BRITISH VIRGIN ISLANDS

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

Claim No. BVIHCV2008/0383

BERENICE FREEMAN

Claimant

-and-

THE ATTORNEY GENERAL

CHIEF AGRICULTURAL OFFICER

DEPARTMENT OF AGRICULTURE

Defendants

Appearances:

Ms. Tamara Cameron of Farara Kerins for the Claimant
Ms. Karen Reid, Senior Crown Counsel and Ms. Maya Barry, Crown Counsel, Attorney General's Chambers for the Defendants

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2011: October 11
2012: May 2

JUDGMENT

PLEADINGS

[1] **JOHN J: Statement of Claim:** The Claimant instituted a claim against the Defendants on the 4th day of December, 2008, which claim was amended on 14th October, 2009, claiming Damages for wrongful dismissal, in that she was wrongfully dismissed from the Department of Agriculture. Paragraph 6 of the Amended Statement of Claim particularizes the wrongful dismissal and she alleges as follows:

(a) The Claimant was not granted a fair hearing in the proceedings before the Public Service Commission.

(b) The Claimant was never informed of the results from the hearing from the Commission so that she could appeal the decision.

(c) The Claimant was not given a fair hearing which is a breach of Natural Justice.

(d) The Chairman verbally attacked the Claimant during the hearing.

[2] The Claimant further pleads that on the 1st of March, 2007 she was informed informally that disciplinary proceedings were to be instituted against her for misconduct. The Claimant was then called to a hearing at the Public Service Commission (hereinafter referred to as "PSC") but was not allowed to cross-examine her accuser nor was she allowed to call her witnesses that were available. The hearing at the PSC was aborted.

The pleadings continue with a statement that the Claimant was informed by a letter dated the 14th April, 2008 that she was retired. The Claimant at paragraph 5 of Amended Claim Form avers that she was not given proper notice of this fact. The Claimant has not to date received all of her remuneration from the Department. At paragraph 5 of the Amended Statement of Claim the Claimant alleges that at the time she was retired from the Department she had amassed 112 days of vacation leave that she had not been compensated for as at the date of filing her claim.

The Claimant therefore claimed:

(a) Damages from wrongful dismissal

(b) Loss of earnings for half salary from 1st of March, 2007 to 31st August, 2008 at $1,410.00 per month

(c) Loss of earnings from 30th September, 2008 at $3,820.00 per month and continuing

(d) Loss of salary from one year up to the time the Claimant would have retired of $45,840.00 ie $3,820.00 for twelve (12) months.

(e) Gratuity as per attached brochure from Human Resources.

[3] **The Defence**: The Defendants assert that on 1st March, 2007 the Claimant was formally informed that disciplinary proceedings had been instituted against her on three charges of misconduct. A full hearing in respect of the said misconduct had taken place before the PSC following which the Claimant was convicted of the said offences. The Defendants deny: that the Claimant was not allowed to cross-examine her accuser; that the Claimant was not allowed to call her witnesses that were available; and also that the hearing at the PSC was aborted.

[4] Paragraph 4 of the Defence asserts as follows:

"4. In further answer to paragraph 3 of the Statement of Claim, the Defendants state as follows...

a. That by the said letter dated 1st March, 2007, which attached certain relevant memoranda; the Claimant was informed of the charges against her. She was asked to submit grounds on which she wishes to rely to exculpate herself by 7th March, 2007.

b. That subsequent to a meeting held by the PSC with the Claimant on 27th March, 2007, the Claimant was given, by letter dated 18th April, 2007, time to submit the grounds upon which she wishes to rely to exculpate herself by 24th April, 2007.

c. The Claimant submitted letter dated 24th April, 2007 setting out her defence.

d. That on 8th May, 2007 a hearing was held before the PSC into the three charges of misconduct against the Claimant.

e. The said charges were read to the Claimant and she entered a plea of not guilty to each charge.

f. Evidence was lead in the presence of the Claimant who had every opportunity to cross-examine the witnesses and to call witnesses in her own defence.

g. The Claimant gave evidence. The hearing was adjourned to 15th May, 2007 for the hearing of further evidence.

h. The hearing of 15th May, 2007 was adjourned to 22nd May, 2007 to facilitate the Claimant, who could not attend on the ground that she was ill.

i. On 22nd May, 2007 the PSC heard evidence from three other witnesses. The Claimant, who was present and had every opportunity to cross-examine the witnesses and call witnesses in her defence, gave further evidence.

j. The PSC at a meeting following the hearing on the 22nd May, 2007, reviewed the evidence and found the Claimant guilty of the charges.

k. At the meeting, the PSC further decided that the Claimant ought to be dismissed from the public service but that in light of her twenty three (23) years in the service it did not wish for her to forfeit any benefits she might have accumulated over that period. These benefits would have been forfeited if she were simply to be dismissed as a result of her conviction on the said disciplinary charges.

l. The PSC thus decided that the Claimant having been convicted of the said offences should be retired in the public interest so that she would be able to be paid whatever benefits she had accumulated during the period.

[5] At paragraph 5 of the Defence, the Defendants further plead that the Claimant was called to a meeting of the PSC on 31st May, 2007, which she did not attend, for the purpose of informing her of the decisions made by the PSC. The Defendants further state that on 5th June, 2007, the Claimant attended a subsequent meeting of the PSC and was informed of its decision convicting her of the said offences and that a recommendation for her retirement in the public interest would be made to His Excellency, The Governor.

[6] At paragraph 7 of the Defence the Defendants state that following the decision to retire the Claimant in the public interest, the Claimant was on 10th December, 2008 informed that she was entitled to gratuity in the sum of US$41,254.13 as well as entitlement to pension. The Defendants also aver that the Claimant was paid the said sum by cheque dated 19th December, 2008, which the Claimant accepted and cashed.

[7] At paragraph 8 of the Defence the Defendants deny that the Claimant was wrongfully dismissed as alleged in paragraph 6 of her Statement of Claim.

[8] At paragraph 10 of the Defence the Defendants admit that the Claimant had amassed 112 days of vacation leave at the time she was retired. The Defendants pleaded that the Claimant was informed by letter dated 2nd February, 2009 that she would be paid for her vacation leave bi-monthly from 2nd February, 2009 through 23rd July, 2009. The Defendants further stated that these amounts have been paid by the Government to the

Claimant. The Claimant was further paid salary arrears during her interdiction for the months of June and July, 2008 in the sum of US$3,055.00.

[9] The Defendants deny that the Claimant was entitled to any relief sought on the grounds that:

a. The Claimant was dismissed following a hearing into charges of misconduct against her at which she was present and gave evidence so that she was not wrongfully dismissed.
b. The Claimant is not entitled to receive the half salary that was withheld during her period of interdiction from duty as entitlement to payment of same only arises under regulation 37 of the PSC Regulations where the Claimant has been found not guilty of the charges against her.
c. The Claimant was paid all the benefits that had accurred to her and she is not, therefore, entitled to any further payment.

[10] The Defendant at paragraph 12 of their Defence further assert that the Claimant is estopped by conduct from claiming that she was wrongfully dismissed. The particulars of estoppel which the Defendants rely on are;

a. The Claimant accepted a cheque for the sum of US$41,254.13 from the Government as gratuity following her retirement in the public interest;and
b. The Claimant encashed the said cheque on 3rd April 2009.

[11] It is noteworthy to mention and reproduce the certificate of Truth to the Defence of the Defendants "I Nolma Chalwell, Secretary to the Public Service Commission, certify that I believe the facts stated in this Statement of Defence are true." Signed NOLMA CHALWELL, Secretary Public Service Commission dated 4th October, 2010. The pith and substance of the Statement of Claim related to the proceedings conducted by PSC and the PSCs' subsequent determination and recommendation. The Defence mounted was in essence a Defence for and on behalf of the PSC in response to the allegations against that public body, and also on behalf of the Crown as employer.

[12] **Reply**: Paragraph 2 of the Claimant's Reply filed on the 19th day of October, 2010 continue to assert that she was wrongfully dismissed in 2008.In response to paragraph 3 and 4 of the Defence, the Claimant states that she was placed on interdiction at half of her month salary from 1st March, 2007 with no formal explanation as to why this was being done. The Claimant avers that she received one letter dated 1st March, 2007 informing her that she was placed on interdiction because disciplinary action was being instituted against her. (Such letter identified as N-C-2) However, the said letter did not set out the charges against her, nor any grounds for such disciplinary action, nor the date of any hearing nor did it inform her that she was allowed to bring witnesses on her behalf. The Claimant further alleges that she did not receive any letter dated 1st March, 2007 containing such requests. (Such letter identified as N-C-1)

[13] At paragraph 5 of the Reply the Claimant further pleads that it was subsequent to 7th March, 2007 that the Claimant was called by a member of the Human Resource Department to inquire why she had not responded to her request for a response to the charges against her or submitted the names of her witnesses by 7th March, 2007 as required. The Claimant pleaded further that in response to the Human Resource Department, the Claimant indicated that she had received no such request. The Claimant further states that; consequently she was given a letter dated 18th April, 2007 and asked to respond to the charges by 24th April, 2007.

[14] The Claimant further pleads in her Reply that at paragraph 6,7,8 and 9 the following:

> 6. The Claimant denies that she was allowed to call her own witnesses to give evidence on her own or a fair opportunity to cross-examine her accusers at the hearing before the PSC. Without being given a proper opportunity to be heard and to defend herself, the meeting was prematurely called to an end and the Claimant was told that she had been found guilty.

7. The Claimant was not made aware that there was any subsequent adjourned hearing on 22nd May, 2007 by the PSC into the charges against her neither was she given any opportunity to be present. If, which is denied, there was any such meeting, the same was held in the absence of the Claimant.

8. The Claimant was not informed of the decision to dismiss the Claimant from the Public Service whether at the end of the hearing on 8th May, 2007 or at a meeting on 31st May, 2007 or 5th June, 2007 as alleged in paragraph 5. The Claimant avers that she attempted on numerous occasions to find out the outcome of the hearing and why she was still on interdiction for over a year but was unsuccessful in getting any information from the Defendants. It was not until the Claimant sought the services of legal counsel to write to the Defendants that she got a letter dated 14th August, 2008 stating that she had been retired in the public interest.

