

IN THE EASTERN CARIBBEAN SUPREME COURT  
IN THE HIGH COURT OF JUSTICE  
TERRITORY OF MONTSERRAT

CLAIM NO. MNIHCV2010/0045

IN THE MATTER OF AN APPLICATION BY NORMAN A. M. CASSELL FOR JUDICIAL REVIEW

AND

IN THE MATTER OF THE MONTSERRAT CONSTITUTION ORDER 1989

BETWEEN

NORMAN A. M. CASSELL

CLAIMANT

AND

HIS EXCELLENCY THE GOVERNOR

FIRST DEFENDANT

THE PUBLIC SERVICE COMMISSION

SECOND DEFENDANT

THE ATTORNEY GENERAL

THIRD DEFENDANT

**Appearances:** Mr. Leon C. Symister for the Claimant

Miss. Allison Skerritt and Mr. Fitzroy Buffonge for the Defendants

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2012: April 25

2013: November 22

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## JUDGMENT

1. **Rhudd, J (Ag).** This is an action commenced by the Claimant on June 16, 2011 by way of a Fixed Date Claim Form. That Fixed Date Claim Form was supported by an Affidavit sworn to by the Claimant and filed on the said date. A few days later, on July 4, 2011, the Claimant filed an Amended Affidavit in Support.
  
2. Prior to the filing of the Fixed Date Claim Form, the Claimant had, by way of an Application filed on December 30, 2010, sought leave to file and serve an Originating Motion seeking an Administrative Order under the Montserrat Constitution Order 1989 pursuant to Rule 56 of the Civil Procedure Rules. On May 30, 2011, the Honourable Mr. Justice Albert Redhead made the Order and granted leave on the condition that the Applicant/Claimant filed his claim within fourteen (14) days of the date of the making of that order.
  
3. In his Fixed Date Claim Form, the Claimant sought Orders:
  - (i) Reversing the decisions of the Public Service Commission and/or the Governor to dismiss him from his position as Airport Manager;
  - (ii) Declaring the decision of the Public Service Commission and/or the Governor *ultra vires*, null and void and of no effect;
  - (iii) Reinstating him as Airport Manager without loss of pay or benefits;
  - (iv) For cost; and
  - (v) For any other relief that the Court deems proper and just.
  
4. On October 11, 2011, Affidavits in Response were filed by Ms. Sarita Francis, the Deputy Governor of Montserrat and by Mr. Joseph Lynch, a member of the Public Service Commission.

### **Background**

5. An outline of the background to this matter is in order. This background has been gleaned from the non-contentious portions of the several Affidavits filed in the matter.

6. From January 1, 1999 up to June 30, 2010, the Claimant was the Manager of the "John A. Osborne Airport" (formerly called "Gerald's Airport") in Montserrat. He had originally become employed to the Public Service in Montserrat in July 1986 as a Trainee Airport Officer at what was then then called "Blackburne Airport". That name was subsequently changed to the "W.H. Bramble Airport" and then to "Gerald's Airport". On January 15<sup>th</sup>, 1999, he was appointed as the Airport Manager at what had by then become the "John A. Osborne Airport".
7. On or around April 28, 2008, the Governor of Montserrat, His Excellency Peter Andrew Waterworth, based on concerns that had been raised relating to the operation and management of the airport, appointed a three person Commission (" the Governor's Commission") to inquire into the management and operations of the lone airport in Montserrat. That Commission was comprised of Mr. Kharl Markham (Chairman), Mr. John E. Ryan and Mrs. Claudia Roach. It was provided with both general and specific Terms of Reference. Those Terms of Reference related primarily to the areas of Airport Security, Airport Management and Air Traffic Control.
8. The Governor's Commission submitted its report in November 2008 to the Permanent Secretary in the Ministry of Communications and Works. That report highlighted several critical issues which were negatively impacting on the operations of the airport and included a number of recommendations. Those critical issues related to, among other things, lack of discipline among staff members, "incoherency and inconsistency" on the part of the airport management in addressing human relations matters and negligence and misconduct "at the highest levels". Several of the airport's employees, including the Claimant, were identified and adversely commented on in the report.
9. Specifically, in relation to the Claimant, the Commission recommended that an Officer above the grade of the Airport Manager be appointed to investigate allegations of misconduct that had been made against him. That investigating officer was to obtain necessary statements, reports and other documents with a view to referring the matter to the Public Service Commission for a determination of whether disciplinary proceedings should be instituted against the Claimant.
10. On December 18, 2008, the Permanent Secretary in the Ministry of Communications and Works wrote a Memorandum to the Chief Establishment Officer (ultimately to be forwarded to the Public

Service Commission) recommending that disciplinary proceedings be taken against five officers at the airport, including the Claimant. The Public Service Commission (hereinafter referred to "the PSC"), having reviewed the recommendations of the Governor's Commission, formed the view that if those recommendations were implemented, the operations at the airport would have been severely affected. The PSC then requested the Permanent Secretary in the Ministry of Communications and Works to submit, to the PSC, a strategy that would ensure the continued operations of the airport if the several recommendations were implemented in their entirety.

11. By way of a Memo, dated February 18, 2009, the Claimant wrote to the Deputy Governor setting out his response to the several issues that had been raised in the report of the Governor's Commission.
12. Some weeks later, on March 9, 2009, the Permanent Secretary in the Ministry of Communications & Works sent a Memorandum to the Chief Establishment Officer wherein certain recommendations were made in respect of the several officers at the airport, including the Claimant. That Memorandum was forwarded to the PSC for its review and action with the result that, on March 31, 2009, the PSC made its recommendations.
13. On June 5, 2009, the Claimant was informed by letter, sent by the Permanent Secretary Ministry of Communication & Works that the matter involving him was being referred to the Public Service Commission recommending his transfer and for disciplinary action to be taken against him resulting from the ASSI Reports and ASSI conclusions. By letter, dated June 8, 2009, the Claimant sought clarification from that Permanent Secretary on the matter being referred but none was forthcoming. Some days later, on or around June 11, 2009, the Claimant was formally instructed by the Governor to proceed on leave with immediate effect.
14. On or around September 4, 2009, the Permanent Secretary in the Ministry of Communications & Works wrote to the Permanent Secretary in Human Resources requesting that the Claimant be transferred and that disciplinary action be taken against him. He was subsequently informed by letter, dated September 21, 2009, that he had breached General Order 301 (1) and, as a result, the PSC had decided to inquire into the allegation of misconduct made against him.

15. On or around October 7, 2009, at the request of the PSC, the Claimant responded in writing to the allegation of misconduct. That response ran to some 17 pages.
16. A meeting was subsequently held by the PSC on November 19, 2009 to discuss the Claimant's response to the allegation of misconduct against him. At that meeting, the Claimant was linked by teleconference to a representative from the UK-based regulatory body Air Safety Support International ("ASSI"). The ASSI representative requested additional documents for review in order to make any meaningful comments on the response that had been provided by the Claimant. The Claimant did not, on that occasion, get a chance to speak extensively to, or "confront", the ASSI representative. The PSC formed the view that it could not continue with the meeting until it had received comments from ASSI on the response that had been provided by the Claimant. The meeting ended at that stage.
17. On March 31, 2010, the Claimant was provided with the comments that had been received from the office of the ASSI in relation to the information that he had submitted to the PSC on October 7, 2009. He attended a meeting with the PSC on April 8, 2010, where he requested, and was allowed, time to respond to ASSI's comments. He formally responded to those comments on April 12, 2010.
18. On or around May 6, 2010, he was informed, by letter, that the PSC had found that he had breached General Order 301 (1) by failing to carry out his usual duties as Manager of the airport. He was also informed that the Governor, having considered the PSC's findings and recommendations, had found grounds for his dismissal. The Claimant was then invited by the Governor to make representations showing cause why he should not be dismissed. Some 12 days later, on May 18, 2009, the Claimant provided his response to the Governor.
19. On or about May 31, 2010, the Claimant was formally informed that he would be dismissed from the Public Service with effect from June 30, 2010. By letter of June 8, 2010, he requested a copy of the findings of the PSC that had informed the Governor's decision to have him dismissed. That request was initially denied but eventually complied with, a little over a year later, on or around June 20, 2011.

20. It is on that background information that the Claimant has sought the several reliefs set out in his Claim Form and detailed in Paragraph 3 above.

### **The Issues**

21. The issues, which the Claimant has identified as being those which are to be determined by the Court, are set out hereunder:
- (i) Whether the PSC erred when it commenced a disciplinary hearing against the Claimant without any prior investigation into the conduct of the Claimant being undertaken;
  - (ii) Whether the findings of the PSC that led to the dismissal of the Claimant was arbitrary and capricious in that it was not supported by the evidence elicited during the disciplinary proceedings;
  - (iii) Whether the Claimant was denied due process when he was not afforded the opportunity to confront the witness for ASSI on whose evidence the PSC relied in recommending his dismissal;
  - (iv) Whether the Claimant's removal from office as Airport Manager by the Governor on the recommendation of the PSC was done in breach of the rules of natural justice and without just cause;
  - (v) Whether the Claimant is entitled to compensation/damages for loss of earnings including emoluments and benefits and for inconvenience and distress suffered; and
  - (vi) Whether the Defendants should pay to the Claimant exemplary damages for its oppressive and arbitrary action.

