant a former Senior Police officer in Canada objected to the probationary clause and the clause relating to termination. It may have been insisted on by Minister Derrick but clearly by July 4th 2008 there was a stand off. The parties were not ad idem, so there was no settled agreement on contract". Counsel further submits that "there was no reliance by the Claimant on any aspect of the contract." The Court finds this latter submission to say the least, quite extraordinary. It is undisputed that the Claimant's appointment as Commissioner of Police was subject to "medical fitness." Indeed, the Claimant's appointment was subject to no other condition. However, there is no mention of this requirement in the letter of 29th February 2008. It is the letter of 1st April 2008 which states, among other matters, that "... Your employment as Commissioner of Police is subject to medical fitness and therefore you are asked to make early arrangements through the Chief Medical Officer who will arrange for you to be medically examined at the earliest possible date." It is also evident both from the testimony of the Claimant and from the submissions of Learned Counsel for the Claimant that the Claimant had already completed his medical examination with Dr. Raphael Evanson since "on or about the middle of March 2008."

[57] Yet, remarkably, the Claimant states that “no reliance was placed on any aspect of the contract”. How and why, therefore, did the Claimant complete his medical examination “since on or about the middle of March 2008”, when he only received the letter specifying that requirement, on or after the 1st April 2008? The answer is quite simple; contrary to what the Claimant would have the Court believe, and what is submitted by Counsel for the Claimant, it is clear that the Claimant did indeed place reliance on the contract which he received before leaving Canada (the last of which is CD3) and which stipulated the requirement for completing a medical examination. It is also significant that one of the items claimed by the Claimant in his Fixed Date Claim is “the costs of return airfares”. Again, there is no mention in the letter of 1st April 2008 that the Claimant would be entitled to a refund of his airfare. It is the contract, at Clause 6 (4) (a), under the heading “Salary and Allowances” which speaks to the Claimant’s entitlement to “the cost of return airfare (Business Class) for the Officer and spouse from Ottawa, Canada to V.C. Bird International Airport, Coolidge, Antigua and Barbuda. Accordingly, to borrow the rather apt expression of Learned Queen’s Counsel for the Claimant, “it does not lie in the mouth of” the Claimant to contend that “he did not act in accordance with and did not rely on the terms and conditions of the contract,” a contract that includes the probation clause.

[58] It is the contention of Learned Queen’s Counsel Hamilton that there is no contract between the parties because the same was unsigned. It would also appear to be his contention that the fact that the contract was not executed is due to the fact that the parties failed to reach agreement. The rival submission of Learned Counsel for the First and Second Defendants is that “the last draft contract received by the Claimant before he left Canada (CD3) was in fact an offer of employment which the Claimant accepted by his conduct thereby creating a binding contract on those terms when he took the oath of office as Commissioner of Police on 28th February 2008, or alternatively and at the latest when he commenced work as Commissioner of Police on 1st March 2008”. That the draft contract, though not signed, contains the terms and conditions of

the oral contract between the Claimant and the Government under which the Claimant was employed when he commenced work on 1st March 2008.

[59] Under cross-examination by Learned Counsel Mrs. De Freitas Rait, the Claimant acknowledged that all three (3) drafts which he received before leaving Canada, CD1, CD2 and CD3, contained provisions which included:-

(a) a six-month probationary period;

(b) provision for early termination.

The Claimant also testified that he objected to the probationary period several times, but was told "that it was a must."

[60] The law is settled that for there to be an agreement, there must be an offer and an acceptance. According to Chitty on Contracts⁷, an offer may be accepted by conduct. "Conduct will amount to acceptance only if it is clear that the offeree did the act of alleged acceptance with the intention (ascertained in accordance with the objective principle) of accepting the offer... a fortiori, there is no acceptance where the offeree's conduct clearly indicates an intention to reject the offer." In the case at bar, it is clear that the Claimant's conduct as outlined above can in no way be said to be a rejection of the offer of employment. It is unquestionably an acceptance of the offer.

[61] Halsbury's Laws of England⁸ is also instructive on the subject of acceptance by conduct:-

"Where there is a lengthy course of negotiations between the parties, it may be difficult to decide when they have reached agreement and have concluded a binding contract. Despite the continuing negotiations, the court may be willing to find a concluded bargain, and, if so, continuance of the negotiations thereafter will not itself terminate that agreement, unless evincing a subsequent mutual intention to rescind that agreement. Moreover, the court may be more willing to infer that the parties have reached a binding contract where one party to the continuing negotiations renders partial performance..."

⁷ Vol. 1 30th Edition, page 160, para. 2-030

⁸ Vol 9(1) 4th Edition re issue, page 389, para. 650

Based on the above authority, even if, as the Claimant testified under cross examination, he took the oath of office and assumed that “we would go back to negotiations”, the Court is of the view that a binding agreement had been reached between the parties, based on the fact that the Claimant had, at this stage, rendered not only merely partial performance, but had performed all his obligations under the (unsigned) contract. In any event, there is no evidence before the Court that negotiations were still continuing, or that the Claimant was told that negotiations would continue.

[62] The learned author Gerard McMeel in his text *The Construction of Contracts*⁹, states that:-

“Contracts may be concluded by conduct, as well as by more traditional oral and written communication. The courts also adopt an objective and contextual approach here. What is critical is the absence of any other explanation (other than the mutual assumption of contractual responsibility) for the parties' behavior. In recent authority this has been expressed as a necessity threshold, akin to that used in the implication of terms.”

[63] The English Supreme Court decision of **RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG** (UK Production)¹⁰, is instructive on the above issue. The facts of the case as set out in *The Construction of Contracts* (supra) at page 404 paragraph 14.32 are as follows:-

The parties entered into negotiations whereby the claimant proposed to supply and install two pot-mixing production lines to the defendant, the well-known dairy products firm. On 21 February 2005 the defendant sent a letter of intent requesting the claimant to start work, which, it was common ground, had contractual effect, but which was held by the judge to have been treated as having expired by the end of May (which finding was not appealed.) Accompanying the letter of intent was a draft formal contract, at a price of £1.6 million and completion date of 30 September 2005, incorporating the standard terms of the Institutes of Mechanical Engineers ('MF/1'), which incorporated both liquidated damages and limitation clauses. A further express clause provided that the contract would not be binding unless signed and executed by the

⁹ Oxford University Press – 2nd Edition, page 401. Para. 14.25

¹⁰ [2010] UKSC 14

parties. An agreement was ready for signing by 5th July 2005, but was never signed. The parties proceeded with the project. The work was completed, following an agreed change to the order of installation, and over 70 per cent of the price was paid. When disputes arose, the judge held that after the letter of intent had expired there was a further contract, but not on the MF/1 terms. The Court of Appeal held there was no contract after the letter of intent expired.