9. The Claimant maintains that she was wrongfully dismissed by the Defendants and that she is entitled to damages as claimed. Subsequent to filing of the Claim Form, the Claimant received the sum of:

    - US$41,254.13 as gratuity
    - US$16,639.84 for unpaid vacation leave
    - Total = US$57,893.97.

[15] These are the pleadings that established the framework for the legal issues arising in the matter; for resolution and determination at the trial.

BACKGROUND

[16] The Claimant was an Agricultural officer employed on a temporary basis with the Government of the British Virgin Islands in 1985 serving in the Department of Agriculture as a Labourer and then as a Messenger/Driver. In 1987, the Claimant was sent by the Government to complete a Bachelor's Degree in Agriculture and upon her return to the Territory the Claimant was employed as an Agriculture Assistant in the Public Service of the British Virgin Islands on temporary terms on 17th February, 1992. She was subsequently appointed on promotion to the post of Agriculture Officer on permanent terms on 1st July, 1993. Thereafter, the Claimant was appointed to the post of Agriculture Officer 2, by letter dated 11th February, 2004 but the appointment took effect on 1st August, 2003. The Court found as a fact that the Claimant was reinstated to work on 26th September, 2006 following her absence due to prior disciplinary hearings which were previously instituted against her. The events which occurred on 26th September, 2006, upon the Claimant's reinstatement to work, were in dispute before the PSC hearing. The disputed facts before the PSC were that the Claimant had a duty to report to the Head of Department upon her reinstatement on 26th September, 2006, which she failed to do. Thereafter, the Claimant was approached by the Chief Agricultural Officer, who told her that they waited to have a meeting with her. The Claimant alleged that she was not told what the meeting was about but she followed the Head to his office and was told to wait outside. The Chief Agricultural Officer alleges that he asked the Claimant to return at 2:00 p.m. on the said 26th September, 2006 to facilitate the attendance of Mr. Berkley the Human Resources Manager for the Department. The Claimant denies that she was ever given a time to return to the meeting and she alleges that she went about attending to her tasks for the day and later in the afternoon returned to her office, waiting to be called back. Further, at this hearing before the Commission, it was alleged that the Claimant did not show up after at all for the 2:00 p.m. meeting neither did she report to the Head of Department at all that afternoon.

[17] The events of 26th September, 2006 led to the Claimant being formally informed of her interdiction from duty on 1st March, 2007 by letter of even date. The said letter was issued by the Senior Assistant Human Resources Manager, Department of Human Resources,

Government of the British Virgin Islands, Tortola. The letter directed to the Claimant read as follows:

> *"I am directed to inform you that His Excellency the Governor, after consultation with the Public Service Commission, has directed that you be interdicted from duty pursuant to PSC Regulation 37, with effect 1st March 2007 and that disciplinary action be instituted pursuant to Regulations 47. His Excellency, pursuant to Regulations 37(2), has further directed that you be paid half salary with effect from 1st March 2007*
>
> *....." (Paragraph 2 not relevant for these proceedings)*

[18] By a second letter dated 1st March, 2007 the Claimant was again formally informed that disciplinary proceedings had been instituted against her on three charges of misconduct, and she was asked to submit any grounds upon which she relies to exculpate herself by 7th March, 2007. The Claimant contends that she did not receive a copy of the said second letter until 18th April, 2007.

[19] The Claimant was called to a meeting of the PSC on 27th March, 2007 and she was subsequently sent a letter dated 18th April, 2007 with an copy of the 1st March, 2007 letter attached.

[20] The 1st March , 2007 letter from the Services Assistant, Human Resources Manager, Department of Human Resources was addressed to the Claimant and reads as follows:

> *"...I am directed to inform you that His Excellency, The Governor has accepted the recommendation of the Public Service Commission that disciplinary proceedings be brought against you in accordance with Public Service Commission Regulations section 37.*
>
> *In a memo dated 9th Oct ober 2006 the Ag. Chief Agricultural Officer reported that you failed to report to him after your reinstatement following disciplinary proceedings being instituted against you.*
>
> *I am to inform you that you are being charged with misconduct on the ground that:*

1. *On Tuesday 26th September, 2006, the Ag. Chief Agricultural Officer scheduled with you a meeting at 2:00 p.m. of which you did not report;*

2. *On Tuesday 26th September, 2006 despite Ms. Eulinda Cox making reference to your meeting scheduled with the Ag. Chief Agricultural Officer you did not report to the Ag. Chief Agricultural Officer's Office;*

3. *On Wednesday 27th September, 2006 despite Ms. Arlene Thomas advising you that the Ag. Chief Agricultural Officer wishes to meet with you, you did not report to his office; the above suggests that you have conducted yourself in a manner which prejudices the discipline and proper administration of Government business contrary to section 3.27 of the General Orders.*

I attached for your information a copy of the aforementioned memo, a memo dated 9th October, 2006 from Arlene Thomas, a memo dated 10th November, 2006 from the Ag. Chief Agricultural Officer in response to His Excellency the Governor's request for an explanation to your letter dated 27th October, 2006 and a memo from His Excellency the Governor dated 14th February, 2007 giving an account of your meeting with him on 12th February 2007.

In light of the above, you are requested to write this department, on or before 7th March, 2007, any grounds upon which you rely to exculpate yourself. I am also to advise that the Public Services Commission will enquire into these charges at its meeting scheduled for 15th March, 2007 at 1:30 p.m. in Conference Room #10 in this Administration Building, and you are required to be present.

[21] The 18th April 2007 letter from the Department of Human Resources was also addressed to the Claimant and stated:

"Dear Ms. Freeman,

I refer to your meeting with the Public Service Commission on 27th March, 2007 and my letter dated 1st March, 2007 regarding disciplinary action being brought against you.

I am directed to inform you that His Excellency The Governor after consultation with the Public Service Commission has directed that you write to the Department of Human Resources, on or before 24th A pril, 200 7, any ground upon which you will rely to exculpate yourself.

I am also advised that the Public Service Commission will enquire into these charges at its meeting scheduled for 1st May, 2007 at 2:00 pm in Conference Room #10 in the Administration Building, and you are required to be present.

Sincerely,

Senior Assistant Human Resource Manager

[22] The Claimant responded in a 3 page letter dated 24th April, 2007 setting out her response to the charges that were laid against her. The PSC convened enquiries into the charges and disciplinary hearings on the 8th May, 2007, which was adjourned to 15th May 2007, to take further evidence. The scheduled hearing of 15th May, 2007, was adjourned to 22nd May, 2007 in order to facilitate the Claimant who could not attend due to illness. On the 22nd May, 2007, the Claimant attended before the PSC for continuation of the hearings. The PSC reviewed the evidence and found the Claimant guilty of the charges against her. The PSC was of the opinion that the Claimant ought to be removed from the Public Service but wished to do so in a manner which in their opinion would not have the Claimant forfeit any benefits. I shall repeat paragraph 13 of the Witness Statement of Nolma Chalwell who was, as at the date of Trial, Secretary of the PSC.

> "The PSC reviewed the evidence and found the Claimant guilty of the charges against her. The PSC was of the opinion that the Claimant ought to be removed from the Public Service but wished to do so in a manner which would not have her forfeit any benefits she may have accumulated

during her years of service. The PSC met with the Director of Human Resources on 22nd May, 2007 to determine how this could be done and the Director of Human Resources indicated that it was possible to enable the Claimant to obtain her benefits if she were retired in the public interest. A true copy of the minutes of the meeting of the PSC and the Director of Human Resources of 22nd May, 2007 was exhibited as part of the Evidence in this case".

The Minutes of that Meeting read as:

"3. Disciplinary Proceedings – Berenice Freeman:

The Chairperson summarized the details surrounding Ms. Berenice Freeman's case for the Director of Human Resources: She stated that after hearing the evidence, the Commission concluded that Ms. Freeman was guilty as charged. She further stated that based on Ms. Freeman's History that the Commission was of the opinion that Ms. Freeman should be severed from the Service, and asked Mr. Archer how this could be done without her forfeiting any benefit that she might have accumulated over her 23 years in the Service. The Director of Human Resources said that she could be retired in the interest of the Public Service under Section 31(1) of the PSC Regulations." (Emphasis mine)

[23] At paragraph 12 of the Witness Statement of Nolma Chalwell, the Secretary PSC; reference was made to, and reliance was place on the copy of the minutes from the hearing of 22nd May, 2007. The last paragraph of the minutes exhibited as "NC6" reads as follows.

"The Commission recommended that Ms. Berenice Freeman be retired in the Public interest under Section 31 (1) of the Public Service Regulations"

[24] A letter dated 27th May, 2008 from the Department of Human Resources signed by the Senior Assistant Human Resources Manager was addressed to the Claimant and the contents are noteworthy for it confirms that His Excellency, The Governor accepted the

22nd May, 2007 decision regarding the charge on the three grounds, and the recommendation of the PSC. The letter reads:

> *"Dear Ms. Freeman:*
>
> *I refer to your appointment as Agricultural Officer II, Department of Agriculture.*
>
> *Reference is also made to your letter dated 1st March, 2007 interdicting you from duty pursuant to Public Service Commission (PSC) Regulation 37 and advising you that disciplinary action be instituted against you pursuant to PSC regulations 47.*
>
> *I am directed to inform you that Your Excellency the Governor, after consultation with the Public Service Commission, has retired you from the Public Service in the public interest with immediate effect.*
>
> *A further letter will be addressed to you detailing the payment of your pension, gratuity or allowance granted by the His Excellency the Governor in accordance with the Pensions Act (Cap 161) Section 7.....*
>
> *Yours Sincerely,*
>
> *Senior Assistant Human Resources Manager for*
>
> *Director of Human Resources."*

[25] The Court finds that there is no evidence that the said letter of 27th May, 2008 was ever delivered to the Claimant. However, there was yet another letter sent to the Claimant dated 14th August, 2008 and signed by Ms. Michelle Donovan Stevens Ag. Director of Human Resources, Department of Human Resources, the letter reads:

> *Dear Ms. Freeman,*
>
> *I refer to your appointment by letter dated 11th February, 2004 as Agriculture Officer II, Department of Agriculture, with effect from 1st August, 2003.*
>
> *Please refer further to our letter dated 1st March, 2007 advising of the institution of disciplinary proceedings against you on specified charges of misconduct.*

I am to inform you that in the course of these proceedings, which included your appearance before the Public Service Commission, the Commission, having regard to the charges against you, to the available evidence and prior record, came to be of the view that your retirement from the Public Service was desirable in the public interest. His Excellency, The Governor accepted the Commission's recommendation to this effect and determined that you should be so retired pursuant to his powers under section 7 of the Pensions Act, Cap 161 of the Laws of the Virgin Islands with effect from 1st September, 2008:

His Excellency will shortly determine what retirement benefits you receive, and shall notify you immediately upon receiving his decision..." (Emphasis mine)

Section 7 Pensions Act (Cap 161) states as follows:

7. "Where an officer's service is terminated on the ground that, having regard to the conditions of the public service, the usefulness of the officer thereto and all the other circumstances of the case, such termination is desirable in the public interest, and a pension, gratuity or other allowance cannot otherwise be granted to him under the provisions of this Act, the Governor may, it he thinks just and proper, not exceeding in amount that for which the officer would be eligible if he retired from the Public Service in circumstances described in paragraph (e) of Section 6."