### **The Claimant's Evidence**

**Norman Cassell**

22. The evidence from the Claimant came by way of his Affidavit<sup>1</sup> (accepted as his evidence in chief), through his cross-examination and from his re-examination. His Affidavit evidence, which substantially provided the background to this matter, has been incorporated in Paragraphs 5 -19 above.
23. The Claimant was cross-examined by Ms. Skerritt. During that cross-examination, he at first stated that he could not recall having received any notice of the allegations that had been made against him. A letter from the Department of Administration, dated September 21, 2009, was shown to him but he maintained that the contents of that letter did not say anything about what might have been said to him. However, when pressed by Counsel he conceded that he had seen a Memo<sup>2</sup>, dated September 4, 2009, from the Permanent Secretary, Ministry of Communications & Works in which issues relating to allegations against him were outlined. He then conceded that he had, on October 7, 2009, responded to the allegations in that Memo.
24. The Claimant admitted to having had a teleconference on February 26, 2010 with a Mrs. Margaret Wilson, of ISSA, as well as with a Mr. Mike Butler, the Lawyer for ISSA, although he had not had a Lawyer present at the time. He testified that he had not asked any questions during that teleconference. During that teleconference it had come out that he had previously provided responses in his communication of October 7, 2009<sup>3</sup>. He could not recall whether it was Mrs. Wilson or Mr. Butler who had asked for a copy of the document before they could proceed. Although he had some questions, he testified that he had not been allowed to ask them as the teleconference was stopped at that stage.
25. The Claimant maintained that, as stated in his Affidavit<sup>4</sup> he had been denied access to the airport compound and to documents kept on the compound as well as to the e-mail system which contained pertinent information and he had indicated this to the PSC. He refuted the suggestion of Counsel that the first time that the PSC had become aware of this denial of access was when he had filed his Affidavit. He initially insisted that he had only been given 4 days within which to respond to comments from ASSI but then admitted that the time period allowed him (March 31 to

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<sup>1</sup> Amended Affidavit filed on July 4, 2011.

<sup>2</sup> Memo dated September 4, 2009

<sup>3</sup> Airport Manager's response to the Public Service Commission

<sup>4</sup> Paragraph 19

April 8) for meeting with the PSC in order to respond to ASSI's comments amounted to more than 4 days.

26. He testified that, upon attending the meeting with the PSC on April 8, 2010 to discuss the comments from ASSI he had asked for additional time within which to respond. He had been granted 4 days but had been told to keep his responses brief. He said that he had needed the additional time to complete his response and to get photocopying done as it was challenging to get those things done in Montserrat. He conceded, however, that he would have already done some level of preparation ahead of that meeting on April 8.
27. He admitted to having received a letter, dated May 6, 2010, from the acting Deputy Governor that informed him that the PSC had found him to be in breach of General Order 301. He admitted that in that letter he had been invited to submit any representations that he might have had. He had provided his responses on May 18, 2010. He conceded that his letter, dated June 8, 2010, sent to the Deputy Governor seeking a copy of the PSC's findings had been sent some 3 weeks after he had already provided his responses.
28. The Claimant was then asked about the several comments that had been provided by ASSI. He confirmed that an inspection, carried out by ASSI, was necessary to get the aerodrome certified. He testified that the granting of aerodrome certificates was regulated by international standards. Local standards, which may or may not be more stringent, were set out in documents prepared by ASSI. ASSI's powers on the island were derived from the Governor.
29. When asked, he defined "RNR" as meaning "Regulatory Non-Conformity Reports" and explained that those reports were used to confirm an airport's compliance with regulations required to obtain aerodrome certificates. They operated as guidelines and were used by the regulators to indicate where certain measures needed to be put in place. As the Airport Manager, he was responsible for ensuring that such measures were put in place. The RNRs were usually issued by Aerodrome Inspectors.
30. The Claimant testified that a Mr. Bjoern Boe was such an inspector and he, Mr. Boe, had sent RNRs to the airport for action to be taken during his (the Claimant's) tenure as Airport Manager. He explained that if one failed to take action in relation to RNRs, it could result in a refusal to issue



an aerodrome certificate. He further described an "Aerodrome Manual" as "the Bible of the airport". All operations at the airport would have been based on this. This manual would have included information and data such as reference points of the airport, specific operational information as well as information on human resources for the airport.

31. He testified further that a Mr. Kelvin Burnell had been the Aerodrome Inspector prior to Mr. Boe's appointment. He believed that an inspection, done in December 2007, would have been conducted by Mr. Burnell. Mr. Burnell had left ASSI in May 2008. The Claimant was asked about his promise to send pertinent documents to Mr. Burnell and denied that he had failed to do so between the date of the inspection and the date of Mr. Burnell's departure. Having been shown an e-mail dated April 30, 2008 accompanying an "RNR Action Plan Update", it was put to him that what he had sent to Mr. Burnell was an updated RNR Action Plan with proposed dates of completion while seeking an extension of time to complete. He disagreed with this. He also strongly disagreed with the suggestion that a visit to the airport, proposed by Mr. Burnell, had only been intended to review progress being made rather than to sign off on a required report.
32. In this regard, it was then brought to his attention that, in an e-mail dated May 1, 2008, Mr. Burnell had stated that during his proposed visit he would have been reviewing progress on all RNRs. The Claimant then conceded that only a part of that visit was intended to have Mr. Burnell sign off on the documents. Despite being shown an e-mail dated May 16, 2008 from Mr. Burnell where the latter commented that "we need to see positive progress in all RNRs and especially the RFFS", the Claimant denied that the primary purpose of Mr. Burnell's visit was to review progress of actions in relation to the RNR's. It was put to him that documents which he had maintained were completed had not in fact been completed. He denied this and asserted that, if Mr. Burnell had had an issue with what he had provided, he (Mr. Burnell) would have commented.
33. The Claimant admitted that one of the RNRs issued by Mr. Burnell related to a review of the Aerodrome Manual. He confirmed that Mr. Boe had succeeded Mr. Burnell as an Aerodrome Inspector and that he, Mr. Boe, had done an inspection in March 2009. He admitted that, based on Mr. Boe's Inspection Report, an RNR had been issued for updating of the Aerodrome Manual to reflect correct practice. He also confirmed that the Manual to which Mr. Boe had referred had been dated 2005.

34. The Claimant was then cross-examined on what was termed "WGS-84 Surveys". He explained that those were similar to topographical surveys. Surveyors would have come in and "proven" reference points and locations to specific objects and physical infrastructure on the aerodrome. The information gleaned during those surveys would then be published to form part of the aerodrome manual or maps and used to update clients. He admitted that a survey that had been needed from in 2007 was only finally completed in April 2009 and that this had prevented the final sign off of the Aerodrome Manual. He gave as a reason for the delay the fact that the Aerodrome Manual had not been completed. In answer to Counsel, he admitted that, in his opinion, the delay in completing the survey indirectly impacted and delayed the renewal of the aerodrome certificate. That delay he attributed to a lack of financing and admitted that he had not asked the Governor directly for financing although he said that he had made the request of the Permanent Secretary in the Ministry of Finance.
35. His attention having been drawn to statements made by him in his response to the PSC<sup>5</sup>, and to a document dealing with the "Outline of Business (Operational) Plan", dealing with the survey and its importance, he admitted that he was the person in charge and the person who had been required to initiate the survey. He however disagreed with the suggestion put to him that the reason that the airport certification was not renewed was because he had procrastinated in producing documents and in having the survey completed immediately.
36. His cross-examination by Ms. Skerritt having been completed, Mr. Cassell was also cross-examined by Mr. Buffonge. He confirmed to Counsel that he had been employed since 1999 and that he had a lot of experience. He testified that he had been aware of the Commission of inquiry (Governor's Commission) but he had not been fully aware of why it had been held. He knew that there had been serious allegations about the management. He agreed that there had been a serious lack of discipline among staff at the airport. That indiscipline had escalated to the level of the supervisors. Some persons, he conceded, had been problematic.
37. He disagreed with the suggestion that he had not taken adequate steps to address the situation. He testified that he had reported the matter to the Executive Council. He also accepted that

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<sup>5</sup> Dated October 7, 2009

establishing good working relationships was important and agreed that all complaints should be treated seriously. He testified that he accepted that safety was of paramount importance.