[64] On a further appeal, the Supreme Court held that there was a subsequent contract on MF/1 terms and the 'subject to contract' clause had been waived by the parties' conduct on or by 25 August 2005. Lord Clarke of Stone-cum-Ebony JSC, delivering the judgment of the court pronounced as follows:-

"The general principles are not in doubt. Whether there is a binding contract between parties, and if so upon what terms, depends upon what they have agreed. It depends not only upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded, or the law required, as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement..."

[65] Learned Queen's Counsel for the Claimant in his submissions states that "negotiations with the intermediary of Alphonse Breau continued and the Claimant was persuaded to fly down to Antigua (using his own funds which were to be refunded), which he did on February 6th 2008. Learned Queen's Counsel also submits that "Indeed the Claimant paid his own passage to Antigua given assurances by the Minister..." Counsel further submits that "the position of the Claimant was that the Second Defendant Derrick emailed him saying to the effect 'that he had to show a little faith and trust in him (Derrick)." If Learned Queen's Counsel is implying that the Claimant inferred from this email or from the alleged unspecified "assurances" of the Minister (Mr. Derrick), that either Mr. Derrick or the Government had changed their position on the non-negotiability of the probation clause, with respect, the Court finds that there is no reasonable basis on which the Claimant could have arrived at such a conclusion. It is illogical, unreasonable and unrealistic.

[66] The Court is of the view that it defies logic and practical good sense, that someone of the experience of the Claimant, and one who was about to take office as Commissioner of Police, with the corresponding duties and responsibilities of that office, would:-

- (a) Travel to Antigua and Barbuda at his own expense.
- (b) Ensure that he complied with the requirement to undergo a medical examination on or about the middle of March 2008, well before he received the letter of 1st April 2008;
- (c) Take the oath of Office as Commissioner of Police on February 29th 2008 and commence duties as Commissioner on the 1st March 2008, unless he was prepared to be bound by the terms of the contract. In the view of the Court, this is the logical inference to be drawn from the conduct of the Claimant, conduct which belies his contention that he did not rely on the contract. The Claimant's conduct clearly demonstrates an intention to be bound by the terms of the contract. He relied on it, he acted upon it; further, all his subsequent conduct is referable to the said contract (CD3). The Claimant was free to reject the offer to take up the appointment. He did not do so. He accepted the salary stipulated in the contract as well as the other allowances contained therein. He cannot approbate and reprobate the terms of his employment contract with the Government of Antigua and Barbuda. The Court is therefore of the view, based on the above authorities, that, notwithstanding the fact that the draft contract (the last of which the Claimant received before leaving Canada is CD3) – was unexecuted, that this document represented a concluded binding agreement between the parties, even if the said document had never matured into a signed contract, like in the RTS Flexible Systems Ltd. case. The Court is of the view that, although the case at bar was not a "subject to contract" type of case, and further that in the RTS Flexible Systems Ltd. case, the Court ruled that the parties had agreed to waive the subject to contract clause, yet the principles

stated in the RTS Flexible Systems Ltd case apply. All depends on the circumstances of the case. The Court is of the view that in the case at bar, taking all the circumstances of the case into account, the conduct of the Claimant "led objectively, in accordance with the reasonable expectations of honest sensible businessmen", to the conclusion that an agreement had been reached between the parties.

[67] The conclusion to be drawn from the Court's finding is that the Claimant is bound by the probation clause contained in the contract. It is also clear that the Claimant, according to his own evidence, was cognizant of the fact that "based on that clause, if the Government of Antigua and Barbuda was unhappy with him, he could be released upon payment of one (1) month's salary".

ISSUE # 2 - DID THE POLICE SERVICE COMMISSION ACT WITHIN THE SCOPE OF ITS POWER TO LAWFULLY DISMISS THE CLAIMANT AS COMMISSIONER OF POLICE?

[68] The Police Service Commission derives its statutory authority to appoint police officers from the Constitution of Antigua and Barbuda Constitution Order 1981 (hereafter referred to as "the Constitution").

Section 105(1) of the Constitution provides:-

"Subject to the provisions of this section, the power to appoint persons to hold or act in offices in the Police Force (including appointments on promotion and transfer and the confirmation of appointments) and to remove and exercise disciplinary control over person holding or acting in such offices shall vest in the Police Service Commission: Provided that the commission may, with the approval of the Prime Minister and subject to such conditions as it may think fit, delegate any of its powers under this section to any one or more of its members or the Commission of Police."

Section 105(3) of the Constitution provides:-

Before the Police Service Commission make an appointment to the office of Commissioner or Deputy Commissioner or a like post however designated it shall consult the Prime Minister, and a person shall not be appointed to such an office if the Prime Minister signifies to the Police Service Commission his objection to the appointment of that person to the office in question."

[69] It is the submission of Learned Queen's Counsel for the Claimant that whilst Section 105(3) of the Constitution requires that the Police Service Commission consult with the Prime Minister on the appointment of a person as Commissioner, it does not require such consultation and approval on removal. Counsel contends that that power vests in the Commission "to the exclusion of anyone and in so executing this power the Commission must do so lawfully, reasonably (in the Wednesbury sense) and rationally."

[70] The contrary submission of Learned Counsel for the First and Second Defendants on the above issue is that "Section 105 of the Constitution must be interpreted in accordance with section 18 of the Interpretation Act, Cap. 224 in the absence of any contrary provision in the Constitution."