[26] The Claimant states at the penultimate paragraph of her Witness Statement, "as a consequence of the Defendants' unlawful actions I have suffered loss from which I am entitled to be compensated".

[27] It is clear from the Claimant's Statement of Case that she has not expressly mentioned or categorized the Defendants' conduct as amounting to "unlawful conduct," rather she sought to ground her claim in "wrongful dismissal" notwithstanding that her pleadings were directed at /and sought to impugn the conduct and recommendation of the PSC before this

Court. The PSC in the Defence and evidence before the Court vigorously sought to defend and justify their actions and conduct in all their dealings with the Claimant.

Issues Raised By Both Parties:

[28]

1. Whether the Claimant can maintain an action for wrongful dismissal against the Crown.
2. Whether the Claimant has supplied sufficient evidence upon which a finding of wrongful dismissal can be made out.
3. Whether the Claimant was wrongfully dismissed.
4. Whether her action ought properly to have been brought by way of judicial review.
5. Whether the Claimant is entitled to relief of judicial review.
6. Whether the hearing before the PSC was conducted in breach of the Rules of Natural Justice.
7. Whether the Court has jurisdiction to grant the relief sought in Administrative Law where no claim for Judicial Review has been made to quash the decision of the PSC or the Governor.
8. Whether the Remedy lies in Public Law or Private Law and whether it was open to the Court to consider an administrative order and grant such relief as the pleadings and evidence dictate.
9. Whether damages can be awarded.

WRONGFUL DISMISSAL

[29] Counsel for the Claimant submitted the following argument in support of the cause of action based on wrongful dismissal:

> "The fact that this officer is employed by a public body and her dismissal is prescribed by Statute does not restrict the Claimant to relief in public Law only. The relationship between a public officer and the Government is contractual and as such relief can be sought for matters arising from a breach of the contract of employment such as where the employee is dismissed without just cause. The learned authors of the oft- cited **De Smith Judicial Review** (6th edition para. 3-066) stated instructively that:

"Where a public authority takes action in relation to an employee, such as disciplinary action or termination of an employee relationship, this will normally be a matter for contract of employment law rather than judicial review"

The above statement is correct in the context of public authorities that are classified as statutory corporations. It is noteworthy that reference is made to public authority usually established pursuant to statute and includes statutory corporations. However, counsel for the Claimant should make a distinction with Crown employees and Public Officers appointed under or by virtue of a written Constitution which establishes autonomous Service Commissions such as exist in Commonwealth Caribbean States and Territories.

Counsel further, urge the court to consider paragraph 3-068 where the Learned Authors went on to state that:

"Judicial review may also be possible in relation to disciplinary proceedings which are specifically provided for in legislation, as opposed to being wholly informed or domestic matters – the Claimant however, is expected to have exhausted other available remedies before resorting to judicial review"

[29] *Counsel for the Claimant in support of her wrongful dismissal arguments sought to rely on the case of* ***Wendell Nichols vs. Attorney General and Commissioner of Police.*** **(No. 313 of 2005, BVI**, unreported). In that case, the Court concluded that the termination of the contract of employment between a police officer and the Government gave rise to remedies in private Law or public Law and a Claimant may choose which course to adopt, that is a claim for wrongful dismissal or one for judicial review, depending on the relief sought. But much depends on the circumstances of each case and which body undertakes the wrongful conduct or unlawful conduct. (Emphasis mine)

[30] In my view the Wendell Nichols case and the principles applied therein were well founded and based on the factual circumstances of that case. Police Officer Wendell Nichols made a proper election or exercised a proper option to pursue a private law remedy of damages for wrongful dismissal occasioned by a breach of his contractual term of employment. In

Wendell Nichols, the Claimant sought damages for wrongful dismissal and payment of salary for the unexpired term of his contract. In that case, a criminal charge of sexual assault against a minor had been brought against the Claimant as a result of which the Claimant was interdicted by the Commissioner of Police pending the outcome of the trial. The criminal charge was later dismissed and the claimant sought to be reinstated. The Claimant was instead discharged summarily without being given an opportunity to be heard. The Commissioner of Police said that officer Nichols was a servant of the Crown, holding office at the Crown's pleasure and that the Crown was entitled to dismiss him at will under section 16 (1) (d) of the Police Act Cap 165. (Emphasis mine)

[31] At paragraph 66 of the judgment, Joseph-Olivetti J. concluded that, "Mr. Nichols' claim succeeds as the Court has found that he has a right to be heard prior to his dismissal and he was not afforded that right neither was he given any reasons for the decision thus rendering his right of appeal given by the Act illusory. These terms were incorporated in his contract by the Act and by common law. Accordingly, the Crown acted in breach of Contract in dismissing him in the manner that it did. He is entitled to damages for wrongful dismissal and to his prescribed cost having regard to the amount reserved as damages which amount would be the value of his claim for the purposes of ascertaining the prescribed costs." (emphasis mine).

Paragraph 67 of the judgment reads: "In closing I wish to highlight the curious element in this case which is that it concerns issues of private law as well as public law. (I am aware that the Master heard arguments on this earlier and allowed the claim to proceed as it was filed – a claim in contract.) This duality, I must confess, posed some difficulties which I have endeavored to resolve in light of general principles". (emphasis mine).

[32] De Smith op. ct. on public employment – para 3-060- 3-061 was useful. The learned authors observed that an employee of a public body may have rights both in public and private law and if conditions of employment "as in the case of police and prison officers" are controlled by statute, the conditions may be reviewable by way of Judicial Review. And, a Claimant may choose which course to adopt, that is, a claim for wrongful dismissal or one for Judicial Review depending on the remedy sought."

[33] I however note paragraph 21 of the Claimant's legal submission which is most instructive and which states that: "It is submitted that the Claimant is not debarred from seeking her remedy in private law. In fact, based on the above authorities it is well established that a Claimant must first exhaust all available remedies before seeking relief by way of Judicial Review. The nature of the remedy which the Claimant seeks is available in private law on the basis of a claim for wrongful dismissal. The Claimant is not seeking to quash the decision of the Governor/Commission and thereby be reinstated. Instead the Claimant is claiming that this Court is entitled to look at the substance and effect of what the Governor did and to find in all the circumstances that the Claimant was wrongfully dismissed and as a result of which she ought to be compensated in damages and be paid the other remuneration to which she would have been entitled had the contract not been unlawfully terminated. It is open to and incumbent upon the claimant to pursue this remedy first rather than a claim for judicial review. In the premises, it is submitted that this Court as in Wendell Nichol has the jurisdiction to grant the relief sought".

[34] Crown Counsel for the defendants submits to the Court that "An action founded upon wrongful dismissal cannot generally be maintained against the Crown as their tenure is at the pleasure of Her Majesty and cited authorities in support namely **IRC v. Handbrook 1956 1 ALL ER 807 and The Privy Council in Shenton v Smith 1985 AC 222.** Counsel for the Defendant cited **Gould vs. Stewart 1896 AC 575** and she submitted that the Courts have recognized Parliament's ability to curtail this power by statute. In Gould it was held that where the New South Wales Civil Service Act of 1884 provided for the terms and conditions of employment including a procedure for dismissal those provisions enacted for the protection and benefit of the officer impose a restoration on the Power of the Crown to dismiss. Counsel for the Defendants accepted that Gould was properly applied in Wendell Nicholas case which was predicated upon the provisions of the Police Act Cap. 165 and which regulates the terms and conditions upon which police officers are employed.

[35] Crown Counsel further attempted to distinguish the case of **Endell Thomas v. The Attorney General (1982) AC 113**, on its facts stating that the Privy Council found that the doctrines of dismissibility at pleasure was inconsistent with the constitutional framework of

Trinidad and Tobago as the Constitution had transferred the power to appoint, discipline and remove public officers to independent Service Commissions. Counsel further argued that this was not the position in the Virgin Islands where public officers in this Territory remained employed by the Governor on behalf of Her Majesty the Queen. Hence, she argued that the case of Endel Thomas is inapplicable to the jurisdiction of the Virgin Islands on this issue. The Attorney General stated that based on the foregoing, that the Claimant will be unable to maintain an action for wrongful dismissal against the Crown, she being dismissible at pleasure and there being no statute assented to by Her Majesty restricting the power to so dismiss.

The Virgin Islands Constitution Order 2007

[36] The 2007 Constitution is patterned after the Westminister Model Constitutions adopted by the other English speaking Commonwealth Caribbean Countries. The Constitution provides a chapter for the Fundamental Rights and Freedom of the Individual, and maintains the separation of powers between the Executive, the Legislature and the Judiciary. In particular the Constitution strives to insulate members of the civil service, the police service, teaching service and lawyers in the service of the Crown from direct political interference by the Government of the day by the establishment of autonomous Commissions e.g. the Teaching Service Commission, the Police Service Commission, The Judicial and Legal Services Commission and the Public Service Commission. Section 91 (9) gives the autonomy to these Commissions. Section 91 (9) provides: "Subject to this Constitution, in the exercise of its functions the Public Service Commission shall not be subject to the direction or control of any other person or authority."