38. He testified further that there had been allegations that some persons in his office were "untouchables" but those were only allegations as that had not been proved. He was aware that there had been an allegation and a complaint of an Air Traffic Controller smelling of alcohol. This had come out during the Commission's inquiry and he had referred the matter to the Attorney General. He maintained that a lot of the allegations that came out during the inquiry had not been proved.
39. He testified that the Chief Security Officer, a Mr. Sullivan, was under his control. Although he had not had any problems with that Officer they had disagreed about issues. He disagreed that the Chief Security Office had been asked to leave the airport but he admitted that he had withdrawn his Pass.
40. He strongly disagreed with Mr. Buffonge's suggestion that he was not performing his task as Airport Manager. He referred to Mr. Boe commenting, during the last ASSI review, that his opinion of the airport was excellent. He totally disagreed with Counsel's suggestion that, as Airport Manager, he should have taken a greater role, in the operation. When asked if he had done all that he could have done, he concluded by testifying that had not been possible.
41. During re-examination, the Claimant reiterated that the letter that he had received from the PSC was the only document containing allegations that he had received. He had never received any document containing the allegation that he had failed to ensure the safety of users of the airport. He denied receiving any other document alleging misconduct. He further denied that the findings contained in the letter from the Deputy Governor, dated May 6, 2010, had ever been brought to his attention.
42. In respect of the hearing that was conducted by the PSC, he testified that he had not been informed by the PSC that he could have been represented by Counsel. He testified that at the teleconference with the ASSI representative on February 26, 2010, he had not been provided with any information by ASSI to facilitate him asking questions. The entire session had lasted about 5 minutes and he had not asked any questions as no information had been provided to him.

43. He then reiterated and clarified some of the points that he had made earlier about Mr. Burnell, about the WGS-84 survey and about the public inquiry (the Governor's Commission).

### **The Defendant's Evidence**

#### **Sarita Francis**

44. Ms. Francis, the Deputy Governor of Montserrat, also gave her evidence in chief by way of her Affidavit<sup>6</sup>. Her Affidavit evidence also formed the basis for the background of the matter set out earlier. She deponed that she was familiar with the factual background as the matter had come to her attention while she had held the position of Chief Establishment Officer, a position subsequently, renamed 'Deputy Governor'.
45. She testified that she was familiar with the Claimant who had been a Public Service employee for over 20 years. She referred to the concerns that had been raised in early 2008 about the operations and management of the airport. As a result of those concerns the Governor's Commission had been sent up. The Report from the Commission highlighted critical issues about the operations of the airport, including indiscipline, negligence and misconduct.
46. On December 18, 2008, the Permanent Secretary in the Ministry of Communications & Works had recommended to the PSC that disciplinary actions should be taken against five officers at the airport including the Claimant. The Claimant provided his response to the Report from the Governor's Commission on February 18, 2009.
47. Following on from communication passing between the Permanent Secretary in the Ministry of Communications & Works and the PSC, a request came through, on June 5, 2009, for the Claimant to be transferred and disciplined for being in contravention of the General Order 301. That request, she testified, was based on the continual failure of the Claimant to submit outstanding required documents to ASSI. The Claimant responded to the recommendation to put him on leave and for him to be transferred and disciplined.

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<sup>6</sup> Affidavit filed October 11, 2011

48. By September 4, 2009 a request had come through from the Permanent Secretary in the Ministry of Communications & Works to the PSC for the transfer of, and for disciplinary action to be taken against, the Claimant. The PSC held several sittings between September 3 and 24, 2009 to consider the matter. The PSC met with the Claimant on September 19, 2009. Two months later, on November 19, 2009, the PSC met with the Claimant again to inquire into the allegation that he had breached General Order 301. The PSC, she testified, was of the view that the inquiry could not be continued until it had obtained a copy of a report from ASSI.

49. Sometime in March 2010, the office of the Deputy Governor received the response from ASSI, dated March 25, 2010. Among other things, the response highlighted the following –

*“When considering someone as the manager of an aerodrome operation, the regulator is required to have regard to the ability of the manager to demonstrate a full understanding of his/her roles and responsibilities and of the requirements detailed in the aerodrome manual including the specific requirements for effective implementation of the SMS. Furthermore, the regulator must be satisfied as to the ability of the manager to respond to and resolve the findings that are raised during periodic audits and inspections of aerodrome in a timely and effective manner. It was principally as a result of persistent failure of Mr. Norman Cassell as the Manager of the airport to satisfy ASSI on the above requirements that led ASSI concluding that he was not acceptable as the manager of the airport.”*

50. A copy of this response was provided on March 31, 2010 to the Claimant, who, in turn provided his own response on April 12, 2010. The PSC then met again in April 2010 to consider the entire matter. A final recommendation was then made that the Claimant should be transferred elsewhere in the Public Service and a fine of 50% of a month's basic salary should be imposed against him.

51. The Witness wrote to the Claimant on May 6, 2010 informing him that the Governor had accepted the PSC's findings and their recommendation and that there were grounds for his dismissal from the Public Service on the basis of gross misconduct. She wrote a follow up letter to him on May 31, 2010 informing him that, based on the Governor's consideration of the entire proceedings,

sufficient grounds had been established to warrant his dismissal from the post of Airport Manager with effect from June 30, 2010.

52. Ms. Francis, like the Claimant before her, was extensively cross-examined. She confirmed that she was, at the time of giving evidence, the Deputy Governor. Prior to that, she had been the Chief Establishment Officer
53. She testified during cross-examination that, in her capacity as Chief Establishment Officer ("CEO"), she would have been the head of the Public Service. The Human Resources and Administration Departments fell under her portfolio. As CEO, she had been familiar with the procedures to be followed when there was an allegation of misconduct. She explained the procedure as follows: (i) the allegation of misconduct is made by the head of a department to the Human Resources Department; (ii), the Human Resources Department would send it on to the PSC; and (iii), the PSC would hear the matter and make recommendations to the Governor. She added that any officer subject to that procedure was entitled to receive notice of the allegation.
54. In the case of the Claimant, she had been aware of the allegations prior to the sitting of the Governor's Commission relating to his management of the airport. She had not, prior to the inquiry, formed any opinion on the Claimant's management style at the airport although she had been made aware of pieces of communication coming in from members of staff. The Permanent Secretary, the Governor and herself had all received communication from staff members. She could not recall if any of those communications had come through the Claimant and over what period. She also could not recall if those communications had come prior to 2008.
55. She testified that, as a result of communications received, she had raised the issue with the Claimant. This took place during meetings with the Governor, the acting Permanent Secretary at the time, the Claimant and the Attorney General. She was unable to recall the number of meetings but she opined that they must have taken place during 2007 and prior to the inquiry in 2008. She was also unable to recall if records of those meetings had been kept as it was customary sometimes to make records and at other times, not to do so.
56. Those meetings involved dealing with complaints received and the actions taken by management and staff. She confirmed that she would have discussed the several complaints received in those

meetings and attempts would have been made to try to resolve some of the complaints. The Claimant would have been informed about the complaints made and he would have been heard from in respect of the complaints.

57. The Witness insisted, despite Counsel's suggestions to the contrary, that such meetings had been held and, if records were taken, they would have been in the custody of the Attorney General's office or with the Permanent Secretary in the Ministry of Communications & Works. She reiterated that, in her capacity as CEO, she had not been required to keep Minutes.
58. The Witness's attention was drawn to a letter written by her, dated March 10, 2009, and sent to the Chairman, PSC accompanying a Memo from the Permanent Secretary in the Ministry of Communication & Works. She confirmed that, prior to that Memo, she could not recall having sent any other Memo, in respect of the Claimant, to the PSC. She explained that, at the time the Memo was sent, no disciplinary actions had been taken against the Claimant. Although the Permanent Secretary in the Ministry of Communications & Works had communicated with a Mr. Oswald Phillip as a possible replacement for the Claimant that had merely been a recommendation.
59. She also acknowledged that she had been aware of a Memo, dated June 5, 2009, sent by the Permanent Secretary in the Ministry of Communication & Works to the Permanent Secretary, Human Resource Management indicating that *"the Government of Montserrat is working with all parties concerned, and pursuing all available options for a replacement for the position of Airport Manager"*. At this date, no disciplinary charges had yet been filed against the Claimant. She explained further that if there was a request for disciplinary action, it would not be fair to conclude that no disciplinary actions had been begun as these were two separate issues. The letter of March 10, 2009 was requesting that disciplinary actions be taken against several persons, including the Claimant.
60. The Witness denied that there had been plans afoot to replace the Claimant although she was aware of the recommendation from the Permanent Secretary, Ministry of Communication & Works. That recommendation, she testified, had to be put before the PSC. Any such recommendation for transfer would also have been accompanied by recommendations for replacement. She testified that she could not be too sure if disciplinary actions had already been begun against the Claimant

at the time that it had been recommended that he be replaced. The Permanent Secretary, she testified, could also recommend the sanction to be imposed against an officer at the time that he was seeking to have disciplinary actions taken. The Witness could not personally testify whether the PSC had taken action on the request for transfer and disciplinary action as she had, by that time, been elevated to the post of Deputy Governor.

