

THE EASTERN CARIBBEAN SUPREME COURT  
SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

SVGHCV2014/0247

IN THE MATTER OF A DECISION BY THE PUBLIC SERVICE APPEAL BOARD TO WRONGFULLY  
DISMISS MR. OTTO SAM FROM THE PUBLIC SERVICE

AND

IN THE MATTER OF AN APPLICATION FOR AN ORDER OF CERTIORARI TO QUASH THE SAID  
DECISION AND AN ORDER OF MANDAMUS COMPELLING THE SAID APPEAL BOARD TO REINSTATE  
MR. OTTO SAM IN THE PUBLIC SERVICE

AND

IN THE MATTER OF THE CIVIL PROCEDURE RULE 56 AND IN THE APPLICATION BY OTTO SAM FOR  
LEAVE TO APPLY FOR JUDICIAL REVIEW

BETWEEN

OTTO SAM

APPLICANT

and

THE PUBLIC SERVICE BOARD OF APPEAL

RESPONDENT

Appearances:

Mr. Jomo Thomas and Mr. Ruggles Ferguson<sup>55</sup> for the Applicant.

Mr. Richard Williams and Mr. Grahame Bollers for the Respondent.

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2016: Jun. 7

Oct. 20  
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## JUDGMENT

### INTRODUCTION

- [1] Henry, J.: Mr. Otto Sam was employed as a teacher in the service of the Government of the State of Saint Vincent and the Grenadines (**'government'**) for thirty years. **In August 2010, he was 'transferred'** to the National Emergency Management **Organisation ('NEMO')**, **from his substantive post of head teacher at South Rivers Methodist public school.** In July 2012 while stationed at NEMO, he admittedly wrote and published an article in two weekly newspapers about certain operations at NEMO. He was interdicted pending investigation.
- [2] Disciplinary proceedings were brought against him for misconduct. He was charged with contravention of the duty of loyalty owed as a public servant, **for criticizing NEMO 'in a manner likely to bring the public service into disrepute and prejudicial to the efficient conduct of the service'**. He was found guilty by the disciplinary tribunal. **After considering the tribunal's report,** the Public Service Commission (**'PSC'**) **dismissed him in August 2014.** His appeal to the Public Service Board of Appeal (**'PSBA'**) was dismissed.
- [3] By order dated 9<sup>th</sup> February, 2015, Mr. Sam was granted leave by this court to apply for judicial review of that decision. He subsequently filed a fixed date claim challenging the dismissal on the grounds that it was illogical, unreasonable, illegal and amounted to disproportionate disciplinary action. He also attacked the tribunal's findings and the actions of certain public officers. He submitted that the officers and the tribunal committed a series of procedural errors and unlawful acts which have rendered the process unfair thereby invalidating **the PSBA's decision.**
- [4] Mr. Sam has applied for an administrative order quashing **the PSBA's decision to dismiss him** and an order of mandamus directing the PSBA to reinstate him to his job as teacher. He contended that he

was unfairly or wrongfully dismissed. He claimed damages, full pay with interest and all increases and benefits he has been denied. He also applied for an order that his pension and gratuity benefits be honoured on the ground that there has been no break in his service.

[5] The PSBA has resisted the claim. They submitted that his **highly critical attack of NEMO 'in face of a request from its Director to desist from doing so, transcended the boundaries of responsible expression and trespassed into the realm of misconduct.'** They argued that the procedure adopted during the disciplinary proceedings was fair. They submitted further that the tribunal neither exceed its authority nor acted in any unlawful manner. The PSBA maintained that they provided a well-reasoned decision having applied the correct common law principles to the charges and facts. They contended further that **Mr. Sam's dismissal was an appropriate punishment** and was not excessive in the circumstances. They submitted that his application has no merit and should be dismissed.

[6] The tribunal, PSC and PSBA were all involved as functionaries and agents of the government. This **court has concluded that Mr. Sam's dismissal was unlawful.** The government is liable to him in damages.

## ISSUES

[7] The issues are whether:

(1) The **PSBA's** decision to dismiss Mr. Sam is vitiated because of:

- (a) illegality,
- (b) procedural irregularity,
- (c) unreasonableness; or
- (d) the imposition of punishment which was disproportionate?

(2) Mr. Sam was unfairly or wrongfully dismissed?

(3) To what remedy, if any, is Mr. Sam entitled?

## FACTUAL BACKGROUND

[8] The factual matrix in this case covers several events starting with the initiation of disciplinary proceedings, extending to the tribunal hearing and PSC decision and culminating **with the PSBA's**

ruling. Mr. Sam has anchored aspects of his challenge on actions which spanned each stage of those proceedings. It is therefore useful at the outset to provide a comprehensive overview of those surrounding facts to facilitate comprehension of the inter-play between each stage.

- [9] Mr. Sam testified but called no witnesses. The PSBA's witnesses were the Honourable Attorney General, PSBA chairman Mr. Cecil John, chairman of the disciplinary tribunal Mr. Colin John and tribunal member Mr. Aldric Williams. They all provided affidavit testimony and were cross-examined. There is little dispute regarding the major elements of the evidence.
- [10] Mr. Sam is a post graduate trained teacher. He holds a UWI teacher's Certificate in Education Management and Supervision and a Degree in Educational Administration. In 2005, he was appointed head teacher of the Lowmans Windward Anglican School and 4 years later was transferred as head teacher to the South Rivers Methodist School. As a teacher, Mr. Sam fell under the umbrella of the Ministry of Education which constitutionally is headed by the Permanent Secretary in that Ministry.
- [11] Mr. Sam's 'transfer' to NEMO placed him within the Ministry of National Security Air and Sea Port but he was not attached to any post there. He was expected to report to the head of that department, Director of NEMO, Mr. Howie Prince. The Permanent Secretary in that ministry was Mr. Godfrey Pompey.
- [12] Mr. Sam wrote the article entitled 'N.E.M.O. an interesting organization' and had it published in the NEWS and Searchlight newspapers on July 20<sup>th</sup> 2012 and July 24<sup>th</sup> 2012 respectively. By memorandum dated August 7<sup>th</sup> 2012, Mr. Howie Prince asked Mr. Sam to present a 'written explanation for the nature of the article and the authorization for publishing same.' Mr. Prince was acting on instructions received from P.S. Pompey by memorandum dated August 2, 2012 requesting the written report by August 9<sup>th</sup>, 2012. By the time he received the directive, Mr. Sam had less than 2 days to comply. He testified that he sought clarification from the Director but none was forthcoming.
- [13] Mr. Sam deposed that on August 8<sup>th</sup>, before he was able to respond to the memorandum, he received a letter dated August 7<sup>th</sup>, 2012, from the Chief Personnel Officer ('CPO'), purportedly on the PSC's behalf, informing him that he was being interdicted from his duties on half pay, pending the outcome of disciplinary proceedings which were to be instituted against him. By letter dated 20<sup>th</sup> August 2012,

Mr. Godfrey Pompey notified Mr. Sam that he was directed by the PSC to initiate disciplinary proceedings against him. He enclosed a statement of charges and asked Mr. Sam to indicate in writing within 14 days of receipt, any grounds on which he relied to exculpate himself.

[14] The charge<sup>1</sup> was unsigned and undated. The statement of charges reads:

‘STATEMENT OF CHARGES

Mr. Otto Sam, Headteacher, South Rivers Methodist School, Ministry of Education, on assignment to the National Emergency Management **Organization (“NEMO”), you are charged** with the following act of misconduct contrary to Order 3.27 of the Civil Service Orders:

CHARGE:

That you, contrary to law and in contravention of the duty of loyalty owed by you as a public servant, to the Government of Saint Vincent and the Grenadines, **publicly criticized the National Emergency Management Organization (“NEMO”), the Government’s central agency for coordinating disaster management in the State, in a manner likely to bring the Public Service into disrepute and prejudicial to the efficient conduct of the Service, when you said ... ’**

The alleged offending portions of the article were then laid out and a copy of the impugned article was attached. The article is fully considered against the applicable law in this judgment.

[15] Mr. Sam testified that he submitted his response on September 4<sup>th</sup>, 2012. In his undated written response to the charge, he indicated that he had repeatedly brought those concerns to the attention of the CPO, **NEMO’s Acting Director Michelle Forbes**, its Director and the PS without success. He explained that he wrote out of concern that NEMO

**‘... is crying out for serious attention** relative to policy, leadership and management, interpersonal relationship, planning and professionalism **and the will to act.’**

He claimed that the publication was actuated by a desire to bring those matters to the attention of someone in the public with the requisite influence to address them. He refuted the allegations of disloyalty and described his approach to work as being that of a committed and loyal worker.

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<sup>1</sup> Exhibited as OS 6 to Mr. Sam’s Affidavit filed on March 11, 2016.

[16] A three member tribunal was constituted<sup>2</sup> to conduct the hearing into the allegations and to render a decision on whether Mr. Sam was guilty. It was chaired by Mr. Colin John, Deputy Director of Public Prosecutions. The other members were Mr. Aldric Williams and Mrs. Cecily Saunders. The hearing was conducted in an office **occupied by the Attorney General's chambers**. By an undated and unsigned report, the tribunal notified the PSC that they had arrived at a majority decision.

[17] Their decision was summarized in the conclusion which was apparently written by Mr. John. It stated:

**'The members of the tribunal has (sic) met and deliberated. The Tribunal has given a majority decision. Mrs. Cecily Saunders' position is that the charge has not been proven. Mr. Aldric Williams' position is that Mr. Sam's action was unethical but it does not deserve dismissal. Mu (sic) interpretation of Mr. Williams' position is that the charge was proven against Mr. Sam but he (Mr. Williams) does not think that Mr. Sam's conduct warrants dismissal. My position is that the charge was proven.**

The decision of the Tribunal therefore is 2 for Guilty and 1 for Not Guilty.'

[18] By letter dated May 2, 2013 to the tribunal, the PSC through the CPO indicated that the position taken by Mr. Aldric Williams was ambiguous and left the PSC unsure if **Mr. Williams' position was** that Mr. Sam had committed the offence charged. **The tribunal's attention was drawn to Regulation 54 (2) (j) (i) and (k)** and it was invited to amplify the report in accordance with regulation 54 (2) (l) of the PSC Regulations. That provision provides:

**'the Commission, after consideration of the report of the tribunal, may, if it is of the opinion that the report should be amplified in any way or that further inquiry is desirable, refer the matter back to the tribunal for further inquiry and report; such further inquiry to include calling upon the officer for his defence, if in the opinion of the Commission, he should have been called upon for the same;'**

Regulation 54 (2) (j) (i) and (k) prescribes what is to be included in the report, such as a statement of **the tribunal's opinion regarding whether in its opinion the officer has committed the offence,**

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<sup>2</sup> Pursuant regulation 54 (2) (d) (i) of **the Public Service Commission Regulations (the regulations')** Cap. 10 of the Revised Laws of Saint Vincent and the Grenadines, 2009.

aggravating and mitigating factors, a summing up and comments encapsulating its opinion. Recommendations regarding punishment are to be omitted.

[19] The next day, the tribunal members replied to the PSC by signed letter to which they attached a revised and signed decision. The letter contained what was described as an 'Addendum' to Mr. Aldric **Williams' reasons for his decision**. It was not incorporated in the body of the amended decision. It stated:

**'This is an addendum to Mr. Aldric Williams's (sic) reasons for his decision:**

*Finally: Mr. Sam has admitted publishing the article in the news-paper to explore what, in his opinion, was going on at the Organisation. He was advised by the Director not to publish the article but refused. Such conduct is unethical and constitutes a breach of the rule of order and discipline contrary to Section 3.27 of the Civil Service Order. Mr. Pompey's evasive stance does not alter the facts of the case but should be an issue for the commission to consider in addition to those previously pointed out. It is clear that the evidence in this case shows that Sam has committed the offence charged. I trust that these comments satisfy the requirements of Sec. 54 (2)(j)(i)(ii) and (iii) of Cap. 10.'*

[20] The PSC concluded that the charge of misconduct was established. It **terminated Mr. Sam's services** as 'Head Teacher, **South Rivers Methodist School, Ministry of Education**' with immediate effect by letter to Mr. Sam dated 15<sup>th</sup> May, 2013 and signed by the CPO Kattian Barnwell. No part of the **PSC's findings was exhibited in this trial. Mr. Sam appealed to the PSBA**. The PSBA considered his appeal on **written submissions and upheld the PSC's decision to dismiss him**.

[21] During the intervening period, Mr. Sam successfully brought action in the high court. His transfer was ruled unlawful. It is against this factual background that this application for judicial review is being pursued.

