EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANTIGUA AND BARBUDA

ANUHCVAP2012/0001

BETWEEN:

GARY NELSON

Appellant

and

[1] THE ATTORNEY GENERAL
[2] COLIN DERRICK, MINISTER OF JUSTICE
[3] THE POLICE SERVICE COMMISSION

Respondents

Before:

The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mr. Don Mitchell	Justice of Appeal [Ag.]

Appearances:

Mr. Dane Hamilton, QC, with him, Mr. D. Raimon Hamilton Jr. for the Appellant
Mrs. Karen de Freitas-Rait for the first and second Respondents
Sir Gerald Watt, QC, with him, Dr. David Dorsett and Mr. Jared Hewitt for the third Respondent

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2013: February 28;
2014: May 26.

Civil appeal – Contract – Antigua and Barbuda Constitution Order 1981 – Section 12(1) of the Police Act – Police Service Commission – Dismissal of Commissioner of Police on contract during probationary period – Judicial Review – Whether trial judge erred in concluding that there was a binding contract where the contract was an unexecuted contract – Whether trial judge erred in concluding that section 12(1) of the Police Act was inapplicable – Whether trial judge erred in concluding that the Police Service Commission acted lawfully – Whether trial judge was correct in finding that there was no basis to conclude that the Commission acted irrationally or unreasonably in dismissing the Commissioner – Whether trial judge erred in concluding that though the Commission was

under an obligation to observe the rules of procedural fairness that duty was not breached – Whether Commissioner had a legitimate expectation to be employed for a period of two years – Whether the learned trial judge erred in her award of costs

The appellant was the former Commissioner of Police of Antigua and Barbuda. The post was offered to the appellant on a two year contract with a specific clause contained therein which stated that the Commissioner's post was subject to a successful probationary period of six months. This clause was included in all drafts of the contract sent to the appellant, who, at the time of receiving these drafts, resided in Canada. The appellant objected to this clause being included in the contract. However, the Government of Antigua and Barbuda ("Government") maintained that this clause was non-negotiable. Despite the Government's position in relation to the probation period, the appellant travelled to Antigua and Barbuda to take up the position as Commissioner of Police.

On 29th February 2008, the appellant was sworn into the office of Commissioner of Police of Antigua and Barbuda and commenced duties the following day even though no formal contract had been signed. On 1st April 2008, he received his letter of appointment from the Chief Establishment Officer. A few months after he had taken up his appointment the appellant received an unexecuted contract for his signature which contained the similar clause which dealt with the six month probation period. The appellant again objected to the inclusion of this clause. By that time the Government was dissatisfied with the appellant's performance and in this regard the Minister of Justice and the Chairman of the Commission had held separate meetings with the appellant. Subsequently, the Police Service Commission ("Commission"), by letter dated 28th August 2008, terminated the appellant's services before the probationary period had expired on the basis of his alleged unsatisfactory performance of duties.

The appellant applied for judicial review of this decision taken by the Commission. He alleged that the Commission and the Minister of Justice had both acted irrationally and unlawfully in relation to the termination of his appointment. Further, he complained that he had a legitimate expectation to be employed for a period of two years and sought an order to this effect. He sought an order that he had a legitimate expectation to a fair hearing and also sought aggravated and exemplary damages together with costs.

The learned trial judge held that the appellant was employed on contract for a period of two years subject to a probationary period of six months. As such he could not have had a legitimate expectation to be employed for a period of two years. The judge held that there was no basis to conclude that the Commission acted unlawfully and or irrationally in terminating the appellant's services. Further, learned trial judge held that the Commission was under an obligation to observe the rules of procedural fairness. This duty was discharged by the meetings held with the appellant; accordingly the learned trial judge dismissed the appellant's claim and held that he was not entitled to any of the reliefs sought. An award of costs was made against the appellant.

The appellant appealed the decision of the learned trial judge on a number of grounds including that (1) the judge erred in concluding that there was a concluded contract between him and the Government of Antigua and Barbuda; (2) the judge erred in concluding that section 12(1) of the Police Act was inapplicable to the case; (3) the judge erred in concluding that his dismissal was lawful; (4) the judge erred in concluding that the Commission did not act irrationally or unreasonably; (5) the judge erred in concluding that he was entitled to procedural fairness but that in any event in the circumstances of the case it was not breached; and (6) the judge erred in concluding that he had no legitimate expectation to be employed for a period of two years.

Held: dismissing the appeal; awarding costs to the respondents of two thirds of the costs in the court below; and dismissing the Commission's cross-appeal, that:

1. A court, in determining whether or not a binding contract exists, and if so, upon what terms can consider what was communicated between the parties by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. A court may then be more willing to infer that the parties have reached a binding contract where one party to the continuing negotiations renders partial performance. The learned trial judge had the evidence of the appellant's partial performance of some of his obligations under the unexecuted contract, such as his completion of a medical examination. In addition, the appellant had received his stipulated salary under the unexecuted contract and, at the termination of his contract, claimed for the reimbursement of his airfare which was a clause provided for in the unexecuted contract. Thus, it is fair to conclude that, due to the conduct of the appellant and the communication between the parties, there was a binding agreement reached which had as its basis the unexecuted contract.

   RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG (UK Production) [2010] 1 WLR 753 applied.

2. Section 12(1) of the Police Act states that certain police officers shall be on probation during the first two years after their appointment. The appellant was employed on a contract for a period of two years with a clear probation period of six months. It therefore follows, that as a matter of both law and logic, section 12(1) of the Police Act could not have been within the contemplation of the parties as being applicable to the appellant. The parties had clearly contracted out of section 12(1) of the Police Act. This ground of appeal must accordingly fail.

   Section 12(1) of the Police Act, Cap. 330, Revised Laws of Antigua and Barbuda 1992 distinguished.

3. Section 105 of the Antigua and Barbuda Constitution Order 1981 ("Constitution") gives power to the Commission to appoint persons to hold or act in offices in the Police Force and to remove such persons. The section states further that consultation must be done with the Prime Minister before a Commissioner can be appointed. Section 18 of the Interpretation Act states that words in an enactment authorising the appointment of a person to any office shall be deemed also to confer on the authority in whom the power of appointment is vested, the discretion of the authority, to remove that person. Section 105 of the Constitution and section 18 of the Interpretation Act must be read together. The conjoint effect of this gives the Commission the power to remove the appellant after consultation with the Prime Minister. The learned trial judge had overwhelming evidence before her which led her to conclude that the decision to remove the appellant was taken by the Commission. This Court can in no way invalidate her assessment of the facts and evidence in the case and her finding that the appellant's services were terminated by the Commission with the concurrence of the Prime Minister. Therefore, this ground of appeal fails.

   Section 105 of the Antigua and Barbuda Constitution Order 1981 applied; Section 18 of the Interpretation Act, Cap. 224, Revised Laws of Antigua and Barbuda 1992applied; Jada Construction Caribbean Limited v The Landing Limited Saint Lucia, High Court Civil Appeal SLUHCVAP2009/0011 (delivered 8th March 2011, unreported) followed; Chiverton Construction Limited et al v Scrub Island Development Group Limited et al Territory of the British Virgin Islands High Court Civil Appeal BVIHCVAP2009/0028 (delivered 19th September 2011, unreported) followed.

4. It is the law that a person who wishes to successfully challenge a decision on the basis of unreasonableness or irrationally must prove that the decision is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. The reasons for the termination of the appellant's service which the Commission placed before the trial judge could in no way support a complaint of unreasonableness. The appellant's complaint was that he was not given a hearing before his services were terminated. He therefore utilised the wrong basis in seeking to impugn the Commission's decision. His complaint is clearly one of breach of procedural fairness. Consequently, this ground of appeal fails.

   Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 applied; HMB Holdings Ltd v Cabinet of Antigua and Barbuda (2007) 70 WIR 130 followed.

5. A claimant's right to substantive legitimate expectation will only be found to be established when there is a clear and unambiguous representation upon which it was reasonable for him to rely. Then the administration or other public body will

be bound in fairness by the representation. The unexecuted contract clearly provided for the terms and duration of the appellant's contract of employment. The contract was for two years subject to a successful probationary period of six months. The appellant agreed to be bound by this term within the contract. Further, there was no representation made to the appellant, on which he could have relied, separate and apart from what was stated in the contract. In light of this, it is impossible for any substantive legitimate expectation to have arisen in the face of clear legal rights which concern the self-same matter albeit subject to a condition namely the satisfactory completion of the period of probation. This ground of appeal must fail.

6. (Per Michel JA, Mitchell JA; Blenman JA dissenting):

The uncontroverted evidence before the court was that the appellant attended monthly meetings with the Commission and was told at these meetings that there was dissatisfaction with his work. Thus, the appellant was not entitled to be informed of non-existent charges against him and to be given a hearing where he would have had an opportunity to defend himself. The contract specifically spoke to the appellant being employed for a period of two years subject to a successful probationary period of six months. Simply, the Commission was dissatisfied with the appellant's work during the probationary period and acted in accordance with the terms of the contract in terminating the appellant. At no point were they required to afford the appellant any hearing before termination. The application of public law principles cannot, in circumstances where the appellant was on a contract for a period of two years subject to a successful probationary period, bind the Commission to prefer a formal charge against the appellant, conduct a formal hearing to adjudicate upon the charge so preferred and then dismiss him, or be otherwise saddled with a police chief whose record of performance while on probation was clearly unsatisfactory.

R v Secretary of State for the Home Department Ex parte Doody [1994] 1 AC 531 applied.

(Per Blenman JA):

A public officer, whether or not he is on contract or holds office for an indefinite period, is entitled to the benefits of the incidents of being a public officer. As such, removal for cause is only permissible if made pursuant to a decision reached by the Commission at the time of removal. Such a decision can only validly be reached if the Commission at that time determines, in accordance with proper procedure, that reasonable cause exists for the officer's removal. Proper procedure, in relation to persons who are being removed from office for cause, dictates that an officer cannot lawfully be dismissed without first telling him what is alleged against him and hearing his defence or explanation. This rule is

fundamental in cases where deprivation of office is in question as dismissal of individual members of a public service at whim is the negation of equality of treatment. In this regard, the minimum standards of procedural fairness required the Commission to put the formal complaints of his unsatisfactory conduct to the appellant,that is, giving him the particulars of the charge and providing him with a reasonable time frame to respond whether orally or in writing. This was so even though the appellant was an officer on probation.

In this case, there was no evidential basis upon which the trial judge could have concluded that the appellant held monthly meetings with the Commission. The evidence before the judge was that the appellant held meetings with the Chairman of the Commission, Mr. Stephens Winter, as distinct from the Commission. The learned trial judge erred in her conclusions of fact that the appellant held meetings with the Commission. In any event, the minimum standard of justice and fairness require a public body that desires to remove a public officer for cause to give the officer a hearing. It is insufficient to simply assert that meetings were held with the officer. The allegations against him should have been put to him and he ought to have been afforded an opportunity to answer the allegations before being removed. At no time did the Commission put the complaints to the appellant and give him an opportunity to respond. That is fatal. The justice of this case demanded that the appellant receive procedural fairness. Accordingly, the appellant was entitled to judicial review of the decision of the Commission.

Cases considered:
Chief Constable of North Wales Police v Evans [1982] 1 WLR 1155
Dattatreya Panday v The Judicial and Legal Service Commission [2008] UKPC 52
Thomas v Attorney General (1981) 32 WIR 375
Roberts (Kemp) v Attorney General (1994) 52 WIR 273
Ridge v Baldwin and Others [1964] AC 40
Horace Fraser v Judicial and Legal Services Commission et al [2008] UKPC 25
Nicholson v Haldimand-Norfolk Regional Police Commissioners [1979] 1 SCR 311
Jada Construction Caribbean Limited v The Landing Limited Saint Lucia, High Court Civil Appeal SLUHCVAP2009/0011 (delivered 8th March 2011, unreported)
R v Secretary of State for the Home Department Ex parte Doody [1994] 1 AC 531

JUDGMENT

[1] BLENMAN JA: This is an appeal by Mr. Gary Nelson, ("Mr. Nelson") former Commissioner of Police of Antigua and Barbuda, against the judgment of the learned trial judge in which she dismissed a claim for judicial review against the

Attorney General, Mr. Colin Derrick ("Mr. Derrick"), the Minister of Justice and the Police Service Commission ("the Commission"). The learned trial judge also ordered Mr. Nelson to pay the respondents' prescribed costs in accordance with Civil Procedure Rules 2000 ("CPR"). He has also appealed against this latter order.

[2] There is a counter notice of appeal by the Commission seeking to have the costs order of the learned judge set aside.

Background

[3] There was a vacancy in the office of Commissioner of Police, the Royal Antigua Police Force. Mr. Nelson, a Canadian national desired to be employed as the Commissioner of Police of the Royal Antigua Police Force. The Government of Antigua and Barbuda utilised the services of Mr. Alphonse Breau ("Mr. Breau") (who acted as its agent) in the Government's efforts to recruit a suitable person as the Commissioner. Mr. Breau and Mr. Nelson at that time were both residing in Canada. Negotiations ensued between the two gentlemen. The Government of Antigua and Barbuda caused two draft contracts to be forwarded to Mr. Nelson both of which contained a clause for a six month probation period. Mr. Nelson objected to this clause. The Government of Antigua and Barbuda maintained that the probation period was non-negotiable. The Government of Antigua caused a third draft of the contract to be forwarded to Mr. Nelson by Mr. Breau; it similarly contained the clause for the six month probation.

[4] Mr. Nelson, despite being aware of the stance of the Government of Antigua and Barbuda in relation to the non-negotiable probationary period, travelled to Antigua, at his own expense, to take up the position as Commissioner of Police. He was appointed Commissioner of Police by virtue of a letter, from the Commission, dated 29th February 2008. He was sworn in as Commissioner of Police on

29th February 2008 and commenced duties on the following day even though no formal contract of employment had been signed.

[5] On 1st April 2008, he received his letter of appointment from the Chief Establishment Officer.

[6] A few months after he had taken up his appointment, Mr. Nelson received an unexecuted contract for his signature. He refused to sign the contract since it contained the similar clause which dealt with the six month probation period. It appears that meanwhile the Government of Antigua and Barbuda had become dissatisfied with Mr. Nelson's performance and discussions were held between Mr. Nelson and Mr. Derrick and he and Mr. Stephans Winter ("Mr. Winter"), the Chairman of the Commission.

[7] In those circumstances, the Commission by letter dated 28th August 2008 terminated his services before the probationary period had expired on the basis of his alleged unsatisfactory performance of duties.

[8] Mr. Nelson being aggrieved with the decision of the Commission to terminate his services sought judicial review of the decision. In particular he sought an order of certiorari quashing the decision of the Commission to terminate his appointment. He also alleged that the Commission and the Minister of Justice both acted irrationally and unlawfully in relation to the termination of his appointment. Further, he complained that he had a legitimate expectation to be employed for a period of two years and sought an order to this effect. He sought an order that he had a legitimate expectation to a fair hearing and to a contractual benefit to employment for a period of two years. He also sought aggravated and exemplary damages together with costs.

[9] The learned trial judge dismissed his claim for judicial review and held that Mr. Nelson was employed on contract for a period of two years subject to a probationary period of six months. All of this was in accordance with the unexecuted third draft of the contract which was tendered into evidence as exhibit "CD3". The judge also held that there was no basis to conclude that the Commission acted unlawfully or improperly in terminating his services. Neither was there any basis to conclude that in arriving at its decision the Commission acted irrationally or unreasonably. In addition the trial judge held that in so far as Mr. Nelson was on probation for a period of six months he could not have had a legitimate expectation to be employed for a period of two years, since his services were terminated within the six month probationary period.

[10] Importantly, the learned trial judge held that the Commission was under an obligation to observe the rules of procedural fairness. In this regard, several meetings were held with Mr. Nelson and the Commission and he and Mr. Derrick, therefore he had no basis to complain about not having been given a hearing prior to the termination of his contract. To the contrary and based on the totality of circumstances he was afforded procedural fairness before his services were terminated.

[11] Significantly, the trial judge held that Mr. Nelson's services were properly terminated and he was not entitled to judicial review or to any of the reliefs that he sought.