61. The Witness confirmed that, on September 4, 2009, she had still been the Chief Establishment Officer but she could not recall whether any disciplinary action had been commenced prior to that date. She could not say how many requests had come through for the transfer of, and disciplinary action against, the Claimant. She confirmed her familiarity with the recommendation, coming out of the Governor's Commission, that an officer above the grade of Airport Manager be appointed to investigate allegations of misconduct against the Claimant but she did not know if such an investigation had taken place. She admitted that it would be fair to say that she did not know the basis for the Permanent Secretary's (Ministry of Communication & Works) request for disciplinary action to be taken. She was aware that the Claimant had been sent on leave in June 2009. She however denied any knowledge of an effort by the Permanent Secretary, Ministry of Communications & Works to get the Claimant out of the airport as early as December 2008.
62. The Witness admitted to knowing that the Permanent Secretary in the Ministry of Communication & Works had recommended in March and June 2009 that disciplinary action be taken against the Claimant. However, she was unable to say whether and how the PSC had responded to those recommendations. She had become aware that disciplinary charges had been laid against the Claimant but by November 2009, she had become the Deputy Governor.
63. The Witness was asked about contact between her office (as Deputy Governor) and the office of ASSI but she denied that any such contact took place. She was unable to recall whether her office had made any requests of ASSI in the matter. She confirmed that a letter, dated May 6, 2010, had been written to the Claimant to inform him that there were grounds for the Governor to dismiss him and he had been invited to show cause why he should not be dismissed. She was not the author of that letter although it had emanated from her office and she knew when it had been sent. At the time the letter had been sent, she had not been aware that the Claimant was not yet in possession of the findings and recommendations of the PSC. She only became so aware when he wrote to



her to ask about these. She initially promised to look into the matter and then subsequently wrote to inform the Claimant that she would not be providing him with the recommendations and findings.

64. Counsel for the Claimant raised the issue of the Witness engineering the inquiry (Governor's Commission) at the airport as the Claimant was up for appointment as the next Permanent Secretary in the Ministry of Education but this was stoutly denied by her. She indicated that she was aware that he was one of several candidates. She admitted to knowing that the Claimant's wife had been made the Permanent Secretary in the Ministry of Education but she denied ever telling the Claimant that he was in line to become the next Permanent Secretary. She resolutely denied any knowledge of any concerted effort to get the Claimant out of the Public Service.
65. When pressed, the Witness concluded by testifying that the person who was eventually selected as the Permanent Secretary at that time was a Mrs. Claudette Hughes, who was also her Sister in Law.
66. During re-examination by Ms. Skerritt, the Witness explained that complaints about the airport's operation had come in from both staff members and the Permanent Secretary in the Ministry of Communication & Works. That Ministry had also been responsible for keeping the Minutes of meetings.

### **Joseph Lynch**

67. Mr. Lynch, a retired Civil Servant and a member of the PSC, also gave evidence for the Defendants. His evidence also came by way of his Affidavit<sup>7</sup>, through his cross-examination and during re-examination. He testified that he had been familiar with the matter involving the Claimant as it was one of the matters dealt with by the PSC.
68. He confirmed that the PSC had received correspondence in January 2009 recommending disciplinary proceedings against five officers at the airport, including the Claimant. The PSC had considered the matter on January 26, 2009 and requested the Permanent Secretary in the Ministry

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<sup>7</sup> Filed on October 11, 2011

of Communications & Works to submit a strategy to ensure the continued operations of the airport if the recommendations were pursued.

69. On March 10, 2009 the PSC had received a further set of recommendations for disciplinary action to be taken against the Claimant and the others. These revised recommendations had been considered and the PSC decided that a letter should be sent to the Claimant to inform him of the complaints made against him and to request him to submit to the PSC reasons why disciplinary actions should not be taken against him.
70. In early June 2009, the PSC received a request from the Permanent Secretary Ministry of Communications & Works for the transfer of and disciplinary action against the Claimant. The PSC met in August 2009 but felt that it was unable to define the charges to be laid, hear the matter and then make a recommendation to the Governor. The PSC, through its Secretary, wrote to the Permanent Secretary Ministry of Communications & Works requesting him to define the charges to be laid by identifying the specific General Order that had been breached. A response having been received, the PSC met again on September 3, 2009 when details were provided about the disciplinary charge to be preferred against the Claimant. The PSC met again on September 10, 2009 and reviewed a revised request from the Permanent Secretary Ministry of Communications & Works for the transfer and disciplining of the Claimant. The PSC decided to make an inquiry into the complaint made by the Permanent Secretary in accordance with Regulation 48 of the Public Service Commission Regulations.
71. The PSC subsequently met on September 17 and 24, 2009. At the latter meeting, the PSC decided to act upon the Governor's approval of its recommendation that an inquiry be held in accordance with Regulation 48. A letter, dated September 21, 2009, was sent to the Claimant requesting him to give reasons by way of defence to the allegations made by the Permanent Secretary Ministry of Communications & Works. He was given up until September 29, 2009 to proffer the said defence.
72. The Witness deponed that the Claimant's response was received on October 7, 2009. He was, by letter dated November 13, 2009, invited to a meeting with the PSC to be held on November 19, 2009 to discuss the said response. At that meeting, the PSC then decided that it could not proceed with the inquiry at that stage as it required a response from ASSI to confirm whether the Claimant

had complied with the Inspector's reports as he had indicated in his response. The response from ASSI was deemed necessary for the PSC to continue that inquiry.

73. He testified further that the PSC met again on January 20, 2010. By that date, it had received e-mail communication from Margaret Wilson at ASSI by way of the Governor's office. In that e-mail, Ms. Wilson had stated, among other things, that –

*"The unacceptable situation of many missed deadlines by the Airport Management for the production of information, manuals and documentation had been ongoing for a lengthy period of time. It had reached the stage that it was no longer appropriate to respond to yet another late submission of documentation as events were already in progress to address the situation in a different manner".*

74. The Witness stated further that the PSC felt it necessary to meet with Mr. Bjoern Boe of ASSI or have a teleconference with him for the purpose of clarifying the situation. The PSC met several times thereafter on January 27, 2010, February 10, 2010, February 18, 2010 and February 23, 2010 to discuss the matter and to co-ordinate the presence of ASSI representatives by way of a teleconference. There was a difficulty in locating Mr. Boe.

75. The teleconference eventually took place on February 26, 2010. Members of the PSC, Ms. Margaret Wilson, ASSI's Legal Advisor (Mr. Mike Butler) and the Claimant were present. ASSI indicated that the Claimant had not complied with deadlines in documents submitted by him on June 2, 2009. The Legal Advisor also indicated there were other issues that ASSI had with the Claimant and requested that the PSC send the Claimant's response of October 7, 2009 to them for further consideration.

76. The PSC subsequently received a response, dated March 25, 2010, from Mike Butler. It contained adverse comments on the Claimant and his competence. The response concluded by stating that –

*"On the basis of all the above and on the basis of the persistent delays on the part of the airport manager in addressing the findings and other requirements, ASSI reached the conclusion that Mr. Norman Cassell could not satisfy ASSI as the regulator as to his*

*competence, level of understanding and experience in accordance with article 105 (2) to the [Air Navigation (Overseas Territories)] Order 2007".*

77. The PSC wrote to the Claimant on March 31, 2010 to invite him to a meeting on April 8, 2010 to discuss the response from ASSI. On that date, the Claimant indicated that he had only received the response on April 4, 2010 and required more time within which to respond. The PSC acceded to that request and allowed him until April 12, 2010 to do so. The Claimant's response was received on that date.
78. The Witness deponed further that, on April 15, 2010 the PSC met to consider the Request for Transfer and Disciplinary Action brought by the Permanent Secretary Ministry of Communications and Works. That Request was based on the Claimant's breach of General Order 301 and his repeated failures to submit outstanding requirements to ASSI, a requirement for the satisfactory renewal of airport certificates. The PSC concluded, finally, that the charges against the Claimant had been substantiated and recommended that he be transferred elsewhere within the Public Service and a fine of 50% of one month's salary be instituted against him.
79. During extensive cross-examination by Mr. Symister, the Witness testified that he had been a member of the PSC since 2006 and was familiar with the Public Service Act. He was able to recall the case involving the Claimant. He remembered the Memo, dated December 18, 2008, from the Permanent Secretary, Ministry of Communications & Works to the Chief Establishment Officer and confirmed that the PSC took action when the Memo had been received.
80. He also recalled the correspondence, dated January 26, 2009, from the Secretary of the PSC where concerns were expressed about the lack of depth in the recommendations coming from the Ministry of Communications & Works. He admitted that the PSC had concerns about how the operations at the airport would continue if the recommendations were implemented. He confirmed that the PSC did receive the letter, dated March 10, 2009, from the Chief Establishment Officer. That letter accompanied the Memo, dated March 9, 2009, from the Permanent Secretary, Ministry of Communications & Works. The resumé of two persons were also included with the Memo.
81. He confirmed that the Claimant had been given 14 days within which to respond to the PSC and he felt that time period had been reasonable. He could not recall if the Claimant had responded within

that time frame. He remembered the Commission of Inquiry but he could not recall all of the recommendations. He did remember the recommendation for an officer above the grade of Airport Manager to investigate the Claimant but he explained that the recommendation was not for the PSC so he did not know if it had been followed. He understood it to mean that the Government would have appointed a person to investigate the matter against the Claimant and then send the matter to the PSC. He had no idea as to whether the Claimant had received complaints as set out in the letter, dated June 5, 2009, sent from the Permanent Secretary Ministry of Communications and Works to the Permanent Secretary, Human Resources Management.