[22] Mr. Sam based his application for leave to apply for judicial review,<sup>3</sup> on 5 grounds

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<sup>3</sup> Filed on 21<sup>st</sup> November, 2014.

which he reframed and repeated in similar terms in his application for judicial review. It is useful to set them out at the outset. In this regard, he alleged that:

- (1) **the PSBA's decision is unreasonable**, irrational and illegal;
- (2) The PSBA erred in law and failed, in all the circumstances to give due consideration or apply at all s. 10 (2) (a) (b) (c) of the Constitution of St. Vincent which provides for freedom of expression and the restrictions of such freedoms;
- (3) The PSBA failed to take into consideration that Parliament repealed the Public Service (Conditions of Employment) Act 1971 which expressly prohibited public officers from publishing in newspapers anything which may reasonably be regarded as information or expression of opinion on any matter of a political or administrative nature. Said Act provided the restriction/interference upon **public officers' freedom of expression**. **The common law duty of loyalty** was misapplied in the circumstances.
- (4) Alternatively, the PSBA arbitrarily applied the common law duty of loyalty and s.3.27 of the Civil Service Orders in all the circumstances. In particular the PSBA failed to give due consideration to the relevant factors for determining whether the principles of and qualifications of the common law duty of loyalty were met; and
- (5) **in all the circumstances the PSBA's decisions is wholly disproportionate to his action** and fail to satisfy the doctrine of proportionality.

[23] **Mr. Sam's application for leave to seek judicial review and his application for judicial review were supported by affidavits in which he chronicled the facts on which he relied.** The permission to apply for judicial review was conditioned on him making his claim within 14 days. He met that deadline by filing his fixed date claim form ('FDCF') on 23<sup>rd</sup> February 2016. His supporting affidavit was not filed until 2<sup>nd</sup> April 2015. He did not apply for extension of time to file it.

[24] His delay in filing the supporting affidavit constitutes non-compliance with the order granting leave for judicial review, and with rules 8.1 (1)(c) and 56.7 (3) **of the Civil Procedure Rules 2000 ('CPR')** which provide for supporting affidavits to be filed with the claim form. Neither the order nor the rules contain any sanctions for such breach. The PSBA has not complained about any prejudice they have



suffered as a consequence, nor have they applied for an order striking out the affidavit. They in fact **supported Mr. Sam's subsequent application for extension of time to file a later affidavit.** Mr. Sam would suffer substantial prejudice if his default resulted in the affidavit being struck out.

[25] Both parties were repeatedly delinquent in meeting timelines. The issues joined between them are of some public significance. The interest of justice is furthered by permitting parties to pursue their case to trial and is stymied by striking out statements of case for curable breaches of the rules. For these several reasons, I have determined that it is appropriate and just in all the circumstances to make an order to rectify the tardy filing of the supporting affidavit. It is accordingly ordered that the affidavit of Otto Sam filed on 2<sup>nd</sup> April, 2015 is deemed properly filed. **The PSBA's affidavits in response were sworn to by the Honourable Attorney General, Mr. Cecil John, Mr. Colin John and Mr. Aldric Williams.**<sup>4</sup> Mr. Sam subsequently filed 4 other affidavits<sup>5</sup>.

#### Preliminary Issues – Objection to new matters

[26] The PSBA has contended that in his final affidavit of March 11, 2016, Mr. Sam raised a number of new matters which were not foreshadowed in his appeal to the PSBA, his application for leave, his application for judicial review or in his statement of case. Mr. Sam acknowledged under cross-examination that he had not previously raised some of the issues as separate grounds. The PSBA did not advance any legal authority which precludes Mr. Sam from making arguments before this court which he did not bring to the **PSBA's** attention. I am not aware of any.

[27] The PSBA contended further that Mr. Sam did not apply for permission to amend the grounds on which to apply for judicial review and cannot therefore ventilate fresh matters in his March affidavit. **They argued that Mr. Sam must obtain the court's leave to rely on grounds for which no permission was granted at the leave stage.** They cited in support CPR 56.11 (2) (c) (ii) and dicta from the case

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<sup>4</sup> Filed on 25<sup>th</sup> September, 2015, 27<sup>th</sup> November 2016, 30<sup>th</sup> November 2016, 11<sup>th</sup> December 2015 and 18<sup>th</sup> May, 2016 respectively.

<sup>5</sup> On December 31<sup>st</sup> 2015 and 11<sup>th</sup> March 2016 respectively.

Gover v Propertycare Ltd<sup>6</sup>. CPR 56.11 (2) (c) (ii) empowers the court to grant permission for amendment of a claim for an administrative order.

[28] In the Gover case, Lord Justice Buxton lamented that judges spend a considerable amount of time:

**‘... pre-reading material before the appeal opens ... to save the parties costs by reducing the time that has to be spent in court by their ... lawyers.’<sup>7</sup>**

He observed and declared:

**‘It makes a mockery of that process if appellants continue to consider that they are free to arrive at the door of the court with a completely new case, and take up the time of the court in an attempt to elucidate the nature and details of the case viva voce. I will not grant the permission that was never asked for to amend the grounds of appeal.’<sup>9</sup>**

[29] It is important to note that the court in Gover case was considering an appeal. Lord Justice Buxton was particularly concerned that the appellant was seeking to rely on new matters on the hearing date. In the instant case, the court is not sitting as an appellate court and the objection is not about new matters being raised on the hearing date but some two months before the trial.

[30] The court must consider whether Mr. Sam amended his statement of case and if so whether he did it in violation of the rules of court, principles of law or court order. The applicable principles on how the court proceeds were elucidated by the Court of Appeal in the case of East Caribbean Flour Mills Ltd. v Ormiston K. Boyea.<sup>8</sup> In that case, the court was engaged in determining among other things, what documents were admissible in support of the pleaded allegations. In essence, the court was considering, much as in the instant case, whether the proposed evidence departed from the pleadings. In doing so, it distinguished the pleadings (statement of case) from the witness statements and affidavit evidence. It explained that the pleadings delineate the broad issues and allegations

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<sup>6</sup> [2006] EWCA Civ 286.

<sup>7</sup> Ibid. at paras. 12 and 13.

<sup>8</sup> SVGHCVP2006/0012.

while the affidavits particularize them. I hasten to add that the court was not then dealing with a judicial review case, however the principles enunciated can be extrapolated and applied here.

[31] The Court of Appeal said that the court is required to determine on a case by case basis whether **'additional details' supplied subsequently constitute either a change to** the statement of case or further particularization.<sup>9</sup>

The learned Justices of Appeal in the Boyea case underscored the established principle of law that a litigant need not set out all the particulars of an allegation in his statement of case, if:

(1) he has provided the other party with sufficient details to put him on notice of the general nature of his case, and

(2) provided that he does not abuse the process of the court or engage in other prejudicial conduct.<sup>9</sup>

He is deemed to have satisfied his obligation to the other side if he sets out the further details in his witness statement or affidavit.

[32] In carrying out such an exercise, the court must be careful not to conflate and confuse an allegation with the particulars of the allegation. It must remain mindful that:

(1) **pleadings outline the general nature of the pleader's case and 'identify the issues and the extent of the dispute between the parties;'**

(2) **'extensive pleadings with detailed particulars' are no longer necessary;**

(3) witness statements supplemented by relevant supporting documentation will make the **substance of the pleader's case obvious to the other side;**<sup>10</sup> and

(4) in order to determine what issues are joined between the parties, it is necessary to examine both the pleadings and affidavits.<sup>11</sup>

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<sup>9</sup> Ibid. at para. 46.

<sup>10</sup> *Mc Philemy v Times Newspaper Ltd* [1993] 3 All E.R. 775, 792J -793A, per Lord Woolf MR; cited with approval in *East Caribbean Flour Mills Ltd. Ormiston Boyea*

<sup>11</sup> Boyea case at paras. 45 – 47.

[33] Applying the foregoing guidance to the instant case, in deciding if the March affidavit amended Mr. **Sam's statement of case**, this court must ensure that the grounds advanced for judicial review are not confused with the details. In other words, if the contents of the March 2016 affidavit merely supply particulars of the allegations which were previously **set out in Mr. Sam's statement of case**, they would not be treated as new matters which effectively amended his claim. If they introduce new **allegations, the converse is true. An examination of the relevant rules of court, Mr. Sam's FDCF and affidavits** is therefore in order. For context, it is also helpful to document the circumstances under which Mr. Sam filed his final affidavit.

[34] Mr. Sam was granted an extension of time to file the subject affidavit - his last.<sup>12</sup> His application was made orally on January 19<sup>th</sup>, 2016, the original date reserved **for the trial. On that date, Mr. Sam's** legal practitioner and both counsels for the PSBA informed the court that all relevant documentation was not before the court. Mr. Sam accordingly sought an extension to March 11, 2016 to file further affidavits and exhibits. The PSBA recorded no objection to the requested extension and in fact stridently supported his application, insisting that such filing was necessary in pursuance of a common approach agreed to by the parties. Leave was granted to the PSBA to file affidavits in response by 30<sup>th</sup> April, 2016, well in advance of the trial. They filed none.

[35] The CPR defines '**statement of case**' to mean:

**'a claim form, statement of claim, defence, counterclaim, ancillary claim form and defence and a reply'**.<sup>13</sup> (bold mine)

Although not relevant in this instance, it also covers additional information given by the other side in response to a Part 34 request. In judicial review cases, the statement of claim is replaced by evidence on affidavit.<sup>14</sup> No limit is placed on the number of affidavits which can be filed in support of a FDCF.

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<sup>12</sup> By order dated 19<sup>th</sup> January, 2016.

<sup>13</sup> CPR 2.4.

<sup>14</sup> CPR 8. 1 (10 (c) and 56.7 (3).

[36] In light of **the definition of ‘statement of case’**, one of the first questions which this court must answer is what comprised **Mr. Sam’s statement of case?** Is it solely the FDCF or both the FDCF and affidavits in support? The answer is captured in rules 2.4, 8.1 and 56.7 of the CPR. Part 8 of the CPR stipulates that a claimant must file a claim form accompanied by a statement of claim or an affidavit<sup>15</sup> to start proceedings. A claimant seeking an administrative order is mandated by CPR 56.7, to file a FDCF and affidavit(s) in support. His affidavit(s) stand in place of a statement of claim. Like any other litigant before the court, he is expected to outline all the facts on which he relies but should keep the statement as short as practicable.<sup>16</sup> He may reference relevant particulars by identifying those documents he considers necessary to his case.<sup>17</sup>

[37] The rules of court preclude a party from relying on any allegation or factual argument not set out in his claim or defence.<sup>18</sup> The combined effect of CPR 8.1 (1), 8.7 and 56.7 is to clothe the FDCF and supporting affidavit(s) collectively with the nature of a statement of case. I am fortified in this position having regard to CPR 56.10 which provides:

**‘Any evidence filed in answer to a claim for an administrative order must be by affidavit but the provisions of Part 10 (defence) apply to such affidavit.’**

[38] Part 10 of the CPR deals with the filing and the contents of a defence. It mirrors in material respects Part 8 which outline what must be included in claim forms including FDCFs. It also authorizes a claimant to file a further pleading in form of a reply, on receipt of a defence. The reply is to be filed **within 14 days of service of the defence or at any time with the court’s permission**. In regular claims instituted pursuant to CPR 8, the FDCF, defence and reply are accepted as pleadings which contain **and set out the litigants’ respective statements of case. The evidence is then outlined in witness statements, witness summaries or affidavits**. However, the rules appear to treat applications for administrative orders differently. In this regard, the affidavits are considered to be part of the

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<sup>15</sup> Or some other document prescribed by rules or practice directions – (CPR 8.1 (1)).

<sup>16</sup> CPR 8.7 and 10.5.

<sup>17</sup> CPR 8.7 (3) and *Quorum Island (BVI) Ltd. v Virgin Islands Environmental Council* BVIHCVAP2009/0021, para. 29 (per Rawlins C.J.)

<sup>18</sup> CPR 8.7 A and 10.7.

statement of case as they are expected to contain particulars of allegations which have been summarized in the FDCF. But they do more. Very importantly, they also contain the evidence which underpins the claim. The affidavits therefore serve the dual purpose of particularizing the allegations and also outlining evidence. They therefore comprise part pleadings and evidence.

[39] **It follows logically that Mr. Sam's affidavits in support of his FDCF fall within the category of** statement of claim or reply (i.e. statement of case). They also contain his evidence in chief. Where therefore, the March affidavit responds to **allegations in the PSBA's affidavits, it would function as a** reply and the particulars would constitute evidence. In the premises, nothing raised in it is objectionable as being new provided it functions as statement of claim, reply or evidence and introduces nothing which cannot be accommodated within the grounds in the FDCF. Furthermore, it has not gone unremarked that in framing his reliefs in the application for leave and the instant claim, **Mr. Sam claimed that 'in all the circumstances' the decision** dismissing him was illegal, illogical, unreasonable and disproportionate. By doing this, he invited the court to examine all the circumstances appearing on the record, in documentary exhibits and as described by him evidentially, to determine whether the **PSBA's decision was illegal, illogical, unreasonable or** disproportionate.

[40] Mr. Sam exhibited certain documentary exhibits to his March affidavit, which were previously not part of the record and which are indispensable to the court in resolving the dispute. They form part of the surrounding circumstances and are therefore relevant. The PSBA conceded as much when Mr. Sam sought more time to file them. **The PSBA's objections** are primarily in respect of averments regarding allegedly illegal, irrational and procedurally irregular events and circumstances. They therefore qualify for consideration under those broad grounds as invoked in Mr. Sam's **FDCF**. On this **basis alone, the PSBA's objections are meritless**. Notwithstanding, for completeness I propose to **examine the substance of the PSBA's objections** sequentially as I consider the grounds on which Mr. **Sam's** claim is based.