[12] The judge ordered Mr. Nelson to pay the respondents' prescribed costs.

[13] It is against that background that Mr. Nelson has appealed against the judgment of the learned trial judge. He seeks a number of orders including the following –

(a) the order of the trial judge be set aside;

(b) that he be granted judicial review in relation to the termination of his services;

(c) that he be granted the reliefs claimed which includes an order of certiorari and general and aggravated damages.

I now refer to the statutory framework

Statutory Framework

[14] Section 105(1) of the Antigua and Barbuda Constitution Order 1981 ("the Constitution") stipulates as follows:

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

Section 105(3) of the Constitution states that:

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

Section 18 of the Interpretation Act:[1]

> "(1) Subject to the Constitution, words in an enactment authorising the appointment of a person to any office shall be deemed also to confer on the authority in whom the power of appointment is vested –
>
> (a) power, at the discretion of the authority, to remove or suspend him, and

[1] Cap. 224, Revised Laws of Antigua and Barbuda 1992.

(b) power, exercisable in the like manner and subject to the like consent and conditions, if any, applicable on his appointment–

(i) to re-appoint or re-instate him,

(ii) to appoint another person in his stead, or to act in his stead whether or not there is a substantive holder of the office, and to provide for the remuneration of the person so appointed, and

(iii) to fix or vary his remuneration, to withhold his remuneration in whole or in part during any period of suspension from office, and to terminate his remuneration on his removal from office;

but where the power of appointment is only exercisable upon the recommendation or subject to the approval, consent or concurrence of some other person or authority the power of removal shall, unless the contrary intention is expressed in the enactment, be exercised only upon the recommendation, or subject to the approval, consent or concurrence of that other person or authority." (Emphasis added)."

Section 12 of the Police Act:[2]

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

[15] I propose now to address his grounds of appeal.

Grounds of Appeal

[16] Mr. Nelson has appealed against the judgment of the learned trial judge on the following six grounds:

[2] Cap. 330, Revised Laws of Antigua and Barbuda 1992.

(a) The judge erred in law and on the evidence in concluding that there was a concluded contract between him and the Government of Antigua and Barbuda as evidenced by the third draft.

(b) The learned trial judge ought to have concluded based on the evidence that he was appointed as the Commissioner of Police.

(c) The learned trial judge erred in concluding that his dismissal was neither irrational nor unreasonable but was lawful.

(d) The learned trial judge erred in concluding that the communication in exhibit "CD3" established a contract between Mr. Nelson and the Government of Antigua and Barbuda. The judge erred when she concluded that section (12)(1) of the Police Act was inapplicable to the case at bar.

(e) The trial judge erred in law in concluding that Mr. Nelson had no legitimate expectation to be employed for a period of two years; nor to be given a hearing prior to the termination of his employment.

(f) The decision to award costs against him was wrong in law.

[17] However, learned Queen's Counsel, Mr. Hamilton, has chosen to confine himself to the following five issues, in his written submissions namely:

(i) Was the conduct of the appellant such as to justify the finding that he was bound by all the terms of the draft contract including the probationary clause?

(ii) Was the appellant entitled to be dismissed only for reasonable cause after due observance by the Commission of the principles of the natural justice?

(iii) Was the decision of the Commission illegal, null and void given their admitted failure to afford the appellant a fair and impartial hearing?

(iv) Was the appellant entitled to a legitimate expectation to the benefit of a contract for two years which could only be withdrawn upon dismissal for reasonable cause at a procedurally fair hearing?

(v) Was the application for judicial review by the appellant without merit?

[18] In the interest of convenience, the above issues can properly be crystallised as follows:

(a) Whether the trial judge erred in concluding that there was a binding contract, between Mr. Nelson and the Government of Antigua which was reflected in exhibit "CD3", between the parties.

(b) Whether the learned trial judge erred in concluding that section 12(1) of the Police Act was not applicable to the case at bar.

(c) Whether the trial judge was correct in concluding that the Commission acted lawfully.

(d) Whether the trial judge was correct in finding that there was no basis to conclude that the Commission acted irrationally or unreasonably in dismissing the appellant.

(e) Whether the trial judge erred in concluding that though the Commission was under an obligation to observe the rules of procedural fairness that duty was however not breached in the case at bar.

(f) Whether the appellant had a legitimate expectation to benefit from a contract for two years which could only be terminated for reasonable cause.

(g) Whether the learned trial judge erred in her award of costs.

[19] It is noteworthy that in addition to providing the court with extensive oral and written submissions in the appeal learned counsel also invited the court to have regard to the submissions that were advanced before the trial judge. I have given deliberate consideration to all of the helpful and lucid submissions to which the court was referred. I propose to address each issue in turn.

Issue Number 1

Whether the trial judge erred in concluding that there was a binding contract

[20] In relation to this issue it bears noting that learned Queen's Counsel, Mr. Hamilton, on behalf of the appellant, challenged several findings of facts that were made by the trial judge including the following:

(a) That the appellant/claimant could not properly contend that he did not rely on the terms and conditions of the contract when the evidence clearly supported this position;[3]

(b) That Mr. Nelson's conduct could in no way be said to be a rejection of the offer of employment. It was unquestionably an acceptance of the offer;[4]

(c) That notwithstanding the fact that the draft contract was unexecuted, the contract represented a concluded binding agreement.

(d) Mr. Hamilton, QC therefore argued that the trial judge erroneously concluded that the third unexecuted contract which was referred to during the trial in the lower court formed the basis of Mr. Nelson's contract of employment.

[3] See para. 61 of the lower court judgment.
[4] See para. 60 of the lower court judgment.

[21] Mr. Hamilton, QC complained that the judge incorrectly formed the view that a binding agreement had been reached between the parties on the basis (among other things) that he had performed part of his obligations under the unsigned contract. Mr. Hamilton, QC submitted that there was clear evidence before the trial judge that Mr. Nelson never agreed nor accepted being placed on any period of probation. In addition, he was appointed by the Commission as the Commissioner and his letter of appointment did not indicate that there was any period of probation. The trial judge in the face of that evidence ought to have concluded that the basis of Mr. Nelson's employment was the letter of appointment and not the unexecuted contract, a copy of which he had received after he had commenced his duties as Commissioner.

[22] Mr. Hamilton, QC maintained that the trial judge ought to have accepted that the letter of appointment dated 1st April 2008 from the Chief Establishment Officer and the letter of appointment issued by the Commission on 29th February 2008 together formed the basis of Mr. Nelson's contract.

[23] Mr. Hamilton, QC argued that the conjoint effect of those two letters was that Mr. Nelson was appointed on contract for a period of two years and the receipts of his emoluments and entitlements was subject only to him being certified medically fit. It was therefore not open to the trial judge to conclude, as she did, that the terms of Mr. Nelson's contract were contained in the third draft of the unexecuted agreement which he had received while he was in Canada.

First and Second Respondent's Submissions

[24] Learned counsel, Mrs. de Freitas-Rait, urged the court to accept the findings of law and facts that were made by the trial judge. Mrs. de Freitas-Rait argued that the judge quite properly concluded that there was a binding agreement even though there was no signed contract. Mr. Nelson, by his conduct in taking the

oath of office and starting to work as Commissioner in circumstances where he had already received the third draft of the contract which included the probation clause, had clearly accepted the terms of the offer as stated in the unexecuted third draft of the contract. In support of the above view, Mrs. de Freitas-Rait averted the court's attention to the evidence that was led by the respondents which indicated that Mr. Nelson, before assuming duties as Commissioner, had received three different drafts of the contract all of which contained the probation clause. In addition there was the evidence from Mr. Nelson, given under cross examination, that the Government of Antigua and Barbuda was adamant that his contract must be subject to a probation period of six months. In pursuance of the agreement Mr. Nelson travelled to Antigua armed with that knowledge and took up the appointment as the Commissioner.

[25] Mrs. de Freitas-Rait said that the trial judge had before her overwhelming evidence from which she could have made the findings of facts. In addition, she drew proper inferences. Learned counsel, Mrs. De Freitas-Rait, argued that the trial judge acted quite properly when she concluded that the third of the three contracts that Mr. Nelson had received while he was in Canada formed the basis of his contract. Further, that by his conduct in accepting the appointment, Mr. Nelson accepted the offer of employment as contained in that contract which included the probationary period of six months. All of the above findings of fact and law, argued Mrs. De Freitas-Rait, are enough to enable the trial judge to conclude and properly so that Mr. Nelson had partially performed the obligations in accordance with the unexecuted contract. The trial judge had correctly applied the relevant legal principles to the facts that she had found.

Third Respondent's Submissions

[26] Learned Queen's Counsel, Sir Gerald Watt, submitted that the trial judge quite correctly concluded that based on the course of conduct between the parties it

was evident that Mr. Nelson took up the post as Commissioner with the full knowledge that the Government had indicated at all times that the six month probation period in the contract was non-negotiable. He accepted the benefits which were stipulated in the draft contract and which was exhibited as "CD 3" and could not now be heard to say that there was no binding agreement between himself and the Government of Antigua.

[27] Sir Gerald, QC argued that Mr. Nelson was not appointed as Commissioner of Police but rather his appointment was subject to the probationary period of six months which he clearly accepted. Sir Gerald, QC maintained that in accordance with the terms of the unexecuted contract Mr. Nelson was a probationer and that the terms of the contract were to be found in the unexecuted third draft contract.

Analysis

[28] Before assessing the force of the arguments advanced by all learned counsel, it is important to note that the learned trial judge had the benefit of hearing and observing the witnesses who testified and also of determining their reliability and credibility. Mr. Nelson testified on his own behalf, Mr. Colin Derrick provided evidence on behalf of the first named respondent while Mr. Winter provided evidence on behalf of the third named respondent. In addition the learned trial judge carefully examined the documentary evidence that was provided to the court. The learned trial judge made adverse findings in relation to the credibility of Mr. Nelson and found Mr. Winter to be a credible and reliable witness.

[29] I have carefully reviewed the submissions of counsel, the evidence and the judgment in seeking to determine whether the trial judge erred in her conclusions as to the nature of Mr. Nelson's employment as Commissioner. In my view, the trial judge gave careful consideration to the oral and documentary evidence that was adduced and made several findings of fact including the important fact that

before leaving Canada to take up his appointment, Mr. Nelson had received (on three distinct occasions) three draft contracts, all of which contained the clause for the probationary period. The court also found as a fact that Mr. Nelson had accepted the benefits that were consistent with the unexecuted contract. He had partially performed his responsibilities in accordance with the terms of that unexecuted contract.

[30] There was no dispute before the lower court nor before this Court that the power to appoint the Commissioner vests in the Commission, in accordance with section 105 of the Constitution. There seemed to be some disagreement however between the parties over whether the Commission had to consult the Prime Minister before removing the Commissioner.

[31] Be that as it may, it was indisputable that Mr. Nelson had assumed duties as Commissioner and had undergone the medical examination in order to have his fitness determined. The trial judge held that Mr. Nelson had partially performed some of his obligations that were provided for in the unexecuted third draft contract, i.e. a medical examination, since among other things the requirement for medical certification was provided for in the unexecuted contract. He had also received his salary as Commissioner. The trial judge also examined Mr. Nelson's conduct subsequent to the termination of the contract and concluded that when he claimed for the reimbursement of his airfare he could only have been doing so if he was relying on the terms of the unexecuted contract since nowhere was this provided for in the letter of 1st April 2008. The trial judge also concluded that Mr. Nelson through his conduct clearly evinced an intention to be bound by the terms of the contract including the probationary period of six months. Having found the facts, the trial judge applied the principle enunciated in RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG (UK Production)[5] to the

[5] [2010] 1 WLR 753.

facts and concluded that Mr. Nelson was employed on a fixed term two year contract which had as its basis the unexecuted or unsigned agreement.

[32] I will now examine the contention that the judge erred in her conclusion of facts and application of law to those facts. As alluded to earlier, there was extensive oral evidence presented by the parties which were tested during cross examination. The learned trial judge also had the documentary evidence by which she could have tested the reliability of the evidence adduced.

[33] I will now reproduce the relevant parts of the letter of appointment from the Commission dated 29th February 2008 which was before the judge.

It states as follows:

> "Dear Madam
>
> …
>
> The Police Service Commission having reviewed the recommendations made by Cabinet on Breau's Report and the CV's of the individual Officers mentioned. With the powers vested in the Police Service Commission under the 1981 Constitution of Antigua and Barbuda, the Commission has approved the appointment of the following officers:
>
> 1. Gary Nelson – Commissioner of Police..."

[34] The material parts of the letter of appointment dated 1st April 2008 read as follows:

> "Mr. Gary Nelson
>
> …
>
> Dear Sir,
>
> I am to inform you that the Government of Antigua and Barbuda has decided to employ you on contract for two (2) years with effect from 1st March, 2008 as Commissioner of Police, Police Division.
>
> …
>
> 4. Your appointment as Commissioner of Police is subject to medical fitness and therefore you are asked to make early arrangements through the Chief Medical Officer who will arrange for you to be medically examined at the earliest possible date…
>
> 5. Upon the completion of your medical, a further correspondence will be addressed to you regarding the execution of your contract."

[35] It is clear that neither of the above two letters provided the full conditions of Mr. Nelson's employment. I have no doubt that the trial judge also had evidence upon which she could have properly concluded that the basis of Mr. Nelson's contract was the unexecuted agreement. Indeed there was overwhelming and cogent documentary and oral evidence upon which she could have arrived at the conclusions that she did.

[36] In fact at paragraphs 65 and 67 of the judgment the learned trial judge carefully analysed the evidence that was adduced and made proper findings of fact. The trial judge said this:

> "[65] Learned Queen's Counsel for the Claimant in his submissions that "negotiations with the intermediary of Alphonse Breau continued and the Claimant was persuaded to fly down to Antigua (using his own funds which were to be refunded), which he did on February 6th 2008. Learned Queen's Counsel also submits that "Indeed the Claimant paid his own passage to Antigua given assurances by the Minister…" Counsel further submits that "the position of the Claimant was that the Second Defendant Derrick emailed him saying to the effect 'that he had to show a little faith and trust in him (Derrick)." If Learned Queen's Counsel is implying that the Claimant inferred from this email or from the alleged unspecified "assurances" of the Minister (Mr. Derrick), that either Mr. Derrick or the Government had changed their position on the non-negotiability of the probation clause, with respect, the court finds that there is no reasonable basis on which the Claimant could have arrived at such a conclusion. It is illogical, unreasonable and unrealistic.
>
> "[66] The court is of the view that it defies logic and practical good sense, that someone of the experience of the Claimant, and one who was about to take office as Commissioner of Police, with the corresponding duties and responsibilities of that office, would:-
>
> (a) Travel to Antigua and Barbuda at his own expense.
>
> (b) Ensure that he complied with the requirement to undergo a medical examination on or about the middle of March 2008, well before he received the letter of 1st April 2008.

(c) Take the oath of Office as Commissioner of Police on February 29th 2008 and commence his duties as Commissioner on the 1st March 2008, unless he was prepared to be bound by the terms of the contract. In the view of the court, this is the logical inference to be drawn from the conduct of the Claimant, conduct which belies his contention that he did not rely on the contract. The Claimant's conduct clearly demonstrates an intention to be bound by the terms of the contract. He relied on it, he acted upon it; further, all his subsequent conduct is referable to the said contract (CD3). The Claimant was free to reject the offer to take up the appointment. He did not do so. He accepted the salary stipulated in the contract as well as the other allowances contained therein. He cannot approbate and reprobate the terms of his employment contract with the Government of Antigua and Barbuda. The court is therefore of the view, based on the above authorities, that, notwithstanding the fact that the draft contract (the last of which the Claimant received before leaving Canada is CD3) – was unexecuted, that this document represented a concluded binding agreement between the parties, even if the said document had never matured into a signed contract, like in the RTS Flexible Systems Ltd. case. The court is of the view, that although the case at bar was not a "subject to contract" type of case, and further that in the RTS Flexible Systems Ltd. case, the court ruled that the parties had agreed to waive the subject to contract clause, yet the principles stated in the RTS Flexible Systems Ltd case apply. All depends on the circumstances of the case. The court is of the view that in the case at bar, taking all the circumstances of the case into account, the conduct of the Claimant "led objectively, in accordance with the reasonable expectations of honest sensible businessman", to the conclusion that an agreement had been reached between the parties.