WHO IS THE EMPLOYER?

[37] The role of the Public Service Commission is analogous to that of the Public Service Commission in the **Endell Thomas v A.G. Trinidad** decision where Lord Diplock stated in the relationship between the police officer and the Crown and classified the relationship as being governed by a contract of employment (not being a contract for a specified period). The Public Service Commission is not the Employer of the Claimant. There are not vested

in it any contractual rights that it is capable of exercising as a party to the Contract of employment of a public officer (see Lord Diplock Endell Thomas page 127 E).

[38] The PSC has no power to lay down terms of service for public officers; this is for the Crown and the Legislature, whether primary or sub-ordinate, it is for the executive to deal with in its contract of employment with the individual officer. As stated by Lord Dipock, terms of service include such matters as "(a) the duration of the contract of employment, e.g. for a fixed period, for a period ending on attaining retiring age, (b) remunerations and pensions; and (c) the code of conduct that the public officer is under a duty to observe."

[39] Halsbury Laws of England, Fifth Edition, Vol. 40 at para 780 set out the principles as "A wrongful dismissal is a dismissal in breach of the relevant provisions in the contract of employment relating to the expiration of the terms for which the employee is engaged. In addition there may be cases where the contract of employment is subject to a contractual. Condition of observing a particular procedure, in which case it may be argued that, on a proper construction of the contract, a dismissal without observance of the procedure is a wrongful dismissal on that ground. Hence, wrongful dismissal may occur where the employer terminates the employment without carrying out the disciplinary procedure the Employer must himself undertake or where the employer fails to refer the issue of dismissal to the requisite tribunal. (emphasis mine)

Was The Claimant Wrongfully Dismissed By Employer?

[40] The Claimant has not pleaded or led any evidence as to what term of her contract her Employer the Crown has breached, considering that the Crown acted through His Excellency, The Governor, with the executive support of the Human Resources Department and its Director. The Claimant was not summarily dismissed by her Employer. The disciplinary matter was referred to the Public Service Commission. His Excellency referred the matter to the Public Service Commission as he was required to do pursuant to section 92 (1) of the 2007 Constitution. The Claimant has not laid a proper case by way of pleadings and evidence of any breach of contract giving rise to wrongful dismissal by her Employer the Crown.

[41] In **McLaren vs. Home Office 1990 IRC 824 Woolf LJ** suggested that there are four general principles which apply when an employee of a public body is proposing to proceed by way of Judicial Review or private law for wrongful dismissal. The principles are stated as follows:

(1) In relation to personal claims against an Employer, an employee of a public body is in the same situation as other employees.

(2) If an employee of a public body is adversely affected by a decision of general application, judicial review of that decision may be sought (see Rv. Security of State Exp CCSU).

(3) If disciplinary procedures are of a domestic nature judicial review will not be sought.

(4) There are however situations where an employee of a public body can seek judicial review and obtain a remedy which would not be available to an employee in the private sector. This will arise where there exists some disciplinary or other body established under the prerogative or by Statute to which the employer or the employee is entitled or required to refer disputes affecting their relationship. The procedure for judicial review can then be appropriate because it has always been part of the role of the court in public law proceedings to supervise inferior tribunals and the court in reviewing disciplinary proceedings is performing a similar role. As long as the "tribunal" or other body has a sufficient public law element, which it almost invariably will have if the employer is the Crown, and it is not domestic or wholly informed, its proceedings and determination can be an appropriate subject for judicial review. (Emphasis mine)

[42] Lord Woolf LJ.'s Judgment was applied in the case **R v. Lord Chancellors Department exparte Nangle 1992 1ALLER 897.** In that case it was decided that employees of the Crown were engaged in a contract of employment with the Crown, and that the Civil Service Code was an exhaustive document containing all terms and conditions of employment. The Court further decided that the internal disciplinary process undertaken by the Permanent Secretary in accordance with the Code was an employment matter that

sounded in private law and was not a matter that can be judicially reviewed. The Court in Nangle approved the distinction between internal disciplinary procedures (which were not susceptible to judicial review) and disciplinary proceedings before independent bodies set up by statute or under the prerogative (for which judicial review would be appropriate).

[43] The above decision of McClaren and also Nangle are in line with the decision of Lord Diplock in Endell Thomas that the PSC operate outside the Contractual relationship between the employer the Crown acting through His Excellency, The Governor, and the employee, public servant. The Privy Council held that the Service Commission exercised their powers under the Constitution or other legislation and not by virtue of any rights under the contract since they are not parties to the contract.

[44] What the Claimant has pleaded and prayed the court's aid for are in verity a review of the proceedings that were undertaken, and/or ought to have been undertaken by the PSC. The way in which that ought properly to have been done is by way of Administrative action which could have invoked judicial review under Part 56 of the CPR 2000. The Claimant prayed for a declaration of wrongful dismissal and damages but relied on certain pleaded conduct of the PSC. Can the Court review the pleading and evidence, and instead of a declaration of wrongful dismissal make a declaration of unlawful dismissal and damages?

CAN AN ADMINISTRATIVE ORDER FOR DECLARATION OF UNLAWFUL DISMISSAL AND DAMAGES BE SUSTAINED?

[45] The question now is can the Claimant's claim be converted at this time. The Civil Procedure Rules Part 56.6 makes provision for proceedings by way of claim which should be an application for an administrative order. The Rule applies where a claimant issues a claim for damages or other relief other than an administrative order but where the facts supporting the claim are such that the only or main relief is an administrative order. The Rule expressly provides that, "the court may at any stage direct that the claim is to proceed by way of an application for an administrative order". Further, that if the appropriate administrative order be for judicial review, the court may give leave for the matter to proceed as if an application had been made under Rule 56.3.

[46] Additionally, Rule 56.4 provides that if the court makes an order under paragraph (2), it must give such directions as are necessary to enable the claim to proceed under this Part.

[47] It was upon the conclusion of the evidence of the witnesses, including their cross examination, that the Court raised the issue to Counsels, for both Claimant and Defendant, in open court. The Court drew to the attention of Counsels that the pleadings and all the evidence revealed that there was a live issue before the court as to whether on the face of the pleadings and evidence, the claim was properly before the Court as labeled, a private law matter of wrongful dismissal, or whether on the pleadings and evidence the matter ought properly to be regarded as an administrative law matter and what if any appropriate administrative law relief could be given in the circumstances.

[48] I directed Counsels for both parties to address the Court on these issues and whether the proceedings by way of claim for private law remedy should now be considered as an administrative law matter under Part 56.6 having regards to their respective pleadings, positions and all the evidence at the trial stage of the matter. This was the direction deemed appropriate and best in the circumstances of the case, and based on the view the Court took of the legal issues, and to bring about a fair and just determination of the matter.

[49] The parties made their oral submissions in open court, and further written submission were filed pursuant to this direction.

[50] Principal Crown Counsel from the Attorney General Chambers submitted that Part 56.6 of the CPR does provide that where a claimant has issued a claim for damages and the facts supporting the claim are such that the main relief is an administrative order, that the court may at any stage direct that the claim is to proceed by way of an application for an administrative order.

[51] The learned Principal Crown Counsel argued that it would be prejudicial to the Defendants and proposed Defendants to convert this action at this stage of the proceedings. Both the Claimant and the Defendants have closed their case. All the evidence has been submitted

to the Court. Any conversion at this stage, **particularly to a claim for judicial review**, would require substantial amendments to the pleadings since there needs now to be set out which decisions of which bodies are being challenged and what relief is being sought in respect of it. Counsel further argued that this would result in the case being re-opened and new evidence having to be filed by both sides. (emphasis mine).

[52] The Defendants further argued that this will necessitate **the addition of new parties**. The Claimant in her present claim has joined neither His Excellency, the Governor (whose decision it ultimately was to retire her) nor the Public Service Commission. Counsel sited the Court of Appeal in **Quorum v Virgin Islands Environmental Council and another HCVAP 2009/021 from the Virgin Islands,** that **the Attorney General was not an appropriate party to judicial review application**. It therefore substituted the Minister of Planning as the proper party. In the instant case, the Public Service Commission will have to be named a party, if the process before them is to be challenged. So too will His Excellency the Governor, if his decision is to be challenged and **quashed**. (emphasis mine).

[53] The learned Crown Counsel stated that at this stage of the proceedings when the case for both the Claimant and the Defendants have been closed, and particularly since the conduct sought to be impugned is some three to four years old, conversion is simply just not possible as there are no directions capable of being given such as could enable this matter to be case managed properly at this stage.

[54] On this issue Counsel for the Claimant essentially argued that a Declaration may be granted by the Court in favour of the Claimant. The Claimant stated that it is not seeking to quash the decision of the Governor and or the Public Service Commission and thereby be re-instated. Instead the Claimant is claiming that this Court is entitled to look at the substance and effect of whatever wrong was done to the Claimant and to compensate her in Damages and for her to be paid the other remuneration to which she would have been entitled had the contract not been **unlawfully terminated,** as stated by Counsel. (emphasis mine).

[55] The Claimant further submitted that having regard to the history of this case, the seriousness of the claim involved, and the overriding objective to deal with cases justly it would result in considerable prejudice and costs to the Claimant to refuse to hear the claim at this stage. The Claimant went on to give a history of the claim. The claim was commenced December 2008 and as a result of the failure of the Defendant to defend, default judgment was entered by the Court on the 10th June 2009. An Application to set aside the Default Judgment was refused by the Master on 2nd November 2009, but on appeal in January 2010 the Application to set aside was remitted for hearing in the High Court and the Default Judgment was set aside and the Court gave the Defendants leave to file their Defence by 4th October 2010. The Claim Form was amended in October 2010 and upon case management orders being made, in March 2011, a pre-trial review was held and witness statements filed.