82. Having been referred to Paragraph 7 of his Affidavit the Witness conceded that his reference therein to "Commission" must have been to the PSC. He confirmed that the PSC had received the letter. He was then taken through a series of communication passing between the Permanent Secretary Ministry of Communications and Works and the PSC. He indicated that he had been out of the country between July 17, 2009 and August 27, 2009 and therefore unable to speak personally to certain of the matters. His Affidavit evidence was, accordingly, based on information in the Minutes kept by the PSC.
83. The Witness confirmed that the PSC had met on September 10, 2009 and had recommended that disciplinary action be instituted against the Claimant pursuant to Regulation 48 of the Public Service Commission Regulations. . That course of action had been recommended to the Governor. That section, he testified, dealt with disciplinary proceedings where dismissal was not warranted and the Governor had confirmed that the PSC could proceed. He acknowledged that there was a different procedure to be followed under Regulation 50 when dismissal was warranted.
84. The Claimant had been given 7 days within which to respond and he had provided his response on October 7, 2009 which was later than the time allowed. The Witness testified that the Claimant had been served a complaint and a charge but he could not recall having seen the complaint. He testified further that the Claimant had been invited to a hearing and he had made certain representations and given certain information. The PSC had decided to stop the hearing to hear from Mr. Boe at ASSI as to whether the Claimant had complied with certain requirements. Even though the PSC had wanted to speak to Mr. Boe, ASSI had not made him available. The PSC had

felt that Mr. Boe should have come so that the Claimant could have challenged him but that had not happened.

85. The Witness testified further that not only did the Claimant not see Mr. Boe but none of the responses received from ASSI had come from Mr. Boe. No representative from ASSI had come so a telephone call had been scheduled to allow the Claimant to speak to ASSI. Several teleconferences had to be rescheduled as ASSI was of the view that it should not have to report to the PSC but only to the Governor. A teleconference was eventually held on February 26, 2010 and the Claimant was present on that occasion. The Witness had asked the Claimant about why he did not have his legal representative and the Claimant had responded that it was alright. The PSC had not advised the Claimant of his right to have legal Counsel and that is why the Witness had asked as he knew that ASSI would have had their Legal Advisor.
86. The Witness stated that the gist of that teleconference was whether the Claimant had completed the activities that he should have; whether he had in fact complied with what he said that he should have. ASSI asked for information on the response that the Claimant had provided and the PSC had promised to send it. The PSC felt that, in all fairness, the Claimant should have met his accuser who was Mr. Boe but who was not present at the teleconference. The PSC had eventually found there was misconduct although the Claimant had not got a chance to confront his accuser. Further, he said that he knew that when the PSC had proceeded under Regulation 48 they knew that the sanctions available were limited.
87. The Witness denied the suggestions put to him that the PSC had no basis to bring disciplinary action against the Claimant. He acknowledged that the Claimant had raised the issue of his lack of access to records that would have allowed him to rebut allegations against him but he did not agree that the lack of access had inhibited the Claimant. He also acknowledged that the PSC had not offered any assistance in this regard.

#### **The Claimant's Submissions**

88. Counsel for the Claimant filed written submissions in this matter on June 28, 2012. He challenged the disciplinary hearing that was conducted on the basis that it was irregular and unfair. He submitted that (a) the Claimant had never been informed about any specific allegation of misconduct; that (b) the hearing had been held without any investigation leading to the charge of

misconduct although this was recommended by the Governor's Commission of Inquiry; that (c) the Claimant had been deprived of his right to confront the witnesses; and (d) that the Claimant had been denied a fair opportunity to be heard.

89. Counsel advanced the argument that the Claimant had not been allowed the opportunity to confront the witness from ASSI whose "testimony" against him and upon whom the PSC relied in making its recommendations that led to the Claimant's dismissal. He relies on the position advanced by the PSC, when presenting its findings to the Governor, that the Claimant should have been given an opportunity "to interface with ASSI regarding the specific issues". He deemed the brief "teleconference" wherein ASSI requested that a document be forwarded as inadequate.
90. Counsel further submitted that, during the actual disciplinary hearing, ASSI had denied the Claimant any opportunity to "interface" with the Aerodrome Inspector. As a result, the Claimant had not been able to challenge the information submitted by ASSI and, subsequently, relied upon by the PSC in making its determination to terminate the Claimant's employment. He submitted further that, even the PSC itself had been denied the opportunity to interface with the Aerodrome Inspector and had, as a result, been confined to interacting only with ASSI's Caribbean Manager and its Legal Advisor.
91. Counsel for the Claimant has identified a number of what he refers to as "undisputed facts" which came out during the hearing. Specifically, he identified the following:
  - (i) That the Claimant had never been given any specifics of his alleged misconduct. The letter of September 21, 2009, informing him that a representation had been made to the PSC that he had breached General Order 301 (1), although accompanied by several attachments, had not linked the alleged breach with the attachments.
  - (ii) The inquiry had been conducted pursuant to the provisions of Regulation 48 of the Public Service Commission Regulation rather than pursuant to the provisions of Regulation 50. The former Regulation did not allow for dismissal for misconduct while the latter Regulation did. The PSC had, accordingly, proceeded under the wrong section of the Regulation and the Governor had accepted the PSC's recommendation that proceedings be conducted under Regulation 48.

- (iii) The Claimant had not had a chance to interface with ASSI. The PSC had felt that the Claimant should have been allowed to face Mr. Boe but that had not happen. Not only had the Claimant not been given a chance to speak with or confront Mr. Boe but none of the responses that came from ASSI had come from Mr. Boe.
- (iv) The Claimant had not been given an opportunity to confront those who had made allegations of misconduct against him.
92. Mr. Symister submitted that, legally, the Claimant was entitled to have a judicial review of the decision of the PSC. Judicial review was available where a decision making body had exceeded its powers, committed an error in law, committed a breach of natural justice, reached a decision which no reasonable tribunal could have reached or had abused its powers. In the instant case, he submitted that the PSC had committed an error in law and had committed a breach of natural justice and the Governor had reached a decision which no reasonable tribunal could have reached.
93. In support of his submission, Counsel relied on the classification adopted by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service*<sup>8</sup>. Lord Diplock had conveniently classified under three heads the grounds upon which administrative actions could be subject to control by judicial review. He identified these as “illegality”, “irrationality” and “procedural impropriety”.
94. Counsel, quoting Lord Brightman in *Chief Constable of the North Wales Police v Evans*<sup>9</sup> reiterated that judicial review was “not an appeal from a decision but a review of the manner in which the decision was made”. He urged the Court to apply this principle to the instant case as the way in which the decision had been made was “indeed troubling”. The Claimant, he submitted, had been terminated without being given due process of law as guaranteed by the Constitution. That decision had been illegal, irrational and riddled with procedural impropriety and should be reversed.
95. On the issue of procedural impropriety, Mr. Symister submitted that the Claimant had not been given any particulars of the charges against him. He pointed out that the Permanent Secretary in

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<sup>8</sup> [1985] AC 374.

<sup>9</sup> [1982] 3 All ER 141 at 155



the Ministry of Communication & Works had written to the PSC on three occasions, seeking disciplinary action against the Claimant. He noted that, on one occasion, the PSC had requested the Permanent Secretary in the Ministry of Communication & Works to notify the Claimant of the charges against him. That was never done, as confirmed by both Mr. Lynch's evidence and the records themselves.

96. Counsel referred to the Trinidad and Tobago case *In the Application of Krishna Rampersadsingh*<sup>10</sup> where the Court had reiterated the principle that "...*fundamental fairness demands that [the Applicant] be told, with sufficient particulars, of the allegations against him, of the persons making them and of any investigations conducted*". He submitted that the Claimant here had never been given particulars, or any sufficient particulars, of the allegations being made against him. Additionally, in giving evidence, Mr. Lynch had testified that it had been pointed out by the PSC that it (the PSC) could not have drafted the charges and then adjudicated on them. Counsel submitted that this failure to provide particulars of the allegations had violated the principle of natural justice.
97. Mr. Symister submitted that the letter, sent to the Claimant by the PSC advising of intended action, had been accompanied by a number of documents. He opined that the Defendants would be relying on that letter and the accompanying documents to bolster their position that the Claimant had been provided with details of the charges against him. He urged the Court to reject this notion. He submitted further that procedural fairness required that the Claimant be given a fair hearing, which dictated that he should be informed of the allegations against him; be given an opportunity to meet the allegations and, if there is a hearing, he should have been informed of his right to be assisted by legal counsel. These principles were fundamental particularly in circumstances where the Claimant was likely to be deprived of an office.
98. On the issue of the Claimant's right to respond and make representations, Counsel submitted that the Claimant had been deprived of that right even though the PSC had, in fact, provided him with an opportunity to respond. He pointed out that, the Claimant had testified that he had been unable to fully respond in writing as he had been denied access to the airport compound, to documents kept there as well as to the e-mail system. That denial, he submitted, had prejudiced the Claimant

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<sup>10</sup> High Court Cv637 of 2004

before the PSC and that had not been challenged by the Defendants. He submitted further that, the Claimant had been restricted in his response as the PSC had warned him about not being too lengthy in his response to ASSI's statement. That must have had a chilling response on the Claimant he opined.