"[67] The conclusion to be drawn from the court's finding is that the Claimant is bound by the probation clause contained in the contract."

[37] I have reviewed the findings of facts that were made by the trial judge and I am guided by the fact that an appellant has an uphill task to set aside the findings of the trial judge. This principle was given judicial acknowledgment in Jada

Construction Caribbean Limited v The Landing Limited.[6] A trial judge's findings of fact are not easily overturned on appeal unless it can be shown that there was no underlying evidence to support those findings.[7]

[38] Indeed, Rawlins CJ in Jada Construction Caribbean Limited v The Landing Limited at paragraph 22 stated as follows:

> "[22] They have been stated, for example, by Sir Vincent Floissac, CJ, in the landmark case Michel Defour et al Helenair et al[9] *[(1996) 52 WIR 194]* and by this court in Golfview Development Limited v St. Kitts Development Corporation and Another.[10] *[Saint Christopher and Nevis Civil Appeal No. 17 of 2004 (20th June 2007), at paragraphs 23 and 24].* An appellate court will not impeach the finding of facts by a first instance or trial court that saw and heard witnesses give evidence, except in certain very limited circumstances. An appellate court may, however, interfere in a case in which the reasons given by a trial judge are not satisfactory, or where it is clear from the evidence that the trial judge misdirected himself. Where a trial judge misdirects himself or herself and draws erroneous inferences from the facts, an appellate court is in as good a position as the trial judge to evaluate the evidence and determine what inference should be drawn from the proved facts. Where therefore there is an appeal against the findings of facts, the burden upon the appellant is a very heavy one. An appellate court will only interfere if it finds that the court of first instance was clearly and blatantly wrong, or, as it is sometimes more elegantly stated, exceeded the generous ambit within which reasonable disagreement is possible."

[39] Also in Chiverton Construction Limited et al v Scrub Island Development Group Limited et al[8] Baptiste JA held that in any appeal which challenges a judge's findings of facts the appellant has an uphill task. Further, that:

> "17] The critical question is whether the trial judge could properly have arrived at the conclusion that he did based on the evidence before

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[6] Saint Lucia, High Court Civil Appeal SLUHCVAP2009/0011 (delivered 8th March 2011, unreported).
[7] Joan Isaac v Cecil Isaac Grenada High Court Civil Appeal GDAHCVAP2009/0013 (delivered 21st November 2011, unreported); Benmax v Austin Motors Co Ltd [1955] AC 370; Grenada Electricity Services Limited v Isaac Peters GDAHCVAP2002/0010 (delivered 28th January 2003, unreported).
[8]Territory of the British Virgin Islands High Court Civil Appeal BVIHCVAP2009/0028 (delivered 19th September 2011, unreported).

him; or whether, based on the available evidence, the reliability and credibility of which he had to assess, he was plainly wrong. One has to bear in mind that the assessment of evidence and the acceptance or rejection of any part of the evidence are matters for the trial judge. The trial judge's conclusions of primary fact were informed largely from the view he formed of the oral evidence of the witnesses and also from an analysis of the documents.

…

"[19] … The judge's findings of fact were rationally explained. His findings were based on a particular assessment of the evidence and he could properly make such findings. It cannot be said that the judge was plainly wrong more so as his conclusions depended to a large extent upon the view he formed of Mr. Chiverton's evidence. In the premises this court cannot interfere with the judge's findings even if it were to take the view that by itself, it might have taken a different view of the evidence. In my view there was adequate evidence to support the judge's finding and I agree with them. I agree with the process of reasoning which led the trial judge to make his finding."

I can do no better than adopt those pronouncements and apply them to the case at bar.

[40] Similarly in the case at bar, I am convinced that the learned trial judge carefully reviewed and weighed the evidence in coming to the conclusions of facts and inferences that she drew. Also, I am satisfied that the learned trial judge correctly applied the principles enunciated in RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG (UK Production) to the facts in concluding that due to the conduct of Mr. Nelson and the communication between the parties, there was a binding agreement reached which had as its basis the unexecuted contract.

[41] Neuberger J in Carlton Campbell v Clarence Royes[9] stated that when it comes to findings of primary fact or drawing inferences, it is well established that an appellate tribunal should be slow to interfere with the findings made of a first

[9] [2007] UKPC 66, para. 18.

instance tribunal. There is much learning on the issue as to the circumstances in which an appellate court would disturb the findings of the court of the first instance.[10] This case however does not fall within any such circumstance.

[42] It is trite that for there to be a contract there must be an offer and an acceptance. It is the law that an offer which is an essential aspect of a contract may be accepted by conduct. In order for the conduct to be regarded as acceptance of the contract it must be clear and unequivocal that the offeree did the alleged acts of acceptance with the intention (ascertained in accordance with objective principles) of accepting the offers a fortiori; there is no acceptance where the offeree's conduct clearly indicates an intention to reject the offer.[11] The learning in Halsbury's Laws of England[12] is also very instructive on the issue of acceptance by conduct. It states that:

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

[43] The learned trial judge correctly concluded that Mr. Nelson was employed on a two year contract subject to a probationary period of six months. There is therefore no reason to disturb the learned trial judge's conclusion of law in relation to the nature of the contract of employment.

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[10] Watt v Thomas [1947] AC 484; Steven Kent Jervis et al v Victor John Skinner [2011] UKPC 2.
[11] Alexander Brogden and others v The Directors of the Metropolitan Railway Company (1877) 2 AC 666; See Chitty on Contracts (Volume 1, 30th edn., Sweet & Maxwell Ltd. 2008) at p. 160, para 2-30.
[12] Volume 9(1), 4th edn. (reissue), Butterworths, 1998) at p. 389, para. 650.

[44] I am fortified in my view by the principle propounded in RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG (UK Production) which the court held as follows:

> "The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement."[13]

[45] Also the learned trial judge quite properly relied on the authority of Gerard McMeel in his treatise The Construction of Contracts[14] which states as follows that "a contract may be concluded by conduct, as well as by more traditional, oral and written communication". The courts also adopt an objective and contextual approach here. What is critical is the absence of any other expression (other than the mutual assumption of contractual responsibility) for the parties' behaviour. In recent authority this has been expressed as a necessity threshold, akin to that used in the implication of terms.

[46] Mr. Nelson's appeal cannot prevail in relation to this issue.

Issue Number 2

Whether the judge erred in concluding that Section 12 of Police Act is inapplicable

[13] At para. 45.

[14] 2nd edn., Oxford University Press 2011, p. 401, para. 14.25.

[47] I now move on to consider whether the trial judge erred in concluding that section 12(1) of the Police Act was inapplicable to the case at bar.

[48] Learned Queen's Counsel, Mr. Hamilton, submitted that the learned trial judge erred in concluding that section 12 of the Police Act did not apply to Mr. Nelson's removal. Mr. Hamilton, QC said that apart from section 12 of the Police Act there are no other provisions which regulate removal of the Commissioner from office. In the instant case, it is agreed that the reason that was given for his dismissal was the unsatisfactory performance of duties. This would bring his removal under the second limb of section 12(1). Mr. Hamilton, QC argued that the Commission could only have removed Mr. Nelson if it could have established that the unsatisfactory performance of his duties rendered him not likely to become an efficient or well conducted police officer. He said that there was no detail provided to Mr. Nelson as contemplated by section 12 of the Police Act which would have, at the very least, put him on notice that his performance was unsatisfactory.

[49] Mr. Hamilton, QC conceded that since the Commission has the power to appoint and remove an officer from office this must include the power to terminate the appointment of a Commissioner whose performance is so substandard and hopelessly inefficient that it can be said on appraisal that his performance is highly unsatisfactory. Mr. Hamilton, QC submitted that the Commission must act lawfully, reasonably and must exercise this power in its own right to the exclusion of anyone. He said that since Mr. Nelson was on a two year contract his probation period was for the two years in accordance with section 12 of the Police Act. As an alternative argument learned Queen's Counsel, Mr. Hamilton, urged the court to find that the learned trial judge erred in concluding that section 12(1) of the Police Act did not apply to the case at bar in that she failed to properly construe clause 18 of the contract.

Submissions on behalf of First and Second Respondents

[50] Learned Counsel, Mrs. de Freitas-Rait, on behalf of the first and second respondents, accepted that section 105 of the Constitution must guide the decisions with regard to the removal or dismissal of the Commissioner. However, Mrs. de Freitas-Rait maintained that section 12(1) of the Police Act addresses the removal of certain police officers during the two year probation period and is therefore inapplicable to the case at bar. Mrs. de Freitas-Rait submitted that the learned trial judge was correct in concluding that section 12(1) of the Police Act was inapplicable to the case at bar.

Third Respondent's Submissions

[51] Learned Queen's Counsel, Sir Gerald submitted that it is clear that section 12(1) of the Police Act has no relevance to the case at bar. Mr. Nelson was appointed on a two year contract which clearly stated that the probationary period was six months. Sir Gerald, QC advocated that it was very clear that when Mr. Nelson entered into the contract with the Government of Antigua and Barbuda the parties were clearly contracting out of section 12(1) of the Police Act.

Analysis

[52] In my judgment this is a very short point. Both Sir Gerald, QC and Mrs. de Freitas-Rait are correct in their submissions.

[53] I have accepted that Mr. Nelson's contract was for two years with a probation period of six months. It therefore follows that, as a matter of both law and logic, section 12(1) of the Police Act could not have been within the contemplation of the parties as being applicable to Mr. Nelson since he was employed on a two year contract. There could be no real sense that Mr. Nelson could have been said to be on probation for the first two years of the contract as argued by Mr. Hamilton, QC when the entire contract period was two years. Section 12 of the Police Act

addresses the removal of certain police officers during the two year probation period provided for them and is clearly not applicable in this case. The Commissioner did not fall within the category of persons to whom section 12(1) of the Police Act would apply. I reject the criticism of the learned trial judge's conclusion on this issue.

[54] Accordingly, the learned trial judge did not err in concluding that section 12 was inapplicable.

General Observations

[55] Before addressing the other challenges that Mr. Nelson has made to the trial judge's decision I propose to make some general observations on judicial review proceedings. Judicial review is concerned with the review of the decision making process and not with the merits of the decision. It is not an appeal against the decision; rather it's a supervisory jurisdiction that reviews the decision making process. It is the law that the court will review the decision of a body or an administrative or quasi-judicial tribunal under three distinct or principal heads namely: illegality (unlawfulness); irrationality (unreasonableness) and procedural impropriety (unfairness). Indeed, judicial recognition was given to the three heads of categories by Lord Diplock in Council of Civil Service Unions and Others v Minister for the Civil Service.[15]

[56] It is not uncommon to find that courts in reviewing the decisions of quasi-judicial and administrative tribunals and other bodies prefer not to compartmentalize the three heads since it is not unusual for there to be an overlap between the three categories. This view was given judicial recognition by Lord Donaldson in R v Secretary of State for the Home Department Ex parte Oladehinde.[16] Also in

[15] [1985] AC 374.
[16] [1991] 1 AC 254.

Chief Constable of North Wales Police v Evans[17] it was stated that administrative action is subject to judicial review under three heads (1) illegality, whether the decision making authority has been guilty of some error of law e.g. by purporting to exercise a power it does not possess; (2) irrationality, where the decision making authority has acted so unreasonably that no reasonable authority would have made that decision; and (3) procedural impropriety, where the decision making authority has failed in its duty to act fairly.

[57] In the celebrated case of Council of Civil Service Unions and Others v Minister for the Civil Service Lord Diplock, at page 408, stated that:

> "Judicial review … provides the means by which judicial control of administrative action is exercised."

[58] In Chief Constable of North Wales Police v Evans Lord Bingham enunciated that "[j]udicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made."[18]

[59] I now propose to address the issue of whether the learned trial judge erred in concluding that the Commission did not act unlawfully.

Issue Number 3

Whether trial judge erred in concluding that the Commission acted lawfully

Appellant's Submissions

[60] Learned Queen's Counsel, Mr. Hamilton, appeared to have argued at first instance that while section 105(3) of the Constitution requires the Commission to consult with the Prime Minister on the appointment of a person as a Commissioner no such consultation is required where the Commission wishes to remove the Commissioner from office. Mr. Hamilton, QC had advocated that since the power

[17] [1982] 1 WLR 1155.
[18] At p. 1174.

to remove the Commissioner vests exclusively in the Commission, the Commission has a duty to exercise this power rationally, lawfully and reasonably. The Commission in removing Mr. Nelson could only have acted in accordance with section 12(1) of the Police Act. He had asserted that it was clear that the decision to terminate Mr. Nelson's services was not made by the Commission but rather by the Executive and the Commission merely acted as a rubber stamp. Mr. Hamilton, QC renewed those arguments before this Court.

[61] Mr. Hamilton, QC submitted that the trial judge erred in coming to a conclusion that the decision was made by the Commission. Mr. Hamilton, QC further argued that if the trial judge was correct that the appellant was bound by all of the terms of the contract the conjoint effect of these clauses conditioned any dismissal or termination on a breach of clause 14(1)(11) or (iii). In so for as the Commission did not act in its own right, it clearly acted unlawfully. He urged the court to so find and to set aside the trial judge's decision on the basis that the decision to terminate Mr. Nelson's services was not taken in accordance with the law.

Submissions on behalf of the First and Second Respondents

[62] Learned counsel, Mrs. de Freitas-Rait, argued that the trial judge was quite correct in concluding that it was the Commission acting in its own right that terminated Mr. Nelson's services. Mrs. de Freitas-Rait submitted that the Commission was duly bound to consult the Prime Minister before terminating Mr. Nelson's services. This was in accordance with the Constitutional provisions. Indeed section 105(3) of the Constitution must guide decisions in relation to the dismissal and therefore the trial judge was quite correct in holding that Mr. Nelson's employment was lawfully terminated.

[63] Mrs. de Freitas-Rait argued that the trial judge was correct to accept that Mr. Nelson's appointment was not terminated by the Prime Minister or the

Executive but rather was lawfully terminated by the Commission with the concurrence of the Prime Minister. Mrs. de Freitas-Rait further submitted that there was overwhelming and uncontroverted evidence before the trial judge upon which she could have properly arrived at that conclusion. She said that the trial judge's conclusion on the issue of the illegality as stated in paragraphs 86-90 of the judgment should be upheld.

Submissions on behalf of the Third Respondent

[64] Learned Queen's Counsel, Sir Gerald, submitted that there was no basis for Mr. Nelson to assert that the Commission acted illegally. There was indeed no evidence of the Commission having acted as a mere rubber stamp for the decision of the Executive in removing Mr. Nelson from office. Sir Gerald, QC stated that the trial judge was quite correct in rejecting Mr. Nelson's claim based on illegality. In coming to the conclusion that the Commission is the body that terminated Mr. Nelson's services, the trial judge paid particular regard to the uncontroverted evidence of Mr. Winter, the minutes of the Commission's meeting and the other relevant evidence. Of importance also, asserted Sir Gerald, QC, is the fact that the trial judge made findings of fact that were adverse to Mr. Nelson and these were properly made. Sir Gerald, QC maintained that the trial judge did not err in relation to this issue.

Analysis

[65] Insofar as I have concluded that the trial judge did not err in holding that section 12(1) of the Police Act was inapplicable to the case at bar, similarly the learned trial judge was quite correct in concluding that the removal of the Commissioner could not be impugned on the basis of any alleged breaches of section 12(1) of the Police Act.

[66] It is undisputable that the Commission is authorised by section 105(1) of the Constitution to appoint persons to hold or act in the Police Force. In my judgment, section 105(3) of the Constitution stipulates that no person shall be appointed to uphold or act in office in the Police Force if the Prime Minister signifies his objection to the appointment.