[71] **Section 18, Interpretation Act, Cap. 224 provides:-**

(1) Subject to the Constitution, words in an enactment authorizing the appointment of a person to any office shall be deemed also to confer on the authority in whom the power of appointment is vested-

- (a) power, at the discretion on the authority, to remove or suspend him, and
- (b) power, exercisable in the like manner and subject to the like consent and conditions, if any, applicable on his appointment-
 - i). to re-appoint or re-instate him,
 - ii). to appoint another person in his stead, or to act in his stead whether or not there is a substantive holder of the office, and to provide for the remuneration to the person so appointed, and

- iii). to fix or vary his remuneration, to withhold his remuneration in whole or in part during any period of suspension from office, and to terminate his remuneration on his removal from office; but where the power of appointment is only exercisable upon the recommendation or subject to the approval, consent or concurrence of some other person or authority the power of removal shall, unless the contrary intention is expressed in the enactment, be exercised only upon the recommendation, or subject to the approval, consent or concurrence of that other person or authority."

[72] Counsel for the First and Second Defendant further submits that "since section 105(3) of the Constitution makes the appointment of a Commissioner of Police subject to prior consultation with the Prime Minister and since the PSC cannot appoint "if the Prime Minister signifies his objection," then the PSC's power to remove a Commissioner of Police from office would equally be subject to consultation with the Prime Minister and could not be exercised if the Prime Minister objected to such course of action". I agree with Counsel's submission.

[73] As stated by Lord Diplock in Council of **Civil Service Unions v Minister for the Civil Service**¹¹, "Judicial review... provides the means by which judicial control of administrative action is exercised." The law is settled that the role of the Court in judicial review proceedings is a supervisory one. Judicial review is concerned, "not with the decision, but with the decision-making process". In the words of Lord Brightman in **Chief Constable of the North Wales Police v Evans**¹², "unless that restriction on the power of the Court is observed, the Court will, in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power... Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made."

¹¹ [1985] AC 374

¹² [1983] 3 All ER 141; [1982] 1 WLR 1155

[74] In Council of **Civil Service Unions v Minister for the Civil Service** (supra), Lord Diplock classified under three heads “the grounds upon which administrative action is subject to control by judicial review.” These are: - illegality (unlawfulness), irrationality (unreasonableness) and procedural impropriety (unfairness.) These heads “are not exhaustive” and sometimes “merge into one another” and “run together.” In the words of Lord Donaldson MR in **R v Secretary of State for the Home Department, exp Oladehinde**¹³, “it would be a mistake to approach the judicial review jurisdiction as if it consisted of a series of entirely separate boxes into which judges dipped as occasion demanded. It is rather a rich tapestry of many strands, which cross, re-cross and blend to produce justice.”

[75] Before embarking into a discussion of whether the Commission exercised its statutory powers “reasonably, rationally and lawfully”, the Court finds it useful to reproduce the letter of termination. The said letter, which was handed to the Claimant on August 30th, 2008 reads as follows:-

“28th, August, 2008

Mr. Gary Nelson
Commissioner of Police

.....

Dear Mr. Nelson,

Further to your terms of engagement please be advised that your appointment as Commissioner of Police will not extend beyond 31st August, 2008 which is the expiry date of your probationary period, as consequence of the unsatisfactory performance of your duties during that period.

Accordingly, please contact the Permanent Secretary in the Ministry of Justice and Public Safety to finalize any outstanding issues.

Yours sincerely
Stephans Winter
Chairman
Public Service Commission”

¹³ [1991] 1 AC 254

ILLEGALITY

[76] The submission of Counsel for the Claimant is that the Third Defendant exercised its powers unlawfully. In the grounds appended to the Fixed Date Claim, Learned Counsel for the Claimant states that the Third Defendant, namely the Police Service Commission's decision was illegal, based on the following:-

- (a) The termination of the Claimant's appointment as Commissioner WAS NOT IN ACCORDANCE WITH SECTION 12(1) OF THE POLICE ACT. Further, the said termination was decided, made and prior communicated to the Claimant not by the constitutional authority but by the Prime Minister, the Minister of Justice and Mr. Alphonse Breaux.
- (b) That the Police Service Commission FAILED TO PROPERLY EXERCISE ITS STATUTORY DISCRETION in regard to the Claimant and acted as a mere rubber stamp for the illegal executive act of termination of the Claimant's appointment as Commissioner of Police.
- (c) That the Police Service Commission FETTERED ITS DISCRETION to act fairly towards the Claimant by acceding to the executive act of terminating the Claimant's appointment.
- (d) The Police Service Commission ACTED IN BAD FAITH in that it promoted the desire of the executive to terminate the Claimant's appointment and further failed to take into account relevant considerations which attended the Claimant's appointment and the subsequent performance of his duties as Commissioner.

[77] According to Lord Diplock, what is meant by illegality as a ground for judicial review is "that the decision – maker must understand correctly the law that regulates his decision-making power and must give effect to it."

**WAS THE CLAIMANT'S TERMINATION IN ACCORDANCE WITH SECTION 12(1)
OF THE POLICE ACT?**

[78] The Police Act Cap. 330 Sections 12 provides:-

"(1) Every Police Officer above the rank of a substantive 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 commissioner 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.

(2) The provisions of subsection (1) shall not apply in the case of an appointment by way of promotion or transfers from another police force."

SUBMISSIONS OF LEARNED QUEEN'S COUNSEL FOR THE CLAIMANT

[79] Learned Queen's Counsel for the Claimant submitted that the reason given for the Claimant's dismissal was "unsatisfactory performance of his duties", which he submits "eliminates the first condition in Section 12 above, that he was not fitted mentally or physically to perform the duties of his office. With respect to the second limb in Section 12, namely that unsatisfactory performance of his duties rendered the Claimant "not likely to become an efficient or well conducted police officer", Learned Counsel submitted that no details were given as to the manner in which the Claimant's performances of his duty were unsatisfactory. Learned Queen's Counsel further submitted that the duty of the Commission to appoint and remove from office must include a power to terminate the appointment of a Commissioner "whose performance is so substandard and hopelessly inefficient, that it can be said on appraisal therefore that his performance is highly unsatisfactory but the Commission must have reasonable grounds and utilize proper procedure. It must act lawfully, reasonably and rationally and must exercise this power in its own right, to the exclusion of any person or authority."