99. On the issue of the Claimant's right to a fair hearing, Counsel submitted that he had been denied this. While accepting that there were instances when a hearing, utilising written statements, could be deemed to be fair, he drew attention to the case of *The Commissioner of Police v Charles Mitchell*<sup>11</sup>. There, Chief Justice de la Bastide had held that, unless there were clear words excluding the right to an oral hearing, then it was expected that the Commission would have afforded the officer an oral hearing before the matter was determined. To have done otherwise would be to act unfairly towards the officer. On this strength of this case, Mr. Symister submitted that Section 48 of the Public Service Commission Act did not exclude the right to an oral hearing. The Claimant had therefore been denied a fair hearing when the matter proceeded on written statements rather than orally.
100. On the issue of the Claimant's right to participate fully in the hearing, Mr. Symister submitted that he had been so denied and thereby the principles of natural justice had been violated. He placed reliance for this position on the evidence of Mr. Lynch who had testified that the PSC had concluded that, in fairness to the Claimant, they needed to hear from Mr. Boe. Although a teleconference had been arranged, Counsel submitted that, based on the evidence of Mr. Lynch, no real discussion had taken place at the arranged teleconference. ASSI, he submitted further, had merely requested to see the Claimant's response to the letter received from the Permanent Secretary. ASSI had then responded to that statement and the Claimant, in turn, was asked to respond to ASSI's response. Mr. Symister submitted that participation was illusory as the Claimant had not been provided with a real opportunity to confront the person making the allegations. He submitted that Mr. Boe was the relevant Aerodrome Inspector at the airport and it was reasonable to conclude that it was Mr. Boe who would have made the allegations about the incomplete reports. In view of this, ASSI's response did not even remotely suggest that Mr. Boe had been involved in the response.

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<sup>11</sup> Civil Appeal No. 1 of 1992 (Trinidad)

101. In respect of the Claimant's right to legal representation, Mr. Symister submitted that the Claimant had been denied that right at the hearing. That had been established, he said, by the PSC's failure to inform the Claimant that he had the right to be represented at the hearing. He referred to Mr. Lynch's evidence where he had testified that it was during the teleconference with ASSI that legal representation for the Claimant had been mentioned because ASSI's Legal Advisor had been present.
102. He submitted further that the PSC should have informed the Claimant of his right to be legally represented particularly in light of the facts and circumstances of the case. The Claimant, he submitted, had been given 7 days within which to respond in writing to the letter, with the attachments, alleging a violation of General Order 301 (1). This had come after the Claimant had been sent on "unrequested vacation" and subsequent to prior requests for disciplinary action to be taken against him. This was in addition to him being denied access to information that would have aided his defence to the allegations. All of these factors necessitated that the Claimant should have had legal representation.
103. On the issue of irrationality, Mr. Symister submitted that, once the Governor had accepted the PSC's recommendation that the hearing should have proceeded in accordance with the Section 48 procedures then he was bound by that decision. He could not, therefore, treat the Claimant's alleged misconduct as one warranting dismissal. That decision to dismiss the Claimant was irrational. He submitted that the authorities supported a reversal of a decision which was found to be irrational. On this, he relied on the position taken by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* where he had said that an administrative decision was irrational where it was "*so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it*".
104. Mr. Symister conceded that there were instances where the dismissal of a civil servant was justified. He referred to *David Lashley & Partners Inc. v Bayley*<sup>12</sup> where the Court of Appeal in Barbados had found that, as a general principle, a civil servant should not be dismissed "*if there is an isolated instance of neglect unless attended by serious consequences*". However, he submitted that no neglect had been established against the Claimant during the hearing. The evidence had

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<sup>12</sup> (1992) 44 WIR 44

pointed instead to allegations that had not been established and procedures that remained questionable.

105. Mr. Symister pointed out that judicial review was discretionary. He submitted that Certiorari was a discretionary remedy and may not be granted even where the Claimant may have made a strong case on the merits. He referred, in this regard, to *R v (Bibi) v Newham London Borough Councils*<sup>13</sup> where it had been indicated that the court had two functions: assessing the legality of actions by administrators and, if it finds unlawfulness on the administrators' part, deciding what [remedy] it should give. He submitted that the exercise of a discretion should take into consideration (1) the nature and importance of the law in the challenged jurisdiction; (2) the conduct of the Claimant; and (3) the effect on administration of granting the remedy.
106. Mr. Symister advanced the argument that, should the Court find that the reinstatement of the Claimant was not warranted then he should be compensated as if he had never been dismissed. He concluded by urging the Court to find for the Claimant and to grant the remedies sought.

#### **The Defendants' Submissions**

107. In their written submissions, the Defendants identified a number of undisputed facts. These included (i) that the Claimant had received the letter of September 21, 2009 from the Acting Permanent Secretary of the Department of Administration with attached written representations; (ii) he had voluntarily attended the teleconference of February 26, 2010 without legal representation; (iii) he had been asked whether he had any questions for the representative from ASSI; (iv) he had been given an opportunity and, had submitted written response to all submissions presented to the PSC against him; (v) Bjorn Boe was an Aerodrome inspector who worked on behalf of ASSI; and (vi) the purpose of the teleconference was to ascertain whether the SMS document confirmed whether the Claimant had complied with the Inspector's Report of March 2009.
108. It was submitted that the Claimant had received notice of the allegations that had been made against him by the Permanent Secretary Ministry of Communications & Works. Further, Mr. Boe had not been the Claimant's "accuser". He, the Claimant had not complied with deadlines set by

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<sup>13</sup> [2002] 1 WLR 237

ASSI for the submissions of the Aerodrome Manual and the Safety Management Systems (SMS) documents for the renewal of the Airport Certificate.

109. Legally, the Defendants contended that, (i) the conducting of investigations is not a prerequisite for the commencement of an inquiry by the PSC under the Public Service Commission Act or Regulations made thereunder; (ii) the Claimant had not been prejudiced by not being given a subsequent opportunity to cross-examine ASSI representatives and (iii) the recommendations and decisions of the PSC and the Governor were reasonable in the circumstances.
110. Counsel for the Defendants, like Counsel for the Claimant before her, relied on the statement of Lord Diplock in *Council of Civil Service Unions and Others*<sup>14</sup> as the basis for the exercise of judicial review. Relying also on the statement of Lord Brightman in *Chief Constable of the North Wales Police v Evans* that judicial review was not an appeal from a decision but rather a review of the manner in which a decision was made, she submitted that it was not for the Court to say whether the recommendations and decisions of the PSC and the Governor were right or wrong but whether the process followed was lawful, reasonable and just.
111. Counsel submitted that the Governor had been given the requisite authority under both Sections 4(4) and 6(1) (b) of the Montserrat Constitution to dismiss any person from their Public Service appointments and he was not obliged to follow the PSC's recommendations, provided that both legal procedures and principles of natural justice had been observed. This, she submitted further, was to be balanced against the provisions of Section 4(1) of the Public Service Commission Act<sup>15</sup> whereby the Governor was mandated to receiving the recommendations of the PSC before making a decision whether to dismiss a person from his duties as a public servant.
112. On the issue of the need to have conducted an investigation prior to commencing the PSC inquiry, Ms. Skerritt submitted that, under the provisions of Section 38 (1) of the Public Service Commission Regulations, the PSC was authorised to commence disciplinary proceedings based on reports provided by the Permanent Secretary of a Ministry. Implicit in this, she said, was that such disciplinary proceedings could be conducted without the need for investigations. She submitted that all that was required was for the PSC to determine, from the reports, whether it

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<sup>14</sup> [1984] 3 All ER 935 at 949-951

<sup>15</sup> Cap 1.06

would be appropriate to inquire into the matter reported for the purposes of making recommendations for disciplinary actions and the sanctions to be imposed, if appropriate.