[56] The Claimant argued that at no time during the preceding three (3) years did the Defendants seek to strike out the claim for lack of jurisdiction and neither did the Court do so on its own initiative. Counsel for the Claimant submitted that to do so at this very late stage would result in a denial of justice to the Claimant.

[57] In the alternative, Counsel for the Claimant stressed the point that the Claimant's claim is essentially one for a declaration that she was wrongfully dismissed by the Government and for the consequential award flowing from such a declaration. As such the Claimants claim would satisfy Rule 56.1(1)(b) in that the claim could be dealt with as a declaration in which a party is a state or any other public body for which no leave is required. The Court has a discretion under CPR 56.6 to treat a claim for damages, as an application for an administrative order **at any stage** of the proceedings where the facts supporting the claim are such that the only or main relief is an administrative order. It is submitted by the Claimant's Counsel that, without prejudice to the previous submissions above, if the Court finds that the claim ought to have proceeded as an application for an administrative order, this is an appropriate case to exercise the discretion under CPR 56.6 in light of the facts pleaded in the Claimant's case, of which the Defendants were aware from the issuance of the claim.

[58] The Court does find that the pleadings of Claimant and Defendants and facts and all evidence in the case support the relief of an administrative order. An administrative order includes declaratory orders, and orders for judicial review. An application for declaratory relief under Part 56 does not require the leave of the court before such applications are made. On the other hand, an application for judicial review requires the leave of the court.

[59] The court finds that there is no prejudice to the Defendant to convert the action at the trial stage of the proceedings to one for declaratory relief. The pleadings do reveal that it is the termination of the Claimant that is being challenged. More particularly the conduct of the PSC in relation to the disciplinary proceedings and consequent recommendations to the Governor.

[60] There is no need to add new parties as the 1st Defendant as Attorney General is already a proper party to these proceedings where declaratory relief is being sought. Here the Claimant may obtain a declaration of her rights as against officers of the Crown to include the Governor, any government department or any officer of the Crown by bringing an action against and in the name of the Attorney General. In a Judicial Review application where the relief sought is either certiorari, mandamus or prohibition, it would be highly irregular for the Court to issue one of these prerogative writs for the Court to quash the decision of a person who is not a party to the proceedings and direct that person to take certain actions.

[61] In this matter the decisions of the PSC and the Governor need not be quashed before any declaration can be made regarding their actions and conduct and involvement in the termination of the Claimants employment. Consequently the principle in **Quorum vs. Virgin Islands Environmental Council and another HCVAP 2009/021** is not applicable as in that case it was held that the Attorney General was not an appropriate party to the Judicial Review application for certiorari. (emphasis mine)

[62] The Court of Appeal therefore substituted the Minister of Planning (who had been originally named and struck off in earlier proceedings) as the proper party. As already noted earlier in this judgment the statement of case or pleadings relied on by the Attorney General is that of the PSC, and the Certificate of Truth to the Statement of Defence came from the

secretary to the PSC. Also the said secretary Mrs. Nolma Chalwell gave a witness statement in the proceedings, along with a witness statement of Ms. Michelle Donovan-Stevens. The Statement of case and the evidence presented by the 1st named Defendant was in every way to exculpate the Crown as employer and the PSC, as an independent tribunal, from any wrong doing or unlawful action or conduct. Consequently the court will proceed to review the conduct of the PSC, and the subsequent recommendation of the PSC to the Governor. The review by the Court will be to ascertain whether there was any unlawful conduct or unlawful retirement as pleaded by the Claimant which was contrary to the well established principles of Administration/Public Law, and if so to make the appropriate declarations as is just in the circumstances so to do.

Review of Disciplinary Proceedings before Public Service Commission

[63] It has earlier been stated that the Public Service Commission is not a contributing party to the employment contact between the Crown and the Claimant. Rather the PSC, as a public body vested under the Virgin Islands Constitution with power to make determination and decisions and make recommendations to the Governor who is vested with Power to remove the Claimant. The PSC is a tribunal which must exercise its powers within the legal and procedural rules of natural justice prescribed by Administrative Law.

Was There Only A One Day Hearing?

[64] The Claimant's Amended Statement of Claim and her Reply aver that there was only one hearing which was aborted, and after which the Commission found her guilty. At paragraph 4 of the Defence it is pleaded that on 8th May, 2007 a hearing was held before the PSC into the charges of Misconduct against the claimant. The hearing was adjourned to 15th May, 2007 and further adjourned to 22nd May, 2007 to facilitate the Claimant who could not attend on the ground that she was ill. On the 22nd May, 2007 the PSC heard the evidence of those other witnesses. The Claimant was present and had every opportunity to cross examine the witnesses and call witnesses in her own defence, and gave further evidence.

[65] The Claimant at paragraph 7 of her Reply stated:

> 7. "The Claimant was not made aware that there was any subsequent adjourned hearing on 22nd May, 2007 by the PSC into the charges against her, neither was she given any opportunity to be present. If, which is denied, there was any such meeting, the same was held in the absence of the claimant."

[66] It is noteworthy that in the Defendant's List of documents, the minutes of the PSC meetings of the 22 May, 2007 were listed and exhibited before the Court. Subsequently at paragraph 19 of the Claimant witness statement she appears to be suggesting or conceding that there were two days of hearing she stated that: "The meeting was adjourned to another day."

[67] In cross examination, the witness agreed that she signed the Reply with a Certificate of Truth. The Claimant was also adamant that paragraphs 6 and 7 of her Reply were true and correct, and even after a very long pause and reflection, the Claimant insisted that paragraph 7 of her reply continued to be a true statement although in her evidence on the stand she was saying she attended two meetings before the PSC, including the adjourned meeting of 22nd May, 2007.

[68] The Claimant was not a truthful and forthright witness to the Court on this issue and she appeared to be insisting that all statements made to the Court in her Reply and Evidence were true and correct even if on the face of the statement they were patently contradictory. The Court finds that the disciplinary hearing before the PSC was held on the 8th and 22nd May, 2007 and the Claimant was in attendance at both hearings.

Cross Examinations of Witnesses

[69] The Claimant contended that she was not allowed to cross examine her accuser. The Claimant unsuccessfully attempted to persuade the court that if she tried to say anything at all to Mr. Braithwaite, her accuser, she was interrupted or stopped by the PSC. When it was pointed out to the Claimant that at paragraph 16 of her witness statement that she admitted to the Court that she challenged Mr. Braithwaite on his evidence; she agreed with

that statement. The Claimant also admitted in cross examination that she challenged Mr. Braithwaite on his evidence and insisted that she did so. I find as a fact from all the evidence given by the Claimant that she used the term "challenge the witnesses on the evidence" interchangeably with "cross examine the witness on their evidence."

[70] The Claimant further admits in cross examination that during the PSC hearing she was allowed to object to the evidence of witnesses at the proceedings. The Claimant gave evidence in cross examination and insisted that she cross examine Mr. Berkley, Mr. Lettsome and Mrs. Cox. But in her evidence-in-chief; in her witness statement paragraph 19 she admits to challenging Mr. Berkley. I am further fortified in the Claimant's inter changeable use of "challenge" and "cross examine" witnesses to mean one and the same thing when I read paragraph 20 of her evidence in chief in her witness statement. In that paragraph she states, "I therefore was not given a fair opportunity to challenge Mr. Braithwaite evidence and the allegations made by him against me."

[71] I find as a fact that the PSC did allow the Claimant to cross examine all witnesses on their evidence and contrary to what she pleaded. She was allowed the opportunity to cross examine her accuser.

Hearing Continued In Her Absence

[72] The Claimant pleaded at paragraph 7 of her reply that she was not made aware that there was any subsequent adjourned hearing on 22nd May, 2007 by the PSC into the charges against her neither was she given any opportunity to be present. I have already found as a fact that there was a hearing on 22nd May, 2007 at which the Claimant was present. However, for the very first time in the matter by way of her Witness Statement, and which was not pleaded, is the evidence at paragraph 18 and 19 which states that:

> "...when I tried to cross-examine Mr. Braithwaite she refused to allow me to do so. At that point the meeting was abruptly adjourned as it disintegrated in an uproar. Consequently, Mr. Braithwaite was called back inside and I was directed to remain outside. I do not know what they were discussing as I was not allowed inside. I remained outside for about half

hour while Mr. Braithwaite spoke to the Public Service Commission after which I was called back inside. The meeting was adjourned to another day".

The above statements regarding the PSC hearing continuing in the Claimant absence for about half hour is totally rejected as unacceptable and unreliable evidence, as it was never pleaded as an issue challenging the alleged unlawful conduct of the PSC. Neither was it ever particularized as amounting to a breach of the rules of natural justice.

Aborted Hearing/Declaration of Guilt

[73] The Claimant next swore at paragraph 20 of her witness statement that as soon as Mr. Berkley gave evidence, the Chairman said alright, you are guilty and bought the proceedings to an end. The minutes from the meeting of the 22nd May, 2007 (Exhibit NCG) of the Trial Bundle does not bear that out. The Claimant admits that Mr. Berkley, Mr. Lettsome and Ms. Cox all gave evidence. From the minutes it can be seen that the order in which they gave evidence, that Mr. Berkley gave evidence first, then Mr. Lettsome, and then Ms. Cox gave evidence. The meeting therefore could not have been called to an abrupt end with a pronouncement of guilt following Mr. Berkley's evidence. The Claimant is being wholly untruthful in this regard. Further, the Claimant pleaded at paragraph 6 (b) of her Amended Statement of Claim that "the Claimant was never informed of the results from the hearing from the Commission so that she could appeal the decision." Additionally, the documentary evidence before the court some of which was correspondence from her attorney to the Human Resources Department indicated that the Claimant was not aware of the outcome of the hearing. The Claimant so pleaded in her Reply at paragraph 8. where she states : "The Claimant avers that she attempted on numerous occasions to find out the outcome of the hearing and why she was still on interdiction for over a year but was unsuccessful in getting any information from the Defendants."

Verbal Attack

[74] At paragraph 6 (c) the Claimant pleaded that the Chairman verbally attacked her during the hearing. That allegation is repeated at paragraph 18 of her witness statement without

more details or particulars. The Court has no evidence as to what constituted this verbal attack and hence the Court rejects this statement as being factual and truthful. There is simply insufficient or no evidence upon which the Court can find that something was allegedly said to the Claimant, and that what was said constituted a "verbal attack." The allegation is therefore baseless and has no factual basis upon which the proceedings before the PSC can be vitiated.