[41] The court is empowered to review decisions of public authorities to determine if they were arrived at in accordance with applicable legal principles. When conducting such a review, the court is not concerned with the merits of the decision, but rather with the decision-making process. It is not an

appeal. The court cannot substitute its opinion for that of the decision-making tribunal or authority. It must confine itself to whether the decision-maker exceeded its powers, committed an error of law or breach of the rules of natural justice, abused its powers or reached a decision which no reasonable tribunal could have reached.<sup>19</sup> Mr. Sam claimed that the PSBA erred in some of these respects. I now proceed to examine his claim within those parameters.

Issue 1 – Was the **PSBA’s decision to dismiss Mr. Sam** vitiated because of illegality, unreasonableness, procedural irregularity or because such punishment was disproportionate?

[42] It is generally accepted that the grounds for judicial review are not closed, however the law recognizes three broad categories:

- (1) illegality;
- (2) procedural impropriety; and
- (3) **irrationality (known also as ‘Wednesbury unreasonableness’)**.

Mr. Sam invoked all three grounds in his application for leave to apply for judicial review and also in his FDCF. Several subsets have evolved under each heading. They include error of law, bias, denial of a right to a fair hearing, failure to take relevant considerations into account, having regard to irrelevant factors, and proportionality.

Illegality

[43] Illegality in judicial review cases refers to the requirement that adjudicators must correctly apply the law when making determinations.<sup>20</sup> Mr. Otto Sam **complained that the PSBA’s decision to dismiss him was unlawful** because:

- (1) **The Court of Appeal’s subsequent ruling, has effectively invalidated any disciplinary action** taken against him while he was stationed at NEMO.
- (2) contrary to the rules and regulations of the public service the disciplinary charge was initiated by the Permanent Secretary in the Ministry of National Security Air and Sea Port who was not the Head of his Department; and
- (3) the charge did not specify the law on which it was grounded.

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<sup>19</sup> Associated Provincial Picture Houses Ltd v Wednesbury Corp. [1949] 1 KB 223, [1947] 2 All ER 680.

<sup>20</sup> Council of Civil Service Unions v Minister for the Civil Service [1984] UKHL 9.

## Procedural Impropriety

[44] Procedural impropriety covers failure to observe natural justice and fairness principles, and procedural rules prescribed by the law which authorizes the impugned conduct.<sup>20</sup> Mr. Sam **submitted that the PSBA's decision was flawed because it was arrived at in a procedurally irregular manner.** In this regard, he contended that:

- (1) He was interdicted without being given an opportunity to be heard;
- (2) The tribunal hearing was tainted with bias, improper, unfair and highly prejudicial to him because despite the fact that the DPP drafted the charge in consultation with the **Attorney General's chambers:**
  - (a) the Deputy DPP served as the chairman of the tribunal; and
  - (b) the hearing took place at the Attorney General's office.**
- (3) The PSBA exhibited bias and accorded unequal treatment to the parties by extending the **Honourable Attorney General's** time to submit submissions to 4 weeks in the absence of proper and sound reasons by her.

[45] Wednesbury unreasonableness or irrationality are terms used to describe **decisions which are '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.'**<sup>20</sup> Mr. Sam contended his dismissal was irrational because:

- (1) in arriving at their findings, the tribunal, the PSC and the PSBA failed to take account to of relevant matters such as his fundamental right to freedom of expression. In addition he contended that tribunal member Aldric Williams and the PSC misunderstood and misapplied the law relating to misconduct;
- (2) his dismissal was a disproportionate punishment;
- (3) the decision goes against the weight of the evidence.

[46] In some respects, Mr. Sam conflated his claim against the PSBA with attacks on the tribunal and the PSC, and criticism of Mr. Pompey. **The nub of his complaint is that the PSBA's decision is undermined to the extent that its members were influenced by and placed reliance on the tribunal's and the PSC's factual and legal findings.** In light of Mr. Sam's contentions, although his



claim is not against Mr. Pompey, the tribunal and/or the PSC, it is necessary to examine aspects of their involvement in the disciplinary proceedings to determine whether their actions or decisions **influenced or affected the PSBA's decision in an unlawful manner** as alleged, thereby rendering it illegal and void.

#### Effect of the Court of Appeal ruling

[47] **Mr. Sam's** transfer to NEMO was ruled irrational and illegal by Thom J.<sup>21</sup> **She found that 'No sensible person who considered the tasks to be performed at NEMO would remove a qualified and experienced head teacher and assign him to perform ...' tasks unrelated to his training and experience and at a grade lower than his post. She also found that Mr. Sam's assignment to NEMO** was not made by the PSC as required by law but rather by then CPO Tyrone Burke. Thom J. ruled that the **CPO's** transfer of Mr. Sam was irrational and unlawful. The Eastern Caribbean Court of Appeal agreed and dismissed the **CPO's** appeal.<sup>22</sup>

#### Stare decisis

[48] Mr. Sam submitted that the net effect of both rulings is that his dismissal was null, void and of no effect. He contended that the decision effectively placed him at the time of the alleged misconduct, in **a 'pre-NEMO transfer' position**. He argued that since the transfer was unlawful, his dismissal was also unlawful. He submitted that based on the doctrine of *stare decisis* this court is bound by the decision of the Court of Appeal and must find that his dismissal was illegal. He did not elaborate or cite legal authorities for this position. The PSBA made no submissions on this point. It is worth noting **that the Court of Appeal did not consider the issue of Mr. Sam's dismissal, only the lawfulness of his assignment to NEMO.**

[49] The doctrine of precedent or *stare decisis* binds lower courts to abide by decisions of superior courts on questions of law. To the extent that **Mr. Sam's** dismissal was incidental and referable to the **'transfer'**, there might be some merit to this contention. In this regard, the fact that he remained

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<sup>21</sup> Otto Sam v Tyrone Burke (The Chief Personnel Officer) SVGHCV2010/0399.

<sup>22</sup> Tyrone Burke (Chief Personnel Officer) v Otto Sam SVGHCVAP2014/0002.

throughout a teacher and never became a staff member at NEMO means that he never became subject to directives of or discipline by Messieurs Prince or Pompey. Any legal defect in their authority would necessarily impact the decisions of the tribunal, PSC and PSBA. Mr. Sam linked this **argument with a challenge to Mr. Pompey's authority to charge him**. They are therefore conveniently addressed together.

#### Initiation of charge by PS National Security

[50] Mr. Sam contended that at all material times he was a head teacher, held no post in the Ministry of National Security Air and Sea Port and was subject to the authority of the Permanent Secretary in the Ministry of Education. He thereby implied that he was never lawfully subject to the supervision of the Director or Deputy Director of NEMO or the Permanent Secretary Mr. Godfrey Pompey who initiated the charge against him. He submitted that any actions they took or purported to take in respect of him were contrary to established rules and regulations, procedurally defective, without lawful authority, null, void and ineffective. He argued that by extension, **the PSC's and PSBA's decisions** are void as they arose directly from the charge initiated by Mr. Pompey. The PSBA countered that this is a new matter which should not be considered because it was raised for the first time in the March affidavit, **and is therefore not part of Mr. Sam's statement of case**.

[51] Mr. Sam did **not make Mr. Pompey's involvement in lodging the charge of misconduct an issue** before the tribunal or a ground of appeal before the PSBA. It was not addressed by the tribunal or the PSBA. However, from the time he lodged his appeal, he has maintained that the decision to dismiss him was illegal in all the circumstances. Before this court, he described the surrounding circumstances of the dismissal in his application for leave, FDCF and his first 4 affidavits in support. He deposed that Mr. Pompey charged him with misconduct. He averred also that the PSC dismissed him from the service and that the PSBA affirmed that decision. He did not in the FDCF or those affidavits expressly level any allegations of proprietary irregularity in this regard.

[52] His challenge is particularized partially at paragraph 13 of his affidavit filed on 2<sup>nd</sup> April where he deposed:

'I have read the decision of the Public Service Appeal Board and it fails to provide

adequate reasons supporting its decision. I further believe that the decision to dismiss **does not measure up to my action. I have been advised by counsel and ... believe that** the decision is fundamentally flawed and irrational because it refused, and, or failed to consider, or give attention to issues or (sic) procedural fairness, unreasonableness, illegality, and its own inconsistencies. **For instance: ...**’

[53] He then gave examples which were framed as a partial list of instances to support his claim that the decision was procedurally and substantially flawed. In response the Honourable Attorney General denied the allegations of procedural unfairness, unreasonableness and illegality thereby opening the door for Mr. Sam to respond as he did in the impugned affidavit. The learned Attorney General provided no reasons for these denials as mandated by the CPR, only bare denials. She averred:

‘It is denied that the decision of the Public Service Appeal Board, fails to provide adequate reasons supporting its decision as alleged and that it is fundamentally flawed and irrational because it refused and or failed to consider or give attention to issues of procedural fairness, **unreasonableness, illegality, and its own inconsistencies.**’

Mr. Sam was therefore entitled to respond as he did.

[54] The facts chronicled in the FDCF and pre-March affidavits contained details which signaled to the PSBA that the procedures were being challenged. By referring specifically to ‘**procedural fairness**’, **all** procedures were questioned even before March 2016 and were open to scrutiny, without more.

[55] He described them fully for the first time in his 11<sup>th</sup> March affidavit. There, he accused Mr. Pompey of usurping the authority of his head of department, thereby acting illegally and contrary to Civil Service Orders 111 and the Constitution. He deposed:

‘**... from the very onset of this entire issue there is ample evidence that the whole process has been flawed, illegal and procedurally incorrect. ... It gets even worst** (sic) illegally/procedurally incorrect when Mr. Pompey PS (instituted) initiated charges usurping the authority of my Head of Department. This procedural bungling and usurping **of others’ authority ... renders this entire case illegal and null and void even before a single charge was made.**’ and

**'The Board ... failed to observe and address the over-reach and usurping of PS Pompey,'<sup>23</sup>**

[56] By including those assertions in the application for leave, FDCF and his April affidavit, Mr. Sam made them a part of his case. They are captured by the broad ground of illegality. Although the PSBA had notice of this and an opportunity to respond they chose not to do so. They did not deny **Mr. Pompey's involvement in laying the charge**. They cannot now be heard to say that these are new matters. I am also satisfied that 2 months before the hearing, the PSBA had before it the necessary particulars to appreciate the full extent of the claim being made by Mr. Sam on this issue. In my opinion, his final affidavit has not departed substantively from the matters foreshadowed in the fixed date claim form and initial affidavit. **I am satisfied that Mr. Sam's FDCF and affidavits in support**, have sufficiently particularized this complaint in accordance with the rules and that it is legitimately before the court. I am fortified in this position based on the above-referenced dicta of Barrow J.A. in the Ormiston Boyea case. I find it was so particularized.

[57] Although not flagged **in his early affidavits as one of the PSC's and PSBA's missteps, Mr. Sam described Mr. Pompey's role and is not thereby deprived of an opportunity to rely on it as one of his bases for challenging the PSBA's decision** for procedural irregularity and illegality. It goes to the fundamental issues of procedural impropriety and absence of fairness which the court was asked to **review as early as the leave stage, when it was asked to examine 'all of the circumstances'**. Based on the available record, the disciplinary tribunal, the PSC and the PSBA did not question whether the charge against Mr. Sam was initiated in accordance with the law. It would be reasonable to expect that the PSC advised itself of the proper procedure from the inception, even before instructing Mr. Pompey to lay the charge. The tribunal, the PSC and the PSBA had a duty to ascertain that the prescribed legal procedures were followed. This was an integral part of ensuring that the disciplinary proceedings were conducted in a fair and legal manner. This was also necessary as part of their deliberations even if the procedures were not questioned by Mr. Sam.

[58] It is accepted by all parties that Mr. Pompey, P.S. National Security charged Mr. Sam with misconduct. The tribunal transcript reveals that Mr. Pompey admitted as much. None of the PSBA

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<sup>23</sup> Paragraphs 19 and 30 of Affidavit of Otto Sam filed on 11<sup>th</sup> March 2016.

witnesses refuted this. The court therefore accepts and finds that the charge was brought by Mr. Pompey on directions from the PSC.

[59] Tribunals and decision-makers in administrative matters are expected to know the law that they are charged with applying. Any deficiency in this area would undermine the systems they are appointed to administer and cause injustice to individuals, sometimes irreparably so. The legal system has in-built checks to neutralize or reverse any such errors in judgment. The judicial review mechanism is **one such feature. When conducting judicial review, the court as ‘the guardian of legality’ must** ‘first construe the authorizing power; determine its terms, scope and purpose, and measure the decision or action against this.’<sup>24</sup> **There is no rule of court or legal principle which curtails the court’s authority** to examine all facets of an impugned decision. In fact, that is the aim and objective of a judicial review exercise. If the decision maker demonstrates by his decision that he did not understand the law, the court has a duty to point this out and to give effect to the law.<sup>25</sup> Nothing less will suffice.