113. She submitted further that public bodies were entitled to proceed with their recommendations or decisions, based on representations made by parties in the matter if they deemed such information as being sufficient in the circumstances. She relied on pronouncements emanating from Owen, J in *R (on the application of Anglian Water Services Limited) v Environment Agency*<sup>16</sup> in support of this submission.
114. Counsel addressed the issue raised by the Claimant who had complained that the recommendations of the Governor's Commissioner had not been followed prior to the commencement of the proceedings by the PSC. She explained that the recommendations of the Governor's Commission related to a matter entirely different from that upon which the PSC proceeded. The Governor's Commission had addressed the state of management of the airport while the PSC's concern was the failure by the Claimant to do what was necessary so that the Aerodrome Certificate could have been renewed. She submitted on this point that the recommendations of the Governor's Commission were merely suggestive and neither the Governor nor the PSC were obliged to follow them. On this basis, the PSC had proceeded lawfully with its inquiry into allegations against the Claimant.
115. In respect of the allegation of procedural impropriety, Ms. Skerritt submitted that the absence of an opportunity to cross-examine witnesses may not be a material factor if it could be shown that no prejudice had been caused to the Claimant. In this regard, she relied on learning in the text **Judicial Review of Administrative Actions**<sup>17</sup> in support of that submission. She pointed to the fact of ASSI's representatives being available to address any concerns and answer any concerns that the Claimant might have had. The ASSI representatives, she submitted further, were knowledgeable on the state of affairs as it related to the Claimant's actions in his effort to have the airport licence renewed.
116. Ms. Skerritt advanced the argument that Mr. Boe had not been the Claimant's "accuser". He was, she said, acting as a representative of ASSI so that ASSI could properly be deemed as the

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<sup>16</sup> [2003] EWHC (Admin)

<sup>17</sup> De Smith, Woolf and Jowell (5<sup>th</sup> Edition)

complainant. She pointed out that the Claimant had, in fact, been provided with the opportunity to cross-examine ASSI's representatives during the teleconference held on February 26, 2010 but he had opted not to do so. That teleconference had been called to discern whether the SMS documents, forwarded by the Claimant to ASSI, confirmed that he had complied with the Inspector's Report of March 2009. ASSI, she said, had already indicated that the SMS had not been processed due to late submissions. Counsel submitted that any further cross-examination of the ASSI representative would not have elicited a different response.

117. Ms. Skeritt observed that the representations that had been made by ASSI and relied on by the PSC had been submitted in writing and provided to the Claimant. The Claimant was then given the opportunity to respond and defend himself and he had done so.
118. She also submitted that, contrary to the assertions of the Claimant, the allegations against him had been communicated by letter dated September 21, 2009 wherein General Order 301 had been identified as the one that had been violated. The attachments which accompanied that letter provided supporting basis for the allegations. That letter, she added also included the reasons that had been sent out in an earlier Memorandum of September 4, 2009, save and except for subparagraph 2 , which would have been captured in subparagraph 1. Sub-paragraph 2 had stated that *"The Government of Montserrat and the United Kingdom were both exposed to reputational harm and to an unacceptable level of risk of legal liability as a result of your failure to ensure the safety of airport users"*.
119. Counsel for the Defendants submitted that the Claimant had been provided with all the documentation that had been considered by the PSC and he had been given an opportunity to provide a written response and to discuss those responses. She refuted the submissions advanced on behalf of the Claimant that he had not been allowed a meaningful opportunity to make representations to the Governor or at all. Any procedural impropriety, if so found, would have been insufficient to vitiate the decision of the Governor.
120. On the issue of whether the recommendations of the PSC were capricious, Ms. Skeritt referred to the test outlined to by Lord Greene, MR in *Associated Provincial Picture Houses Ltd. v*

*Wednesbury Corporation*<sup>18</sup>. In applying the test there set out, the Court was urged to consider whether the PSC had taken relevant or irrelevant considerations into account, and whether the conclusion reached was one that a reasonable authority would have come to based on the relevant considerations.

121. She then highlighted the several considerations that the PSC had used. Those had included the Claimant's failure to ensure the renewal of the airport certificate within the several stipulated deadlines given by ASSI; his response of October 7, 2009 to the allegations made by the Permanent Secretary in the Ministry of Communications and Works; the discussion at the teleconference held on February 26, 2010; the written comments from ASSI's legal representatives, the non-completion of RNR's; the inspector's reports detailing deficiencies; non-delivery of progress reports on SMS implementation; and the Claimant's response of April 12, 2010. She submitted that those documents and discussions had all been relevant in the PSC's recommendations to have the Claimant removed from the post of Airport Manager. Those recommendations, she concluded, had not been acted upon so that the Claimant could not have had any basis for complaining.
122. Insofar as the Claimant had alleged that the Governor had acted unreasonably in dismissing him from the Public Service, Counsel submitted that the Governor, under the provisions of the Montserrat Constitution had not been obliged to follow the recommendations made by the PSC. He was at liberty to make a decision unlike that which had been recommended to him.
123. She explained that while the Governor had authorised the PSC to carry out its inquiry pursuant to Regulation 48 of the Public Service Commission Regulations, the Governor had acted upon information revealed during that inquiry and presented to him afterwards in making the decision to dismiss the Claimant. The Governor, she submitted had the power to so act under the Constitution and there was no legal authority prohibiting him from making the decision that he had. His decision was a logical and justified one based on the considerations before him and, accordingly, should not be quashed.

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<sup>18</sup> [1948] 1 KB 223 at pages 233 to 234



124. As to the specific remedies sought by the Claimant, Ms. Skerrit submitted that, the PSC did not have any authority to make any decision in respect of his dismissal. All that it could do, and had done, was to make recommendations. Accordingly, the Court was urged to disregard those aspects of the Claimant's prayers seeking declarations that the PSC's decision was *ultra vires*, null and void and of no effect as the PSC had not made any decision to dismiss the Claimant.
125. She concluded by urging the Court not to reinstate the Claimant as reinstatement would not have been an appropriate relief. She pointed to the breakdown of the relationship between the Claimant, the Deputy Governor and the Permanent Secretary in the Ministry of Communications and Works. Additionally, she submitted, ASSI had expressed its loss of confidence in the competence and ability of the Claimant to act as Airport Manager. A decision to reinstate the Claimant could possibly, she concluded, be a usurpation of the legal authority of the Governor.
126. I now turn to a consideration of the several issues previously identified as requiring the Court's determination.

***(i) Whether the PSC erred when it commenced a disciplinary hearing against the Claimant without any prior investigation into the conduct of the Claimant being undertaken***

127. The requirement for the holding of an investigation into the conduct of the Claimant had arisen as a result of the Commission of Inquiry into the management of Gerald's Airport set up by the Governor on April 28, 2008. In item 4 in the Final Observations and Recommendations portion of the Report, the Commissioners had recommended that -

*"An officer above the grade of the Airport Manager be appointed to investigate allegations of misconduct made against the Airport Manager. The investigating officer should obtain the necessary statements, reports and other documents with a view to referring the matter to the Public Service Commission for a determination of whether disciplinary proceedings should be instituted against the Airport Manager."*

128. The undisputed evidence is that the Commission had been appointed by the Governor. The findings and the recommendations emanating from that Commission would have been intended for the Governor to act upon in whatever way he deemed appropriate. While it might have been

desirable for its recommendations to have been followed, the PSC was, not in my view, duty bound or legally required to act on those recommendations. The Commissioners themselves in their Report had noted that the task of the Commission was “investigative in nature”<sup>19</sup>. Having conducted their investigations, they made their recommendations based on their findings. The decision of the PSC to proceed with an inquiry prior to the conduct of any investigation was not one about which the Claimant could legally complain.

129. Regulation 38 (1) of the Public Service Regulations provided that –

*“The Commission ...shall discharge its functions in regard to disciplinary proceedings against officers in light of reports from Permanent Secretaries and Heads of Departments.”*

130. The PSC was not legally obligated to follow the recommendations of the Governor’s Commission. Adopting the words used by Owen, J in **R (on the application of Anglian Water Services Limited) v Environment Agency**<sup>20</sup> the PSC was “not under any obligation to seek independent advice” which is what an investigator, acting on the recommendations from the Governor’s Commission would have been producing. The PSC, acting on the legitimate authority of the Public Service Regulations, was entitled to make its own inquiries and conduct its own investigations, consider representations and then make its own recommendations.

*(ii) Whether the findings of the PSC that led to the dismissal of the Claimant were arbitrary and capricious in that they were not supported by the evidence elicited during the disciplinary proceedings.*

131. In conducting its inquiry into the Claimant’s conduct, the PSC, in my view, considered matters that it deemed appropriate and relevant in the circumstances. The PSC was faced with the allegations, submitted by the Permanent Secretary, Human Resources Management, that the Claimant had contravened Paragraph 301 (1) of the General Orders for the Public Service.