SUBMISSIONS OF LEARNED COUNSEL FOR THE FIRST AND SECOND DEFENDANTS

[80] The submission of Learned Counsel for the First and Second Defendant on the above is that the probation period in Section 12 of the Police Act is not applicable to the Claimant's appointment. Learned Counsel further states as follows:-

- (a) The Claimant's allegation of a breach of Section 12(1) of the Police Act is based upon the erroneous assumption that that section applies to the Claimant's contractual relationship under which he was employed as Commissioner of Police.
- (b) The Claimant had a contractual commitment to a six months probation period. This is not the same as the statutory provision for probation in Section 12 of the Police Act. Section 12 calls for a two year probation period. The Claimant's contract was for a total term of two years only. It would defy all logic to suggest that the Claimant's two year employment term was subject to a two-year probation period. Learned Counsel further submits that, although the terms of the statute on its face appear to be mandatory, a "purposive approach to construction of the statute is necessary to make sense of it in the context of fixed term contractual arrangements."
- (c) It is a well established principle of statutory interpretation that words must be read in their context, first the context of the particular section and secondly in the context of the entire statute. In Section 12 of the Police Act, the words "shall be on probation during the first two years after his appointment" when read in the context of the entire section clearly refer to the appointment of a senior officer for an indefinite period of employment.
- (d) The Court must be satisfied that it is giving effect to the true legislative intention. See the case of **Savarin v Williams**¹⁴ in which Floissac CJ gives guidance on the factors to be considered in construction based on statutory context.

¹⁴ Civil Appeal No. 3 of 1995-Dominica

(e) Section 12 of the Police Act “creates an absurd result in the context of a Commissioner with a fixed-term contract because it was never intended to apply to such an eventuality. There is a casus omissus in the statute which needs to be filled by the court when, as in the case at bar, it is faced with a factual situation which the legislators never anticipated.” The courts will strain against ... leaving unfilled ‘the casus omissus’.” To fill the casus omissus in section 12 of the Police Act and to give effect to the legislative intent, the following words of exception should, of necessity, be implied at the beginning of the section as follows: “Save and except in the case of an officer employed under the terms of a fixed term contract, where the terms of such contract shall prevail.”

SUBMISSIONS OF LEARNED COUNSEL FOR THE THIRD DEFENDANT

[81] The submission of Learned Queen’s Counsel Sir Gerald Watt and Learned Counsel Dr. Dorsett, for the Third Defendant on this point is that “both parties had clearly contracted out of the provisions of Section 12 (1) of the Police Act Cap 330.” Counsel further submit that “the probationary period was a most important part of the contractual arrangement between the parties and the Court must look at the intention of the parties, which was that the Claimant could be “released on payment of one month’s salary” should the Government not be satisfied with the Claimant’s performance.”

[82] I agree with the submission of Learned Counsel for the Defendants that Section 12(1) of the Police Act is not applicable in the instant case. Further, as stated in paragraph above, it is my finding that the Claimant was subject to the probation clause as stated in CD3. That contract makes provision (at paragraph 2) for the Claimant’s appointment to be terminated in accordance with the contract before the end of two years and at paragraph 15 (c), for the Claimant’s appointment to be terminated upon payment of one month’s salary.

[83] Based on the above, there can be no merit in the allegation that Section 12(1) of the Police Act has been contravened.

[84] The further submission of Learned Queen's Counsel for the Claimant was that the Claimant's termination "was decided, made and prior communicated to the Claimant not by the constitutional authority but by the Prime Minister, the Minister of Justice and Mr. Alphonse Breau." He stated that:-

- i). About 11 a. m. on the 28th August 2008, the Claimant met with Alphonse Breau (Mr. Breau) at the latter's request at his hotel room, and there he was informed by Mr. Breau that the Government no longer wanted him in their employ, and that he was terminated immediately. Their reason was that the Claimant was not paying enough importance to their directions. The Claimant requested a meeting with the Government representatives and Mr. Breau agreed to set one up.
- ii). At 3 p.m., on the 28th August 2008, the Claimant attended a meeting at the Prime Minister's Office at which the Prime Minister, the Attorney General and Minister Colin Derrick were present. At that meeting, both Minister Derrick and the Prime Minister confirmed to the Claimant that he was dismissed. The Claimant requested compensation and was told by Minister Derrick and the Prime Minister that there would be no compensation; the Prime Minister further advised the Claimant that they were offering him the opportunity to quietly resign or be dismissed.
- iii). That on or about 4 p.m. of August 30th 2008, the Claimant was handed a letter of dismissal dated August 28th 2008. This letter was signed by Stephans Winter as Chairman of the Police Service Commission.

[85] According to Learned Queen's Counsel Hamilton, "it is of importance that this notification (that the Government no longer wanted the Claimant in their employ) did not come from the Chief Establishment Officer, the Permanent Secretary in the Ministry of Justice, or, indeed from the Police Service Commission. Neither did it purport to convey a decision or view arrived at by the Police Service Commission; it stated unequivocally that the

Government no longer wanted the Claimant in their employ, that he was terminated immediately.”

[86] Learned Queen’s Counsel further submits that the Third Defendant acted as a mere rubber stamp for the illegal executive act of termination of the Claimant’s appointment as Commissioner of Police.

