EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT VINCENT AND THE GRENADINES

SVGHCVAP2014/0002

BETWEEN:

TYRONE BURKE (CHIEF PERSONNEL OFFICER)

Appellant

and

OTTO SAM

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste — Justice of Appeal
The Hon. Mr. Mario Michel — Justice of Appeal
The Hon. Mr. Paul Webster, QC — Justice of Appeal [Ag.]

Appearances:

Mr. Grahame Bollers for the Appellant
Mr. Jomo Thomas for the Respondent

2015: July 1;
September 15.

Civil Appeal-appeal arising out of judicial review proceedings - whether open to trial judge to disbelieve uncontroverted evidence of the Chief Personnel Officer when bases upon which he was to be disbelieved were not put to him - whether judge erred in drawing adverse inferences from evidence when evidence not subject to cross-examination - duty of candour in judicial review proceedings

The respondent, Mr. Otto contended by way of judicial review proceedings that he was transferred by letter written by the appellant, the Chief Personnel Officer of the Government of St. Vincent and the Grenadines from the post of Head Teacher to the National Emergency Management Organization (NEMO). The Chief Personnel Officer testified that the decision to transfer Mr. Sam was made by the Public Service Commission ("PSC") and that he wrote the letter on the instructions of the PSC. In his affidavit evidence, he had stated that the letter was written at the instance of the Permanent Secretary in the Ministry of Education who had advised that the Permanent Secretary in the Ministry of National Security had requested someone to be temporarily assigned to NEMO. Gertel Thom J held that a public officer could be appointed or designated to

NEMO but that that had to be done by the PSC. The learned judge also stated that she did not believe the Chief Personnel Officer's testimony that the decision to transfer Mr. Sam had been made by the PSC and held that based on the evidence before her, it was not done by the PSC and was therefore unlawful. The learned judge therefore ordered that the decision of the Chief Personnel Officer to transfer Mr. Sam was illegal and irrational.

The Chief Personnel Officer being dissatisfied with the decision of the learned judge appealed. The main grounds of appeal advanced were that the learned judge erred in making adverse findings that the appellant was not speaking the truth buttressed by the fact that no minutes of the meetings of the PSC reflecting that the decision was made to transfer Mr. Sam were exhibited. The question on appeal was whether it was open to the trial judge to disbelieve the uncontroverted evidence of the Chief Personnel Officer that the decision was made by the Public Service Commission, when the bases upon which he was to be disbelieved were not put to him. The appellant contended that the Chief Personnel Officer's evidence was not subject to cross-examination nor was it disputed by the respondent and in such circumstances, it was not open to the trial judge to reject evidence.

Held: dismissing the appeal and awarding costs to the respondent in the sum of $2,500.00 that:

1. The rule in **Brown v Dunn** that if a party proposes to invite a jury to disbelieve the evidence of a witness, this should be made clear to the witness so that he has the opportunity to offer an explanation which he may have for what he says and to show if he can that his evidence is reliable is inapplicable in this case. The rule in **Browne v Dunn** is speaking to the actions of counsel in cross-examination as opposed to the judge in his fact-finding role.

   Browne v Dunn (1894) 6 R 67 at 70-71 (HL) distinguished;

2. Where a finding turns on the judge's assessment of the credibility of a witness, an appellate court will take into account that the judge had the advantage of seeing the witnesses give their oral evidence, which is not available to an appellate court. It is therefore rare for an appellate court to overturn a judge's finding as to a person's credibility. Where any finding involves an evaluation of facts, an appellate court must take into account that the judge has reached a multi-factorial judgment, which takes into account his assessment of many factors. The correctness of the evaluation is not undermined, for instance, by challenging the weight the judge has given to elements in the evaluation unless it is shown that the judge was clearly wrong and reached a conclusion which on the evidence he was not entitled to reach. In other cases, where the finding turns on matters on which the appellate court is in the same position as the judge, the appellate court must in general make up its own mind as to the correctness of the judge's finding.

Langsam v Beachcroft LLP [2012] EWCA Civ 1230 applied; **Watt (Thomas) v Thomas** [1947] AC 484 applied.

3. In the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified.

   Henderson v Foxworth Investment Limited [2013] UKPC 41 considered.

4. A public authority impleaded as a respondent in judicial review proceedings owes a duty of candour to disclose materials which are reasonably required for the court to arrive at an accurate decision and this duty applies throughout the proceedings. The learned judge in this case was deeply concerned about the absence of documentary evidence to support the Chief Personnel Officer's evidence that he was instructed to write the letter to Mr. Sam by the Public Service Commission. The learned judge's criticisms and observations about the fact that the letter did not state that approval was given by the Public Service Commission were well-founded.