Cousin

[75] The Claimant for the first time in her witness statement mentions that Mr. Braithwaite is the "cousin" of the Chairman of the PSC. The Claimant did not plead this as a reason for challenging the decision of the Commission hence the evidence must be rejected. Further, the Claimant makes no nexus between that allegation in the witnesses statement and any allegation of bias or breach of the principles of natural justice and the fair hearing requirement.

Witnesses

[76] The crux of the Claimant's case was that she had witnesses who attended the hearing, who were directed to sit outside and who were prevented by the Commission from giving evidence. This is the pivot upon which her case appears to turn. Her evidence on this, however, is inconsistent and inadequate.

[77] In order to establish that you were prevented from doing a thing, one ought ordinarily to establish that you sought to in fact do the thing, and that you were denied permission to do it, or were actively prevented from doing it.

[78] In her Statement of Claim, the Claimant simply alleges that she was not allowed to call her witnesses that were available. In her witness statement she alleges that her witnesses were directed to remain outside. She also says the hearing was adjourned after the giving of Mr. Berkley's evidence and so she did not have an opportunity to call her witnesses. She says that she gave her whole account of the events in her defence. However, the Claimant does not state at any time that she asked the Commission to call any of her witnesses. Neither does the Claimant state that at any time she was refused permission to

call witnesses after a request was made by her so to do. At the very least the Claimant must establish how she was prevented from calling her witnesses.

[79] The Claimant alleges that the witnesses attended the hearing. We know there were two days of hearing. She does not allege that the witnesses were present and available on both days of hearing. She does not allege that if they were not present at the second hearing, that she made a request for the hearing to be adjourned so they could attend or that such request was refused.

[80] Inasmuch as this is a crucial point for the Claimant it was curious to note that when asked by her counsel during the amplification of her evidence how many witnesses she had she replied that she had "about three or four". Subsequent to the Court asking her to clarify whether it was three or four, she then settled upon there being four witnesses. Of course, these persons were never named in her evidence. She never swore under oath or named any person that was outside the PSC hearing, was available to give evidence to give evidence on her behalf and was prevented from doing so. As such, it is impossible to verify. It must also be noted that the names of these witnesses were never mentioned in any of her pleadings either so that the Defendants were not in any position to investigate and verify the truthfulness of that statement before this court..

[81] Further, in cross-examination the Claimant indicated that she never submitted to the Commission written statements from any witness to exculpate her. Her reason for this was that she did not think it was important. It is curious that the Claimant believed that it was not important to have the statements of independent persons capable of exonerating her submitted to the Commission which had asked her to submit all the grounds upon which she wanted to rely to exculpate herself.

[82] For the first time, under cross-examination she indicates that she wrote to the Commission specifically to inform them of the names of the witnesses she intended to call at the hearing who were ready to give evidence. She then indicates that she did not exhibit a copy of this letter to the Court since she did not think it was important to do so.

[83] Then, after being put by counsel to her that she could not get a single one of these alleged witnesses to come to Court to state that they were present at a hearing and willing to give evidence on behalf of the Claimant, she sought to explain their absence as follows:

(i) first she said, that they did not come to court because she did not ask them;
(ii) then on re-examination she said that they did not come to court because their jobs were at risk;
(iii) then she said she did not ask them because their jobs were at risk; and
(iv) then she said she asked one person to come, they spoke to her counsel, and they did not come.

[84] This is all unusual and surprising. In the first place, it seems very odd that the alleged witnesses' jobs were not in danger for the purpose of giving evidence before the Commission to supposedly establish that their head of department or fellow employees (depending on who the alleged witnesses were) were not being truthful in their evidence before the Commission. Subsequently, their jobs are in danger to simply state to the court that they sat outside a disciplinary hearing of the PSC and waited to be called as witnesses.

[85] Further, the question arises whether the Claimant asked anyone to give evidence in Court or whether she asked and they refused to give evidence.

[86] Finally, it is apparent that one person was allegedly asked, they spoke to her counsel and they did not give evidence. Taken at its highest, it can readily be inferred that that person did not wish to support the Claimant.

Inferences to be drawn from failure to call witnesses

[87] It is a well-established principle of law that where a person, without explanation, fails to call as a witness someone who can give evidence to corroborate his case, the court can draw an inference that what that witness would have stated in evidence would not have been favourable to the person's case. In ***Benham Ltd v Kythira Investments*** **(2003) All ER (D)**

252 the Court approved the summary of the principle by the court in Wisniewski v Central Manchester Health Authority thus, at para. 26 of the judgment:

> "The principles Brook LJ derived from those cases are:
>
> (1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
>
> (2) If the Court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
>
> (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words there must be a case to answer on that issue.
>
> (4) If the reason for the witness's absence or salience satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."

[88] The principle, has been used by the House of Lords in ***R v IRC ex p. Coombs*** **(1991) 2 AC 283** at p. 300 F-G as follows:

> "Another fact is the sparseness of the evidence adduced by the revenue. In our legal system generally, the silence of one party in face of the other party's evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence. Thus, depending on the circumstances, a prima facie case may become a strong or even overwhelming case. But, if the silent party's failure to give evidence (or to give the necessary evidence) can be credibly explained, even if not entirely justified, the effect of his silence in favour of the other party, may be either reduced or nullified."

[89] In Australia, the principle has come to be known as the rule in ***Jones v Dunkel*** **[1958-1959] 101 CLR 298**. The case involved a traffic accident in which the Plaintiff/Appellant's husband was killed. The driver of the diesel truck (the other vehicle involved in the

collision) was not called to give evidence on behalf of the defendant. The best expression of the rule is contained in the judgment of Windeyer J at pp. 12 of the internet copy as follows:

> "...I think, his Honour should, when the juryman asked his question, have given an answer in accord with the general principles as stated in Wigmore on Evidence 3rd ed. (1940) vol. 2, s. 285, p. 162 as follows: **"The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavourable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also open always to explanation by circumstances which made some other hypothesis a more natural one that the party's fear of exposure. But the propriety of such an inference in general is not doubted**."
> This is plain commonsense." (emphasis supplied)

[90] The principle was followed earlier this year by the Federal Court of Australia in ***Easyway v Infinite Plus*** **(2011) FCA 351** at para 90 thus:

> "...According to the evidence before me, Chen Zhao was in charge of Chatime's promotions and advertising at the time. The fact that he did not give any evidence and, in particular, did not deny involvement on his part in the placing of the post is significant. I am entitled to draw a very strong inference against Chatime by reason of the absence from the witness box of Chen Zhao. That inference, in the circumstances, may go so far as to provide a basis for concluding that not only would his evidence not have helped Chatime but that it would have possibly harmed its case (Jones v Dunkel...). I propose to draw the strong inference and to weigh it in the balance with the other evidence relevant to the determination of the issue with which I am now dealing."

[91] Finally, in the Supreme Court of Victoria, Australia, the rule was applied in ***O'Donnell v Reichard*** **(1975) VR 916.** In that case the Plaintiff had failed to call certain doctors to substantiate her personal injury claims. The full court on appeal, in the joint judgment of Newton and Jones JJ, at p. 12 of the internet copy, held the following:

"The relevant law has been considered in recent years by appellate courts on a number of occasions...It is sufficient to say that in our opinion for the purposes of the present case the law may be states to be that **where a party without explanation fails to call as a witness a person whom he might reasonably be expected to call, if that person's evidence would be favourable to him, then, although the jury may not treat as evidence what they may as a matter of speculation think that that person would have said if he had been called as a witness, nevertheless it is open to the jury to**

infer that that person's evidence would not have helped that party's case; if the jury draws that inference, then they may properly take it into account against the party in question for two purposes, namely: (a) in deciding whether to accept any particular evidence, which has in fact been given, either for or against that party, and which relates to a matter with respect to which the person not called as a witness could have spoken; and (b) in deciding whether to draw inferences of fact, which are open to them upon evidence which has been given, again in relation to matters with respect to which the person not called as a witness could have spoken." (emphasis supplied)

[92] The whole of the Claimant's evidence on this issue comprises the bald statement by her that she had four witnesses outside the hearing, who were directed to remain outside and prevented from giving evidence. The Courts have long cautioned about accepting wholesale the completely self-serving evidence of a witness in such circumstances where corroborating evidence is available and not adduced.

[93] In ***Moonan v Moonan*** **(1965) 7 WIR 420** the principle was expressed a bit differently but the result was the same. The matter concerned a will executed by a testator (Joseph Moonan) one day after he had undergone major surgery in which he devised all his property to his nephew Mahabir Moonan and his brothers while leaving nothing for his wife and only child, who both sought to have the will rejected on the ground of coercion. In the will Ramnarine Moonan was named as the sole executor.

[94] An essential point of the case was a conversation which allegedly took place between Soonalal Moonan and the testator. Mahabir Moonan gave evidence that when Ramnarine Moonan died, his son Soonalal Moonan opened his safe, found the will and gave it to the testator to read whereupon the testator read it and said "it was made by me", handed the will to Mahabir Moonan and told him to keep it. Soonalal Moonan was not called as a witness at the trial. The Court of Appeal held the following at pp. 428 G-429 C:

> "The learned judge said that he regarded the evidence of Mahabir Moonan as suspect. Much has been made of the facts that he said it "must be suspect" but that he did not say he did not believe it. **What the learned judge seems clearly to be saying is that Mahabir Moonan was not a disinterested witness, he was a beneficiary under the will, so that any evidence he gave in support of the validity of the will would be in the nature of self-serving evidence. Not that that would necessarily make it untrue, but it ought to be scrutinized with care. And when his evidence is examined, he does not appear to be a very**

reliable witness. He seemed not to recollect that the will was made on the day after the operation, and when questioned about this he undoubtedly prevaricated. At first, he said, "I know he had an operation but I cannot remember what year. I only know of one." Then he said he had a "cut", meaning an operation, but "I do not remember what year". And when he was pressed yet again about it, he said "I can remember one (cut). That was in 1939." We need only say that there was abundant evidence which the learned judge accepted that the operation took place on the day before the making of the will of June 10, 1940.