[87] The rival submission of Learned Counsel for the First and Second Defendants is that the Police Service Commission’s (PSC) decision to terminate the Claimant’s appointment “was a lawful decision well within the Constitutional authority vested in the PSC.” Learned Counsel bases her submission on the following:-

- a. The uncontroverted evidence of Stephans Winter, Chairman of the Commission is that after consultation with the Honourable Prime Minister on 27th August, 2008 and having confirmed that the Prime Minister had no objection to the Claimant’s appointment being terminated, the Commission at a meeting held on 28th August 2008 took a final decision to terminate the Claimant’s appointment as Commissioner of Police. That the Minutes of the Commission’s meeting of the 28th August 2008 - Exhibit SW 103, confirms this. That under cross-examination, Mr. Winter further explained that the Commission had taken an earlier decision on the 26th August 2008, but “in accordance with the law had felt the need to consult with the Prime Minister before formalizing that decision.” That the Commission had written to the Prime Minister on 26th August 2008 seeking a meeting with him and that the meeting took place on 27th August, 2008. At that meeting, the Prime Minister “agreed with the Commission” for the termination of the Claimant’s appointment. This then “paved the way” for the Commission’s “final decision” on 28th August, 2008 to terminate the Claimant’s appointment and the termination letter of the same date from the Commission.
- b. The fact that it was the Claimant who requested the meeting with the Prime Minister and the Minister of Justice on the afternoon of 28th August is “particularly relevant”. That even if the Prime Minister had at that meeting

spoken in terms of the Claimant's impending termination, such a discussion would have been "merely an indication of his knowledge of the Commission's decision, not an indication of any interference by the Executive in the Commission's decision making process."

- c. The date of the Claimant's dismissal is also significant. The Claimant's appointment was terminated by the letter dated 28th August, 2008 with effect from the end of the day on 31st August, 2008. The letter expressly advised the Claimant that his "appointment... will not extend beyond the 31st August, 2008 which is the expiry of your probation period." That letter was delivered to the Claimant by the Chairman of the Commission on 30th August 2008. The minutes of the Commission (Exhibit SW103) reflect a termination date of 31 August and further indicate that Thomas Bennett was appointed Commissioner of Police with effect from 1st September, 2008.

[88] According to Learned Counsel Mrs. De Freitas Rait, the above is "all consistent with the fact that the termination of the Claimant's appointment was the act of the PSC and that the effective date of dismissal was the 31st August, 2008." Counsel further submits that "the defendants maintain that the Claimant's appointment was not terminated by the Prime Minister or the Executive but rather was lawfully terminated by the PSC, with the concurrence of the Prime Minister as required by the Constitution."

[89] The minutes of the Commission, which was tendered into evidence as Exhibit SW 103, is instructive and is reproduced in part as follows:-

"Minutes of 2nd Extraordinary Meeting 2008
Of the Police Service Commission
Held on 28th August, 2008.

.....
.....

Agenda

1. Termination of the appointment of Gary Nelson and the acting appointment of Deputy Commissioner Thomas Bennett as Commissioner of Police.

1b. In reference to the Police Service Commission's letter dated 26th August 2008, the Commission received a correspondence from the Honourable Baldwin Spencer, Prime Minister approving the termination Mr. Gary Nelson's appointment as Commissioner of Police, the Commission discussed and agreed to terminate Mr. Gary Nelson's appointment as Commissioner of Police from the 31st August, 2008.

A letter was written to Mr. Gary Nelson advising him that his appointment was terminated during the probation period which ends on the 31st August, 2008. A Copy was sent to the Prime Minister and Minister of Justice.

1c. In reference to the Police Service Commission's letter dated 26th August 2008, the Police Service Commission having receive a correspondence from the Honourable Baldwin Spencer, Prime Minister agreeing to appoint Deputy Commissioner – Thomas Bennett as Acting Commissioner of Police, the Commission discussed and agreed to appoint Deputy Commissioner Thomas Bennett as Acting Commissioner of Police effective 1st September 2008 until further notice.

A letter was written to Mr. Thomas Bennett advising him that the Police Service Commission has appointed him Acting Commissioner of Police with effect of 1st September, 2008 until further notice. A copy was sent to the Prime Minister and the Minister of Justice.

.....
....."

[90] From the above, it is evident that (a) the Commission had already taken the decision to terminate the appointment of the Claimant on the 26th August 2008; (b) that the decision of the Commission to do so was communicated to the Prime Minister for his approval. The Court is of the view that there is no evidence before the Court that the decision was first taken by the Prime Minister and then communicated to the Commission. Neither is there any evidence that the decision was made by Mr. Breaux, just because he verbally communicated to the Claimant that the Government "no longer wanted him in their employ". In any event, we have only the word of the Claimant of the content of this alleged conversation. The further fact that the Prime Minister confirmed at the meeting with the Claimant on the 28th August, which incidentally was requested by the Claimant, that the services of the Claimant were no longer required, in the view of

the Court, does not support the submission of Learned Queen's Counsel for the Claimant that the decision was that of the Prime Minister.

[91] Whether the Commission's decision was a correct one is not the function of the Court to inquire into. As stated in Rajandra Ramlogan's text *Judicial Review in the Commonwealth Caribbean*, "the function of the High Court on an application for judicial review is limited to determining whether or not the impugned decision was legal, not whether or not it was correct. The freedom to exercise a discretion necessarily entails the freedom to get it wrong; this does not make the decision unlawful."¹⁵

[92] As to the submission of Learned Queen's Counsel Hamilton that the Commission acted in bad faith "in that it promoted the desire of the executive to terminate the Claimant's appointment..." Supperstone and Goudie's *Judicial Review*¹⁶, states that "...it is suggested that 'bad faith' as a concept should be, and properly is, limited to cases of malicious or deliberately ulterior motives or knowingly ultra vires actions." In the view of the Court, there is no evidence before the Court that the Commission's decision was tainted by malice or by improper or ulterior motives.

[93] The Court agrees with the submission of Learned Counsel for the First and Second Defendant that "there is no factual or legal support for the claim of illegality as a basis for judicial review" in this case. In the view of the Court, and considering the evidence before it, the Claimant has not provided cogent evidence to prove, on a balance of probabilities, that the Commission exceeded its powers, abused its power, or fettered or abused its discretion as alleged by the Claimant.

IRRATIONALITY OR UNREASONABLENESS

[94] Counsel for the Claimant contends that, "in terminating the Claimant's appointment, the Police Service Commission acted unreasonably and irrationally in that it failed to bring to

¹⁵ Page 15-per Morris P in *Bailey v. Flood Tribunal*, High Court, 6th March 2000 (unreported)

¹⁶ *Judicial Review* by Michael Supperstone Q.C, James Goudie Q.C, and Paul Walker, 4th Edition, page 187, para 7.28.4

the attention of the Claimant any perceived shortcoming and/or dereliction of his duties and/or highlighting any failure on the part of the Claimant to satisfactorily perform the duties of his office.”