   R v. Lancashire County Council ex p Huddleston [1986] 2 All ER 941 applied. **Guidance on Discharging the Duty of Candour in Judicial Review Proceedings,** Treasury Solicitor's Department of England, January 2010 considered.

5. It was within the competence of the learned judge to make adverse findings against the Chief Personnel Officer, given the circumstances of the case. Where as in this case there was a clear conflict of evidence between the Chief Personnel Officer and Mr. Sam regarding who had actually made the impugned decision, reference to the objective facts and documents, to witnesses' motives and to the overall probabilities can be of very great assistance to the judge in ascertaining the truth. The learned judge tested the Chief Personnel Officer's evidence against all the other material available to her and in her fact-finding task, was understandably swayed by and attached much weight to the absence of contemporary documentation to confirm his oral evidence. The learned judge was entitled to and was correct to test the appellant's evidence by reference to both the contemporary documentary evidence and its absence.

   The Ocean Frost [1985] 1 Lloyd's L.R. 1 applied; **Wetton v Ahmed and Others** [2011] ECWA Civ. 61 applied.

6. Although cases are decided on evidence, the Court is entitled to draw adverse inferences from the unexplained absence of evidence from witnesses, or in the form of documents, which it would be reasonable to expect would be before the Court. The learned judge was therefore entitled to draw adverse inferences

from the Chief Personnel Officer's failure to produce documentary evidence in support of his oral evidence that he acted on the instructions of the Public Service Commission.

Wisniewski v Manchester Central Health Authority ("The Wisniewski principle") [1998] ECWA Civ. 596 applied; **Western Trading Ltd. v Great Lakes Reinsurance (UK) PLC** [2015] EWHC 103 QB applied.

JUDGMENT

[1] **BAPTISTE JA**: This appeal comes by way of judicial review proceedings in which the respondent, Mr. Sam, contended that he was transferred by letter written by the appellant, the Chief Personnel Officer of the Government of St. Vincent and the Grenadines, from the post of Head Teacher to the National Emergency Management Organisation (NEMO). The Chief Personnel Officer, who penned the letter, testified that the decision was made by the Public Service Commission and that he wrote the letter on the instructions of the Public Service Commission, as that was his administrative role. Gertel Thom J. stated that a public officer could be appointed or designated to NEMO but it must be made by the Public Service Commission. The learned judge further stated that she did not believe the Chief Personnel Officer's testimony that the decision was made by the Public Service Commission and accordingly held that, based on the evidence, it was not done by the Public Service Commission and was therefore unlawful. The learned judge also found that "no sensible person who considered the task to be performed at NEMO would remove a qualified and experienced Head Teacher and assign him to perform such tasks for an indefinite period. I therefore find that the decision was irrational." The learned judge made an order that the decision of the Chief Personnel Officer in the letter dated 17th August 2010 is illegal and irrational.

[2] The Chief Personnel Officer has advanced several grounds of appeal against the decision and challenged important findings of fact. Mr. Bollers, counsel for the Chief Personnel Officer, contends that the learned judge erred in making adverse findings that he was not speaking the truth and buttressed her findings by the fact that no minutes of any meetings of the Public Service Commission reflecting that

the decision was made was exhibited. During the hearing of the appeal, it became clear that the critical issue fell within a very narrow ambit. Succinctly put, it was whether it was open to the trial judge to disbelieve the uncontroverted evidence of the Chief Personnel Officer that the decision was made by the Public Service Commission, when the bases upon which he was to be disbelieved were not put to him. Pitted against this is the duty of candour owed by a public authority in judicial review proceedings and whether it was competent for the judge to draw adverse inferences against the appellant because of the absence of contemporaneous documentary evidence in the form of minutes of the Public Service Commission. In the circumstances, this judgment accordingly deals with the critical issue as articulated above.