[67] In my view the learned trial judge was quite correct when she accepted the submissions of learned counsel Mrs. de Freitas-Rait at paragraph 72 of her judgment that in removing a person from office the Commission had the duty to consult with the Prime Minister. In this regard, I am in total agreement with learned Queen's Counsel, Sir Gerald, that the conjoint effect of sections 105(1) and (3) of the Constitution and section 18 of the Interpretation Act empowered the Commission to remove the Commissioner and such removal was subject to the approval of the Prime Minister.

[68] I have reviewed the oral and documentary evidence together with the submissions that were placed before the learned trial judge. Also, I have given deliberate consideration to paragraphs 79 – 92 of the judgment. I have paid particular regard to paragraph 93 of the judgment where the learned trial judge concluded that "there is no factual or legal support for the claim of illegality as a basis for judicial review".

[69] Mr. Nelson seeks to impugn the judge's findings of fact. In so doing he has an uphill task since an appellate court would only do so if there was no underlying evidence to support those factual findings.[19]

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[19] See Benmax v Austin Motor Co. Ltd. [1955] AC 370; Jada Construction Caribbean Limited v The Landing Limited Saint Lucia, High Court Civil Appeal SLUHCVAP2009/0011 (delivered 8th March 2011, unreported); Joan Isaac v Cecil Isaac Grenada High Court Civil Appeal GDAHCVAP2009/0013 (delivered 21st November 2011, unreported); Chiverton Construction Limited et al v Scrub Island Development Group Limited et al Territory of the British Virgin Islands High Court Civil Appeal BVIHCVAP2009/0028 (delivered 19th September 2011, unreported); Grenada Electricity Services Limited v Isaac Peters GDAHCVAP2002/0010 (delivered 28th January 2003, unreported).

[70] On the oral and documentary evidence that was before the learned trial judge, it was open to her to find as she did that Mr. Nelson was not a credible witness. The trial judge had the advantage of hearing and seeing the witnesses and preferred the evidence of Mr. Winter and Mr. Derrick to that of Mr. Nelson's.

[71] I accept Sir Gerald, QC's submission that the learned trial judge at paragraph 87 of the judgment indicated that she relied on the uncontroverted evidence of Mr. Winter, Chairman of the Commission. It was open to the trial judge to make those findings based on the evidence that was before her. She had the benefit of hearing and seeing the witnesses and there is no basis to impugn her well-reasoned decision and factual conclusions. In addition the inferences that she drew were available to the judge based on her factual findings. At paragraphs 86-89 of her judgment the trial judge very carefully reviewed the evidence that was placed before her. Also at paragraph 90 of the judgment the trial judge concluded that the decision to remove Mr. Nelson was taken by the Commission.

[72] In my opinion and based on the totality of circumstances, it was open to the trial judge to conclude that there was no legal or factual support for the claim of illegality as a basis for judicial review. In my judgment, the learned trial judge quite correctly concluded that the appellant had not provided cogent evidence to prove, on a balance of probabilities, that the Commission exceeded its power or fettered or abused its discretion.

[73] In the premises, Mr. Nelson's appeal on the basis of illegality fails.

[74] I now turn to address issue number 4.

Issue Number 4

Whether the learned trial judge erred in concluding that the Commission did not act irrationally or unreasonably in removing Mr. Nelson from office

[75] The issue that has to be determined is whether the learned trial judge erred in concluding that the Commission did not act irrationally or unreasonably in removing Mr. Nelson from office. Before this Court, even though this was one of the grounds of appeal and was identified by Mr. Hamilton, QC as an issue to be determined, he did not pursue this point with much force. It however remains a live issue to be determined in this appeal.

[76] Mr. Nelson, in his grounds of appeal, seems to challenge the learned trial judge's conclusion that applying the Wednesbury test for unreasonableness there was no basis for the conclusion that the decision of the Commission was irrational or unreasonable since he contends that he was not afforded a hearing.[20]

[77] In my view the main gravamen of Mr. Nelson's appeal on this ground was the trial judge's error in concluding that Mr. Nelson was given a hearing by the Commission and therefore the decision it arrived at to remove Mr. Nelson was not irrational. He urged the court to set aside the trial judge's conclusion which is stated at paragraph 102 of the judgment.

Submission on behalf of First Respondent

[78] Learned counsel, Mrs. de Freitas-Rait, urged the court to find that the judge was correct in holding that the decision of the Commission was rational. Mrs. de Freitas-Rait said that the trial judge had abundant cogent evidence upon which she could have so concluded. Learned counsel urged the court to accept the trial judge's conclusion that the Commission's decision to remove Mr. Nelson from office was not unreasonable. She said that the court is only empowered to interfere with the Commission's decision if it is 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. Mrs. de Freitas-Rait

[20] See para. 102 of the lower court judgment.

asserted that the trial judge had overwhelming evidence from Mr. Winter and Mr. Derrick of the poor performance of Mr. Nelson during the probationary period.

[79] Mrs. de Freitas-Rait further submitted that even if the Commission had failed to advise Mr. Nelson of their concerns about his performance, this would not be a sufficient basis upon which to find that the Commission's decision to remove him was irrational. Mrs. de Freitas-Rait reminded the court of the numerous infractions, which Mr. Winter had indicated in his evidence, that Mr. Nelson had committed and which apparently the learned trial judge had accepted to be true.

[80] Mrs. de Freitas-Rait argued that even if there had been no communication of the Commission's dissatisfaction with Mr. Nelson's performance the Commission still acted rationally in terminating his appointment. The learned trial judge was correct to dismiss his claim on this ground.

Submissions on behalf of Third Respondent

[81] Learned Queen's Counsel, Sir Gerald, advocated that Mr. Nelson has failed to establish that the learned trial judge erred in concluding that there was no basis upon which to conclude that the Commission's decision was irrational or unreasonable. Sir Gerald, QC said that both Mr. Winter and Mr. Derrick gave evidence of several instances of poor performance on the part of Mr. Nelson during his six months period tenure.

[82] Sir Gerald, QC adverted the court's attention to various portions of evidence which allegedly illustrated that Mr. Nelson was not performing well as a Commissioner. Mr. Winter had provided evidence that there were matters that infringed on national security. Sir Gerald, QC said that at paragraph 100 of the judgment the learned trial judge pointed to the failings and the unsatisfactory conduct of Mr. Nelson that led the Commission to conclude that he was not a proper person to

continue to hold the office of Police Commissioner. This clear evidence was before the learned trial judge; accordingly she did not err in arriving at the conclusion which she did. In further support of his argument, Sir Gerald, QC referred the court to paragraphs 94-102 of the judgment. Sir Gerald, QC said that the trial judge was very careful in her analyses of the evidence that was placed before her and applied the relevant legal principles to the facts as she found them. He argued that the learned trial judge's conclusion at paragraphs 102 cannot be faulted.

[83] Accordingly, Mr. Nelson's appeal on this ground should be dismissed.

Analysis

[84] In public law, a body must not act unreasonably. It is the law that an appellant/claimant who wishes to successfully challenge a decision on the basis of unreasonableness or irrationally must prove that the decision is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.[21]

[85] Mr. Hamilton, QC reiterated the arguments that were made in the court below namely that the Commission acted unreasonably and irrationally in that it failed to bring to Mr. Nelson's attention any perceived shortcoming and/or dereliction of his duties and/or highlighted any failure on Mr. Nelson's part. Also, in this Court, much of his argument focused on the Commission's alleged failure to give Mr. Nelson a hearing and thereby arriving at an irrational decision.

[21] See Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374; HMB Holdings Ltd v Cabinet of Antigua and Barbuda (2007) 70 WIR 130 at p. 145 where it was held that the test of irrationality was satisfied where the decision is one which no sensible person who had applied his mind to the question to be decided could have arrived at.

[86] I bear in mind that irrationality is used interchangeably with unreasonableness. It refers to a way in which a public authority has acted which was not open to it. The court in reviewing the decision seeks to ascertain whether the decision in question was one within the range of reasonable decisions open to the decision maker. The court examines the actual decision and determines whether it should intervene. As a general rule courts only intervene in strong cases.

[87] In my view, the gravamen of Mr. Nelson's complaint was not that the reasons for his dismissal were unreasonable but rather they were never put to him and neither was he provided the opportunity to meet those charges. It is clear to me that Mr. Nelson utilised an incorrect head of judicial review to launch his attack against his removal. The reasons for the termination of his service which the Commission placed before the trial judge could in no way support a complaint of unreasonableness. In addressing this issue it is evident that the review of the correctness or otherwise of the learned trial judge's conclusion is inextricably bound up with a determination of the issue of whether there was procedural fairness. It is trite that the question of whether or not a decision was rational or reasonable or otherwise must perforce be premised on the assumption that there was a hearing after which a decision was taken. In my judgment if there is clear evidence that the person who is affected by the decision was afforded the opportunity to be heard or was actually heard then the court on a proper review can seek to ascertain whether the decision was irrational or unreasonable.

[88] It is important to note that if a tribunal adopts a procedure which is unfair then the court may, in the exercise of its discretion, seldom withheld, quash the resulting decision by applying the rules of natural justice.

[89] I have no hesitation in saying that when Mr. Nelson purported to rely on irrationality as a basis to impugn the Commission's decision he confused procedure with substance. In my judgment, on matters of substance, Wednesbury

provides the correct test. However, on this issue, namely on matters of procedure, natural justice is the correct test. I have no doubt that Mr. Nelson's complaint against the learned trial judge on this ground cannot prevail. In my view, the learned trial judge came to the correct conclusion but for the wrong reasons. Mr. Nelson utilised the incorrect category in seeking to impugn the decision of the Commission. His complaint should have been breach of natural justice or procedural fairness and not irrationality or unreasonableness. Accordingly his appeal in relation to this issue does not succeed.

[90] I will now move on to address issue number 5.

Issue Number 5

Whether the learned trial judge erred in concluding that Mr. Nelson was entitled to procedural fairness but that in any event in the circumstances of the case it was not breached

Appellant's Submissions

[91] In the alternative, Mr. Hamilton, QC argued that since the judge held that there was a binding contract between the parties as evidenced in the unexecuted contract Mr. Nelson was entitled to be given a hearing and told how he had contravened clause 14 of his contract before the Commission could have lawfully terminated his services. Also, he was entitled to make representations to any charges that were levied against him. He was not provided with any such opportunity and this was fatal to the subsequent decision that was taken by the Commission.

[92] Mr. Hamilton, QC conceded that the draft unexecuted contract makes provision for the termination of Mr. Nelson's employment. Mr. Hamilton, QC adverted the court's attention to clause 14 of the draft contract. It stated as follows:

"If, at any time during the continuance of this employment, the Officer shall:

i. neglect or refuse or become unable, from any cause (other than ill health not caused by his own misconduct), to perform any of his duties under his employment, or to comply with any order given by or on behalf of the Government; or

i. without the written consent of the Permanent Secretary; The Minister responsible for the Royal Police Force of Antigua and Barbuda or The Prime Minister of Antigua and Barbuda disclose any information respecting the affairs of the Royal Police Force of Antigua and Barbuda to any unauthorized person; or

ii. be guilty of misconduct;

the Government may terminate this employment forthwith and all rights and advantages reserved to him by this Contract shall cease."

[93] Learned Queen's Counsel, Mr. Hamilton, also referred to clause 2 of the draft unexecuted contract under the heading "Term of Service":

"Subject to a successful probationary period of six (6) months the Officer shall faithfully and to the best of his ability perform the duties and responsibilities hereinafter stated for a period of two (2) years commencing on the … and terminating on the … or until this contract of employment is sooner terminated or renewed in accordance with the terms of this contract."

[94] Mr. Hamilton, QC submitted that in view of the above-mentioned clauses of the draft contract Mr. Nelson was entitled to be told by the Commission which aspect of clause 14 of the draft contract he had breached and be provided with the opportunity to answer the charges. He asserted that no such opportunity was provided to Mr. Nelson and this failure was fatal to the Commission's decision to terminate his services.

[95] In Ridge v Baldwin and Others[22] Lord Reid divided the cases of dismissal into three classes namely (i) dismissal of a servant by his master (ii) dismissal from an office held during pleasure and (iii) dismissal from office where there must be something against a man to warrant his dismissal. Mr. Hamilton, QC argued that Mr. Nelson's case fell within the third category of cases and the Commission could therefore only have dismissed him for cause. In doing so, the Commission was duty bound to afford him a hearing. This was so whether the Commission was purporting to exercise the power in clause 14 of the draft contract or whether that power of removal was being exercised pursuant to section 105 of the Constitution. The Commission is a public authority exercising a public and constitutional duty and is amenable to judicial review in the manner of its exercise of such power.

[96] Mr. Hamilton, QC asserted that in so far as the Commission failed to be procedurally fair to Mr. Nelson before dismissing him it has breached its duty to observe the rules of natural justice and as such had acted unlawfully. Further, this duty is owed whether or not the appellant was on probation. It was a duty owed to anyone who occupied an office which fits the in the third category as stated in Ridge v Baldwin and Others. It was immaterial that Mr. Nelson was a probationer.

[97] In support of his contention, Mr. Hamilton, QC referred the court to the pronouncements of Lord Hailsham LC in Chief Constable of North Wales Police v Evans:

> "Once it is established … that the office held by the appellant was of the third class enumerated by Lord Reid in Ridge v Baldwin [1964] A.C 40., 66, it becomes clear, quoting Lord Reid, that there is "an unbroken line of authority to the effect that an officer cannot lawfully be dismissed without first telling him what is alleged against him and hearing his defence or explanation." I regard this rule as fundamental in cases of this kind when deprivation of office is in question."[23]

[22] [1964] AC 40.
[23] At p. 1161.

[98] In further support of his argument, Mr. Hamilton, QC also relied on the pronouncements of Bernard JA in Roberts (Kemp) v Attorney General:[24]

> "In exercising the powers of dismissal or discharge of the appellant as a constable in the police force conferred on him under the Constitution [a fortiori the Antigua Constitution and the Commission] the commissioner was bound to observe the principles of natural justice and accord the appellant the right to be heard … The principles of natural justice cannot be circumvented by utilising a short cut in achieving the desired objective of removing an employee from office. The errant constable or public servant is entitled to be heard before any disciplinary action is taken against him, especially if such action is likely to affect his ability to earn a living in the future and any financial entitlements."[25]

[99] He also referred to Thomas v Attorney General,[26] where Lord Diplock in delivering the advice of the Privy Council stated as follows:

> "To "remove" from office in the police force… in their Lordships' view, embraces every means by which a police officer's contract of employment … is terminated against his own free will, by whatever euphemism the termination may be described… In their Lordships' view there are overwhelming reasons why "remove" in the context of "to remove and exercise disciplinary control over" police officers in section 99(1) [which language corresponds to section 105(1) of the Constitution] … 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 would frustrate the whole constitutional purpose… It would also conflict with one of the human rights recognized and entrenched by… the Constitution, viz "the right of an individual to equality of treatment from any public authority in the exercise of any functions". Dismissal of individual members of a public service at whim is the negation of equality of treatment."[27] (My emphasis).

Lord Diplock was at pains to stress that the 'removal' must be for reasonable cause and the Commission is to follow 'proper procedure'.

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[24] (1994) 52 WIR 273.
[25] At p 278.
[26] (1981) 32 WIR 375.
[27] At pp. 384-385.

[100] Also in Horace Fraser v Judicial and Legal Services Commission et al[28] Lord Mance speaking on behalf of the Board at paragraph 19 stated:

> "Removal, whether outright or under a contractual provision is… only permissible if made pursuant to a decision reached by the Commission at the time of removal. Such a decision can only validly be reached if the Commission at that time determines, in accordance with a proper procedure, that reasonable cause exists for the officer's removal." (My emphasis).

[101 Mr. Hamilton, QC submitted that in so far as the learned judge drew a distinction between the case at bar and a case concerned with disciplinary proceedings, on the authorities, no such distinction can be legitimately made. The rules of natural justice apply equally to the disciplinary offences in the Police Act or the relevant contractual provisions or the exercise by a Public Constitutional Authority of its powers of removal. Failure to so observe the rules of natural justice would render the decision unlawful.