[95] What has now come to be termed the “Wednesbury principle” derives from Lord Diplock’s speech in *Council of Civil Service Unions v Minister for the Civil Service* (ibid) where the Learned Judge stated that “...By “irrationality” I mean what can now be succinctly referred to as “Wednesbury unreasonableness”...It applies to a decision which is outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.”

[96] According to Supperstone & Goudie in the text *Judicial Review* (supra):-

“Lord Diplock’s statement of principle underlines the crucial feature that the Court is not concerned with what it regards as the appropriate decision, but rather with the quite different test of whether sensible decision-makers, properly directed in law and properly applying their minds to the matter, could have regarded the conclusion under review as a permissible one.”

[97] As stated in the case of **Associated Provincial Picture House Ltd. V Wednesbury Corporation**¹⁷:-

“A person entrusted with discretion must... direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting ‘unreasonably.’”

[98] In the New Zealand case of **Webster v Auckland Harbour Board**¹⁸, Cooke J stated that which is required before the Court may intervene on this ground is that the decision is one outside the limits of reason.

¹⁷ [1948] 1 KB B 223

¹⁸ [1978] 2 NZR

[99] Counsel for the First and Second Defendants submits that the reasons for the decision to terminate the Claimant's employment were:-

- a) Poor performance on the part of the Claimant during his six-month tenure as Commissioner of Police.
- b) The Government and the Police Service Commission had a public duty as a matter of national importance to the citizens and residents of Antigua and Barbuda to ensure that the Commissioner of Police was performing to the highest standards, particularly during a period of time when, by all accounts, the escalating crime rate was a matter of "grave national concern."

[100] The incidents of "unsatisfactory conduct on which the Commission based its findings include:-

- (i) The Claimant's lack of performance, during a critical period of investigation of the Mullany murder investigations.
- (ii) At its frequent meetings with the Claimant, it was found that the Claimant appeared unable to answer questions put to him with respect to developments within the Police Force, questions which he was expected to answer as Commissioner, and which his deputies were able to answer quite easily about what was going on in the Police Force over which he had charge.
- (iii) The Claimant had a "penchant" for not accurately conveying to the Prime Minister and other parties matters occurring between himself and the Commission and which the Commission had to correct by reference to the Commission's minutes. This action caused much embarrassment to the Commission.
- (iv) Establishing a website which "made Antigua look like a beggar country as he was soliciting firearms and other crime fighting equipment for the Police Force.
- (v) The Claimant knowingly and deliberately usurped the authority of the Commission with respect to promotions by proceeding to promote officers from

Inspector upwards which he knew he had no legal authority to do. He also appointed Scotland Yard Detectives Special Constables.

(vi) "In light of the derision and scorn with which the Claimant was viewed by his peers and which was known to the Commission, the continuation of the Claimant's appointment as Commissioner was simply untenable."

[101] In the Barbadian case of **Redman v Gaskin**¹⁹, cited in Albert Fiadjoe's *Commonwealth Caribbean Public Law* (supra) at page 46, the courts made it clear that they were not willing to categorise a decision as unreasonable merely because it was "inconvenient, unwise or unjust." In that case, the holder of a hotel licence applied to the licensing authority for the renewal of his licence. The court made the observation that if it had been in the shoes of the authority, it would not have granted the licence. The Court felt, however, that the decision was not so unreasonable that no reasonable authority could have come to that conclusion.

[102] In the case at bar, the Court is of the view that, applying the *Wednesbury* test for unreasonableness, there is no basis for a conclusion that the decision of the Commission was irrational or unreasonable. In the view of the Court the decision of the Commission to terminate the Claimant's employment, given their reasons, was not so unreasonable that no reasonable authority could have come to that conclusion. Or to use the language of Langrin J in **Regina v The Jamaica Racing Commission ex parte Harold Clemetson**²⁰, the decision of the Commission "is not so perverse that it lacked logic or violated the fundamental values of our society".

PROCEDURAL IMPROPRIETY

[103] Under Lord Diplock's classification, the third ground of judicial review is that of procedural impropriety or unfairness. By this is meant "not only failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who

¹⁹ [1946] 8 WIR 22

²⁰ [1994] 31 JLR 390 (JM)

will be affected by the decision," but also "because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred." Per Lord Roskell (see page 443 Fordham). Procedural impropriety is therefore concerned "with the procedure by which a decision is reached, not the ultimate outcome."

[104] Ground 12 of the Claimant's Fixed Date Claim is that:-

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

[105] The above ground is closely linked with Ground 19 which states:-

"The Police Service Commission further failed to allow the Claimant a fair opportunity to make any representation as to why his appointment ought not to be terminated."

[106] Learned Queen's Counsel for the Claimant has submitted that during the Claimant's tenure as Commissioner of Police, he never received any written correspondence or otherwise from the relevant authority that the performance of his duty was less than satisfactory or that he was not likely to become an efficient and well conducted Commissioner of Police.

[107] The uncontroverted evidence before the Court is that the Claimant attended monthly meetings of the Commission. The evidence of Mr. Winters, the Chairman of the Commission, is that the Claimant was told, at those monthly meetings, that there was dis-satisfaction with his work. The Claimant acknowledges that these meetings took place, but denies that there was an expression of dis-satisfaction with his duties. The evidence of Mr. Derrick is that at the meetings which he had with the Claimant, which for the first two and a half months, were weekly meetings, he also expressed to the Claimant dis-satisfaction with the Claimant's performance. Again this is denied by the Claimant.

[108] Learned Queen's Counsel Hamilton further submitted that "the Claimant was never informed that his role as Commissioner would be under the scrutiny or review of Alphonse Breau." The evidence before the Court with respect to this submission is that the Claimant himself testified that:-

- (a) When he started work on the 1st March, it was under the general recommendations of the Police Commission, to implement the Breau Report.
- (b) He was aware that Mr. Breau was continuing to advise Government with respect to the implementation of the Breau Report.
- (c) Mr. Breau was going to conduct a review in six (6) months.