[3] It is instructive to refer to the letter from the Chief Personnel Officer. It states:

> "Dear Sir
>
> "Please be informed that approval has been given for your assignment to the National Emergency Management Office, Ministry of National Security, Air and Sea Port Development with effect from August 23, 2010 and until further notice.
>
> "You are therefore requested to report to the Director, National Emergency Management Office, Ministry of National Security, Air and Sea Port Development, on August 23, 2010 for instructions in relation to the said assignment.
>
> "Yours faithfully
> Tyronne Burke (Mr.)
> Chief Personnel Officer"

[4] In his affidavit evidence, the Chief Personnel Officer stated that the letter was written at the instance of the Permanent Secretary in the Ministry of Education who advised that the Permanent Secretary in the Ministry of National Security had requested someone to be temporarily assigned to the National Emergency Management Organisation to assist with the preparation of a national disaster preparedness education policy. At the trial, in amplifying his evidence, the Chief Personnel Officer testified that information received from the Permanent Secretary

in the Ministry of Education was submitted to the Public Service Commission and the Commission directed that he should assign the respondent to the National Emergency Management Organisation. He therefore wrote the letter of assignment on the instructions of the Commission. The Chief Personnel Officer also testified that when he mentioned in paragraph 6 of his affidavit that "my letter was written at the instance of the Permanent Secretary", he meant that the Permanent Secretary submitted the information for the assignment but the Commission approved the recommendation. He wrote on behalf of the Commission, his role being an administrative one. The Chief Personnel Officer further stated that the respondent was not transferred; what took place was an assignment.

[5] Before I consider the judge's core reasoning, it would be useful to make a few observations regarding the Public Service Commission stemming from some of the evidence given by the Chief Personnel Officer in his affidavit and oral evidence. The oral evidence of the Chief Personnel Officer was that he was responsible for the day to day administration of the Public Service Commission. In his affidavit evidence, he described himself as "the Chief Personnel Officer of Saint Vincent and the Grenadines, of the Public Service Commission". I note that the appellant is not a member of the Public Service Commission; neither is he the secretary to the Commission. The Commission has its own secretary. In fact, the appellant, as a serving public officer, is precluded by section 77(2)(c) of the **Constitution of Saint Vincent and the Grenadines**[1] ("the Constitution") from being a member of the Public Service Commission.

[6] The Public Service Commission is an autonomous body established by section 77 of the Constitution. The Constitution contains provisions to secure its independence from both the executive and the legislature. The Constitution vests in the Commission, to the exclusion of any other person or authority, the power to make appointments, promotions and transfers within the public service. Subject to

[1] Statutory Instrument No. 916 of 1979.

the approval of the Prime Minister, it may delegate any of its powers to any of its members or to a person holding some public office.[2] It is not contended here that the Commission delegated any of its powers to the Chief Personnel Officer.

[7] I now consider the trial judge's core reasoning in rejecting the evidence of the appellant. The reasoning is contained in paragraph 27 of her judgment. It is necessary to reproduce it in full. It states:

> "At the hearing the CPO stated that it was the Public Service Commission that made the decision. Having seen and heard the CPO and having reviewed his testimony and his affidavit I do not believe the CPO's testimony at the trial that the decision was made by the Public Service Commission. Mr. Sam in paragraph 6 of his affidavit specifically alleged that he was transferred by the CPO. The CPO made a detailed response to Mr. Sam's paragraph 6. At no time did the CPO make any mention of the matter being submitted to the Public Service Commission. Indeed, the CPO in his affidavit makes no mention to the Public Service Commission. The CPO exhibited several documents to his affidavit, however no minutes of a meeting at which the Public Service Commission would have made the decision or no decision was exhibited. Regulation 7 of the Public Service Commission Regulations makes provisions for minutes of all minutes of the Commission and all decisions of the Commission to be kept. … Mr. Bollers also referred to the CPO's letter where he stated "approval has been given for your assignment…" and submitted that this meant approval was given by someone other than the CPO being the Commission. I note that the CPO's letter did not state that approval was granted by the Commission or by any other person. The CPO did not state in his letter that he was writing on behalf of the Commission. The letter contains no reference to the Commission. In my opinion the letter informed Mr. Sam the CPO had granted approval for his assignment to NEMO".

[8] At paragraph 28 the learned judge concluded that:

> "I am of the view that if the decision was made by the Public Service Commission the CPO would have so stated in his affidavit more so since Mr. Sam was contending that the decision was made by the CPO."

[9] On appeal it was contended that the learned judge erred in finding that she did not believe the Chief Personnel Officer's testimony, as the evidence was not subject to cross-examination nor disputed by the respondent. The trial judge erred by not

[2] See: Endell Thomas v Attorney General of Trinidad and Tobago, [1982] AC 13.

appreciating the fact that the Chief Personnel Officer was never given an opportunity to explain why in his affidavit, in response to paragraph 6 of the respondent's affidavit, he made no mention of the matter being submitted to the Public Service Commission. The Chief Personnel Officer was not given an opportunity to explain why no minutes of a meeting at which the Public Service Commission would have made the decision or no decision was exhibited to his affidavit. The Chief Personnel Officer was not given an opportunity to explain why his affidavit did not state that approval was granted by the Commission or by any other person.