132. General Order 301 (1), falling under the heading “Conduct of Public Officers”, provided that –

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<sup>19</sup> Page 4 “The Sittings and Conduct of the Inquiry

<sup>20</sup> [2003] EWHC (Admin)

*"An officer shall discharge the usual duties of the office to which he is appointed and any other reasonable duties that the Governor, a Permanent Secretary or Head of Department may, at any time, call upon him to discharge".*

133. That Memo of September 4, 2009, along with the accompanying documents had set out in great details the several areas where the Claimant had been found to have been deficient or delinquent and had failed to discharge his duties. In that Memo, the Permanent Secretary had stated, inter alia, that –

*"The key purpose of the job of Airport Manager is to manage and control the Airport operations and to provide aviation advice to the Government of Montserrat in accordance with Civil Aviation requirements so as to ensure the safe, orderly, expeditious and economical movement of aircraft and airport operations in Montserrat".*

134. The Memo went on to give specific details of instances where the Claimant had fallen short in his responsibilities. He had blatantly failed to discharge his duties in the manner expected of him. The problems were recurrent and long standing, and, due to the peculiar nature of the facility being dealt with (to wit, the country's lone airport), there was a pressing need to address what had obviously been seen as a rapidly deteriorating situation. ASSI, the international regulatory body had seen it fit to send a number of correspondences in respect of issues which had remained outstanding for extra-ordinarily long periods of time. Taken together, those documents (the letter, the Memo and the accompanying documents) presented a sufficiently comprehensive indication of the allegations that were being made against the Claimant. The Claimant could not have been in any doubt about what was being alleged.

135. The situation was one which required quick and decisive action. The operational safety of the Airport facility was being seriously compromised. That was directly attributable to the Claimant's delay in ensuring compliance with critical requirements issue. This was not a matter that had arisen overnight. There was evidence that there had been extensive communication passing between the Claimant and ASSI.

136. The evidence is that the PSC deliberated long and hard about its decision to make the recommendations. The evidence from the Witnesses for the Defendants, which I accept, is that several meetings were held by the PSC at which the Claimant was in attendance. He was informed about complaints that had been made by ASSI. The Claimant was allowed very reasonable opportunities to participate in and to provide his feedback and input into the deliberations that were ongoing.

137. The Permanent Secretary was clear when he wrote –

*"In light of the foregoing and the repeated failure by the Airport Manager to address the requirements for the Airport certification by ASSI, I am recommending the transfer and disciplinary action on the part of [the Claimant]."*

138. In the *Associated Provincial Picture Houses Ltd*<sup>21</sup>. case, Lord Greene, MR had stated that –

*"The court is entitled to investigate the action of the local authority with a view to seeing whether they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may still be possible to say that, although the local authority kept within the four corners of the matter which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever come to it."*

139. Here, it cannot be said, with any type of conviction, that the PSC had not addressed its mind to matters that it ought properly to have considered before arriving at its decision. I have no difficulty in finding that the PSC did consider those matters which it deemed appropriate before making its recommendation. The evidence is that the several correspondences emanating from ASSI were considered. Further, the Claimant was provided with the details of the several allegations being made against him and invited to provide his response. The Claimant's response of October 7, 2009<sup>22</sup> sought to set out his position in relation to the said allegations. That was an occasion afforded to the Claimant to raise any issues which, in his view, would correct any misconceptions

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<sup>21</sup> [1947] 2 All ER 680 at

<sup>22</sup> Airport Manager's Response to the Public Service Commission

or any erroneously held positions on the part of the PSC. He was also provided with the comments coming from ASSI and again invited to provide his response. He did provide that response.

140. During the hearing, I had the opportunity to observe the Claimant while he gave his evidence. I was not in any doubt as to his intelligence. The Claimant provided reasoned and intelligent written responses to the allegations and comments made about him and his handling of matters at the airport. He would have been well aware of the need to engage the services of a legal representative if he felt that he could not adequately deal with the issues. I accept the evidence that, when asked by Mr. Lynch whether he needed to have a Lawyer present that he responded that it was alright. I am therefore unable to find that the PSC's approach in making its findings were arbitrary or capricious as is being alleged by the Claimant.

*(iii) Whether the Claimant was denied due process when he was not afforded the opportunity to confront the witness for ASSI on whose evidence the PSC relied in recommending his dismissal.*

141. The evidence of the Claimant and that of Mr. Lynch for the Defendants is that the Claimant had not been afforded an opportunity to "confront" Bjoern Boe, the Aerodrome Inspector who had done inspections at the airport and who had written adversely about the Claimant. The teleconference which had been intended to allow for that "confrontation" had not materialized. The evidence of Mr. Lynch, however, was that the teleconference was primarily intended to confirm whether or not the Claimant had submitted the required SMS document to ASSI in order to comply with the Inspector's Report of March 2009. That he said was supposed to have been the "gist" of the teleconference.
142. Admittedly, the Claimant did not get to speak with, or to use his expressions, "confront" or "interface" with Bjoern Boe. However, I accept the submission of Counsel for the Defendants that Bjoern Boe was but a representative of ASSI, the regulatory body. During the aborted teleconference on February 26, 2010, ASSI, as an entity was represented by both Margaret Wilson (correctly, Captain Margaret Wilson) and Mike Butler.

143. The Claimant was at liberty to interface with those representatives of ASSI who were present. It was not, in my view, absolutely essential for the Claimant to confront or "interface" with Bjoern Boe personally in order to challenge the position being taken by ASSI. The evidence is that ASSI's concerns had not arisen in relation to a single matter. The e-mail correspondences passing between the Claimant and ASSI's representatives had taken place over several months and had dealt with issues including the late submissions of reports (RNR's), the non-completion of the surveys, the failure to update the Aerodrome Manual and the renewal of the airport certificates. The evidence of the Claimant, corroborated by that of Joseph Lynch, is that he opted not to ask the ASSI representatives any questions. I have no doubts that both Captain Wilson and Mike Butler could have adequately responded to any concerns that the Claimant might have raised had he utilized the opportunity to do so. I do not consider that the Claimant was denied due process by virtue of his inability to "confront" or "interface" with Bjoern Boe personally.

*(iv) Whether the Claimant's removal from office as Airport Manager by the Governor on the recommendation of the PSC was done in breach of the rules of natural justice and without just cause.*

144. The Claimant has taken issue with the adoption by the Governor of a Regulation 50 decision based on the Regulation 48 procedure. Regulation 48 (1) of the Public Service Commission Regulation deals with proceedings for misconduct not warranting dismissal of officers. It provides that –

*"48 (1) Where –*

*(a) it is represented to the Commission that an officer has been guilty of misconduct; and*

*(b) the Commission is of the opinion that the misconduct alleged is not so serious as to warrant proceedings with a view to dismissal;*

*The Commission may cause an inquiry to be made into the matter in such manner as it may think proper, and the officer shall be entitled to know the whole case made against him, and shall be given an adequate opportunity of making his defence.*

*(2) If, after inquiry, the Commission is of the opinion that the alleged misconduct is proved it may recommend to the Governor such punishment other than dismissal as may seem just."*

145. The Claimant's contention is that the Governor, having accepted the recommendation from the PSC to proceed in accordance with the provisions of Regulation 48, is deemed to be bound by those provisions. By extension, the Claimant is contending that, no matter how serious his misconduct was ultimately found to be, the Governor would have not have been able to dismiss him and must impose a punishment less than dismissal. I do not agree with this submission. I am more inclined towards the position, advanced by the Defendants, that the Governor, in accordance with the provisions of the Constitution<sup>23</sup>, is not obliged to follow the recommendations of the PSC. Section 6 (1) (b) of the Constitution bestows upon the Governor the power to -

*"dismiss any person...or take such other disciplinary action...as the Governor may think fit."*

146. Any insistence that the Governor must act on the PSC's recommendations would amount to a usurpation of his constitutionally bestowed powers and authority. Those recommendations had been made after the PSC had conducted its own inquiry and had allowed the Claimant an opportunity to make representations in defence of the allegations made against him. The Governor, in his wisdom, acted reasonably based on the recommendations and the facts that had been presented to him. I am unable to find any fault with that decision and I can find no proper basis for concluding that the manner of the Claimant's dismissal as Airport Manager breached rules of natural justice.

*(v) Whether the Claimant is entitled to compensation/damages for loss of earnings including emoluments and benefits and for inconvenience and distress suffered.*

*(vi) Whether the Defendants should pay to the Claimant exemplary damages for its oppressive and arbitrary action.*

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<sup>23</sup> The Constitution of Montserrat, Chapter 1.01

147. In view of the conclusions that I have reached in respects of the abovementioned issues (i) to (iv), I do not consider it necessary to consider the issues in items (v) and (vi).

***CONCLUSION***

148. The Order of the Court, therefore, is as follows:

(1) The Claimant's claim for Judicial Review is dismissed

(2) The Claimant is to pay the Defendants' prescribed costs in accordance with the provisions of the Civil Procedure Rules.

149. I am particularly aware that the decision in this matter has come after an extra-ordinarily long delay. This, undoubtedly, must have caused inconvenience to the Parties and Counsel concerned. I apologise sincerely for the said delay which had been caused, primarily, by the intervention of my own personal circumstances.

150. I wish to extend my appreciation to the Lawyers for their industry, research and the general assistance provided in respect of the conduct of this matter as well as the patience displayed while awaiting this decision.

**Septimus A. Rhudd**

**High Court Judge (Acting)**