When questioned as to whether the review would have included a review of his role in implementing the Breau Report, the Claimant responded, "I assume so." He also testified that he knew that when Mr. Breau arrived in Antigua in August, that he was there in reference to the review and that he knew that his role in respect to the implementation of the Breau Report would be under scrutiny. It is therefore not unreasonable to conclude that the Claimant was aware, or ought to have been aware that his role as Commissioner would be under the scrutiny or review of Mr. Breau. In the view of the Court, it is immaterial whether the Claimant was "informed" of that fact.

[109] Learned Counsel further submitted that Section 12 of the Police Act regulates the removal of the Commissioner of Police from office. He submits that the second limb of Section 12 of the Act relates to "unsatisfactory performance of duties". Counsel submitted that the duty of the Commission to appoint and remove from office must include a power to terminate the appointment of a Commissioner whose performance is so substandard and hopelessly inefficient, that it can be said on appraisal therefore that his performance is highly unsatisfactory but the Commission must have reasonable grounds and utilize proper procedure.

[110] It is the further contention of Counsel for the Claimant that "whether or not his employment was subject to a probationary period of six months does not matter or detract from the settled law as the Commission could only dismiss him for reasonable cause after exercising this right in accordance with proper procedure that adhere to the principles of acting fairly and in accordance with natural justice. This duty was owed whether he was subject to probation or not."

[111] Learned Counsel for the First and Second Defendants Mrs. De Freitas Raitte on the other hand, submits that Section 12 of the Police Act is not applicable to the Claimant's appointment. Counsel submits further that it is not appropriate to apply the probation standards within the Police Act which were clearly intended to apply to indefinite employment terms where officers could be confirmed only after rigorous two-year probation. Counsel further submits that the Claimant's appointment was subject to termination without cause during the 6-month probation period in keeping with normal industrial law practice relating to probation periods.

[112] Learned Counsel invites the Court to find that the Claimant's probation clause permitted him to be removed from office without any reason being given and therefore it follows that in those circumstances he could not have had an entitlement in natural justice to be told why his appointment was being terminated or to be heard in this regard because there would be no justiciable issue on which the Commission could properly have given him an opportunity to respond. Learned Counsel further contends that:-

- i). The Claimant accepted the position of Commissioner of Police notwithstanding the fact that he failed to sign off on a written contract with respect to his appointment.
- ii). The Claimant's position was subject to a probation period of six months.
- iii). Within six months the Commission had come to the conclusion that the Claimant's performance as Commissioner of Police was "unsatisfactory."

- [113] Learned Counsel submits further that the Claimant did have numerous opportunities to respond to the Government's and the Commission's concerns about his performance. She submits that even if the Court were of the view that during his probation some opportunity to be heard was required to meet standards of natural justice, then it is submitted that such standards were met by the several oral communications and one written communication with him.
- [114] The further submission of Learned Counsel Mrs. De Freitas Raite is that the Claimant's complaint of procedural impropriety would have been cured if he had followed the mandatory requirement appeal procedure laid down in the Constitution. This submission was also made by Counsel for the Commission (the Third Defendant); they, too submitted that the Claimant's claim for judicial review should be dismissed since he should have availed himself of the appeal mechanism specified by the Constitution, namely to appeal to the Public Service Board of Appeal. Accordingly, that an alternative remedy is available to the Claimant, "he must first resort to that remedy before oppressing the Third Defendant with judicial review action." As stated in paragraph, this issue has already been dealt with above.
- [115] The Court must also disagree with the submission of Learned Counsel that the issues raised by the Claimant are by their nature nothing other than private law matters and that the claim for judicial review should be dismissed on that ground. Again, this issue has already been dealt with above.
- [116] What does acting fairly require in this case? In **R v Home Secretary ex p. Doody**²¹, Lord Musthill stated at page 560, thus:-

"What does fairness require in the present case... The standards of fairness are not immutable. ...The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects..."

²¹ [1994] 1 AC 531

[117] In the Court of Appeal decision of **Hugh Wildman and The Judicial and Legal Services Commission Of The Eastern Caribbean States** – Civil Appeal No. 9 of 2006, Gordon, J.A. who delivered the judgment stated , at paragraph 19:-

“It would appear that there are common chords running through these cases which I perceive to be:-

- That where no statutory guidelines are set, courts will be slow to interfere with a procedure adopted by an administrative entity in fulfilling a function which could be broadly expressed as ‘selection’ on the grounds of unfairness;
- The requirements of fairness vary from a high point in forfeiture cases to a low in initial application cases and between the two there are the legitimate expectation cases;
- Fairness will often require that where a decision is to be given against the interests of an individual that that individual be given an opportunity to make representations on his own behalf. In that connection the individual should be advised if there are any factors that might weigh against him.”

[118] Ground 20 of the Claimant’s claim states:-

“The Claimant had a legitimate expectation to the benefit of a contract of employment for two years and expected to enjoy that benefit except on the rational grounds for withdrawing it and/or that it will not be withdrawn without giving him first an opportunity of advancing reasons for contending that the contract should not be withdrawn. The Police Service Commission decision to terminate the Claimant’s appointment is an unlawful breach of this legitimate expectation.”

[119] The Court does not share the view that the Claimant had a legitimate expectation as alleged by the Claimant. The Claimant’s employment was subject to a six-month probationary period. He could only have had a legitimate expectation to the benefit of a contract for two years after he was confirmed in his position. As stated above, the Claimant was well aware of, and understood the effect of the probation clause, and by taking the oath of office and commencing work as Commissioner of Police, bound himself to that clause. It is significant that the Claimant stated, “the Government can within the first 6 months, release us with only one month’s salary. That’s it. The problem with the probation period is that the Police Act is very weak on this issue and indicates that they do not have to have cause to release us... a contract is binding and we have

to protect our interests.” The Claimant has not provided any evidence of any promise made by the Defendants on which he could have relied to have formed a legitimate expectation.