[10] Mr. Bollers further contended that the learned judge took totally irrelevant considerations into account in coming to her findings of fact. Mr. Bollers argued that the judge's finding that she disbelieved the witness because he failed to exhibit minutes of the Commission was unfair, as the issue of absence of minutes was never put to him; he was never cross-examined on the issue, nor was his explanation for failure to exhibit minutes ever elicited either by counsel or by the Court. Mr. Bollers submitted, somewhat speculatively, that the appellant may well have had a good explanation as to why no minutes were attached to his affidavit. In my judgment, the arguments of Mr. Bollers are easily defeated by the duty of candour owed by a public authority in judicial review proceedings. For reasons which will be articulated later, I do not accept Mr. Bollers' arguments.

[11] In support of the appeal Mr. Bollers relied on the case of **Browne v Dunn**,[3] where Lord Herschell LC said:

> " … it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might be able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of

[3] (1893) 6 R. 67 at 70-71.

> credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whist he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that it is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses."

[12] The rule in **Browne v Dunn** is essentially one of fairness. It applies in both civil and criminal cases. It was addressed by the Privy Council in the context of a criminal matter in **Director of Public Prosecutions v Nelson**.[4] At paragraphs 23 and 24, the Board endorsed the general principle that if a party proposes to invite a jury to disbelieve the evidence of a witness on a particular point, that ought except in unusual circumstances to be made clear to the witness so that he has the opportunity to offer any explanation which he may have for what he says and to show if he can that his evidence is reliable. The Board stated that the gravamen of the principle is fairness. "The witness and in particular a defendant witness, must not be deprived of the opportunity to deal with a particular suggestion by it being unspoken when it ought to be put directly."

[13] I am not, however, of the view that the rule in **Browne v Dunn** is applicable to this case. The rule in **Browne v Dunn** is speaking to the actions of counsel in cross-examination as opposed to that of the judge in his fact- finding role. The issue here is whether, having regard to the evidence given by the Chief Personnel Officer, it was open to the judge to disbelieve him, when the bases upon which she made an adverse finding against him, were not put to him, thus denying him the opportunity to explain the absence of documentary evidence evidencing the decision of the Commission. In that regard, the critical issue is whether the judge's findings can be successfully impugned.

[14] Mr. Bollers referred to a passage from the well-known case of **Watt (Thomas) v Thomas**[5] where Lord Thankerton said that in the absence of a misdirection of himself by the trial judge, an appellate court which was disposed to come to a

[4] [2015] UKPC 7.
[5] [1947] AC 484, 487-488.

different conclusion on the evidence should not do so 'unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion'. Lord Thankerton stated at page 488:

> "The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

[15] In **Henderson v Foxworth Investment Limited**[6] Lord Reed said:

> "It follows that, in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified."

[16] In **Langsam v Beachcroft LLP,**[7] Lady Justice Arden said:

> "It is well established that, where a finding turns on the judge's assessment of the credibility of a witness, an appellate court will take into account that the judge had the advantage of seeing the witnesses give their oral evidence, which is not available to the appellate court. It is, therefore, rare for an appellate court to overturn a judge's finding as to a person's credibility. Likewise, where any finding involves an evaluation of facts, an appellate court must take into account that the judge has reached a multi-factorial judgment, which takes into account his assessment of many factors. The correctness of the evaluation is not undermined, for instance, by challenging the weight the judge has given to elements in the evaluation unless it is shown that the judge was clearly wrong and reached a conclusion which on the evidence he was not entitled to reach. In other cases, where the finding turns on matters on which the appellate court is in the same position as the judge, the appellate court must in general make up its own mind as to the correctness of the judge's finding (see *Datec Electronic Holdings v United Parcels Service* [2007] UKHL 23, [2007] 4 All ER 765, [2007] 1 WLR 1325 at 46 per Lord Mance)."

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[6] [2014] UKSC 41.
[7] [2012] EWCA Civ 1230.