[60] Section 60 of the Constitution of Saint Vincent and the Grenadines vests Permanent Secretaries with supervisory authority for each department of the ministry to which they are appointed and by extension the officers contracted to work in those departments. Regulation 54 authorizes the Permanent Secretary to initiate disciplinary proceedings against those officers on directive from the PSC. A P.S. may therefore initiate charges in respect of officers who are lawfully posted within his ministry, but not against officers in other ministries.

[61] It follows that the P.S. in the Ministry of National Security, Air and Sea Port does not have supervisory control over a teacher within the Ministry of Education. Accordingly, when Mr. Pompey purported to charge Mr. Sam for misconduct, he had no authority in law to do so. He acted contrary to section 60 of the Constitution and regulation 54. The charge of misconduct was therefore made in a manner which was *ultra vires* section 60 of the Constitution and in excess of Mr. Pompey’s authority as P.S. in the Ministry of National Security Air and Sea Port. It was substantively and procedurally defective, null, void and unlawful.

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<sup>24</sup> Quorum Island (BVI) Ltd. v Virgin Islands Environmental Council BVIHC VAP 2009/021 para. 30, (per Rawlins, C.J.)

<sup>25</sup> Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374.

[62] In similar vein, the PSC had no authority to direct Mr. Pompey to lay the charge. All decisions that flowed from the unlawful charge were therefore vitiated by the procedurally irregular and unlawful manner in which Mr. Pompey purportedly lodged it. Effectively, the disciplinary proceedings before the tribunal, the PSC and PSBA were invalidated by this excess of authority and I so hold.

[63] Mr. Sam alleged that the disciplinary charge was brought by Mr. Prince. This conflicts with his allegation that Mr. Pompey initiated the charge. There is no credible evidence that Mr. Prince participated in bringing the charge and I make no such finding.

#### Interdiction – denial right to be heard

[64] Mr. Sam submitted that the PSC violated fairness principles by interdicting him on half pay before he was given an opportunity to be heard.<sup>26</sup> While he outlined the chronology of events surrounding his interdiction in the application for leave and in the April 2015 affidavit, he made no explicit connection between those allegations and unfairness until March 2016. However, he did include it as a ground of appeal before the PSBA. The PSBA responded that his interdiction and withholding of half of his **salary 'were validly imposed under regulation 45' of the PSC regulations**. For reasons articulated before, I am satisfied that the PSBA was sufficiently seized of the nature of the claim before March 2016. In any event, they would undoubtedly have appreciated by then that the broad assertions of procedural impropriety and unfairness covered all procedures in the disciplinary regime such as the manner of interdiction especially since it was a live issue before the PSBA.

[65] **Mr. Sam has not indicated how the PSC's decision to interdict him on half pay invalidated the PSBA's order confirming his dismissal.** He made no legal submissions on this point. Neither did the PSBA. This attack seems to be directed against the procedure leading to his termination. Be that as it may, regulation 45 provides for interdiction. It also allows for the PSC to withhold part of the salary of an officer who is interdicted.

[66] It states in part:

**'(1) Where there have been, or are about to be instituted against an officer-**

(a) disciplinary proceedings; or

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<sup>26</sup> Paragraph 18 of 11<sup>th</sup> March, 2016 affidavit.

(b) criminal proceedings,

and where to Commission is of the opinion that the public interest requires that that officer forthwith cease to perform the functions of his office, The Commission may interdict him from such performance. ...

(3) An officer interdicted for misconduct, other than a dishonest act which involves the loss of Government property or funds, may receive such proportion of the salary of his office, not being less than one half, as the Commission may deem appropriate.'

[67] The PSC Regulations and CSO do not provide for a hearing before interdiction. Nothing has been urged on the court which suggests that this is a statutory or other procedural requirement. Sub-regulations (1) and (3) of regulation 45 stipulate that the PSC is required to take account of three factors in arriving at the portion of emoluments the officer should receive during interdiction:

(1) the nature of the charge, (i.e. whether disciplinary or criminal);

(2) public interest concerns in relation to **the officer's continued service pending resolution** of the charges; and

(3) what would be an appropriate salary payment during that period.

[68] Sub-regulation (4) provides that the officer shall receive any salary deducted, if he is exculpated at the end of disciplinary proceedings. The objective of this regulation appears to be dual. On the one hand, it **caters to the officer's** realistic need not to be deprived of his full salary unless he has been tried and found guilty of the offence charged. On the other hand, it prevents the PSC from withholding more than one half of his salary during such period. It therefore balances the employee's reasonable expectation not to be punished without cause, **against the employer's** contractual obligation to pay its employee during the contract. It seems to me that the provision is not punitive in nature or intent in cases where a charge is validly laid against an officer in accordance with the regulatory framework. There is usually no need for the PSC to give an employee a hearing regarding any proposed deduction.

[69] **However, this case was not typical. For one, Mr. Sam was not a member of NEMO's staff. Secondly,** the offence for which he was being interdicted was unrelated to his employment as a teacher. He

was therefore entitled to a hearing in accordance with the '*audi alteram partem*' rule which requires that individuals be given:

- (1) notice of any proposed punitive action against them; and
- (2) an opportunity to present a response before a decision is rendered.

I find therefore that Mr. Sam was improperly denied the opportunity to be heard on the proposed interdiction. The interdiction violated natural justice procedural requirements and was therefore unfair and unlawful. For this reason, the deduction of his salary was also unlawful.

#### Charge - Validity

[70] **It is Mr. Sam's contention that the charge did not specify the law on which it was based and was therefore illegal.** He asserted that Mr. Pompey was unable to identify the law during the hearing. Mr. Pompey admitted that he was unable to say which law Mr. Sam was charged with infringing. **The PSBA's case is that the alleged breach of loyalty was in violation of the common law.** The common law was not mentioned in the charge.

[71] It is an accepted and established principle of law that a person charged must be given full particulars of the case against him. This entitlement is intrinsically bound up in the concept of the right to a fair hearing. The rationale behind this right is founded on the imperative of ensuring that the parties in a dispute operate on a level playing field. It assumes greater significance where the person charged is liable to have his liberty curtailed or his employment terminated, as in the case at bar. This right entails full disclosure of the allegations, which are adequate to enable the person charged to prepare his case. What is fair is determined by what a reasonable man would consider to be fair in the circumstances.<sup>27</sup>

[72] The charge in the instant case was misconduct contrary to Order 3.27 of the Civil Service Order ('CSO'),<sup>28</sup> for publicly criticizing NEMO. It was expressed to be:

- (1) '**contrary to law and**'
- (2) '**in contravention of the duty of loyalty owed ... as a public servant.**'

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<sup>27</sup> Ridge v Baldwin [1964] AC 40.

<sup>28</sup> For the public service of Saint Vincent and the Grenadines.



It neither specified the referenced law nor did it indicate where the duty of loyalty originated (i.e. whether by statute or common law).

[73] During the hearing before the tribunal, **Mr. Sam's lawyer asked Mr. Prince** which law Mr. Sam contravened. **He responded that he did not 'lay the charges,' that it was for the service commissions to say. Mr. Pompey for his part responded that the charge arose from a violation of 'section 40(1) of the public service regulations and section 54 (2) Cap. 10'. He added that the charges were** drafted by the DPP in consultation with the Attorney General's **chambers** and that he could not say what law was allegedly breached. Mr. Pompey was the one who laid the charges as directed by the PSC. His inability to indicate what law was contravened suggests that he did not know. Neither the DPP nor the Honourable Attorney General testified before the tribunal.

[74] Sometime later, while Mr. Pompey was still being questioned, the Chairman Mr. John and Mrs. Saunders engaged in a short dialogue regarding the basis of the charge. Mrs. Saunders appeared to be seeking clarity on the specific law under which the charge was brought. The Chairman Mr. Colin John stated:

**'There was a law relating to public servants publishing they could have been held criminal (sic) liable for that on the statute but that law has since been repealed.'**

When pressed by Mrs. Saunders, he had no response as to what law replaced the repealed provision. He stated:

**'There is no criminal sanction now, the law in no way repealed the Civil Service Orders; a person can be disciplined. Example a police officer can be charged criminally and also by the orderly room issue.'**

[75] The uncertainty and confusion evidenced in that exchange appears to have persisted throughout the hearing because later Mrs. Saunders repeated her concern asking:

**'... If you go to court and states contrary to the law, I agree with you contrary to the law, I am asking which law?'**

She did not get a response from Mr. Pompey or anyone else, whereupon the chairman directed Mr. Thomas to proceed with his cross-examination. Still later and towards the end of Mr. Pompey's testimony she remarked:

**'The charges that have been laid out I am still trying to find out what law was in contention with (sic), because the law has been repealed. So we now have to depend on the DPP and the Attorney General's Chambers to use his discretion.'**

[76] Those reservations appeared to have persisted in the deliberation phase of the hearing. They found expression **in the tribunal's** report. In this regard, Mrs. Saunders remarked in her findings:

**'... I perused the Civil Service Orders and noted that section 3.27 seems only to establish the procedure for disciplinary action. The law for sections 3.11 to 3.17 – rules of conduct for public officers – and in particular, this type of conduct "publication of information" was repealed and not replaced. Public officers no longer require authorization for the publication of any article of otherwise. Further, the witnesses could not have stated which law Mr. Sam breached. So 'contrary to law' as indicated in the charge, to me could not be justified. ...**

The Permanent Secretary struggled in defending the charge. The charge was laid by him yet he could not have stated which law the officer breached.'

She concluded:

**'... a charge that warrants dismissal should be in accordance with the law.'**

[77] On this subject, Mr. Aldric Williams neither mentioned misconduct nor the common law duty of loyalty. He stated:

**'... While it is true that the law prohibiting communication with the Press has been repealed, no one has a right to publish defamatory material against another.'**

[78] Mr. John was the only tribunal member who referenced the common law. Notably, it was the first time in the entire proceedings that the common law was mentioned. By then, Mr. Sam had long departed. Mr. John opined that Mr. Sam has a common law duty of loyalty to the organization where he worked

and he contravened it when he published the article in the newspapers. It is striking that only one **member of the tribunal interpreted 'contrary to law' as** referring to the common law.

[79] Despite his questioning of the witnesses, Mr. Sam left at the end of the hearing without being informed that the legal basis for the charge was the common law. No tribunal member mentioned the common law at any stage. No witness did. The PSC did not make reference to the common law in their letter terminating his services. From all appearances, Mr. Sam became aware that the charge was based **on the common law only when he received the transcript of the tribunal's proceedings** sometime later. This is unacceptable and was unfair to him. He stood charged with an offence which jeopardized his entire career and livelihood, yet he had no idea of a critical component of the charge against him. He did not know he was charged with misconduct contrary to the common law. The charge did not identify with the requisite specificity which law was allegedly violated. This is a glaring example of what any reasonable man would describe as unfair.

[80] In this regard, the charge ran afoul of the fundamental legal principles of equality at arms and fairness. It is therefore not legally maintainable. The deficiency became incurable once the proceedings were concluded. In effect therefore, Mr. Sam was unlawfully charged, tried and punished. I find therefore that the failure to mention the common law in the charge was fatal. The disciplinary proceedings were thereby rendered unfair and unlawful. Consequently, the disciplinary proceedings before the tribunal, the PSC and the PSBA and the resulting decision were null and void.

#### Bias

[81] Mr. Sam contended that because Mr. Colin John was Deputy Director of Public Prosecutions and second in command to the DPP, his appointment as chairman of the disciplinary tribunal was tainted with bias and highly prejudicial to his interests. He submitted that since Mr. John was employed in the **DPP's** office and the DPP was consulted in formulating the charges, this created the perception of bias which disqualified him from serving on the tribunal. He posited that consequently **Mr. John's** appointment was tainted with bias, improper, unfair and highly prejudicial to him. He argued further that because the tribunal hearing was conducted at the office of the Honourable Attorney General, it was tainted with bias.

[82] The PSBA countered that both assertions are new. They maintained that the procedure was fair and that there was no violation of the rule against bias. They contended that the DPP is simply consulted on the terms of the charges and not for advice on whether to initiate disciplinary proceedings. Mr. John testified to like effect. The PSBA argued further that the power to discipline public officers is vested in the PSC which is in an independent body that in accordance with section 77 (12) of the Constitution it is not subject to the direction or control of any person or authority.

[83] They contended that it was **the PSC which determined Mr. Sam's guilt** in accordance with section 77 (12) of the Constitution and regulation 54 (2) (k) of the PSC regulations, and not the tribunal. They added that due to the separate roles of the tribunal and PSC the procedure was fair and no possibility of bias existed. They submitted also that Mr. Sam did not particularize in his FDCF or affidavit any facts on which to conclude that Mr. Colin John or the tribunal was biased. Mr. Sam made no such allegations against the tribunal. He did however level those criticisms at Mr. John in relation to what he claimed was favourable treatment of Mr. Prince and Mr. Pompey.

[84] **Contrary to the PSBA's submission, Mr. Sam did question Mr. John's participation in the tribunal panel:**

- (1) on day 2 of the tribunal hearing;
- (2) in his appeal to the PSBA;
- (2) in his affidavit supporting the application for leave to apply for judicial review; and
- (3) in the FDCF.