[102] Mr. Hamilton, QC opined that the question then arises as to what informs or underlies the phrase 'in accordance with proper procedure'; what minimum standards are necessary? In Horace Fraser v Judicial and Legal Services Commission et al the Commission failed in that respect as they had recommended the removal by Government when it had accepted that no reasonable cause existed. He also referred the court to Dattatreya Panday v The Judicial and Legal Service Commission.[29] In that case, the appellant was employed as a temporary district magistrate. Complaints were received about the appellant's performance, about which he was notified and warned by the Chief Justice. His appointment was temporary and subject to one month's notice and could be terminated at will by giving such notice. The Privy Council ruled that the appellant's appointment gave it a public law aspect over and above the contract

[28] [2008] UKPC 25.
[29] [2008] UKPC 52.

aspect; that the Commission on dismissing the appellant had a public law duty to act fairly and in accordance with natural justice. Mr. Hamilton, QC posited it is this reason (public law) why arguments as to whether the appellant's remedy lies in contract are misconceived. He emphasised that the Commission exercises, on removal of a public officer, a constitutional and statutory function which makes it amenable to public law and judicial review.

[103] During the course of the Dattatreya Panday v The Judicial and Legal Service Commission's judgment the Privy Council had to consider the effect of Regulation 9[30] which provided for dismissal in the public interest and prescribed a procedure which entailed the submission of a report giving the officer concerned an opportunity of replying before a decision is arrived at. Lord Mance on behalf of the Privy Council was of the view that in the circumstances this was dispositive of the case, but he went on and stated as follows:

> "In their Lordships' view, there is a strong case for saying that Regulation 9 governed the present case. Their Lordships would determine this appeal on that simple basis. But they add some observations about the position upon the alternative hypothesis for which Mr. Boolell contended, namely that the Regulations do not apply to a situation like the present. The Commission would on that hypothesis have been faced with a situation outside the Regulations which it had made under s.118 to regulate and facilitate its performance of its constitutional functions under ss.86 and 116(1), but nonetheless within the scope of its constitutional functions under those sections. The Commission would be free to decide how to proceed, subject, as Mr. Boolell accepts, to its public law duty to act fairly and in accordance with natural justice. However, the Board considers that assistance as to what that would and should mean in practice can, as Mr. Guthrie submitted, be derived by analogy from the Commission's own Regulations. In any event, the need for a report to the Commission from those with knowledge or information about the relevant matters and issues, for communication of the substance of such matters and issues to the judicial officer affected to enable him or her to respond, and for consideration of any response by the Commission – these are all elementary aspects of procedural fairness before the taking of any final

[30] The Mauritius Judicial and Legal Services Commission's power conferred by the Mauritius's Constitution was exercised by making the Judicial and Legal Service Commission Regulations.

> decision by the Commission whether or not to continue or to terminate even a temporary appointment such as the present."[31]

[104] Mr. Hamilton, QC complained that in the case at bar none of the above elementary aspects of procedural fairness were given consideration either by the Commission, whose duty it was, or by the Minister, who usurped that duty. Also, Mr. Hamilton, QC referred the court to McLaughlin v Governor of the Cayman Islands[32] where the Privy Council in its judgment stated:

> "It is a settled principle of law that if a public authority purports to dismiss the holder of a public office in excess of its powers, or in breach of natural justice, or unlawfully (categorises which overlap), the dismissal is, as between the public authority and the office holder, null, void and without legal effect, at any rate once a court of competent jurisdiction so declares or orders. Thus the office holder remains in office, entitled to the remuneration attaching to such office, so long as he remains ready, willing and able to render the service required of him, until his tenure of office is lawfully brought to an end by resignation or lawful dismissal."[33]

[105] Mr. Hamilton, QC argued that the trial judge was wrong to conclude that due to the fact that Mr. Nelson had monthly meetings with the Minister and with the Commission he had received procedural fairness. Those monthly meetings, such as they were, were irrelevant.

[106] Mr. Hamilton, QC maintained that Mr. Nelson held a public office and it was immaterial whether or not he was a probationer; he was entitled to receive procedural fairness from the Commission. He asserted that the Commission failed to observe the rules of natural justice and of procedural fairness when it terminated Mr. Nelson's services. This was fatal. To buttress his arguments, Mr. Hamilton, QC reminded the court that Mr. Nelson held a public office which was created in accordance with the Constitution. The Commission similarly owes its existence to the Constitution and in executing its functions it must act lawfully.

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[31] At para. 18.
[32] [2007] UKPC 50.
[33] At para. 14.

In removing Mr. Nelson the Commission ought to have given him a hearing. Mr. Hamilton, QC relied on Chief Constable of North Wales Police v Evans to support this proposition that even as a probationer he was entitled to a fair hearing.

[107] During the course of the hearing of this appeal, the respondents took the point that Mr. Nelson was a probationer and therefore he was not entitled to be given a hearing by the Commission before his services could have been properly terminated. Mr. Hamilton, QC disagreed and referred the court to Nicholson v Haldimand-Norfolk Regional Police Commissioners.[34] In that case it was held that in circumstances where a quasi-judicial tribunal wished to remove a probationary constable from office the tribunal is required to observe the rules of natural justice which affords extensive procedural protection to persons affected by decisions of such tribunals, including the right of notice of a hearing and to counsel. Tribunals exercising executive or administrative powers are not bound by the rules of natural justice as such. However they are nevertheless under a general duty of fairness which at least requires them to inform the person holding a public office of the substance of the reasons for his dismissal and give him an opportunity to respond either orally or in writing. It was further held that a police officer holds public office and while he cannot claim the procedural protection afforded to an officer with more than 18 months service he should be treated fairly, not arbitrarily.

[108] Queen's Counsel, Mr. Hamilton, reminded the court the learned trial judge at paragraph 120 of the judgment stated as follows:

> "The court is of the view that, while the Commission was under an obligation and a duty to observe the rules of procedural fairness, that on the facts of the case and based on the totality of the evidence, that duty was not breached."

[34] [1979] 1 SCR 311.

[109] Mr. Hamilton, QC urged the court to find that the learned trial judge erred in arriving at the conclusion that the duty was not breached. He said that the Commission was duty bound to write to Mr. Nelson and place the charges before him and to call on him to respond to the charges. It simply could not suffice for Mr. Winter, the Chairman of the Commission or for Mr. Derrick to meet with Mr. Nelson and to tell him of their concerns; rather the obligation was on the Commission as a whole to specifically place the charges before Mr. Nelson and call on him to respond. The Commission having failed to do this, the termination cannot stand. Mr. Hamilton, QC relied heavily on the Privy Council's decision in Dattatreya Panday v The Judicial and Legal Service Commission and Thomas v Attorney General to support this proposition.

[110] Learned Queen's Counsel, Mr. Hamilton, expanded on the arguments that he had advanced at first instance and he relied heavily on the decisions of the Privy Council which indicate that even public officers who are on contract should be given the opportunity to be heard before they are removed from office. He referred the court to Horace Fraser v Judicial and Legal Services Commission et al and Dattatreya Panday v The Judicial and Legal Service Commission. Mr. Hamilton, QC accepted that the learned trial judge at paragraphs 103–120 of the judgment dealt extensively with the issue of procedural impropriety or breach of natural justice. However, he insisted that she got it wrong. Mr. Hamilton, QC was adamant that Mr. Nelson held public office and was entitled to be heard before his services were terminated and that he was not heard.

[111] At the conclusion of the appeal, the court invited all of the parties to address in writing the further point that Mr. Nelson was a probationer and was therefore not entitled to be heard before his services were terminated. All learned counsel have accepted the court's invitation and provided further helpful lucid written submissions for which the court expresses its appreciation.

[112] Mr. Hamilton, QC pointed the court to the evidence of Mr. Winter, at first instance, where Mr. Winter stated that he did not think that the Commission had any obligation to hear Mr. Nelson before removing him from office. Mr. Hamilton, QC advocated that the trial judge clearly erred when she concluded that the Commission had afforded Mr. Nelson a hearing since this was not in accordance with the evidence of Mr. Winter. At first instance, the Commission's position, which was maintained during the appeal, was that it had the right to dismiss Mr. Nelson with or without cause and that in either situation he was not entitled to be heard before being removed. Mr. Hamilton, QC also complained that there was no evidence before the trial judge to indicate that, at any time, Mr. Nelson met with the Commission. He further stated that the monthly meetings that Mr. Nelson may have had with Minister Colin Derrick had absolutely nothing to do with Mr. Nelson's subsequent termination. He also said that any meeting that Mr. Nelson had with Mr. Winter could not be regarded as meetings with the Commission. Mr. Hamilton, QC said that when the Commission met and took the decision to terminate Mr. Nelson's services they had failed to put any particulars of any unsatisfactory work or infractions to him; neither was he given the opportunity to meet any of the allegations. He ought at the very least to have been called upon to answer any allegation against him and to show cause why he should not have been dismissed. This was not done.

[113] Mr. Hamilton, QC opined that while the trial judge was correct in her assessment that, in the case at bar, procedural fairness required that Mr. Nelson be heard before his services were terminated, the judge clearly went wrong when she concluded that in the circumstances of the case Mr. Nelson had been afforded a hearing as a consequence of the several monthly meetings that were held not with the Commission but with Mr. Winter and the Minister.

[114] In his further written submissions, Mr. Hamilton, QC in buttressing his arguments also referred the court to the judicial pronouncements of Byron CJ in Duncan v Attorney General:[35]

> "I think that the qualifications imposed by the Constitution are very important. It is well established and generally accepted that the Constitution limited the arbitrary power that had previously been exercised by the Crown in relation to the public service, in particular by abolishing the concept of dismissal at pleasure, and by giving government employees a security of tenure superintended by an autonomous PSC. In *Thomas v Attorney General* (1981) 32 WIR 375, (supra) Lord Diplock discussed these principles in relation to the Police Service Commission in Trinidad and Tobago, principles which apply with the equal force to PSC in Grenada. At page 381 he said:
>
> > 'The whole purpose of Chapter VIII of the Constitution which bears the rubric "The Public Service" is to insulate members of the Civil Service, the Teaching Service and the Police Service in Trinidad and Tobago from political influence exercised directly upon them by the Government of the day. The means adopted for doing this was to vest in autonomous commissions, to the exclusion of any other person or authority, power to make appointments to the relevant service, promotions and transfers within the service and power to remove and exercise disciplinary control over members of the service.'
>
> The qualifications which affect the exercise of the powers conferred on the PSC include the obligation to act for reasonable cause, and not to act whimsically or arbitrarily, to apply the constitutional 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 PSC. In *Thomas* (supra) Lord Diplock expressed the idea at 384:
>
> > 'In their Lordships' 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

[35] [1977] ECLR 361..

> construe it otherwise would frustrate the whole constitutional purpose of Chapter VIII of the constitution which their Lordships have described. It would also conflict with one of the human rights recognised and entrenched section I[d] of the Constitution. Viz. "the right of the individual to equality of treatment from any public authority in the exercise of any functions. Dismissal of individual members of a public service at whim is negation of equality of treatment.'"[36]

[115] Mr. Hamilton, QC also found more support for his arguments in Judge Richard Therrien Q.C.J. v The Minister of Justice et al[37] where Gonthier J stated at paragraphs 81 and 82:

> "Since *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311, compliance with the rules of natural justice, which was required of the courts, has been extended to all administrative bodies acting under statutory authority, [a fortiori constitutional authority], where they are expressed as the rules of procedural fairness ("duty to act fairly"). The fact that a decision is administrative and affects "the rights, privileges or interests of an individual" is sufficient to trigger the application of the duty of fairness...
>
> "Essentially, the duty to act fairly has two components: the right to be heard (the *audi alteram partem* rule) and the right to an impartial hearing (the *nemo judex in sua causa* rule). The nature and extent of the duty may vary with the specific context and the various fact situations dealt with by the administrative body, as well as the nature of the disputes it must resolve…"

[116] Learned Queen's Counsel, Mr. Hamilton, also referred the court to Public Service Commission v Davis And Others[38] in support of his argument that Mr. Nelson was entitled to procedural fairness. In the case at bar and in so far as the trial judge concluded that in the circumstances he was provided with procedural fairness, the trial judge got it wrong. The appeal should therefore be allowed.

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[36] At p. 366.
[37] [2001] 2 SCR 3.
[38] (1984) 33 WIR 112.

[117] He urged the court to apply the above very instructive principles in Caribbean decisions which he asserted were very persuasive and consistent with a long line of authority from the Privy Council. For the sake of completeness, Mr. Hamilton, QC pointed out that Nicholson v Haldimand-Norfolk Regional Police Commissioners was revisited and restated by the Supreme Court of Canada in Judge Richard Therrien Q.C.J. v The Minister of Justice et al.

Submissions on behalf of the First and Second Respondents

[118] Learned counsel, Mrs. de Freitas-Rait, maintained the arguments that were advanced at first instance in relation to procedural fairness. Mrs. de Freitas-Rait submitted that Mr. Nelson had a master and servant relationship with the Government of Antigua and Barbuda; he accordingly fell within the first category of persons referred to by Lord Reid in Ridge v Baldwin and Others. She urged the court to bear in mind that Mr. Nelson was a probationer who had a two year contract. Mrs. de Freitas-Rait argued that there was no statutory provision which imposed restrictions as to the kind of contract the Government of Antigua and Barbuda could have entered into with its servants or the grounds upon which it could have dismissed them. The only statutory provision which was applicable to the case at bar is section 105 of the Constitution and this section places no bar or limitations on how dismissals shall take place. In her view, due to the unique characteristics of the case at bar, the case did not fall to be considered under the third class that Lord Reid postulated. Mrs. de Freitas-Rait further argued that since Mr. Nelson had a master and servant relationship with the Government of Antigua and Barbuda, the terms of the contract of employment must prevail and there could be no implied right to a hearing before dismissal during a probationary period.

[119] Learned counsel, Mrs. de Freitas-Rait, acknowledged that in Ridge v Baldwin and Others the House of Lords enunciated that a hearing was imperative in cases

where the affected employee's dismissal was due to misconduct which findings of misconduct would have deprived the employee of some benefit. Mrs. de Freitas-Rait argued that the case of Ridge v Baldwin and Others is distinguishable from the case at bar. Ridge v Baldwin and Others did not consider a contractual period of probation in a fixed term contract. Mrs. de Freitas-Rait further submitted that the cases that Mr. Nelson sought to rely on such as Thomas v Attorney General, Public Service Commission v Davis And Others, Duncan v Attorney General are all distinguishable from the case at bar since they fall within the third category of cases as identified by Ridge v Badwin and Others. Alternatively, Mrs. de Freitas-Rait, in her further written submissions, stated that while Mr. Nelson may have been entitled to the protections of natural justice, a formal hearing was not required to comply with the dictates of natural justice or procedural fairness because he did not fall within the third category of case identified in Ridge v Baldwin and Others.

[120] Mrs. de Freitas-Rait implored the court to accept the trial judge's findings of fact and law that the several meetings between Mr. Nelson and Mr. Derrick and the Commission were sufficient to meet the requirements of fairness. She argued that the trial judge was correct in concluding that those meetings were sufficient to satisfy the requirement of procedural fairness and pointed the court to paragraph 117 of the judgment. At that paragraph the trial judge placed reliance on pronouncements of Gordon JA in Hugh Wildman v The Judicial and Legal Services Commission of the Eastern Caribbean States.[39] Mrs. de Freitas-Rait agreed with the trial judge that the requirement of natural justice may vary from case to case. She said that the learned trial judge correctly applied the principles stated in Hugh Wildman v The Judicial and Legal Services Commission of the Eastern Caribbean States in concluding that "the threshold of procedural fairness which was required on the facts of this case was low".

[39] Grenada, High Court Civil Appeal GDAHCVAP2006/0009 (delivered 1st March 2007, unreported).

[121] Reinforcing her arguments, Mrs. de Freitas-Rait said further that where an employee (even a public servant) is within his probation period and the employer is dissatisfied with his performance and has held meetings and informed the employee of his short comings over a period of several months that can be enough to meet the threshold of natural justice and particularly procedural fairness. Learned counsel, Mrs. de Freitas-Rait, reminded the court that the trial judge had accepted the evidence of the respondents that prior to receiving the letter of termination the appellant had been told at monthly meetings that there was dissatisfaction with his work. The trial judge's findings of fact cannot be impugned particularly since she found that Mr. Nelson was not a credible witness.