[17] I now consider the duty of candour in judicial review proceedings. It is well established that a public authority, impleaded as respondent in judicial review proceedings, owes a duty of candour to disclose materials which are reasonably required for the court to arrive at an accurate decision. The existence and rationale of the duty are not to be equated with procedural rules and practices concerning the burden of proving facts or leading evidence. Its purpose is to engage the authority's assistance in supervising the legality of its decisions: to uphold those which are lawful, and correct those which are not.[8] The duty of candour in judicial review proceedings applies throughout the proceedings.[9] The applicant has to satisfy the court that he is entitled to judicial review and it is for the respondent to resist an unjustified application. "But it is a process which falls to be conducted with all the cards face upwards on the table and the vast majority of the cards will start in the authority's hands."[10] Donaldson MR also said that the new development of judicial review had created:

> "a new relationship between the courts and those who derive their authority from the public law, one of partnership based on a common aim, namely the maintenance of the highest standards of public administration".[11]

[18] Useful guidance as to the what the duty of candour entails is obtained from a document entitled **"Guidance on Discharging the Duty of Candour in Judicial Review Proceedings",** prepared by the Treasury Solicitor's Department of England in January 2010. I fully endorse the guidance given. It states in part:

> "…all public authorities who are respondents to applications for judicial review are subject to what is known as a duty of **candour**. The effect of this duty is to require the public authority, when presenting its evidence in response to the application for judicial review to set out fully and fairly all matters that are relevant to the decision that is under challenge, or are otherwise relevant to any issue arising in the proceedings.
>
> - "The duty of candour gives rise to a weighty responsibility. The obligation of candour is the reason why the rules as to standard

[8] Per: Sir John Laws in Graham v Police Service Commission and the Attorney General of Trinidad and Tobago [2011] UKPC 46, paragraphs 18 and 19.

[9] Peerless Limited v Gambling Regulatory Authority and others, [2015] UKPC 29 at para 21.

[10] see Donaldson MR in R v Lancashire County Council ex p Huddleston, [1986] 2 All ER 941.

[11] Ibid at page 945c.

disclosure do not apply to applications for judicial review as a matter of course. When responding to an application for judicial review public authorities must be open and honest in disclosing the facts and information needed for the fair determination of the issue. The duty extends to documents/information which will assist the claimant's case and/or give rise to additional (and otherwise unknown) grounds of challenge.

…

- "It is particularly important when evidence is being prepared. When evidence is served in response to an application for judicial review, what is required is that that evidence read as a whole (i.e. the witness statement and the documents served in support of it) must be such as to meet the obligation of candour.

…

- "When preparing evidence in response to a claim for judicial review, one issue that frequently arises concerns the extent to which the duty of candour can be satisfied by providing a full and fair explanation of all relevant matters in a witness statement, and the extent to which such evidence must be supported by exhibiting relevant documents. Usually a mix of explanation by way of witness statement, and exhibiting key documents will be appropriate."

[19] In reviewing the judgment of the leaned judge, it is clear that she was greatly troubled by the absence of documentary evidence in support of the Chief Personnel Officer's contention that he was instructed by the Public Service Commission to write the letter and that the decision was taken by the Public Service Commission. From upfront, Mr. Sam's evidence in his witness statement was that he was transferred by the Chief Personnel Officer and cited the letter written by him, evidencing the transfer. The learned judge properly pointed out that the letter did not state that approval was by the Public Service Commission or by any other person or that he was writing on behalf of the Commission. When one reads the letter, the learned judge's criticisms and observations are well-founded. The learned judge was justified in pointing out that although the Chief Personnel Officer made a detailed response in his affidavit evidence to Mr. Sam's paragraph 6 (in which he [Mr. Sam] specifically stated that he was transferred by

the Chief Personnel Officer), at no time did he make any mention of any matter being submitted to the Public Service Commission.

[20] The learned judge quite properly observed that in his affidavit, the Chief Personnel Officer made no reference to the Public Service Commission and that although he exhibited several documents to his affidavit, no minutes of a meeting in which the Public Service Commission would have made the decision or no decision was exhibited. The learned trial judge attached significant weight to these matters, as she was entitled to do. What degree of weight or importance, is attached to the evidence or lack thereof is a matter within the province of the trial judge. The learned judge, no doubt would have considered that the matter was not conducted by the appellant with "all the cards face upwards on the table" and that the vast majority of cards will start in the hands of the public authority. To my mind, the judge's findings and conclusions in paragraph 27 of her judgment are reasonable and justifiable. It is also clear that the Chief Personnel Officer did not satisfy or was in breach of the duty of candour. Given the circumstances of the case, it cannot be denied that the minutes of the meeting in which it is said that the Public Service Commission made the decision were reasonably required by the court to arrive at an accurate decision, more so, in the absence of independent oral evidence attesting that the decision was taken by the Public Service Commission.