[85] On the morning of 28<sup>th</sup> February 2013, while giving his evidence before the tribunal Mr. Pompey **testified that the charges 'were drafted by the Director of Public Prosecutions in consultation with the Attorney General's Chambers'**. Soon afterwards in response to a query from Mrs. Saunders, the chairman Mr. John explained that regulation 54 provides for the P. S. to consult with the DPP. Later that morning while Mr. Sam was giving his testimony, he noted that the Deputy DPP functions in the office of DPP when the DPP is incapacitated. Nothing further was said. Mr. John continued to preside as chairman. Mr. Sam did not include in his grounds of appeal any concerns that the tribunal hearing

took place at the Attorney General's office and he did not do so expressly in his application for leave to seek judicial review on in his FDCF.

[86] Mr. Sam also protested that the charges were made in consultation with the Attorney General yet the hearing was being conducted in her office. When the tribunal was invited to note this, Mr. Colin John remarked:

**'With regard to the AG she is the government legal representative;**  
any issue relating to an officer is (sic) must come to her attention.  
Should we get the Attorney General from a different country?'

[87] Regulation 54 provides for the P. S. to consult with the DPP before bringing a charge. Mr. Colin John acknowledged that he was aware of this provision when he was appointed as chairman of the tribunal. Before this court, he initially denied and later conceded under cross-examination that Mr. Sam did question his involvement as a member of the tribunal. He testified that he had no involvement at all in advising P.S. Pompey. He denied being involved with the preparation of the charge or having any knowledge of the matter before he was appointed as chairman.

[88] Although this court has not had sight of the record of **the PSC's deliberations**, it appears that the PSC was of the same view as Mr. John because **they acted on the tribunal's findings**. In his appeal to the PSBA, Mr. Sam submitted **that Mr. John's participation on the tribunal constituted an unfair procedure which ran contrary to the 'fundamental principle of neutrality and fairness'**. The PSBA ruled that it was unaware of any violation of the procedure laid out in regulation 54 of the PSC Regulations or section 77 (12) of the Constitution.

[89] A cornerstone principle of administrative law is that a man must not be a judge in his own cause. This rule contemplates that persons charged will have their cases presided over by individuals who have no real or apparent interest in the matter. A potential adjudicator is therefore disqualified from serving as judge at a hearing if he has any direct or indirect personal or proprietary interest in the outcome. A direct interest is referred to as 'actual bias' **while an indirect interest is called 'apparent bias'**. **Mr. Sam has alleged that Mr. John's participation in this case falls within the second class.**

Accordingly, it was not necessary for him to make any averments that Mr. John or other members of the tribunal were biased.

[90] In deciding whether an allegation of bias is made out, the court must examine all of the relevant circumstances and ask itself whether a fair minded and informed observer would conclude that there is a real possibility that the tribunal was biased.<sup>29</sup> If apparent bias is alleged, the court must also consider whether a real possibility existed that the adjudicator could have, (from the perspective of a fair-minded and informed observer who has full knowledge of the surrounding facts and the **parties'** respective positions) approached the matter with a closed mind and without impartial consideration of all relevant issues.<sup>30</sup>

[91] Such an observer would no doubt appreciate that Mr. John is trained as an attorney and apparently was the only legally trained mind on the tribunal. In that regard, he would reasonably be expected to provide some guidance on legal matters to the other members, who might conceivably defer to him. Like all adjudicators, he would be expected to approach the case from a position of objectivity and his legal training would have prepared him to do so. Mr. John did not deny and the court takes judicial notice that at the material time he was the sole Deputy DPP who acted as DPP in the absence of the substantive DPP. Furthermore, the DPP and Deputy DPP are expected to work together closely in prosecuting the mandate of the DPPs office.

[92] Despite **Mr. John's denial of** prior knowledge of the consultation between the DPP and P.S. Pompey in drafting the charges, and any involvement in such consultation, I have no doubt that a fair minded and informed observer would conclude that there was a real possibility that Mr. Colin John would not have approached the inquiry with an open mind and be able to be impartial. I so conclude based on the professional relationship and the close nexus between the DPP and Deputy DPP relative to their function **as managers of the DPP's office. Mr. John's** denial even if true, does not erase the perception of bias. Although he might not have assisted in drafting the charge, his participation in the

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<sup>29</sup> Porter v Magill [2001] UKHL 67; cited with approval in Mitchell v Georges (sole Commissioner of the Ottery Hall Commission of Inquiry) (No. 2) [2015] 3 LRC 392, PC.

<sup>30</sup> Georgiou v Enfield London Borough Council [2004] EWHC 779 (Admin).

proceedings created the appearance of bias. Accordingly, I agree with Mr. Sam that Mr. John was disqualified from serving as Chairman or member of the disciplinary tribunal by reason of apparent bias. His participation deprived Mr. Sam of his right to a fair hearing and I so find.

[93] Regarding **Mr. Sam's** objection to the venue used by the tribunal, it is self-evident that the state ideally should have arranged for the hearing to be held at a venue which was totally unconnected with any of the players who assisted in formulating the charge. However, I am of the considered view that the mere fact that it was held in the **Attorney General's office would not have caused a fair-minded** observer to conclude without more that the tribunal members would be so affected that they would be unable to render an objective decision. I have not been made aware of any connections between the **tribunal members and the Attorney General's chambers which would lead a fair minded** and fully informed observer to make such connection and conclude that the hearing was tainted by bias in that regard. This does not assist Mr. Sam. I make no finding that this rendered the process unfair or procedurally irregular.

[94] **The PSBA did not rebut Mr. Sam's submission regarding the favourable treatment he alleged was** meted out to the Honourable Attorney General when she was granted additional time to file her submissions. The Honourable Attorney General deposed that in matters of appeal it is common and proper practice to permit the respondent to file his submissions after the appellant has filed its own. I take note that this is not unusual. I therefore make no finding that the Honourable Attorney General was given preferential treatment in this regard. I now turn to address what was advanced seemingly as the primary ground for this claim.

#### Freedom of expression and duty of loyalty

[95] Mr. Sam submitted **that the PSBA misapplied the law as 'it related to balancing one's fundamental right to expression and his duty to his public employer.'** In this regard, he contended that in arriving at their respective findings, the tribunal, the PSC and the PSBA failed to consider or adequately consider his fundamental right to freedom of expression. He submitted that the PSBA seems to have adopted a **'one size fits all approach'** when it stated that **'Section 10 of the Constitution has shown**

that the exercise of freedom of expression must be done in tandem with respect for the rights of **freedoms of others as well as respect for the dignity of institutions in the state.**'

[96] He contended further that this was an incorrect approach and in direct conflict with the constitutional provision which contemplates that government as an employer must create different restrictions for employees based on their seniority. **He argued that restrictions on civil servants' enjoyment of the fundamental right to freedom of expression are permissible only if they are reasonably required for the proper performance of their civil service functions and reasonably justifiable in a democratic society.** In support, he cited the Privy Council decision of *Elloy De Freitas v Permanent Secretary of the Ministry of Agriculture, Fisheries, Lands and Housing and Others*.<sup>31</sup> In essence, **Mr. Sam's contention is that the tribunal, the PSC and ultimately the PSBA did not understand the law which governs a civil servant's exercise of his right to freedom of expression and this misunderstanding caused them to misapply the applicable legal principles.**

[97] He submitted too that Mr. Aldric Williams misunderstood the meaning of misconduct within the context of section 3.27 of the CSO and this led him to arrive at a fundamentally flawed decision adverse to the claimant. **He pointed out that Mr. Williams found Mr. Sam's conduct to be unethical but did not warrant dismissal and under cross-examination he equated unethical with 'a failure to obey directives' and agreed that it was interchangeable with 'disobedience'.** He thereby demonstrated that he addressed his mind to the wrong issue.

[98] The PSBA also relied on the De Freitas decision and maintained that they correctly applied the law. The PSBA posited that the **PSC correctly balanced the duty of loyalty with Mr. Sam's freedom of expression.** They submitted that there is no unfettered right of freedom of expression guaranteed under the Constitution of Saint Vincent and the Grenadines. They contended that public servants, especially senior public servants and officers are required to comply with the terms and conditions of their employment and **that 'limitations on expressions especially on senior or public officers and servants holding certain offices and who represent a particular Ministry or government department does not offend section 10' and 'alternatively, such limitations are reasonably required in the interest**

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<sup>31</sup> (1998) 53 WIR 131.



of public order and/or to preserve the integrity of the public service, and are reasonably justifiable in a **democratic society**.'. The PSBA stopped short of identifying those limitations which they imply have been imposed exclusively and specifically on senior civil servants in Saint Vincent and the Grenadines. They also did not indicate in what way publication of the article might have led to disruption of public order. I have uncovered none on either score.

[99] They submitted that under the common law, public servants in Saint Vincent and the Grenadines owe a duty of loyalty to their employer (the government); **which 'derives from the mission of the civil service to help the duly elected government to serve the public interest.'** They posited that this duty reflects the importance and necessity of an impartial and professional civil service. They submitted that **'the common law duty of loyalty sufficiently accommodates the right to freedom of expression as guaranteed by sections 1 and 10 of the Constitution and therefore constitutes a reasonable restriction within the meaning of section 10 (2) of the Constitution.** They cited the De Freitas case and *Read v Canada*<sup>32</sup> **in support of this contention and as authority for the contention that 'a public servant's freedom of expression was not unreasonably limited within section 1 of the Charter.'** The PSBA did not specify which aspect of the common law duty of loyalty purportedly embodies such restriction or which aspect of the charge particularized it.

[100] The PSBA argued that the Public Officers (Conditions of Employment) (Repeal) Act 2005 did not repeal the common law duty of loyalty. They contended that the duty of loyalty arises out of the contract of employment and is separate and apart from anything prescribed in the Public Officers (Conditions of Employment) Act 1971. They maintained that Mr. Sam made critical statements against his employers in the article he published about NEMO, even though the Director of NEMO asked him not to do so. They insisted that his words and actions displayed a lack of loyalty to the Government of Saint Vincent and the Grenadines, transcended the boundaries of responsible expression and constituted flagrant misconduct which contravened the terms and conditions of his appointment and employment.

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<sup>32</sup> 2006 FCA 283.

[101] The PSBA acknowledged that the CSO does not contain a definition of misconduct. However, they **submitted that misconduct is conduct which ‘falls short of the standard expected of an officer, or which is considered improper’.** They cited *Sherman McNicholls v Judicial and Legal Services Commission*<sup>33</sup> and *Claude Gerald v The Governor of Montserrat*<sup>34</sup> in support. I accept that both authorities correctly describe ‘misconduct’. The PSBA pointed out that CSO 3.27 provides that a public officer will be liable to disciplinary action for any misconduct including general misconduct to the prejudice of discipline or the proper administration of Government business and contravention of specific rules.

[102] They mentioned a Privy Council decision of *Lawrence v. AG* in support of their submission that CSO 3.27 is not unconstitutional. They did not supply a citation.<sup>35</sup> **They submitted that ‘the Crown or Government must be able to institute disciplinary proceedings for conduct which brings the employer into disrepute or which irreparably harms the employer/employee relationship and/or which amounts to misconduct.’**

[103] **An examination of the tribunal’s two reports and addendum which were transmitted to the PSC** revealed that none of the tribunal members considered how the common law duty of loyalty impacted the constitutionally guaranteed right to freedom of expression. It was not mentioned and no oblique reference was made to it. In his concluding remarks in the tribunal report, Mr. Williams outlined his findings. He wrote:

**‘Mr. Sam’s decision to go to the Press was no justification to remedy the situation and shows that he learned very little about the Public Service Orders and other Regulations during his thirty (30) years as a Public Servant.**

While it is true that the law prohibiting communication with the Press has been repealed no one has a right to publish defamatory material against another. Ms

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<sup>33</sup> [2010] UKPC 6.

<sup>34</sup> MNIHCVAP2003/0002.

<sup>35</sup> The PSBA also mentioned *Chester Precilla v AG of Trinidad and Tobago*, *State v Public Service Commission* (1996), *Lawrence v AG* and *Eugenia Moore v Jones* without citations. They were not considered.

Forbes who took offence to the publication initially seems to have a change of heart and thus may be considered as mitigating circumstances.

Sam was advised by Prince not to publish the article but he disobeyed. His conduct on the whole was unethical but does not warrant dismissal as cited in **Section 54 of Cap. 10.**'

[104] On this issue, the chairman Mr. Colin John opined:

**'It is my opinion that the charge against Mr. Otto Sam was proven. ...**

The authorities complied with the procedural requirements as were laid down in Chapter 10 Section 54 of the Laws of Saint Vincent and the Grenadines 2009 and every element of the allegations were proven.

The points that have to be proven in determining this charge are as follows:

- (i) Mr. Otto Sam published the article;
- (ii) The article is likely to bring NEMO into disrepute
- (iii) It is contrary to Law and in breach of his duty of loyalty. ...