[122] Also, Mrs. de Freitas-Rait reminded the court that during cross examination, at first instance, Mr. Nelson had admitted that he understood the probation clause to mean that he could have been dismissed during that period without cause. Mrs. de Freitas-Rait observed that Mr. Nelson relied on Dattatreya Panday v The Judicial and Legal Service Commission in support of the contention that his appointment gave it a public law aspect over the contractual aspect and submitted that even if the Commission's decision is amenable to judicial review there was no breach of the right to a fair hearing or natural justice. She also posited that the facts in Chief Constable of North Wales Police v Evans are distinguishable from the case at bar. Mr. Nelson, unlike the officer in that case, was not seeking long term and indefinite employment within the Royal Police Force of Antigua and Barbuda. Finally, Mrs. de Freitas-Rait urged the court to uphold the decision of the trial judge in so far as she held that there was no breach of procedural fairness in view of the totality of circumstances of the case.

Submissions on behalf of the Third Respondents

[123] Learned Queen's Counsel, Sir Gerald, disagreed with Mr. Hamilton, QC that Mr. Nelson was entitled to be heard before his services could have been

terminated by the Commission. He too argued, like Mrs. De Freitas-Rait, that Mr. Nelson fell within the first category of persons as referred to in Ridge v Baldwin and Others. Mr. Nelson was a servant of the Government of Antigua and Barbuda. Sir Gerald, QC said that issues of public law and contract law were both placed before the trial judge who addressed them both. Sir Gerald, QC maintained that since Mr. Nelson was on probation the Commission could properly have terminated his services without giving him a hearing. During the probationary period the employee is simply required to prove him or herself before the contractual relations could crystallise. Sir Gerald, QC argued that there is a clear distinction to be drawn where the Government can terminate an employee's services for cause and the situation where it can do so without cause. In the case of Mr. Nelson since he was a probationer his services could have been properly terminated by the Government without cause. This would not have breached the terms of the contract since the same contract specifically enabled the Government to terminate Mr. Nelson's services on giving him three months' notice or one month's pay in lieu of notice.

[124] Sir Gerald, QC said that he has found no case in which a probationer was held to be entitled to a hearing before being removed from office during the probationary period. However, when Mr. Hamilton, QC replied he (Mr. Hamilton, QC) referred the court to the case of Nicholson v Haldimand-Norfolk Regional Police Commissioners and to the jurisprudence in De Smith's Judicial Review[40] which supports the contention that a probationer was entitled to procedural fairness or a fair hearing before he could be removed from office. It must be remembered that it was in those circumstances that the court, at the conclusion of the hearing of the appeal, invited the parties to submit further written submissions on the issue whether or not a probationer was entitled to be heard before he could have been removed from office. Like his colleagues Sir Gerald, QC accepted the court's

[40] 6th edn., Sweet & Maxwell 2007.

invitation and provided the court with further helpful submissions on this point. I will turn to these submissions shortly.

[125] Sir Gerald, QC reminded the court that the trial judge had accepted the submissions of learned counsel for the first and second respondents that the appellant did have numerous opportunities to respond to the Government's and the Commission's concerns about his performance. The trial judge was right to agree with these submissions. Sir Gerald, QC said that even if the court was of the view that during Mr. Nelson's probation some opportunity to be heard was required to meet standards of natural justice such standards were met by the several oral communications and the written communication to him.

[126] Sir Gerald, QC adverted the court's attention to the judge's consideration of the principle of procedural fairness. Indeed, at paragraph 113 of the judgment the learned trial judge, in considering the law with regard to the issue of procedural fairness, referred to the case of R v Secretary of State for the Home Department Ex parte Doody[41] in which Lord Mustill stated at page 560 as follows:

> "What does fairness require in the present case?... (2) The standards of fairness are not immutable. They may change with the passage of time, both in general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demand is dependent on the context of the decision, and this is to be taken into account in all its aspects."

[127] The judge also referred to the judgment of Gordon JA in the case Hugh Wildman v The Judicial and Legal Services Commission of the Eastern Caribbean States in which the learned justice of appeal stated at paragraph 19:

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

[41] [1994] 1 AC 531.

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

[128] The references of the learned trial judge to the above case was cited in support of the findings of the court with regard to the appellant's submission on procedural fairness and the issue of natural justice. As stated in paragraph 120 of her judgment:

> "The Court is of the view that, while the Commission was under an obligation and a duty to observe the rules on procedural fairness, that on the facts of the case and based on the totality of the evidence, that duty was not breached. The instant case is not concerned with disciplinary proceedings against a claimant where there was a failure to observe proper procedure … The Court is of the view that this case is on the level of the "low point" in the classification of Gordon J.A. in the Hugh Wildman case cited above … the Claimant [appellant] admitted that over the course of his employment, he met the Chairman of the Police Service Commission Mr. Winters, "several times". He also testified that he would attend monthly meeting, and that he also met with the Minster of Justice "many times"… The Court accepts the evidence of the Defendants that, prior to receiving the letter of termination, the Claimant was told, at the monthly meetings, that there was dis-satisfaction with his work. Based on the Court's findings that the Claimant was not a credible witness, the Court does not accept the evidence of the Claimant to the contrary. The Court is of the view that, in the instant case, there was no procedural fairness such as to invoke the intervention of the Court."

[129] Sir Gerald,, QC said that he endorsed the findings and reasoning of the learned trial judge. He said that he parted company with learned counsel Mrs. de Freitas-Rait. In his view, during the probationary period the employee could not be

regarded as having any security of tenure. He said that the Commission was entitled to terminate Mr. Nelson's services without giving him a hearing.

[130] Sir Gerald, QC in his further written submissions stated that Nicholson v Haldimand-Norfolk Regional Police Commissioners is no longer good law and is inapplicable to the case at bar as it relates to persons employed under contract with public bodies. The law has evolved greatly since Nicholson v Haldimand-Norfolk Regional Police Commissioners and it is now settled that where there is a contractual relationship between parties (including instances where one of the contracting parties is a public body) the relationship is governed by the private law of contract and the public law duty of procedural fairness does not arise. In support of this proposition, Sir Gerald, QC referred the court to Dunsmuir v New Brunswick.[42] He said that in the case of Dunsmuir v New Brunswick the law as laid down in Her Majesty The Queen in Right of Newfoundland and Board of Commissioners of Public Utilities v Andrew Wells[43] was confirmed and the duty of procedural fairness as stipulated in The Board of Education of the Indian Head School Division No. 10 of Saskatchewan v Ronald Gary Knight[44] was considered and put into proper context. The relevant facts in Dunsmuir v New Brunswick as contained in the headnote are as follows:

> "D was employed by the Department of Justice for the Province of New Brunswick. He held a position under the *Civil Service Act* and was an office holder "at pleasure". His probationary period was extended twice and the employer reprimanded him on three separate occasions during the course of his employment. On the third occasion, a formal letter of reprimand was sent to D warning him that his failure to improve his performance would result from further disciplinary action up to and including dismissal. While preparing for a meeting to discuss D's performance review the employer concluded that D was not right for the job. A formal letter of termination was delivered to D's lawyer the next day. Cause for the termination was explicitly not alleged and D was given four months' pay in lieu of notice."

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[42] [2008] 1 SCR 190.
[43] [1999] 3 RCS 198.
[44] [1990] 1 RCS 652.

[131] Dunsmuir appealed to the Canadian Supreme Court. His appeal was unanimously dismissed by the nine-member court. In giving the leading judgment Bastarache and LeBel JJ at paragraphs 80-83 stated:

> "This case raises the issue of the extent to which a duty of fairness applies to the dismissal of a public employee pursuant to a contract of employment. The grievance adjudicator concluded that the appellant had been denied procedural fairness because he had not been granted a hearing by the employer before being dismissed with four months' pay in lieu of notice. This conclusion was said to flow from this Court's decision in *Knight*, where it was held that the holder of an office "at pleasure" was entitled to be given the reasons for his or her dismissal and an opportunity to be heard before being dismissed (p.683).
>
> "We are of the view that the principles established in *Knight* relating to the applicability of a duty of fairness in the context of public employment merit reconsideration. While the majority opinion in *Knight* properly recognized the important place of a general duty of fairness in administrative law, in our opinion, it incorrectly analysed the effects of a contract of employment on such a duty. The majority in *Knight* proceeded on the premise that a duty of fairness based on public law applied unless expressly excluded by the employment contract or the statute (p.681), without consideration of the terms of the contract with regard to fairness issues. It also upheld the distinction between office holders and contractual employees for procedural fairness purposes (pp.670-76). In our view, what matters is the nature of the employment relationship between the public employee and the public employer. Where a public employee is employed under a contract of employment, regardless of his or her status as a public office holder, the applicable law governing his or her dismissal is the law of contract, not general principles out of public law. What *Knight* truly stands for is the principle that there is always a recourse available where the employee is an office holder and the applicable law leaves him or her without any protection whatsoever when dismissed.
>
> "This conclusion does not detract from the general duty of fairness owed by administrative decision makers. Rather it acknowledges that in the specific context of dismissal from public employment, disputes should be viewed through the lens of contract law rather than public law."

[132] Sir Gerald, QC advocated that in view of the above principles that were stated in Dunsmuir v New Brunswick Mr. Nelson was not entitled to procedural fairness.

[133] Alternatively, Sir Gerald, QC argued that if however the court was of the view that he was so entitled to procedural fairness the trial judge was correct to conclude that in view of the totality of circumstances he had received procedural fairness due to the several monthly meetings that were held with him. Sir Gerald, QC urged the court to dismiss this ground of appeal.

Analysis

[134] Before seeking to address this issue of whether the trial judge was wrong to say that Mr. Nelson benefited from procedural fairness, it is important for me to reproduce the letter of termination which states as follows:

"28th August 2008

> Mr. Gary Nelson
> Commissioner of Police
> …
>
> Dear Mr. Nelson,
>
> Further to your terms of engagement please be advised that your appointment as Commissioner of Police will not extend beyond the 31st August, 2008 which is the expiry date of your probationary period, as a consequence of the unsatisfactory performance of your duties during that period. (My emphasis)
>
> Accordingly, please contact the Permanent Secretary in the Ministry of Justice and Public Safety to finalize any outstanding issues."

[135] Having reviewed the letter of termination, let me say straight away that irrespective of whatever label the parties wish to attribute to Mr. Nelson's termination, the letter of dismissal is self-explanatory. He was dismissed for cause namely unsatisfactory performance. I am fortified in this view having reviewed the evidence of both Mr. Winter and Mr. Derrick. It is clear that the Government of Antigua and Barbuda was dissatisfied with his performance and felt that he had committed several infractions such as promoting officers who he was not lawfully authorized to do so, setting up a website and soliciting equipment etc. on behalf of

the Police Force, without prior approval and apparently not giving the true picture to his functional superiors when information was required from him. The transcript of the proceedings at first instance indicates other things which he is alleged to have done and both Mr. Winter and Mr. Derrick say were unacceptable to the Government of Antigua and Barbuda. Also, Sir Gerald, QC and Mrs. de Freitas-Rait in their oral and written submissions highlighted some of these unacceptable behaviors in asserting that the Commission acted rationally and the he was given a fair hearing or benefitted from procedural fairness.

[136] Turning now to the argument made on the nature of Mr. Nelson's employment, with respect, it is most surprising that arguments could have been advanced, as they were, that Mr. Nelson shared a master and servant relationship with the Government of Antigua and Barbuda. Public Officers or what were known as civil servants were never regarded at common law as having master and servant relationship with their Governments. The old position was that they were public officers who were dismissible at pleasure.[45] However, with the introduction of the written Constitution in the Commonwealth Caribbean public servants were held to be entitled to certain fundamental rights including the right to hold office which is a property right. The corollary of this is that in several cases the Privy Council has spoken very clearly and unequivocally in holding that public officers are no longer dismissible at pleasure. Instead their services could only be terminated in accordance with law.[46] Public officers now have security of tenure.

[137] To postulate that public officers are servants of the Government of Antigua and Barbuda as Sir Gerald, QC and Mrs. De Freitas-Rait have done only bears stating so as to be rejected. It has always been accepted at common law that public

[45] See Ridge v Baldwin and Others [1964] AC 40.
[46] See Thomas v Attorney General (1981) 32 WIR 375; Horace Fraser v Judicial and Legal Services Commission et al [2008] UKPC 25; Dattatreya Panday v The Judicial and Legal Service Commission [2008] UKPC 52; also Attorney General of Guyana v Nobreiga [1969] GLR 552 at 558.

officers hold offices as such. In fact, the Privy Council has propounded the principles on removal of public officers from office in the seminal case of Thomas v The Attorney General which clarified the legal position and revolutionized the law in holding that public officers are not dismissible at pleasure. In that case it was recognized that public officers held office and did not have a master servant relationship with the Government.

[138] Since then the Privy Council in a plethora of highly persuasive cases from the Caribbean has held that as a consequence of the constitutional rights provided for in our written Constitution, public officers held office and could only be removed from office for cause and in accordance with law. This is the legal position in the Commonwealth Caribbean and seems to be at variance with the position in Canada as recognized in Dunsmuir v New Brunswick. There is also a long line of authority from appeal courts in the Caribbean including this Court which have held that public officers are entitled to a hearing before being removed.

[139] In view of the above authorities from the Privy Council and of well-established common law decisions from the House of Lords which for several years have been applied by our courts and which indicate that even probationers must be afforded a hearing before being removed from office I have no doubt that the Canadian case of Dunsmuir v New Brunswick is distinguishable from the case at bar and should not be followed.[47] The celebrated case of Chief Constable of North Wales Police v Evans is a decision of the House of Lords in which it was held that a police officer who was a probationer was entitled to procedural fairness before he could have been removed from office. There is no need in my view to resort to Canadian authorities on this issue in view of the highly persuasive authorities of the House of Lords and Privy Council referred to above. I fail to see

[47] See Ridge v Baldwin and Others [1964] AC 40 and Chief Constable of North Wales v Evans [1982] 1 WLR 1155.

how in the face of the well-established case of Chief Constable of North Wales Police v Evans learned Queen's Counsel, Sir Gerald, could have stated that he was unaware of a case in which a probationer was held to be entitled to procedural fairness. Further, I reject the distinction that learned counsel Mrs. de Freitas-Rait sought to make between the facts of the case at bar and those in Chief Constable of North Wales Police v Evans. This latter case has established a general principle of law and there is no basis upon which the principle that was enunciated in that case could be said to be inapplicable to the case at bar.

[140] In my judgment, whether or not a public officer is on contract or holds office for an indefinite period he is entitled to the benefits of the incidents of being a public officer. It is immaterial that his contract may be for a period of two years as distinct from a public officer who is entitled to serve in the public service until the age of retirement.[48]

[141] By now it is clear that I do not for one moment accept that Mr. Nelson's employment/dismissal fell into the first category of persons as identified by Lord Diplock in Ridge v Baldwin and Others. I agree with the submissions of Mr. Hamilton, QC on this sub-issue. He clearly fell within the third head of Ridge v Baldwin and Others.[49]

[142] Be that as it may, I accept the submissions urged upon the court by Mrs. de Freitas-Rait namely that Mr. Nelson was entitled to benefit from procedural fairness. I agree also that procedural fairness is not an absolute concept nor is

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[48] See Endell Thomas v Attorney General of Trinidad and Tobago [1982] AC 113 at p. 127. Also Chief Constable of North Wales v Evans and Ridge v Baldwin and Others are all well respected decisions of the House of Lords which provide support for this view.

[49] See also Vine v National Dock Labour Board [1957] AC 488; Malloch v Aberdeen [1971] 2 ALL ER 1278 at 1283 and 1284 per Lord Reid.

immutable and can vary from case to case, as was stated by the trial judge.[50] In my view, Mrs. de Freitas-Rait was quite correct to concede that where the employee's dismissal was due to misconduct, which finding of misconduct would have deprived the employee of some benefit, he was entitled to a hearing.[51]

[143] It is trite law that if a public authority intends to remove a person from office for cause procedural fairness requires that the person be given a hearing.[52] I have no doubt that since Mr. Nelson was removed from office due to his unsatisfactory conduct he ought to have been given a hearing since his name and reputation were being questioned. I accept the correctness of Mr. Hamilton, QC's argument on this issue.