[21] It was within the competence of the learned judge to make adverse findings against the Chief Personnel Officer, given the circumstances of the case. There was a clear conflict of evidence between the Chief Personnel Officer and Mr. Sam regarding who made the impugned decision. As Robert Goff LJ said in **The Ocean Frost**:[12]

> "…It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to the judge in ascertaining the truth…"

[12] [1985] 1 Lloyd's L.R 1.

[22] The learned judge tested the Chief Personnel Officer's evidence against all the other material available to her and in her fact-finding task, was understandably swayed by and attached much weight to the absence of contemporary documentation to confirm his oral evidence. In assessing the Chief Personnel Officer's credibility, contemporaneous written documents were of great importance. In this case, the learned judge was entitled to test the appellant's evidence by reference to both the contemporary documentary evidence and its absence. I note that "the absence of evidence can be as significant as its presence." The judge placed due weight on the absence of the critical contemporary documentation to confirm the oral evidence of the Chief Personnel Officer. The judge's approach is supported by Arden LJ in **Wetton v Ahmed and Others**.[13] Arden LJ said:

> "11. By the end of the judgment, it is clear that what has impressed the judge most in his task of fact-finding was the *absence*, rather than the presence, of contemporary documentation or other independent oral evidence to confirm the oral evidence of the respondents to the proceedings.
>
> "12. There are many situations in which the court is asked to assess the credibility of witnesses from their oral evidence, that is to say, to weigh up their evidence to see whether it is reliable. Witness choice is an essential part of the function of a trial judge and he or she has to decide whose evidence, and how much evidence, to accept. This task is not to be carried out merely by reference to the impression that a witness made giving evidence in the witness box. It is not solely a matter of body language or the tone of voice or other factors that might generally be called the 'demeanour' of a witness. The judge should consider what other independent evidence would be available to support the witness. Such evidence would generally be documentary but it could be other oral evidence, for example, if the issue was whether a defendant was an employee, the judge would naturally consider whether there were any PAYE records or evidence, such as evidence in texts or e-mails, in which the defendant seeks or is given instructions as to how he should carry out work.
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> …

[13] [2011] EWCA Civ. 610.

> "14. In my judgment, contemporaneous written documentation is of the very greatest importance in assessing credibility. Moreover, it can be significant not only where it is present and the oral evidence can then be checked against it. It can also be significant if written documentation is absent. For instance, if the judge is satisfied that certain contemporaneous documentation is likely to have existed were the oral evidence correct, and that the party adducing oral evidence is responsible for its non-production, then the documentation may be conspicuous by its absence and the judge may be able to draw inferences from its absence.
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> …
>
> "16. The approach of the judge in this case was to seek to test the evidence by reference to both the contemporary documentary evidence and its absence. In my judgment, this was an approach that he was entitled to take. The evidence of the liquidator established a prima facie case and, given that the books and papers had been in the custody and control of the respondents to the proceedings, it was open to the judge to infer that the liquidator's case would have been borne out by those books and papers."

[23] I respectfully adopt that approach as it is apt to the circumstances of this case. The learned judge was entitled to draw adverse inferences from the Chief Personnel Officer's failure to produce the documentary evidence in support of his oral evidence that he acted on the instructions of the Public Service Commission and that the decision was taken by that Commission, having regard to the fact that no mention was made of the Public Service Commission in his affidavit evidence in response. I also pay regard to the "The Wisniewski principle" drawn from the decision of the Court of Appeal in **Wisniewski v Manchester Central Health Authority**.[14] This principle was stated thus in **Western Trading Ltd v Great Lakes Reinsurance (UK) PLC**:[15]

> "In short the principle is that although cases are decided on evidence, the Court is entitled to draw adverse inferences from the unexplained absence of evidence from witnesses, or in the form of documents, which it would be reasonable to expect might be before the Court. It is always useful to be reminded of the principled base behind the daily task of deciding facts and of doing so not just on the evidence but bearing in mind what further evidence a party might reasonably have been expected to produce".

[14] [1998] PIQR 324, 1998 EWCA Civ. 596.
[15] [2015] EWHC 103 QB.

[24] For all the reasons given, the appeal is dismissed with costs to the respondent of $2,500.00.

Davidson Kelvin Baptiste
Justice of Appeal

I concur.

Mario Michel
Justice of Appeal

I concur.

Paul Webster, QC
Justice of Appeal [Ag.]