**... his conduct is contrary to law and also a contravention of duty of loyalty.**

Mr. Sam is a civil servant. He is subjected to the Civil Service Orders. His action of publishing this article is in my opinion misconduct as was referred to in Order 3.27 of the Civil Service Orders. Mr. Sam also has a common law duty of loyalty to the organization at which he worked. He contravened that **duty when he published the article in question in the newspapers.'**

[105] Mrs. Saunders started her analysis from the position that there was no legal basis for the charge. She **then examined the concept of loyalty in relation to Mr. Sam's punctuality and how efficiently he executed duties assigned to him, but not in respect of its wider meaning.** Clearly all tribunal members overlooked any connection between the common law duty of loyalty and freedom of expression rights in arriving at their decision. In the absence of records from the PSC, it is impossible to ascertain if this issue was in their contemplation. It does not appear that the **PSC's** findings were

before the PSBA when it considered the appeal. If they were, the PSBA did not refer to them in their ruling.

[106] The PSBA dedicated 2 short paragraphs in its decision to the issue of freedom of expression and did not mention the common law duty of loyalty. In response to **Mr. Sam's** submission that the PSC **'failed to arrive at a correct balance between Reg. 3.27 and section 10 of the Constitution**, they ruled:

**'There is no unrestrained right to freedom of expression guaranteed by the Constitution** of St. Vincent and the Grenadines. Section 10 of the Constitution has shown that the exercise of freedom of expression must be done in tandem with respect for the rights and freedoms of others as well as respect for the integrity of institutions and functions of State.

Section 10 of the Constitution, objectively interpreted in its entirety, could not have provided the Appellant with justification for the act of misconduct, and the Commission **did not have to establish that the applicant's act of misconduct had an actual** prejudicial impact on NEMO or the public service. The potential for impact resides in the **letter and it was enough to cause the Commission to act. ...**

It is repeated that the Appellant did not have any unfettered right and freedom under section 10 of the **Constitution of St. Vincent and the Grenadines.'**

[107] The tribunal, PSC and PSBA did not expressly outline or reference the elements of the common law duty of loyalty or indicate whether and how the charge incorporated any aspect of that duty. They did not specifically delineate the constituent elements of the constitutionally guaranteed right to freedom of expression or the permissible restrictions. An appreciation of the full import of the common law **'duty of loyalty' and the constitutional concept of 'freedom of expression' was indispensable to them** in conducting their respective duties as decision-makers. It is also important for this court to set out those guiding principles to determine to what extent the PSBA's **decision embodied** or implicitly acknowledged those relevant considerations.

[108] The common law duty of loyalty is not defined or codified in any statute or code of civil service behavior. It has been considered by the Supreme Court of Canada and courts in the United States of

America. The Canadian case of *Re Fraser and Public Service Staff Relations Board*<sup>36</sup> relied on by both parties, described it briefly and examined the position in Canada. The court expressed reservations about the propriety and lawfulness of public officers engaging in strident and incessant criticism of government policies. Dickson C.J. had this to say:

**'... a public servant may actively and publicly express opposition to the policies** of a government. This would be appropriate if, for example, the Government were engaged in illegal acts, or if its policies jeopardized the life, health or safety of the **public servant or others, or if the public servant's criticism had no impact on his or her ability to perform effectively the duties of a public servant or on the public perception of that ability.** But having stated these qualifications (and there may be others), it is my view that a public servant must not engage, ... in sustained and highly visible attacks on major Government policies.'<sup>37</sup>

[109] He expressed the view that a public officer who did so would be displaying a lack of loyalty to the Government which would be inconsistent with his duties as a government employee. He reasoned:

**'... there is a powerful reason for this general requirement of loyalty, namely,** The public interest in both the actual and apparent, impartiality of the public **service.'**<sup>38</sup>

These sentiments were echoed by the Board in the *Defreitas* case.

[110] Dickson C.J. continued:

**'A person entering the public** service or one already employed there must know, or at least be deemed to know, that employment in the public service involves acceptance of certain restraints. One of the most important of those restraints is to exercise caution when it comes to making criticisms of the

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<sup>36</sup> (1985) 23 DLR (4) 122.

<sup>37</sup> *Ibid.* at para. 41.

<sup>38</sup> *Ibid.* at para. 42.

**Government.**<sup>39</sup>

[111] The foregoing pronouncements contain general statements in relation to enjoyment of freedom of expression by civil servants. They have been adopted and applied with modifications and greater precision in our jurisdiction. They therefore apply to the case at bar. **In rendering the Board's decision** in the Defreitas case, Lord Clyde highlighted the special position which public servants enjoy in a democratic society as servants and agents of the State. He remarked that they must submit to certain restrictions in order to preserve public confidence in the conduct of public affairs. For this reason, they are expected to demonstrate neutrality, political impartiality and loyalty. Very importantly, he noted that:

**'The general proposition that civil servants hold a unique status in a democratic society does not necessarily justify a substantial invasion of their basic rights and freedoms.'**

He emphasized that a proper balance must be struck between the right to freedom of expression and **the civil servant's duty to properly** fulfill his functions. He adopted certain pronouncements made in the Fraser case of by Dickson C. J. in which he described how this balance is to be achieved and maintained.

[112] Likewise, in the Fraser case Dickson CJ highlighted three reasons why public servants must be permitted some freedom to speak publicly on public issues. They were endorsed by the Board, are binding on this court and are accordingly applied in this case. In this regard, they emphasized:

**'First, our democratic system is deeply rooted** in, and thrives on, free and robust public discussion of public issues. As a general rule, all members of society should be permitted, indeed encouraged, to participate in that discussion. Secondly, account must be taken **of the growth in recent decades of the public sector ... as an employer.** A blanket prohibition against all public discussion of all public issues by all public servants would, quite simply, deny fundamental democratic rights to far too many people. Thirdly, common sense comes into play

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<sup>39</sup> Ibid. at para. 43.

here. An absolute rule prohibiting all public participation and discussion by all public servants would prohibit activities which no sensible person **in a democratic society would want to prohibit.**'

[113] Dickson CJ also acknowledged that despite this duty of loyalty, a public servant may in appropriate situations exercise his right to free speech. He expressed the view that those exceptions include instances where:

- (1) the government is engaged in illegal activity,
- (2) has adopted or enforced policies which jeopardize life, health and safety; and
- (3) such speech does not impact on the public's perception of the officer's ability to perform his duties** or on his ability to do so.

[114] Dickson CJ and Lord Clyde stressed that public officers cannot be silent members of the society, and must be permitted to express their opinions publicly on matters of interest. This is the legal position in Saint Vincent and the Grenadines. That is a helpful and critical starting point in reconciling civil servant Otto Sam's **common law duty of loyalty with** his right to freedom of expression in the particular circumstances of this case.

[115] The Defreitas and Re Fraser cases provide guidance on how adjudicating bodies should evaluate complaints against public servants involving alleged breaches of contract which touch and concern restrictions on freedom of expression. The learned authors of Harvey on Industrial Relations and Employment Law<sup>40</sup> described the common law duty of loyalty as applied by English courts and particularized it in some detail as summarized below.

#### Common law duty of loyalty

[116] The concept of loyalty is derived from the feudal concept of fealty. In the absence of express terms, an employee is bound by an implicit undertaking in his contract of employment to protect and remain trustworthy to his employer.<sup>41</sup> It comprises several overlapping elements namely:

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<sup>40</sup> Issue 253, October 2016, LexisNexis.

<sup>41</sup> Malik v BCCI SA [1997] IRLR 462, HL.

- (1) an implied undertaking by an employee to render good and faithful service to his employer, sometimes referred to as his duty of fidelity. This aspect is usually invoked where a former employee sets up a similar business in competition with his former employer or goes to work for a rival concern.
- (2) **An implicit agreement to remain trustworthy and protect his employer's confidences.**<sup>42</sup> An employee is deemed to have destroyed or undermined that bond of trust and confidence where he deliberately and without justification betrays **his employer's confidence**.
- (3) Honesty, which in limited circumstances binds an employee to disclose to his employer misdeeds of fellow employees; and
- (4) Confidentiality which obligates on an employee:
  - (a) to pass on to his employer any information which comes to him on **the former's behalf**; and
  - (b) by an implied term, not to disclose to third parties or use **to his employer's detriment**, confidential information or trade secrets obtained through his employment.<sup>43</sup>

[117] It is important to note that in English jurisprudence, the duty of confidentiality is not absolute and may be disregarded if the public interest demands disclosure.<sup>44</sup> For example, if legislation mandates disclosure of confidential information to a regulatory body, an employee would not be bound by the **duty to protect his employer's confidences**. The law in Saint Vincent and the Grenadines is more aligned with the law in the United Kingdom than with Canada. Accordingly, decisions from the UK jurisdiction have more persuasive force. For this reason, I adopt the learning outlined by Harvey and in the cited English authorities.

[118] Mr. Sam relied almost exclusively on this public interest defence to the charge. He alleged that his **concerns for the inadequacies he observed in NEMO's level of preparedness** prompted him to try to activate corrective measures by the relevant Ministry officials and only when this failed did he bring **his concerns to the public's attention as a last ditch attempt to ameliorate the situation**.

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<sup>42</sup> *Malik v BCCI SA* [1997] IRLR 462, HL.

<sup>43</sup> *Amber Size and Chemical Co. Menzel* [1913] 2 Ch. 239; *Bent's Brewery Co v Hogan* [1945] 2 All ER 570.

<sup>44</sup> *Re a Company's application* [1989] IRLR 477, ChD.



[119] **The PSBA's contention is** that Mr. Sam contravened the implied restriction on freedom of expression which is inherent in the common law duty of loyalty. They did not impute dishonesty to Mr. Sam, or allege that he evinced an intention to compete with the government. Accordingly, those aspects of the common law duty of loyalty do not arise and it is unnecessary to analyze them.

[120] By its response, the PSBA has implicitly invoked the implied duty of confidentiality and the fidelity aspects of the common law duty of loyalty. In *Faccenda Chicken Ltd v Fowler*,<sup>45</sup> the UK Court of Appeal considered the legal principles which apply where the contract of employment does not contain an express confidentiality clause, as in the case at bar. Although that case involved a claim against an ex-employee, the principles outlined in it are applicable to the instant case. The court opined that in such cases, the extent of the duty of good faith will vary according to the nature of the contract.

[121] In deciding whether an employee has breached the duty of loyalty in connection with confidentiality, the adjudicating body is enjoined to examine:

- (1) all the circumstances of the case;
- (2) whether the information disclosed is confidential or trivial and/or easily accessible to the public;
- (3) the nature of the interest sought to be protected;
- (4) the manner in which the employee acquired the information; and
- (5) how the information was made public and the extent of the publication.<sup>46</sup>

[122] Obviously, information which is already in the public domain, is trivial or easily accessible by the public will not attract the cloak of protection accorded by the duty of confidence. Neither will information received at a public forum. The mere fact that publication of information about the **government's procedures and actions will expose it to public discussion, criticism or even ridicule has** been held not to be a relevant detriment.<sup>47</sup> In the words of Mason J.:

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<sup>45</sup> [1986] IRLR 69

<sup>46</sup> *Attorney General v Observer Ltd et al* [1990] 1 A.C. 109, HL; *Attorney General v Jonathan Cape Ltd.* [1976] Q. B. 752.

<sup>47</sup> *Commonwealth of Australia v John Fairfax & Sons Ltd* (1980) 147 C.L.R. 39.

**'It is unacceptable in our democratic society that there should be a restraint** on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticize **government action. Accordingly, the court will determine the government's** claim to confidentiality by reference to the public interest. Unless disclosure **is likely to injure the public interest, it will not be protected.'**<sup>48</sup>

This sentiment was endorsed and applied by the House of Lords<sup>49</sup> and is adopted for present purposes.

[123] In summary, the common law duty of loyalty is absolute in the sense that it applies to all levels of public servants, however it does not embody a complete restriction against the disclosure of all **information received by a public servant in the course of his employment, by or on the government's** behalf. That duty imposes an implied obligation on **a public officer to keep his employer's confidential** information **secret, in circumstances where disclosure would work to the employer's detriment.** An employee is not so bound if he did not receive the information during the course of his employment. This duty of loyalty may however be disregarded without attracting a penalty when the public interest so demands. Interestingly, strands of these principles were explored by courts in the UK, Australia and the USA in the notorious Spycatcher case which involved a former MI5 officer who exposed in his published memoirs, details about classified data he became privy to as a member of the British counter-intelligence agency. Certain aspects are captured in the above referenced Observer case.

[124] Mr. Sam was not charged with disclosing confidential information he obtained as a consequence of his employment. It was not suggested by the charge or any of the witnesses that the information in the article was confidential. The charge alleged that the public service would likely be brought into disrepute by the publication and that it was prejudicial to the efficient conduct of the service. Conceivably, those qualifications hinted at some detriment suffered by the government or NEMO as a consequence of the publication. Suffice it to say that the important **'confidentiality'** component of the

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<sup>48</sup> Ibid. at para. 51.

<sup>49</sup> In Attorney General v Observer Ltd et al [1990] 1 A.C. 109.

common law duty of loyalty which was invoked by the government in this case, did not find expression in the charge. I will address later whether the evidence captured it.