[144] I do not for one moment accept the submissions of learned Queen's Counsel, Sir Gerald, that because he was a probationer he was not entitled to a hearing. Chief Constable of North Wales Police v Evans, Ridge v Baldwin and Others and Nicholson v Haldimand-Norfolk Regional Police Commissioners, all of which are very highly persuasive for the opposite view. I accept the correctness of the principles propounded in these cases and apply them to the case at bar.

[145] I now turn to the question of whether Mr. Nelson was entitled to a procedural fairness before he was removed from office. In my judgment the decision of Nicholson v Haldimand-Norfolk Regional Police Commissioners is very attractive and persuasive. It accords with the principles that were enunciated in Ridge v Baldwin and Others and applied in cases such as Chief Constable of North Wales Police v Evans. Of equal significance is the very instructive

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[50] See R v Secretary of State for the Home Department Ex parte Doody [1994] 1 AC 531 and Hugh Wildman v The Judicial and Legal Services Commission of the Eastern Caribbean States Grenada, High Court Civil Appeal GDAHCVAP2006/0009 (delivered 1st March 2007, unreported).

[51] See Ridge v Baldwin and Others [1964] AC 40; Horace Fraser v Judicial and Legal Services Commission et al [2008] UKPC 25; and Chief Constable of North Wales v Evans [1982] 1 WLR 1155.

[52] See Dattatreya Panday v The Judicial and Legal Service Commission [2008] UKPC 52.

decision of Richard Duncan v The Attorney General[53] where Byron CJ made the very helpful pronouncements referred to above.

[146] I am not at all persuaded as to the correctness of Dunsmuir v New Brunswick. In any event that decision is not binding on this Court. As stated earlier, it is noteworthy that in Dunsmuir v New Brunswick the officer in question was dismissible at pleasure. Even though the Supreme Court of Canada purported to make general pronouncements on fairness and the right to be heard of great concern to me is the fact that the pronouncements in that case run counter to a long line of established Privy Council decisions from the Eastern Caribbean and the wider Caribbean which clearly held that public officers (in those cases magistrates) who were on contract were entitled to be heard before being remove from office. Also very persuasive and attractive to me are the very instructive pronouncements made by the Privy Council in Dattatreya Panday v Judicial and Legal Service Commission. I am not persuaded that there is any proper basis for this Court to refuse to apply well and accepted legal principles that were enunciated by the Privy Council in several cases referred to above. Further the courts in the Caribbean have consistently held the decision of Chief Constable of North Wales Police v Evans to be highly persuasive and they have applied the principles enunciated in that case to appropriate circumstances. There is no basis for me to now refuse to apply those principles.

[147] The case of Dunsmuir v New Brunswick has several distinguishing features some of which I have highlighted earlier and for the reasons stated above, I decline to follow Dunsmuir v New Brunswick. I am fortified in my view due to the fact that it does not appear that the Privy Council decisions of Horace Fraser v Judicial and Legal Services Commission et al and Dattatreya Panday v

[53] Grenada, High Court Civil Appeal GDAHCVAP1997/0013 (delivered 8th December 1997, unreported).

Judicial and Legal Service Commission were cited in the Supreme Court of Canada and they were not considered.

[148] I have no doubt that the principles enunciated in Nicholson v Haldimand Norfolk Regional Police Commissioners are in keeping with those adumbrated by the Privy Council and the House of Lords and are consistent with our common law, namely that tribunals exercising executive or administrative powers are at the very least required to inform the person holding a public office of the substance of the reasons for his dismissal and give him an opportunity to respond either orally or in writing whether the employee is on contract or not. This was the very least, in my judgment, that the Commission ought to have done before removing Mr. Nelson from office. Having failed to do so it is fatal to its decision to remove him.

[149] For the sake of completeness I state that I reject the arguments advanced by learned counsel Mrs. de Freitas-Rait's that the cases of Thomas v Attorney General and that of Public Service Commission v Davis and Others are distinguishable since they address employees who unlike Mr. Nelson fell within Lord Reid's third category of employees. To the contrary those decisions are plainly applicable and relevant to the case at bar. I agree with the learned trial judge that in the case at bar the circumstances necessitated that Mr. Nelson receive procedural fairness. I reject Sir Gerald, QC's criticism of the judge in saying that there was no need for procedural fairness. In my judgment the trial judge came to the right conclusion on this aspect of the issue, namely that even as a probationer he was entitled to receive procedural fairness.

[150] I now turn to determine whether the learned trial judge was correct in saying that in the circumstances of the case at bar Mr. Nelson was afforded procedural fairness.

[151] It is the law that the method of achieving a hearing can vary from case to case. It all depends on what the justice of the case demands.[54] However, I most definitely do not agree with the learned trial judge that the requirement of fairness was met by the Minister having met monthly with Mr. Nelson initially and thereafter less frequently and the meetings that the "Commission" held with Mr. Nelson. To be clear, in my view, the Minister had no proper role to play in the matter of Mr. Nelson's removal. I agree with Mr. Hamilton, QC that the meetings with Mr. Derrick were of no moment. Also, I accept Mr. Hamilton, QC's submissions that there was no evidential basis for the judge to conclude that Mr. Nelson met with the Commission. The record/transcript reveals the meetings, such as they were, were held between the appellant and the Chairman of the Commission and the appellant and the Minister of Justice as distinct from the Commission itself. I agree with Mr. Hamilton, QC that the trial judge erred when she found as a fact that monthly meetings were held between the appellant and the Commission. Also, the Commission's case was prosecuted on the basis that there was no need to give Mr. Nelson a hearing before removing him from office.

[152] I have no doubt that the minimum standards of procedural fairness required the Commission to put the formal complaints to Mr. Nelson, that is, giving him the particulars of the charge and providing him with a reasonable time frame to respond. While I agree with learned counsel Mrs. de Freitas-Rait that there was no need for the Commission to conduct a formal hearing into the charges, at the very least, Mr. Nelson was entitled to know the charges made against him, to make representations and be heard in connection therewith. This did not occur. It cannot suffice to indicate that he had been told in several monthly meetings of the Government of Antigua and Barbuda's dissatisfaction with his performance. I have no doubt that the learned trial judge clearly erred when she concluded that

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[54] See R v Secretary of State for the Home Department Ex parte Doody [1994] 1 AC 531 and Hugh Wildman v The Judicial and Legal Services Commission of the Eastern Caribbean States Grenada, High Court Civil Appeal GDAHCVAP2006/0009 (delivered 1st March 2007, unreported) per Gordon, JA.

since Mr. Nelson had held monthly meetings with the Commission and Mr. Derrick and was told of their dissatisfaction with his work, in those circumstances he was afforded procedural fairness. To be clear the matters to which the learned trial judge relied on in support of this conclusion fell short of the required threshold.[55]

[153] I therefore accept Mr. Hamilton, QC's arguments on this issue. Accordingly, Mr. Nelson's appeal succeeds in relation to this issue.

[154] My conclusion in relation to the issue of procedural fairness effectively disposes of this appeal. However, in so far as the issue of whether or not he had a legitimate expectation to be employed for two years remains a live one and out of deference to the submissions of learned counsel, I propose to address the issue of Mr. Nelson's legitimate expectation to the benefit of a two year contract. In addition, should this appeal go further it is only right that the highest court should have the benefit of our views.

I now turn to address issue number 6

Issue Number 6

Legitimate Expectation

Whether the learned judge erred in concluding that Mr. Nelson had no legitimate expectation to a two year contact.

Appellant's Submissions

[155] This issue was ventilated in the court of first instance and many of the arguments that were canvassed below were relied on in this Court. Queen's Counsel, Mr. Hamilton, complained that since Mr. Nelson was employed on contract for a

[55] See R v Secretary of State for the Home Department Ex parte Doody [1994] 1 AC 531 and Hugh Wildman v The Judicial and Legal Services Commission of the Eastern Caribbean States Grenada, High Court Civil Appeal GDAHCVAP2006/0009 (delivered 1st March 2007, unreported).

period of two years he had a legitimate expectation that he would have been allowed to serve the entirety of his contract. In so far as the Government of Antigua terminated his contract prematurely they did so in clear breach of his legitimate expectation to serve a period of two years and he was entitled to relief.

First and Second Respondent's submissions

[156] It is unnecessary to recite all of the submissions made by learned Counsel Mrs. de Freitas-Rait. It will suffice to state that she asserted that Mr. Nelson could not properly claim any legitimate expectation to a two year contract since the contract not only contained a clause for a six month period of probation but critically that Mr. Nelson had admitted during the trial that the Government of Antigua and Barbuda could have terminated his services if it was unhappy with him and on giving him one month's salary. Mrs. de Freitas-Rait reasserted her views which were canvassed at first instance that in those circumstances Mr. Nelson could have had no legitimate expectation to being employed on contract for a period of two years.

Third Respondent's submissions

[157] Sir Gerald, QC posited that the learned trial judge was correct when she concluded that Mr. Nelson could have had no legitimate expectation to the benefit of a contract of employment for two years and the judge was correct in finding that Mr. Nelson's employment "was subject to a six-month probationary period". In order for there to be a breach of a legitimate expectation it must first be established that the public body made representations to Mr. Nelson that gave rise to a legitimate expectation. Mr. Nelson having failed to establish that such representations were made to him, the trial judge was quite correct to dismiss his claim on the basis of judicial review.[56]

[56] See HMB Holdings Limited v The Attorney General of Antigua and Barbuda et al, Antigua and Barbuda, High Court Civil Appeal ANUHCVAP2010/0007 (delivered 5th December 2011, unreported).

Analysis

[158] It is trite law that in order for a claimant to successfully assert that he or she had a legitimate expectation he or she must prove that he had an expectation which, although not amounting to an enforceable legal right, is founded on a reasonable basis that his claim would be dealt with in a particular way.[57]

[159] It is noteworthy that the appellant is asserting that he had a substantive legitimate expectation to the benefit of a two year contract. Substantive legitimate expectation only arises where there are no legal rights, but there exist circumstances in which promises were made or held and resulting in the other party having relied on those promises and acting thereupon and it would now be unfair to allow the first party to change its position to the detriment of the other. Simply put a legitimate expectation to a contract cannot coexist with a legal right to being employed pursuant to a contract. The court will protect an expectation which arises from a representation that is made by a public body or authority and from which it would be an abuse of power to resile. The relevant representation must be unequivocal and lack any relevant qualification.[58] The principle of good administration prima facie requires adherence by public bodies to their promises. It is the law that legitimate expectation can arise in relation to substantive matters. A claimant's right to substantive legitimate expectation will only be found to be established when there is a clear and unambiguous representation upon which it was reasonable for him to rely. Then the administration or other public body will be bound in fairness by the representation.

[160] It is clear to me that the unexecuted contract clearly provided for the terms and duration of Mr. Nelson's contract. Indeed, it was a two year contract which had an essential clause for six months' probation. In my view, the question of Mr. Nelson

[57] See Schmidt and Another v Secretary of State for Home Affairs [1969] 2 Ch 149.
[58] See R v Inland Revenue Commissioners Ex p. MFK Underwriting Agents Ltd [1990] 1 WLR 1545.

having a legitimate expectation to any two year term of contract could not arise since there were clear legal rights created by the unexecuted contract. Since Mr. Nelson has contracted to be bound by the probationary period of six months he cannot now properly complain that the trial judge erred in holding him to his contractual agreement.[59]

[161] I fail to appreciate how Mr. Nelson could have claimed a legitimate expectation to be employed on a two year contract in the face of the written unexecuted contract for two years. I have no doubt that in the case it is impossible for any substantive legitimate expectation to have arisen in the face of clear legal rights which concern the self-same matter albeit subject to a condition namely the satisfactory completion of the period of probation. The doctrine of substantive legitimate expectation plainly could not apply in the case at bar and the learned trial judge was correct in rejecting Mr. Nelson's claim to legitimate expectation to a two year contract even though she seemed to erroneously premise her conclusion on the existence of a probationary period of six months. This is conspicuously bad argument which, in my opinion, should not have been advanced on behalf of Mr. Nelson.

[162] I accept totally the correctness of submissions of learned Queen's Counsel Sir Gerald and learned counsel Mrs. de Freitas-Rait that Mr. Nelson could not have had any legitimate expectation to be entitled to serve the entire two year period of the contract, though not for the reasons they have advanced. In my judgment the judge was right in concluding at paragraph 119 of the judgment that Mr. Nelson did not have a legitimate expectation to a two year contract.

[163] Accordingly, Mr. Nelson does not succeed in relation to this issue.

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[59] See Attorney General et al v Jeffery Joseph et al Barbados, CCJ Appeal No. CV 2 of 2005, a decision of CCJ for an in depth exposition of legitimate expectation.

[164] I will now address issue number 7

Issue Number 7

Whether the learned trial judge erred in awarding costs against the appellant

Appellant's Submissions

[165] Learned Queen's Counsel, Mr. Hamilton, argued that the trial judge erred in awarding costs to the Attorney General and the Commission. He urged the court to set aside the costs order at first instance and award Mr. Nelson costs in the lower court and on the appeal.

First and Second Respondent

[166] Learned counsel, Mrs. de Freitas-Rait, submitted that the trial judge was quite correct to award costs to the Attorney General and the Commission. She urged the court to award costs to the Attorney General and the Commission.

Third Respondent

[167] Learned Queen's Counsel, Sir Gerald, argued that the trial judge was quite correct to award costs to the successful Commission. However, she got it wrong when she ordered for the costs to be on a prescribed basis. The correct approach was for costs to be assessed. He implored the court to reverse the costs order with the Commission's counterclaim and to order costs to the Commission in relation to first instance and on this appeal to be assessed.

[168] In view of my disposal of this appeal, the matter of costs is a short point. In so far as Mr. Nelson has succeeded in this appeal the costs order below cannot stand. I will allow his appeal in relation to the costs that were awarded. For obvious reasons, the Commission's counterclaim on the issue of costs fails and is dismissed. As a general rule, costs follow the event. There is no basis upon which I could depart from this rule. It leaves me now to determine what is the

appropriate costs order. I hold that Mr. Nelson is entitled to receive costs in the lower court to be assessed pursuant to rule 56.13(5) of CPR. In relation to this appeal he is entitled to receive two thirds of the assessed costs. I so hold.

Reliefs

[169] I come now to determine the exact nature of the reliefs which should be awarded to Mr. Nelson.

[170] In so far as Mr. Nelson has prevailed in his appeal against the Commission and the Government of Antigua and Barbuda on the ground of breach of procedural fairness when his services were terminated by the Commission, the only question to be determined are the total reliefs to which he is entitled. It is clear that he is entitled to obtain reliefs against the Commission and the Government of Antigua and Barbuda jointly and severally.[60] Mr. Hamilton, QC in his written submissions urged the court to grant reliefs that it thinks fit. All counsel however have invited the court to pay regard to the arguments that were advanced at first instance. The Attorney General and the Commission maintain that Mr. Nelson is not entitled to any relief whatsoever.

[171] Even though in this Court, in his written submissions, learned Queen's Counsel, Mr. Hamilton, urged the court to award any sum the court thinks fit, it is noteworthy that the appeal before this Court proceeded on the basis that Mr. Nelson was asserting that he was entitled to the declarations, administrative orders, damages including aggravated and exemplary damages and costs against the defendants jointly and/or severally. I emphasis that these claims were strenuously opposed by learned Queen's Counsel, Sir Gerald, and learned counsel Mrs. De Freitas-Rait.

[60] See Horace Fraser v Judicial and Legal Services Commission et al [2008] UKPC 25.

[172] In view of my conclusions above, it is evident that the learned trial judge erred when she concluded that the decision making process of the Commission did not fall within the compass of the legal principles applicable to judicial review and therefore refused to grant judicial review to Mr. Nelson. More critically, the trial judge got it wrong when she concluded that Mr. Nelson's claim should be dismissed due to the fact that his claim lacked merit. In so far as Mr. Nelson's judicial review claim was refused by the trial judge, that decision is reversed and his appeal is allowed.