Further, Mahabir Moonan tried to make out that Joseph Moonan's condition in hospital was never really very bad, certainly not nearly as bad as was being suggested by the respondents. He said that he had never seen Joseph Moonan in such a state at the hospital that he could not fully realize or appreciate what was happening. Having regard to the evidence of the doctors as well as to the evidence of Henry Debi, the brother-in-law of the deceased, who said that he went there on June 13, 1930, that is to say, three days after the will was made and he was prevented from going to see Joseph Moonan by the nurse who was in attendance, it is manifest that Joseph Moonan's condition was such as to make it right and proper for him not to be disturbed by visitors. Yet Mahabir Moonan would have the court believe that he was quite unaware of the gravity of his uncle's illness.

In the whole of the circumstances, any available witness who could give support to the conversation which is alleged to have taken place in 1957 should have been called. Soonalal was in no way interested in the estate of the deceased. It is he who is said to have found the document. It is he who handed it over to Joseph Moonan. Admittedly, he is still alive. But he has not been called and no explanation has been offered why he was not. In the face of all of this – and it seems reasonable to infer that the learned judge did not believe Mahabir Moonan – we are of the opinion that the suspicion has not been displaced and accordingly that the learned trial judge was right when he rejected the will and refused to admit it to probate." (emphasis supplied)

[95] Crown Counsel submitted that there is no doubt that the oral evidence given by the Claimant in this regard is entirely self-serving. Secondly, her allegation is not simply that there was only one witness who for some reason was unavailable. Her allegation is that there were four such people. Of course, it must be noted that she could not decide whether there were three or four people before finally settling on four. In any event, not a single piece of evidence to support that any person had agreed to give evidence on her behalf at the hearing or had attended such hearing, and was prevented from giving evidence, was presented by the Claimant. The Claimant does not even positively identify any such person as having been there. It is impossible to verify whether such person(s) was in fact there but the Claimant wishes this Honourable Court to find as a fact that such

unnamed persons existed, attended the hearing and were prevented from giving evidence on her behalf.

[96] On the other hand, neither the minutes from the meeting of 8th of May, 2007 nor the 22nd May, 2007 indicate that the Claimant made a request to call witnesses or that any such request was denied. Not even in summary of the Claimant's evidence or answers recorded in those minutes indicate any statement to the effect that, "I have x witness who will be able to verify this".

[97] It is useful also to note that those minutes were prepared by the former Secretary to the Public Service Commission and not the Commissioners themselves, and there is no allegation that the former Secretary to the Commission has any interest in these proceedings, and/or that the minutes were purposely tailored to exclude evidence.

[98] In conclusion, on this issue this Honorable Court has drawn the inference that the absence of any witnesses called on behalf of the Claimant or any documentary evidence supplied by her that no such witnesses were available, or present at the PSC hearing and were prevented from giving evidence.

The Credibility of the Claimant

[99] The Court finds from considering the demeanor and manner of the Claimant in the witness box, that the she was not a credible and reliable witness. Additionally, during her oral evidence and especially under cross examination, the claimant was a difficult witness, who had to be admonished several times to answer the questions being asked. Her testimony has proven in the material issues to be inconsistent with her own pleadings, erroneous and self-serving. This is further exacerbated by the Claimant not providing any support from other witnesses on the critical issue of being denied the opportunity to call her witnesses whom, the Claimant alleges were present outside and available at the hearing of the PSC.

[100] The burden was on the claimant to prove her case and the allegations of breaches of the principles of natural justice on the part of the PSC. In respect of the charge of misconduct. I conclude that the Claimant has failed to prove that the conduct by the PSC on 8th May

and 22nd May, 2007, up to the point in time when she was found guilty of the three charges brought against her, that these proceedings were conducted in breach of the rules of Natural Justice as alleged by the Claimant. I can make no finding that the PSC acted unlawfully, as alleged, in their determination that the Claimant was guilty of the charge of misconduct on three grounds as there were stated in the letter dated 1st March, 2007.

Retirement in Public Interest

[101] The PSC made a determination that the Claimant was guilty of misconduct and thereafter the PSC was of the opinion that the Claimant ought to be removed from the Public Service but wished to do so in a manner which would not have her forfeit any benefits she may have accumulated during her years of service. The PSC met with the Director of Human Resources on the 22nd May, 2007 to determine how this could done. The Director of Human Resources said that she could be retired in the interest of the Public Service under Regulation 31(1) of the Public Service Regulations.

[102] At paragraph 14 and 15 of the Witness Statement of Mrs. Chalwell, Secretary to PSC she stated that:-

> "Paragraph 14
>
> The Claimant was called to a meeting of the PSC on 31st May, 2007, which she did not attend, for the purpose of informing her of the decisions made by the PSC that she was found guilty of the charges against her and that it was recommending to the Governor that she be retired in the public interest. The Claimant attended a subsequent meeting of the PSC on the 5th June, 2007, where she was informed of its decision convicting her of the said offences and that a recommendation for her retirement in the public interest would be made to His Excellency, the Governor.
>
> "Paragraph 15
>
> By letter dated 14th August, 2008, the Claimant was formally informed of the decision of the Governor, accepting the recommendation of the PSC that she be retired in the public interest....."

[103] Under cross examination by Counsel for the Claimant Mrs. Chalwell agreed that she was not the secretary at the time of the disciplinary proceedings and except for what was

recorded in the minutes, she did not know what else happened at the Public Service Commission meetings. In further cross examination Mrs. Chalwell admits that there is no documentary record that the Claimant was notified of the 31st May, 2007 meeting which the Claimant did not attend. Neither could Mrs. Chalwell say whether anyone telephoned the Claimant to notify her. Mrs. Chalwell also agreed that she was not the one who took minutes at the 5th June, 2007 meeting.

[104] It is noted by the Court that minutes of the meeting of 31st May, 2007 and 5th June, 2007 were not provided to the court in the bundles of documents or at all. On further cross examination Mrs. Chalwell stated that she is not aware of the existence of any minutes of the meeting of 5th June, 2007 and she is not aware of the Claimant receiving either a written or telephone notification of the 5th June, 2007 meeting. The witness could not recall whether there are minutes or additional minutes in existence 5th June, 2007 but agreed she only exhibited 3 sets of minutes when pressed by Counsel for the Claimant with the question, "could you have attached additional minutes as exhibits to your witness statement?" There was a long pause and a response that "the minutes of 5th June, 2007 were overlooked by me".

[105] The court finds that the Claimant was not informed of the said meetings of the 31st May, 2007 and 5th June, 2007 respectively, further the Claimant did not attend any such meeting as was alleged to have been held on the 5th June, 2007. I find also that it was a letter from the Claimant's Lawyer dated 21st August, 2008 which prompted a letter of response dated 25th August, 2008 and the subsequent termination letter dated 14th August, 2008. It was that letter which notified the Claimant that following the disciplinary hearing before the PSC which ended on 22nd May, 2007, it was determined that the Claimant should be retired in the public interest.

[106] The PSC relied on Regulation 31(1) of the Public Service Commission Regulation at arriving at their recommendation to the Governor. It is noteworthy that Regulation 31 falls under Part V dealing with determination of Appointment. The Regulation 31(1) states as follows:-

31(1) "Where it is represented to the Commission or the Commission considers it desirable in the public interest that an officer ought to be required to retire from the public service on grounds which cannot suitably be dealt with under any of these Regulations, it shall call for a full report on the officer from the Head of every Ministry or Department in which the officer has served during the last preceding ten years."

31(2) If after considering such reports and giving the officer an opportunity of submitting a reply to the grounds on which his retirement is contemplated and having regard to the conditions of the public service and the usefulness of the officer thereto, and all the other circumstances of the case, the Commission is satisfied that it is desirable in the public interest to do so, it shall recommend to the Governor that the officer be required to retire. "

[107] The Court finds that the PSC was: (a) in clear breach of regulation 31(1). The PSC failed to state to the Claimant any "grounds which cannot suitably be dealt with under any of these regulation;" and (b) the PSC breached Regulation 31(2) by failing to allow the Claimant an opportunity of submitting a reply to the grounds on which the retirement was contemplated.

[108] **In Endell Thomas vs Attorney General 1982 AC 113 at page 126 (1)** Lord Diplock stated the applicable principle with respect to the meaning of the word "remove" and may I add in the context of this case a "recommendation to remove" as:

"To "remove" from office in the police force in the context of Section 99 (1) in the Lordship's view embraces every means by which a police officer's contract of employment (not being a contract for a specific period) is terminated against his own free will, by whatever euphemism the termination may be described, as, for example, being required to accept early retirement. (*emphasis mine*)

[109] In the context of the Virgin Islands 2007 Constitution Section 92 (1) it is the Governor who removes from office, but the Governor must do so after consideration of the

recommendation of the PSC to remove, as occurred in this case. But the question must be raised, how must the PSC act and conduct itself in arriving at a decision which results in a "recommendation to remove the Claimant from office"?

[110] At page 126 H of the **Thomas** decision Lord Diplock further states:

> "In their Lordship's view there are overwhelming reasons why "remove" in the context of "to remove and exercise disciplinary control over" police officers in section 99(1) and in the corresponding sections relating to the other public services must be understood as meaning "remove for reasonable cause" of which the commission is constituted the sole judge; and not as embracing any power to remove at the commission's whim. To construe it otherwise could be to frustrate the whole constituted purpose of Chapter VIII of the Constitution which their Lordships have described. It would conflict with one of the human rights recognized and entrenched by Section 1(d) of the Constitution; viz "the right of the individual to equality of treatment from any public authority in exercise of any functions." Dismissal of individual members of a public service at whim is the negation of equality of treatment."