[125] The freedom of expression protection is enshrined in section 10 of the Saint Vincent and the Grenadines Constitution. The relevant part states:

**'10. (1) Except with his own consent, a person shall not** be hindered in the enjoyment of his freedom of expression, including freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision-

(a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health;

**(b) ... ; or**

(c) that imposes restrictions upon public officers that are reasonably required for the proper performance of their functions.

and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.'

(underlining mine)

[126] **An individual's right to** enjoyment of freedom of expression encompasses freedom to communicate ideas and information to the public without interference. As with all constitutionally guaranteed rights and freedoms, there are countervailing limitations or restrictions. Three of those restrictions are relied on by the parties before the court. The PSBA urged that public order concerns justified the imposition of limitations on speech by public officers. Mr. Sam made no submissions in response. Both Mr. Sam and the PSBA presented opposing arguments in relation to whether the common law duty of loyalty

as applied by the PSBA was either reasonably required for the proper performance of his functions, or reasonably justifiable in a democratic society.

[127] The Board in the Defreitas case reviewed a similar provision in the Antigua and Barbuda Constitution to determine whether restrictions in the Antigua and Barbuda Civil Service Act 1984<sup>50</sup> were unconstitutional. While Mr. Sam has not challenged the constitutionality of any legal provision in the instant case, the principles enunciated in the Defreitas case illustrate how a tribunal or court should **treat with restrictions placed on a civil servant's enjoyment of this constitutionally protected freedom.** Specifically, the Board outlined the approach which must be taken in determining whether implicit or **express restrictions on public servants' freedom** of expression run counter to the constitutional provision.

[128] This court is not concerned with evaluating the constitutionality of section 3.27 of the CSO or the common law duty of loyalty. Rather the court must **ascertain whether the PSBA's approach in determining Mr. Sam's culpability took account of those relevant considerations, including in particular whether it properly balanced the duty of loyalty against the constitutional protection.**

[129] In the Defreitas case, the Board opined that the law permits the employer (i.e. government) to impose some restrictions on this right to freedom of expression but only those which are necessary and reasonably required for the proper performance of their functions and reasonably justifiable in a democratic society. In that case, the impugned legislative provision sought to restrain public officers **from commenting publicly on political matters. The Board observed that a 'blanket restraint on all civil servants from communicating to anyone any expression of view on any matter of political controversy would ... be excessive'.** In this regard, they approvingly referred to observations made by the European Court of Human Rights in *Vogt v Germany*<sup>51</sup> where that court considered that a complete ban on association by teachers in groups which the competent authorities deemed to be inimical to the constitution, was excessive.

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<sup>50</sup> By section 10 of that Act.

<sup>51</sup> (1995) 21 EHRR 205 at page 237, para. 59.

[130] In describing what the term ‘reasonably required for the proper performance of their functions’ contemplates, the Board stressed that **restrictions on an individual’s rights must meet the threshold of legal certainty**. It adopted language from the European Commission on Human Rights<sup>52</sup> which explained that such limitations must be **‘formulated** with sufficient precision to enable the citizen to regulate **his conduct**’. In particular, commenting on public criticism of politicians, the Board:

**‘It is a fundamental principle of a democratic society that citizens**  
should be entitled to express their views about politicians,  
and while there may be legitimate restraints upon that freedom  
in the case of some civil servants, that restraint cannot be made  
absolute and universal. But where the line is to be drawn is a  
matter which cannot in fairness be left to the hazard of individual  
**decision.**’

[131] These principles apply equally when criticism is leveled at a government as employer. Furthermore, when the threatened sanction amounts **to the curtailment of one’s means of livelihood** they must be meticulously observed. This is the benchmark against which this court must decide if the PSBA fully appreciated and gave due consideration to whether the **restriction on Mr. Sam’s right to freedom of expression** based on the common law duty of loyalty as applied in this case, was reasonably required for the proper performance of his functions.

[132] In construing the expression ‘reasonably justifiable in a democratic society’, the Board adopted a formula enunciated by Gubbay CJ and held that three criteria must be satisfied:

- (1) The limitation must have a sufficiently important legislative objective to justify limiting a fundamental right;
- (2) The measures designed to meet the legislative objective must have a rationale connection with it;  
and
- (3) The least drastic means are to be used to achieve the objective.<sup>53</sup>

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<sup>52</sup> In G v Federal Republic of Germany (Application 13079/87) (1989) 60 Decisions and Reports 256 at page 261.

<sup>53</sup> Defreitas case (1998) 53 WIR p. 10.

[133] In their submissions, the PSBA has implied that the ‘public order’ exception to restriction of free speech by **civil servants’ is permissible**, incorporated in the common law duty of loyalty and **applicable in this case**. The expression ‘public order’ as used in the Bahamas Constitution was construed by the Supreme Court of Bahamas in the case of Frederick Smith v Commissioner of Police and another.<sup>54</sup> Georges C.J. opined:

‘In my view the term ‘public order’ in Constitutions should embrace rather more than the concept of preventing such disturbance as would tend to create the fear that there will be a real disturbance to the community and the breaking up of the peace of the neighbourhood. It must extend to preventing crime generally, whether or not such crime is likely immediately to lead to such disturbance as may cause alarm.’<sup>52</sup>

I adopt that interpretation.

[134] Assuming that the matters raised in the submissions are all relevant to this case and applying the foregoing principles to the issue under consideration, to the extent that the common law duty of loyalty imposed restrictions on Mr. Sam’s **enjoyment of his right to freedom of expression**, they must have been:

- (1) reasonably required for the proper performance of his functions;
  - (2) reasonably justifiable in a democratic society;
  - (3) reasonably required in the interests of public order;
- and any punishment imposed must be proportionate.

[135] **A review of the PSBA’s ruling on this issue demonstrates convincingly that** they had no regard to the common law duty of loyalty and what it entails. They did not take into account that it is absolute in the sense that it applies to all categories and levels of civil servants. They did not seem to appreciate that it is applicable only to confidential information. Very importantly they did not appear to ask themselves whether the article contained material disclosed to Mr. Sam by his employer in confidence. They were not cognizant that disclosure of such information in the public interest is an exception to the restriction against disclosure.

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<sup>54</sup> (1984) 50 WIR 1.

[136] An evaluation of the alleged objectionable portions of the article revealed very little material which could be described as confidential. Mr. Sam explained that he received some of the information while assigned to NEMO. He also made casual observations of the goings on in the office. He testified before the tribunal of reading the Corporate Plan and other official documents. Mr. Prince testified that Mr. Sam saw things at NEMO that needed to be fixed. Ms. Forbes implied that some of what he reported was untrue. Apart from his description of interactions between staff stationed at NEMO, it was not apparent when and where he made the other observations described in the article. A large part of the publication consists of his opinions.

[137] A critical review the article is in order. The first two paragraphs state:

**“...For a national institution with such an important mandate (Disaster Management) my observations at NEMO make me laugh.”**

- **“...there appears to be no real plans to build the organization capacity in Disaster Management/Disaster Risk Reduction/DRR, except for attending a few in-house sessions.”**

The first statement expressed a personal opinion and incorporated no factual statement about NEMO. The second statement contained **an observation regarding the department’s** intention to build its capacity. It seemed to be a subjective observation. Neither statement contained confidential information.

[138] According to Mr. Sam he made those observations while he was attached to NEMO. He was not contradicted. If that is correct, he was not as a member of staff of NEMO but a member of the public albeit, employed within the Ministry of Education. He would have made those observations not during the course of his employment or incidental to his employment but as an outsider. In that regard, he owed no duty of confidentiality to the department of NEMO. In any event, the incident he discussed in that second statement is in my opinion so trivial that disclosure to the public could not conceivably have placed the government in detriment or constituted a public security breach.

[139] The next three bullet points state:

- **“a top management officer makes NEMO an interesting creature. The officer is discourteous to particular staff members and clients. In early June NEMO had**

a major storm as they lashed out loudly/having a brawl- a real shouting match with staff members in the office even with overseas volunteers in the building. At NEMO one worker who management says curses expletives on clients and lapses with her work is not given a reprimand, however, another who does her work well, is disciplined but is late fifteen minutes for lunch and gets a warning letter. NEMO is very special, workers are insulted and called **names by the senior management. Names like 'ground zero'.**"

- **"Workers are targeted if they make suggestions or question particular things."**
- **"...NEMO is really interesting. I sometimes call it the upside down organization."**

[140] Mr. Sam was here describing the interaction between a management officer and members of staff and clients. It ended with his personal description of NEMO. The scenarios described would under no circumstances attract the label of confidential government information. It was about one or more private individuals. If his observations were factual, the events described did not take place in secret, were observed by persons other than members of staff and would conceivably be in the public domain. NEMO did not indicate what detriment the government was likely to suffer by the release of that information. I fail to see any.

[141] The final section of the impugned article reads:

- **"What makes my stint even more interesting is, NEMO teaches business house and government departments and some schools Disaster management or how to prepare for disaster/DRR, including developing Disaster Plans, yet NEMO  
"...NEMO has no plans of its own to secure its workers and office if there is an event."**
- **"The fact that senior management incites chaos is also another lesson learnt from this interesting organization. It is not uncommon to see lines of management in open verbal confrontation in the presence of nearly most workers."  
"Sometimes I wonder if NEMO is managing disasters or it itself...!"**

[142] Once more, Mr. Sam commented on the interaction of certain staff at NEMO in the last paragraph. These observations were not about government confidential information received in the course of his



employment, disclosure of which would be detrimental to the government. In the preceding paragraph, he criticized **NEMO's lack of internal preparedness in the event of a disaster**. Whether or not that allegation was accurate, **publication of such a statement could cause NEMO's clients and the general public to question its credibility and internal management capabilities or effectiveness**. There is however no evidence of its veracity. Mr. Sam certainly did not become privy to it during the course of his employment. It is therefore not protected by the common law duty of loyalty.

[143] As with the other data which Mr. Sam included in his article, he would have obtained this information while at NEMO as an unconnected third party. As such he would have obtained the information through voluntary disclosure by the NEMO officials while unlawfully stationed there. It is not clear whether NEMO would disseminate such particulars generally to head teachers in the Ministry of Education. I rather doubt that. This was not addressed by NEMO officials. Not being a member of staff, Mr. Sam had no obligation to handle the information in a restricted manner by not disclosing it.

[144] It is common ground between the parties that he first brought his concerns to the attention of the Ministry head who by his own admission ignored the correspondence from Mr. Sam and made no attempt to ascertain its veracity or take corrective action.

[145] Faced with the wall of silence Mr. Sam opted to go public out of concern for what he decried as evidencing: **'... no plan where workers' safety' is concerned, and in respect of '... interpersonal relationship, basic elementary management issues.'** He considered it a matter of immense public interest which begged for attention because nothing was being done within the departmental level where he first raised them. He testified:

**'... I thought that some of these issues should be raised publicly where someone who has the influence and weight could say to someone at NEMO, Mr. Prince take this ship and steer it properly.'**

[146] Even if Mr. Sam was properly contracted to work at NEMO, his disclosure would not attract sanctions for breach of the common law duty of loyalty if it was made in the public interest. It seems to me that the public would have an interest in ensuring that public servants at all levels and specifically within

NEMO take all necessary actions to protect state assets and their persons during a disaster. Failure to have such protocols and procedures in place could likely expose employees and the government to loss and **expense which are ultimately borne by John Public. I agree with Mr. Sam that the public's** interest in learning of such matters overrode any conceivable confidentiality concerns. For these reasons, even if Mr. Sam had divulged confidential information received in the course of his employment, he was entitled to rely on the public interest exception. The PSBA did not take these matters into account.

[147] They also did not have regard to **whether the purported restriction on Mr. Sam's speech met the** criteria of being reasonably required for the performance of his duties. In this regard, they did not demonstrate an appreciation that the common law duty of confidentiality did not differentiate between classes of public officers. Furthermore, they signaled that they did not recognize that the common law duty of loyalty is not formulated with a measure of precision which incorporated guidelines or rules for officers according to their seniority, to enable an officer to regulate his conduct based on established expectation.

[148] Likewise, the PSBA did not consider whether the restrictions imposed by the common law were reasonably justifiable in a democratic society. In this regard, they failed to examine whether those limitations **have a sufficiently important legislative objective to justify limiting Mr. Sam's right to** freedom of expression. They in effect incorrectly interpreted the common law limitation as being all-encompassing (i.e. embracing all government information) and failed to question whether it had a rationale connection to the implied objective.

[149] The PSBA did not consider that Mr. **Sam's** public interest explanation might afford him a complete defence. It was also not explored by the tribunal and apparently not by the PSC. If they had done so they realistically would have concluded that Mr. Sam had a total defence to the charge, which would have resulted in him being exonerated from all wrong doing. In this regard, they failed to take all relevant factors into account. They did not ask themselves whether there were less intrusive ways to meet the confidentiality objective of the common law duty of loyalty. Their failure to take these

matters into account introduced irrationality into their deliberations and final determination and **resulted in Mr. Sam's dismissal.**

[150] It was never asserted that any particular rules were issued to head teachers regarding the restrictions on freedom of expression which apply to them during the course of their employment. Notwithstanding the broad brush of confidentiality which is inherent in the common law duty of loyalty, Mr. Sam and other head teachers or employees within his class, must be informed in clear and unambiguous language as to the limitations which apply to them. There is no evidence that this was ever done. In all the circumstances and in view of the foregoing, the common law restrictions as applied by the PSBA were too broad and unspecific and cannot be countenanced as being reasonably required for the performance by Mr. Sam of his duty as head teacher or as being reasonably justifiable in a democratic society.