[173] It is common ground that Mr. Nelson's services were terminated after he had completed six (6) months of a two year contract. For the reasons I have given I have no doubt that he was entitled to obtain judicial review of the decision of the Commission. He is also entitled to an order of certiorari to quash the Commission's decision as was stated in the letter dated 28th August terminating his services. He is also entitled to a declaration that the Commission acted procedurally unfair or in breach of natural justice in dismissing him. I am satisfied that the case at bar is pre-eminently one that can be effectively dealt with by ordering the respondents to pay compensation to Mr. Nelson.

[174] In so far as the Commission and by extension the Government of Antigua and Barbuda terminated Mr. Nelson's services in clear breach of the rules of natural justice or in violation of procedural fairness the dismissal was void and of no legal effect.[61] Mr. Nelson therefore remains entitled to have the remuneration that was attached to his office. He is entitled to receive his net salary and allowances which formed the remuneration that he was in receipt of before his unlawful removal.[62]

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[61] See Privy Council decision in Dr Astley McLauglin v His Excellency the Governor of the Cayman Islands (2007) UKPC 5o; See also Horace Fraser v Judicial and Legal Services Commission et al [2008] UKPC 25.
[62] See Horace Fraser v Judicial and Legal Services Commission et al [2008] UKPC 25; Vine v National Dock Labour Board [1957] AC 488.

[175] However, I am not persuaded that the case at bar merits an award of aggravated or exemplary damages. In my view, Mr. Nelson has failed to meet the evidential threshold that would justify such an award.[63] I am far from persuaded that Mr. Nelson is entitled to receive his housing allowance which was quite wisely not pursued with any force. I therefore decline to make an order for Mr. Nelson in relation to his housing allowances.

Minister Colin Derrick – as a party

[176] For the sake of completeness, even though the issue of whether or not the Minister Derrick was a proper party to the appeal was not ventilated before this Court, I have no doubt that he was improperly joined.[64] Public officials are not suable in their official capacities; in any event, there was no evidence that Mr. Derrick had anything to do with Mr. Nelson's termination of services. The decision to terminate was taken by the Commission and by extension the Government of Antigua and Barbuda. Mrs. de Freitas-Rait has indicated that she had objected to Mr. Derrick being named as a party but it was not addressed by the judge. Also, learned counsel Dr. Dorsett, in his written submissions at first instance, had brought the improper joinder of Minister Derrick as a party to the trial judge's attention. Be that as it may, I have no doubt that Mr. Derrick was improperly joined as a party to the claim.

Conclusion

[178] For the above reasons, Mr. Nelson's appeal is allowed and I make the following orders:

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[63] Rookes v Barnard and Others [1964] AC 1129 distinguished.

[64] See section 13 of the Crown Proceedings Act Cap. 121 Laws of Antigua and Barbuda. See also Glentis W. Goodwin v Hon. Winston B. Spencer et al, Antigua and Barbuda, High Court Civil Appeal ANUHCVAP2005/0025 (delivered 14th March 2007, unreported).

(1) Mr. Gary Nelson is entitled to judicial review of the decision of the Commission contained in the letter dated 28th August which terminated his employment.

(2) An order certiorari is granted quashing the decision of the Commission in the letter dated 28th August which terminated his employment.

(3) A declaration is granted to the effect that the Commission and by extension by the Government of Antigua and Barbuda acted procedurally unfair when the decision was taken to terminate Mr. Nelson's services.

(4) Mr. Nelson is to be compensated in damages which reflects the net sum of his salary for the eighteen (18) months that he would have worked had his services not been unlawfully terminated.

(5) The damages are awarded against the Commission and/or the Government of Antigua jointly and severally.

(6) Mr. Nelson is to have his costs in the lower court to be assessed if not agreed within 21 days of this order. On this appeal, he is to have two thirds of the costs assessed below.

(7) The Commission's counter claim is dismissed.

[179] I gratefully acknowledge the assistance of all learned counsel.

Louise Esther Blenman
Justice of Appeal

[180] Michel JA: I have read the very scholarly and well-researched judgment of my sister, Blenman JA, and I agree with the greater part of her reasoning and conclusions, but I disagree with my learned sister on the one issue of whether the learned trial judge erred in concluding that the appellant was not entitled to a fair hearing before his dismissal but that in any event in the circumstances of the case he was given a hearing.

[181] I do not propose to repeat the pertinent facts of this case which are helpfully set out in paragraphs 1 through to 13 of the judgment of my learned sister. I also do not propose to embark on any analysis of the submissions of counsel or the conclusions of the trial judge on all of the other issues on which I agree with Blenman JA. I am content to concur with my learned sister's exposition on the facts of the case and her reasoning and conclusions on all the other issues in the appeal but for the issue of the appellant's entitlement to a fair hearing. In fact, I feel compelled to commend the extensive and intensive analysis which she has made of the relevant statutes, cases and principles bearing upon the issues in this appeal, so that I really do not need to dwell on them too much since this would not be much more than an exercise in needless repetition. I propose therefore to merely set out below - without unnecessary repetition of the issues and points on which I agree with my sister or of the cases cited and discussed - my views on the issue which Blenman JA referred to as issue number 5, that is, whether the learned trial judge erred in concluding that the appellant was not entitled to a fair hearing before his dismissal, but that in any event, in the circumstances of this case, he was given a hearing.

[182] This case straddles the border between public law and contract law, involving as it does a public officer on contract. It also contains the added feature of being a case involving a public officer not only on contract but also on probation.

[183] The cases involving the public law rights of public officers generally are many; cases involving the public law rights of public officers on contract are also now quite prevalent; and there have been cases involving the public law rights of public officers on probation. What I have not yet encountered though are cases involving contract public officers on probation, so as to ascertain judicial attitudes to their public law rights.

[184] There is no doubt that all public officers appointed by the service commissions – whether they be public service, police service, teaching service or judicial and legal services commissions – are entitled to apply for administrative orders, including judicial review, with respect to the decisions of public bodies and/or public officers touching or concerning their employment in the public service. The considerations for the grant of judicial review and of remedies thereunder to public officers must however differ depending on whether the public officer involved is on permanent establishment, is on probation or is a contract public officer, and more so a contract public officer on probation.

[185] The fact that a public officer is on a fixed term contract would deny him the right to security of tenure beyond the term of his contract of employment, unless a legitimate expectation is created that his contract of employment will be extended beyond the fixed term, but during the term of his contract the public officer would be entitled to the whole slew of public law rights enunciated by the English courts over the years and applied to the Commonwealth Caribbean by the Judicial Committee of the Privy Council since Thomas v Attorney-General[65] in 1981 – a case involving the termination of employment of a police officer by the Police Service Commission of Trinidad and Tobago. These public law rights would include the right to a hearing before the public officer's employment could be terminated by the service commission.

[65] (1981) 32 WIR 375.

[186] The slew of public law rights, to include the right to a hearing before termination of employment, has been extended by the House of Lords in Chief Constable of the North Wales Police v Evans[66] to a public officer on probation. That case, like the present one, involved the termination of the services of a police officer before the conclusion of his probationary service. No case has thus far, however, at least none that I have read or been referred to, extended this slew of public rights to a contract public officer on probation, and it is not axiomatic that if these rights are extended to a public officer on contract (as in Horace Fraser v Judicial and Legal Services Commission et al)[67] and to a public officer on probation (as in the Chief Constable of the North Wales Police v Evans case) then they must therefore be extended to a contract public officer on probation. Indeed, I have great difficulty in envisaging how the entire body of rights, including the right to a hearing before termination of contract, can be extended to the case of a public officer on a fixed term contract, with a fixed probationary period, especially where it is determined that statutory provisions like those in section 12 of the Police Act[68] of Antigua and Barbuda do not apply to the officer.

[187] Section 12 of the Police Act states:

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

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[66] [1982] 3 All ER 141.
[67] [2008] UKPC 25.
[68] Cap. 330, Revised Laws of Antigua and Barbuda 1992

[188] If section 12 was to be applied to the appellant, then there may be a triable issue as to his physical or mental fitness to perform the duties of his office or of the likelihood of his becoming an efficient or well conducted police officer. In fact, section 12(1) of the Police Act requires a finding to be made of the officer's unfitness to perform the duties of the office or of the unlikelihood of his becoming an efficient or well conducted police officer, and the making of a finding by the Police Service Commission ("Commission") would certainly invite a hearing on the issue. This indeed was the position taken by the House of Lords in Chief Constable of the North Wales Police v Evans. Where, however, section 12 is determined to be inapplicable - and I agree with the learned trial judge and with my learned sister that it is inapplicable to the situation of the appellant - what remains is the appellant's contract which entitles him to employment in the police service for a period of two years if he remains in post beyond the probationary period of six months. Moreover, there is no triable issue in the determination of whether the officer should remain in post beyond the probationary period, only that if he does remain then his employment is guaranteed for two years unless earlier terminated, which earlier termination, the cases have determined, must be in accordance with the public law rights to judicial review, including a hearing on the merits of his termination.

[189] In the case of the appellant, it is sufficient (in my view) if the Commission determines prior to the confirmation of his employment that he should not continue in his employment in the police service beyond the six-month probationary period. There is no other reasonable construction of clause 2 of the contract and no other reasonable outcome of all the facts and circumstances of this case, including the insistence of the respondents on the inclusion of the probationary clause in the contract, the resistance to its inclusion by the appellant until it was made clear to him that he would not otherwise be engaged, and the inclusion of the clause in all three versions of the contract, including the final version determined by the learned

trial judge and accepted by my learned sister to be the basis on which the appellant was employed as the Commissioner of Police of Antigua and Barbuda.

[190] Clause 2 of the appellant's contract of employment states:

> "Subject to a successful probationary period of six (6) months the Officer shall faithfully and to the best of his ability perform the duties and responsibilities hereinafter stated for a period of two (2) years commencing on the 1st of March, 2008 and terminating on the 28th day of February, 2010 or until this contract of employment is sooner determined or renewed in accordance with the terms of this contract."

One only has to ask the question - why would the appellant have so resisted the incorporation of this clause in the contract and why would the respondents have so insisted on its incorporation if its inclusion did not give the Commission the right to determine the appellant's contract prior to its confirmation without the necessity for the preferring of a charge and the conduct of a hearing; because if the Commission could only terminate the appellant's employment as a result of a specific charge preferred against him and after a hearing to determine the merits of the charge, then what difference would it make whether the appellant was or was not on probation?

[191] The Commission, by letter dated 28th August 2008, informed the appellant that his "appointment as Commissioner of Police will not extend beyond 31st August, 2008 which is the expiry date of your probationary period, as a consequence of the unsatisfactory performance of your duties during that period", effectively terminating his services before the confirmation of his appointment because of their dissatisfaction with his performance during the period of his probation.

[192] The Commission in so doing could not be said to be acting illegally or unlawfully, because section 105(1) of the Antigua and Barbuda Constitution Order 1981 ("Constitution") invests the Commission with the power to appoint persons to or remove persons from the police service, and by its letter to the appellant of 28th

August 2008 it exercised its right to remove him from the police service, having appointed him to the service in the first place.

[193] The Commission, in terminating the appellant's services, could not be said to be acting irrationally or unreasonably, having terminated his services prior to the end of his probation (when his appointment would have been confirmed) and having done so because of its dissatisfaction with the performance of his services during his period of probation.

[194] The Commission also could not be said to be acting unfairly or with procedural impropriety, having discussed with the appellant their dissatisfaction with his performance during his period of probation. At paragraph 107 of her judgment the learned trial judge expressly found that the uncontroverted evidence before the court was that the appellant attended monthly meetings with the Commission and was told at these meetings that there was dissatisfaction with his work. I do not therefore take the view that the appellant was entitled to be informed of charges against him and to be given a hearing where he would have an opportunity to defend himself. In the first place, there were no charges against the appellant, only that the Commission was dissatisfied with his performance during his probationary period and, secondly, there could be no hearing of a non-existent and unnecessary charge. All that was required for the Commission to have terminated the appointment of the appellant as Commissioner of Police during the probationary period was for them to have determined that they were not satisfied with his performance during the period of his probation. They evidently made that determination and acted on it. Nothing more was required of them.

[195] The Commission was not, in my view, required even to inform the appellant of the reason for their dissatisfaction with his performance, but if I am wrong on this point the evidence in the case was that in fact they "did on divers occasions … communicate with the [appellant] relative to the performance of his duties and in

so communicating indicated the Commission's grave concern and displeasure." This evidence, contained in paragraph 22 of the affidavit of the Chairman of the Commission, Mr. Stephans Winter,[69] was affirmed by him in evidence in chief[70] and accepted by the trial judge as truthful.[71]

[196] That there was evidence accepted by the trial judge that the Commission did communicate with the appellant their concern and displeasure relative to the performance of his duties and in so doing enabled him to respond to their concern and displeasure, not only debunks the argument of the lack of communication of and opportunity to be heard on the issues of complaint, but it also reinforces the propriety of the decision and action of the Commission in terminating the services of the appellant as the Commissioner of Police of Antigua and Barbuda.

[197] The learned trial judge in the course of her judgment made reference to the judgment of Lord Mustill in the House of Lords in the case of R v Secretary of State for the Home Department, Ex parte Doody.[72] I am particularly attracted to the portion of his judgment at pages 560-561 of the report where he stated:

> "… it is not enough for them to persuade the court that some procedure other than the one adopted by the decision-maker would be better or more fair. Rather, they must show that the procedure is actually unfair. The court must constantly bear in mind that it is the decision maker, not the court, that Parliament has entrusted not only the making of the decision but also the choice of how the decision is made."

I would merely substitute "appellant" for "them" and "they" and substitute "the Constitution" for "Parliament" and adopt in its entirety the dicta of Lord Mustill.

[198] Public law, and administrative law in particular, which governs the exercise of powers and duties by public authorities and regulates the relationship between

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[69] At pp. 222 to 223 of Record of Appeal Vol. 2(ii).
[70] At pp. 239 to 240 of Record of Appeal Vol. 4 (iii).
[71] Para. 20 of the judgment.
[72] [1994] 1 AC 531.

public officers and government agencies, has undergone considerable development in the last 50 years and has provided more and more protection to public officers in their dealings with governmental agencies, but it has not supplanted altogether contract and other species of private law.

[199] I take the view that even the most liberal application of administrative law cannot insulate a person in the position of the appellant from termination of employment during the probationary stage of his employment and in accordance with a contract of employment entered into by him as a mentally composite adult professional clearly cognizant of the existence and effect of the probationary clause in the contract. The reason given by the Commission in its letter to the appellant for terminating his probationary employment was its dissatisfaction with his performance during the course of his probation, and there was abundant evidence before the trial judge of good reason for the Commission to be dissatisfied with the appellant's performance. The application of public law principles cannot, in these circumstances, bind the Commission to prefer a formal charge against the appellant, conduct a formal hearing to adjudicate upon the charge so preferred and then dismiss him, or be otherwise saddled with a police chief whose record of performance while on probation was clearly unsatisfactory.

[200] For the reasons which I have given in my judgment, I would answer the question posed as issue 5 in the judgment of my learned sister in the negative and would dismiss the appellant's third ground of appeal and the portion of the fifth ground of appeal which challenged the trial judge's finding on the issue of a fair hearing prior to the termination of the appellant's contract. For the reasons given by my learned sister in her judgment, I would also dismiss the appellant's other grounds of appeal. I would accordingly dismiss the appellant's appeal and the third respondent's cross-appeal, which was not pursued, and affirm the decision of the trial judge. I would also award costs to the respondents of two thirds of the costs in the court below.

Mario Michel
Justice of Appeal

[201] Mitchell JA [AG.]: I have had the advantage of reading advance drafts of both of the judgments of my learned sister Blenman JA, and of my learned brother Michel JA. For the reasons which she has so ably set out, I agree with Justice of Appeal Blenman's finding on issues one to four, and issue six. I agree with Justice of Appeal Michel's finding on issue five, for the reasons which he has given, and with the order that he proposes should be made.

Don Mitchell
Justice of Appeal [Ag.]