[120] The Court is of the view that, while the Commission was under an obligation and a duty to observe the rules of procedural fairness, that on the facts of the case and based on the totality of the evidence, that duty was not breached. The instant case is not concerned with disciplinary proceedings against a claimant where there was a failure to observe proper procedure. Neither does it involve a case involving the Antigua and Barbuda Labour Code, Cap 27 as amended, as Section A6 thereof precludes its application to employees employed in the Police Force. The Court is of the view that this case is on the level of the “low point” in the classification of Gordon J.A. in the Hugh Wildman case cited above. Under cross-examination by Learned Counsel Mrs. De Freitas Raitt, the Claimant admitted that over the course of his employment, he met with the Chairman of the Police Service Commission Mr. Winters, “several times”. He also testified that he would attend monthly meeting, and that he also met with the Minister of Justice “many times”. The Claimant denied, however, that “they raised several issues with him with respect to his performance.” The Court accepts the evidence of the Defendants that, prior to receiving the letter of termination, the Claimant was told, at the monthly meetings, that there was dis-satisfaction with his work. Based on the Court’s findings that the Claimant was not a credible witness, the Court does not accept the evidence of the Claimant to the contrary. The Court is of the view that, in the instant case, there was no procedural unfairness such as to invoke the intervention of the Court.

[121] Learned Queen’s Counsel Hamilton cited several cases for the Court. One such case is that of the Privy Council, namely that of **Fraser v Judicial and Legal Service Commission (supra)**, where Lord Mance stated:-

“Removal, whether outright or under a contractual provision is ...only permissible if made pursuant to a decision reached by the Commission at the time of removal. Such a decision can only validly be reached if the Commission at that time determines, in accordance with proper procedure that reasonable cause exists for the officer’s removal.”

[122] In the Fraser case, the Commission recommended the removal by Government of the Appellant, a magistrate, who had served in St. Lucia under successive annual contracts, when it had accepted that no reasonable cause existed.

[123] In the case at bar, the Commission's decision to terminate the Claimant's appointment, cannot, in the view of the Court be said to have been based on the Commission's "whim". The Claimant's employment was for a specified period of two years. It was subject to a six month probation clause. The Claimant's employment was terminated during the probation period, after the Commission had reached a decision, which, in the view of the Court did not offend the principles of illegality, irrationality or procedural impropriety. In the view of the Court, the case at bar can be distinguished from the Fraser case. In the Fraser case there was failure by the administrative tribunal, namely the Public Service Commission "to observe procedural rules ...expressly laid down in the legislative instrument by which its jurisdiction was conferred." In the case at bar, there was no such failure.

THE RELIEF SOUGHT

[124] As stated by Michael Fordham in the text Judicial Review Handbook, at page 428, paragraph 42.1, "In judicial review, it is generally for the claimant to prove grounds for intervention, not for the defendant to disprove them." The onus is therefore on the Claimant Gary Nelson to establish that the Commission's decision was tainted with illegality, unreasonableness and procedural impropriety.

[125] The Court is not involved in a review of the merits of the decision of the Commission. In the words of Rawlins J.A. as he then was in the Hugh Wildman case (*supra*): "The Court's jurisdiction is to review the decision making process in the light of the applicable legal principles for such a review." In the case at bar, to borrow again the words of Rawlins J.A., I am of the view that "the decision making process of the Commission fell within the compass of those principles." Therefore, I find that the Claimant's case for judicial review be refused.

[126] Even if I am wrong in my conclusion, the law is settled that all the remedies sought in judicial review proceedings are subject to the discretion of the Court. Even if a case is proved, the court may refuse any or all of the remedies sought by the claimant. The learned authors Supperstone and Goudie in the text *Judicial Review* (supra) state that “there are several bases upon which the court in the exercise of its discretion may refuse to grant a remedy.” A court may refuse relief because of the claimant’s conduct or motives, for example, where the claimant suppressed or misrepresented material facts in presenting the claim – **R v Kensington Income Tax Commissioners ex parte Princess Edmond de Polignac**²². The learned authors state that, “In an exceptional case turpitude or lack of merit in the claimant may lead to discretionary refusal of relief.” An example cited by the learned authors is the case of **Dorot Properties v Brent London Borough Council**²³. In that case, a ratepayer challenged a refusal to refund rates; the remedy was refused because he had previously withheld payment of rates without justification.

[127] Taking the Claimant’s conduct as a whole, the Court is also of the view that the Claimant’s application for judicial review should be dismissed on the grounds of lack of merit in the Claimant. As stated above, the evidence before the Court is that the Claimant made a decision to travel to Antigua and Barbuda well knowing that he would be subject to the Contract (CD3) which included the probation clause. He was well aware of the implications of the probation clause, included in which was the provision for dismissal within the six month probationary period on payment of one month’s salary. According to his evidence, he had been advised by his Attorney in Canada that the said probationary clause was “unfair”. Notwithstanding his alleged dissatisfaction with the probationary clause, he nevertheless made a deliberate decision to travel to Antigua and Barbuda to take up the appointment, ostensibly because he was induced by Minister Derrick to do so, by vague and unspecified “assurances”, and by being told to “have a little faith and trust in him (Mr. Derrick).” He was well aware that the position of

²² [1917] 1 KB 486

²³ [1990] RA 137

Commissioner of Police was one which required from the holder of that office, qualities of leadership and integrity.

[128] It was indeed fortuitous for the Claimant that the wheels of the beauracratc machinery in Antigua and Barbuda turned so slowly that the Claimant was given the contract for signature at least one month after he took the oath of office. He therefore took the oath of office and officially commenced duties as Commissioner of Police before signing the contract. He then refused to sign the contract, purportedly because he did not agree to the probationary clause therein. He further testified that he thought that "we" "were still in negotiation", though he provides not a shred of evidence, either by way of letter or otherwise that he continued negotiations with anyone on the subject of the probation clause upon his arrival in Antigua and Barbuda or indeed at any point prior to his dismissal. The Court is of the view that the Claimant, like the ratepayer in the case of **Dorot Properties v Brent London Borough Council** cited above, does not merit the intervention of the Court exercising its discretion to grant him relief.

CONCLUSION

[129] The Order of the Court is as follows:-

- (1) The Claimant's claim for judicial review is dismissed.
- (2) The Claimant is to pay to the Defendants prescribed costs in accordance with CPR.


Jennifer Remy
High Court Judge