[151] The PSBA did not examine what implicit limitations **on an employee's freedom of expression were** embedded in the common law duty of loyalty. They did not consider whether the publication constituted a breach of the common law duty of loyalty. They did not take into account whether the restrictions imposed by the duty of loyalty were reasonably required for the performance by Mr. Sam of his duties and were reasonably justifiable in a democratic society. They accordingly failed to take account of material and significant considerations which were germane and central to the determination of the charge against Mr. Sam. If they had not overlooked those significant and material factors, in all likelihood they would have arrived at a different conclusion.

[152] Although the PSBA described misconduct as being conduct which falls short of the standard expected by an officer, they did not analyze what type of speech by a civil servant is forbidden under the concept of duty of loyalty and manifests in disloyalty. For the foregoing reasons, I reject their contention that the common law duty of loyalty sufficiently accommodates the right to freedom of expression as guaranteed by the Constitution and constitutes a reasonable restriction within the meaning of section 10 (2) of the Constitution.

[153] The PSC and Mr. Pompey never accused Mr. Sam of publishing material which did or was likely to

cause a breach of public order. The charge did not contain any such aspersion and no evidence was led to that effect. Even if the facts permit such finding to be made, the tribunal, PSC and PSBA did not address it in their findings. The tribunal and the PSC before them had no regard to these matters. Their findings were wholly deficient on all of the foregoing issues. To the extent that the PSBA placed reliance on the **tribunal's and PSC's findings**, they were misled and they erred. Their failures on these counts were cumulatively significant, irrational and fatal. Their decision is accordingly incurably flawed and unlawful.

### Proportionality

[154] **Mr. Sam's criticized** the PSBA for imposing the ultimate punishment of dismissal. He attacked it as being excessive and disproportionate to the alleged breach. The PSBA countered that the PSC may on consideration of the report exonerate the officer or impose a penalty ranging from a fine to dismissal. They added that it **is the PSC and not the tribunal that determines the officer's guilt or innocence** and that **the PSC is not bound by the tribunal's opinions, but must consider them when** formulating its own decision in respect of the charge.

[155] The PSBA submitted further that the PSC has the power to dismiss a public officer pursuant to regulation 50 (1) (a) and that in view of the serious nature of the alleged misconduct and the consequences such misconduct could have to the international, regional and local regard of NEMO, the punishment was most appropriate. They produced no credible evidence of any such detriment to the government. The PSBA maintained that they neither exceeded their authority nor acted in an unlawful manner, and that they acted within their statutory discretion.

[156] The concept of proportionality introduced to the public law realm, the requirement for decision makers to consider whether sanctions are proportionate to the legitimate objective they seek to address. If the measure imposed is disproportionate to the overall objective, it would be characterized as excessive and forms a ground to invalidate the decision.

[157] **The PSBA's decision shed no light on whether they considered the issue of proportionality.** It appeared that they viewed any criticism of the government, government department or government

agent as sufficient to warrant dismissal. **They summarily dismissed this aspect of Mr. Sam's appeal** by saying:

**'The punishment** was imposed pursuant to regulation 50 (1) (a) of the Public Service Commission Regulations and in accordance with the serious nature of the misconduct that has the potential for adverse **consequences for NEMO.'**

[158] It does not appear that it was in their contemplation that some utterances are inherently more objectionable than others and that a fair system required the formulation of a raft of penalties to be applied depending on the severity of the established breach. Even if Mr. Sam was guilty as charged, the PSBA still needed to consider other matters such as the extent of the detriment suffered by the government or **Mr. Sam's** behavioral record during the course of his employment. They wrongly characterized publication of any such information to be gross misconduct which justified dismissal in all cases and in the instant case. Their conclusion was irrational as no reasonable person would have so concluded. This approach was flawed. In the premises, I find that his dismissal was disproportionate and accordingly irrational.

#### Further contentions by Mr. Sam

[159] Mr. Sam made a number of submissions which were not supported by particulars in his pleadings or by the evidence. There was therefore insufficient credible or coherent evidentiary or other basis on which the court could assess their merits. They were therefore not addressed. These include contentions that:

- (1) he was not provided with the audible transcript of proceedings and/or an audible copy of the recorded transcript as ordered by Justice Thom on 27<sup>th</sup> November, 2013;
- (2) the PSC and by extension the PSBA upheld his dismissal on the basis of a defective transcript;  
and
- (3) the PSBA determined the appeal without the benefit of the edited or unedited transcript of the tribunal hearings.

[160] Mr. Sam submitted also that the decision of the tribunal goes against the weight of the evidence. In this regard, he referred to testimony as to his punctuality and discipline to support that he was loyal and had not committed a breach of duty of loyalty. He submitted further that the evidence of the Honourable Attorney General demonstrated that she was unaware that Mr. Sam was not a part of the management team. He highlighted in his submissions that Mr. Cecil John testified that he could not **recall if he had seen the minutes. He also referenced the PSC's failure to comply with Thom J.s order to provide him with a full, complete and unedited transcript. He also referred to Mr. Colin John's testimony where he denied that his presence as chairman of the tribunal was challenged. He also mentioned Mrs. Saunder's finding that Mr. Sam 'broke no laws', and Mr. Aldric Williams' conclusion that Mr. Sam was unethical and disobedient but had contravened no law and should not be dismissed.**

[161] The PSBA responded that the tribunal and PSC objectively considered all of the evidence. They submitted that the tribunal functions simply to hear the evidence, find the facts and submit an expression of its opinion as to the meaning and value of the facts found together with the record of the proceedings to the PSC, which it did.

[162] It bears repeating that when the court is invited to judicially review a decision made by a tribunal, it does not sit as an appellate body. The circumstances in which judicial review of findings of fact are **permissible are limited to instances of unfairness. The authors of Blackstone's Civil Practice have outlined four criteria which must be established in this regard:**

- '(1)there must be a mistake as to an existing fact, including mistake as to the availability of evidence;**
- (2) the fact or evidence must now be uncontentious and objectively verifiable;
- (3) the claimant or his advisers must not have been responsible for the mistake of fact; and
- (4) the mistake must have played a material (but not necessarily decisive) part in the Tribunal's reasoning. E v Secretary of State for the Home Department [2004] EWCA Civ 49'**

[163] The evidence advanced by Mr. Sam in support of this contention fall short of satisfying the listed criteria. However, in view of the substantive evaluation conducted in relation to the content of the

impugned article and the requirements of the common law duty of loyalty, I am satisfied that the charge as formulated had an inadequate legal or factual basis. In this regard, a fundamental mistake was made as to the type of information which would attract the protection of the common law duty of loyalty: namely confidential information. The tribunal did not appreciate this and misdirected themselves on this factual issue through no fault of Mr. Sam. The circumstances of this case do not support a factual **or legal finding that Mr. Sam's** words and actions displayed a lack of loyalty to the Government of Saint Vincent and the Grenadines, transcended the boundaries of responsible expression and constituted flagrant misconduct which contravened the terms and conditions of his appointment and employment. There is also no legal or factual basis for accepting that his conduct fell short of the standard expected of an officer and was **improper**'. I find therefore that the evidence did not support the decision.

Issue No. 2 - Was Mr. Sam unfairly or wrongfully dismissed?

#### Unfair Dismissal and Wrongful Dismissal

[164] Mr. Sam has relied on several allegations of illegality, procedural impropriety and irrationality to ground his claim in damages for unfair dismissal. In view of the findings that his dismissal was procedurally unfair, he has succeeded in establishing that he was unfairly dismissed and I so find.

[165] Wrongful dismissal involves the breach of the termination clause in an employment contract. It occurs where the employer unlawfully terminates the contract with his employee without justifiable reasons and in breach of an agreed or understood procedural regime. As illustrated above, there was no **justification for Mr. Sam's dismissal**. I therefore find that he was wrongfully dismissed.

[166] It is trite law that a former employee may succeed in dual claims for unfair and wrongful dismissal. However, the law recognizes that they are parallel causes of action. If he is successful on both counts, the dismissed employee will not be compensated twice.

Issue No. 3 - To what remedy, if any, is Mr. Sam entitled?

#### Reinstatement

[167] Mr. Sam alleged that he faced emotional, social and psychological challenges as a result of his dismissal. He seeks several remedies including reinstatement, declaratory relief and damages.

Practically, reinstatement is unrealistic having regard to the period of time that has transpired and in light of the very real probability that all head teacher and equivalent posts in the Ministry of Education have been filled substantively by other officers. No evidence was presented one way or another regarding this. I therefore make no order for his reinstatement.

### Declaration

[168] The grant of declaratory relief is discretionary. In deciding whether to grant such relief the court takes **into account all the relevant circumstances including the claimant's conduct** and its effect. I am satisfied that the surrounding circumstances have demonstrated an embarrassing lack of knowledge of fundamental administrative procedures applicable to disciplinary hearings within the civil service among several functionaries. This has implications for all civil servants and highlighted issues which must be addressed urgently by the relevant authorities. It is partly for this reason why I consider it just and appropriate to grant the declarations sought.

[169] For the reasons outlined in this decision, **it is declared that the PSBA's decision to dismiss Mr. Otto Sam** was:

- (1) illogical, unreasonable and unlawful;
- (2) arrived at in an unfair and procedurally improper manner; and
- (3) disproportionate to the alleged wrong.

It is further declared that Mr. Otto Sam was unfairly and wrongfully dismissed by the PSBA.

### Certiorari

[170] Certiorari issues to quash an unlawful decision or one arrived at in breach of natural justice rules.

**The PSBA's decision to dismiss Mr. Sam** was flawed by reason that:

- (1) it was tainted by bias;
- (2) P.S. Pompey had no authority to initiate charges against Mr. Sam;
- (3) Mr. Sam was unfairly denied an opportunity to be heard on the matter of interdiction;
- (4) The charge was defective;
- (5) it was otherwise procedurally defective and unfair, irrational and unlawful.



**It is accordingly ordered that the PSBA's decision to dismiss Mr. Sam was null, void, of no effect** and is hereby quashed.

[171] In light of the foregoing, it is declared that Mr. Otto Sam never ceased to be entitled to hold the office of head teacher in the Ministry of Education and is and has remained so entitled. In consequence thereof, Mr. Sam is entitled to full pay, and all benefits due and payable to him in his capacity as head teacher, including the salary deductions made during his interdiction and his pension and gratuity benefits. He is also entitled to recover from the government, damages for unfair and wrongful dismissal on application to be made within the next three months. The PSBA shall pay to Mr. Sam costs to be assessed on application pursuant to CPR 56.13 to be filed and served on or before November 30, 2016.

#### ORDER

[172] It is accordingly ordered and declared:

- (1) No order of mandamus is issued directing the PSBA to reinstate Mr. Otto Sam to his job as a teacher in the public service.
- (2) It is declared that:
  - (a) **the PSBA's decision to dismiss Mr. Otto Sam was illogical, unreasonable**, unlawful, arrived at in an unfair and procedurally improper manner and disproportionate.
  - (b) Mr. Otto Sam was unfairly and wrongfully dismissed by the PSBA.
  - (c) Mr. Otto Sam never ceased to be entitled to hold the office of head teacher in the Ministry of Education and he is and has remained so entitled.
- (3) **The PSBA's decision to dismiss Mr. Sam** be and is hereby quashed.
- (4) Mr. Otto Sam is entitled to:
  - (a) receive the portion of his salary which was deducted during his interdiction between 7<sup>th</sup> August, 2012 and 15<sup>th</sup> May, 2013.

- (b) his full pay, all increases and benefits that accrued to him and which are due and payable to him in his capacity as head teacher, benefits from the date of his dismissal on 15<sup>th</sup> May 2013, including his pension and gratuity.
  - (c) recover damages for unfair or wrongful dismissal; and
  - (d) interest on the said sums at the statutory rate of 6% per annum from the date of this judgment until payment.
- (5) The PSC and the Honourable Attorney General are directed to make the necessary arrangements for Mr. Sam to receive all payments and benefits to which he has become entitled as rehearsed in sub-paragraph 4 of this order.
- (6) The PSBA shall pay to Mr. Sam costs to be assessed. Mr. Sam is to file and serve:
- (a) on or before 30<sup>th</sup> November, 2016 an application for assessed costs pursuant to CPR 56.13;<sup>55</sup>  
and
  - (b) on or before 2<sup>nd</sup> December, 2016 an application for assessment of damages.<sup>55</sup>

[173] I wish to thank counsel for their helpful written submissions.

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Esco L. Henry  
HIGH COURT JUDGE

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<sup>55</sup> Clerical error corrected pursuant to CPR 42.10.