[111] The above principles of Lord Diplocks' Judgment were applied in the Grenada Court of Appeal decision **Richard Duncan vs The Attorney General Civil Appeal No. 13 of 1997**. In that Judgment Byron C.J. (A.G.) as he then was, further stated that:

> "The qualification which affect the exercise of the powers conferred on the Public Service Commission include the obligation to act for reasonable cause, and not to act whimsically or arbitrarily, to apply the constituted provisions to conform to the rules and regulations it administers and to observe the rules of natural justice. I would say that there are substantial qualifications to the powers exercisable by the Public Service Commission."

[112] Lord Diplock's definition of "remove" in the Trinidad case of **Thomas vs. Attorney General** was also reaffirmed and applied by the Privy Council in the Decision **Horace Fraser vs.**

Judicial and Legal Service Commission Privy Council Appeal No. 116 of 2006 delivered by Lord Mance. At paragraph 19 of that decision it is stated:-

> "Removal, whether outright or under a contractual provision, is, in the light of Section 91, 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 a proper procedure, that reasonable cause exists for the officer's removal."

[113] It is noteworthy to highlight the mandatory requirement for "proper procedure," and "reasonable cause." His Lordship continues at paragraph 20:-

"The Board in these circumstances considers that Shanks J was right to conclude that there had been breach of S91. The Commission was in breach of its constitutional duty by its letter of 5th January 2004 in recommending, and making clear that it expected immediate action by the Government to remove the appellant when it is accepted there was no reasonable cause for such removal."

[114] The question then is whether the Government was also in breach of its constitutional duty by acting on the Commission's letter.....

> "Again, it is necessary to interpret and read together the Constitution and contractual arrangements in such a way which provides the intended protection. The agreement between the appellant and the Ministry must be read as permitting removal under the agreement only in the event determined by the Commission, that reasonable cause for such removal actually exists. Here, no such reasonable cause was determined to exist. Both the Commission and the Government were therefore rightly held by Shanks J to have been in breach of constitutional duty, and the Court of Appeal was wrong to reverse his decision.

[115] At paragraph 21 of the Boards decision it is further stated that:

"But the question arises whether Shanks J was right, as a matter of discretion, to award such damages only against the Commission. The Commission contends that he was not; and that, since both the Commission and the Government were in

breach of their constitutional duty to the appellant, the right cause would have been to award damages against both."

[116] Having found the PSC to be in breach of this procedure established by Regulation 31, it is now left for consideration of the veil argument raised by the Attorney General that Regulation 47 (2) (k) being different from the provisions of Regulation 31 does not require the rules of natural Justice to be observed.

[117] Regulation 47 (2) (k) provides:-

> "If the Commission is of the opinion that the officer does not deserve to be dismissed by reason of the charges allege, but that that the proceedings disclose other grounds for removing him from the service in the public interest, it may recommend to the Governor that an order be made accordingly, without recourse to the procedure prescribed by regulation 31." (emphasis mine).

[118] Crown Counsel further argued that:

"It is wholly consistent with the Commission's powers regarding the exercise of disciplinary control to have considered the matter itself and to come to a determination. It is apparent from Exhibit NC7, that the Commission appeared to base its decision on the cumulative effect of the entire history of the Claimant in the public service. Indeed, in the letter to her of 14th August, 2008 the Claimant was advised that the Commission had taken into account, her prior record (see Exhibit NC8). It was appropriate for the Commission to consider the whole of her record in the public service when came to make its decision, and that in those circumstances having regard to Regulation 47 (2) (k) it was unnecessary to resort to the procedure in Regulation 31. There is therefore nothing irregular about the manner in which she was retired."

[119] I hold that the Administration Law Principles of procedural fairness and the Rules of Natural Justice are imported into the interpretation of Regulation 47 (2) (k) and are therefore binding and applicable. That where the Public Service Commission seek to rely on 47 (2) (k) it must disclose the "other grounds for removing" to the public officer and

observe this rules of natural justice. The PSC may elect to exclude other procedures stipulated under Regulation 31; but the Rules of Natural Justice it must observe. The PSC has wholly failed to do so in respect of the Claimant and even if the PSC were to attempt to rely on Regulation 47 (2) (k) as the basis for its recommendation, at this stage, the PSC would have been obligated to observed the rules of natural justice before deciding to recommend retirement of the Claimant.

Declarations

[120] The recommendation by the Public Service Commission to retire the Claimant in the Public Interest was clearly unlawful and in Breach of Regulation 31(1) which the PSC expressly relied upon. The Public Service Commission failed to follow the procedures prescribed therein and there is no evidence of a report being provided by the Claimant's Head of Department and the Claimant was not allowed to "reply to the grounds on which the retirement was contemplated." Consequently, the recommendation of the Public Service Commission to retire the Claimant in the public interest is hereby declared unlawful.

[121] The PSCs' recommended to retire the Claimant is not quashed by certiorari and further the Claimant does not seek to be restored to her post. Initially the Claimant sought a declaration for wrongful dismissal and damages. This Court has dealt with the issues as an Administrative Law matter, and I have made an Administrative Law declaration of unlawful recommendation to remove the Claimant from public service with the consequent damages which were claimed.

[122] The Governor acting on behalf of the Crown relied on an unlawful recommendation of the PSC and retired the Claimant in the public interest by letter dated 14th August, 2008. The decision of the Governor to remove the Claimant from officer was tainted with the unlawful conduct and recommendation of the PSC. Hence it is hereby declared that the removal from office the Claimant by said letter dated 14 August, 2008 is hereby declared unlawful. In accordance with the principles applied by the Privy Council in **Horace Frazer**, it is further declared that the Crown as employer and the PSC are jointly responsible for the unlawful termination of the Claimant's services as a Public Officer.

Damages

[123] Having declared the removal of the Claimant from office was unlawful, it is left to determine what damages the Claimant is entitled to.

[124] Regulation 37 (3) of the Public Service Commission Regulation provides that an officer will only be entitled to receive her arrears of salary withheld during the period of interdiction if that officer had been exculpated. This court has already found that the Claimant's guilt on the charge of misconduct was lawfully determined by the PSC. The Claimant's conviction remains. The Claimant is, therefore, not entitled to be repaid the portion of her salary that was withheld during the period of her interdiction.

[125] With respect to the Claimant's pension and gratuity, the Claimant in her evidence or at the trial has taken no issue with the figures calculated by the Defendants for her gratuity and pension. The unchallenged evidence before the court is that the Claimant was paid and received from the Crown, through the office of the Director of Human Resources the sum of $41,254.13 as gratuity and is entitled to a reduced monthly pension of US$825.08 with effect and payable from 11th July, 2012. Further evidence is that the Claimant was paid by the Crown for 112 vacation days with she has amassed. The Claimant has not led any further evidence or pressed the Court or satisfied the Court that she is entitled to any further pension payments or benefits or that she is entitled to any further sum as special damages. Hence the Court makes no other award under this head of damages.

[126] The Claimant had given twenty four (24) years of service to the Crown of which for sixteen (16) years and six (6) months of the said service, she was appointed as an Agricultural Officer, in the permanent establishment of the Crown. At the time of her unlawful retirement she was fifty four (54) years of age. Both Counsel for the Defendants and Claimant made submissions to guide the court on the damages to be awarded should the court find the termination wrongful or unlawful. The Claimant in particular cited **Satyaprakash Rajmanjel vs. BVI Electricity Corporation Civil Claim No. 270 of 2006; BVI, Dominica AID Bank vs. Mavis Williams Civil Appeal No. 20 of 2005, Dominica**; and **Waither Caribbean International Airways Ltd. (1988) 39 WIR 61**; where these

Courts award in each case 12 months' salary as reasonable noticeable period in assessing damages. In the Court of Appeal in Mavis Williams the Court stated that:

> "The Respondent having been wrongfully dismissed she is entitled to an award of damages that compensate her for her losses she suffered from not having been terminated in accordance with the contract, which is to say upon reasonable notice or upon payment of salary and other contractual entitlements in lieu of notice .....Reasonable Notice was a matter of Law, he stated, and its determination always depended on the circumstances of each case. The Court should consider among other things the employees qualifications, his stature in the position which he held, his skill, his training, the very senior position he occupied, the duration of his employment, the responsibilities of his position and the reasonable length of time it would take him to obtain alternative employment."

[127] In the BVI Electricity Corporation Case it was held at page 13 ...

> "The duty of the Court is assessing damages for wrongful dismissal is to put this successful employee as far as practicable in the financial position that he/she would have been in if his employment has not been wrongfully terminated, bearing in mind that the employee is under a duty to mitigate his loss."

[128] In the circumstances of case I find that the Claimant is entitled to damages representing the monies she would have earned had she been given twelve (12) months notice. Hence the Claimant is entitled to pay twelve (12) months salary, from which allowance must be made for income tax and any other statutory deductions if any, such as social security payment, which the Claimant was obligated to pay.

[129] I am thankful for the very helpful written submissions which were lodged by both Counsel.

FINDINGS AND ORDER

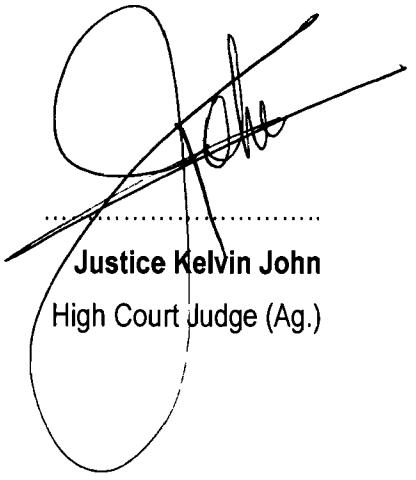
[130] (i) It is hereby declared that the recommendation by the Public Service Commission to The Governor to retire the Claimant in the public interest is unlawful.

(ii) The Governor's acceptance of such unlawful recommendation rendered The Governor's decision to retire the Claimant in the Public Interest unlawful and it is so declared.

(iii) The Claimant is entitled to be paid by the Crown through the Director of Human Resources in the Human Resources Department of the Government, damages in the sum of twelve (12) months' salary less income tax and other statutory declarations, if any.

(iv) Counsel for the parties to calculate and agree on the quantum, failing which parties are at liberty to apply to the Court for a determination on quantum.

(v) Claimant is entitled to prescribed costs on the Damages calculated.



.....

Justice Kelvin John

High Court Judge (Ag.)