EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

Claim No. BVIHCV 2016/0063

BETWEEN:

CLAUDE SKELTON-CLINE

Claimant

-AND-

THE CABINET OF THE VIRGIN ISLANDS

Defendant

Appearances: Tana'ania Small-Davis, Pauline Mullings and Christine Hart, Counsel for the Claimant
Giselle Jackman Lumy, Principal Crown Counsel, Counsel for the Defendant

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2019: May 23rd

JUDGMENT

[1] Ellis J: The Claimant herein is aggrieved by the decision of the Cabinet of the Virgin Islands ("Defendant") not to approve the renewal of his appointment as Managing Director of the British Virgin Islands Ports Authority ("BVIPA") and makes a claim for judicial review of that decision and for the following relief:

(1) An order of certiorari quashing the decision of the Cabinet in failing to approve the renewal the Claimant's contract of employment as Managing Director of the BVI Ports Authority.

(2) Damages for failure to renew the Claimant's contract of employment as Managing Director of the BVI Ports Authority including loss of earnings and diminution of job prospects;

(3) General Damages;

(4) Further or other relief as the Court deems just;

(5) Costs.

[2] The Claimant was appointed as Managing Director in accordance with section 20 of the British Virgin Islands Ports Authority Act[1] ("the Act") which provides that:

> *20. (1)* The Authority shall, with the approval in writing of the Governor in Council appoint a Managing Director and a Deputy Managing Director.
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> (2) The Managing Director shall, subject to the general direction of the Authority, be the Chief Executive Officer and be charged with the direction of the business of the Authority, the organisation and the exercise, performance and discharge of its powers, duties and functions and the administrative *control of the employees of the Authority.*
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> *(3) -*
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> *(4) -*
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> *(5) -*

[3] By an agreement dated 4th December 2012, between the BVIPA and the Claimant, the Claimant agreed to serve for a period of three (3) years commencing on 1st December 2012 and terminating on 30th November 2015. In or about January, 2015 and in accordance with clause 9 of the Agreement, the Claimant communicated to the BVIPA his desire to continue in employment for a further term.

[4] On 22nd January 2015, the BVIPA Board passed a resolution approving the extension of the Claimant's contract of employment as Managing Director for a further period of three years (1st December 2015 to 30th November 2018) with a one (1) year option to extend. This resolution was communicated to the Ministry of Communications and Works ("the Ministry") in or about 28th January, 2015.

[5] The Claimant asserts that during the period March 2015 – November 2015, the Minister of Communications and Works and several other minsters of Government, both publicly and privately expressed confidence in the Claimant's performance of his duties during his period of employment and assured him that his employment contract would be renewed.

[6] Notwithstanding this, the Claimant's contract of employment was allowed to expire on 30th November 2015 without confirmation of approval. Nevertheless, the Claimant asserts that he continued to perform his duties as Managing Director until 7th December 2015. On 8th December 2015, the Acting Chairman of the BVIPA Board informed the Claimant that it had received no

[1] No. 12 of 1990 as amended

approval of the resolution for the continuation of his employment and informing him that the Permanent Secretary in the Ministry had advised that the Deputy Managing Director had been appointed to act as Managing Director.

[7] By letter dated 16th December 2015, the Board acknowledged that the Claimant's contract of employment had ended. Paragraph 1 of the letter is relevant and provided as follows:

> *"As you are aware, the Board of the British Virgin Islands Port Authority ("the Ports Authority") made recommendation to the Ministry of Communications and Works in March 2015 to retain your services as Managing Director for a further contract term of three years. To date, Cabinet which is required to approve the recommendation has not communicated a decision regarding renewal of the contract and your appointment. The Board therefore considers that your relationship with the BVI Ports Authority as Managing Director has ended pending a decision by Cabinet. In light of the developments, we are constrained to ask for your full cooperation in ensuring a smooth transition of matters to the Deputy Managing Director*."

[8] The Claimant asserts that when he sought to determine what had occurred, he was informed by several ministers of Government that his contract had not been deliberated upon and that the relevant Cabinet Paper had in fact been withdrawn from consideration on 2nd December 2015. This evidence was neither admitted nor denied by the Defendant or indeed by the individual ministers, however, the Cabinet Secretary, Ms. Sandra Ward averred that no Cabinet decision which touches and concerns these proceedings was taken on 2nd December 2015.

[9] The Claimant filed an Application for leave to make a judicial review claim on 23rd February 2016. Prior to doing so, he recounts a meeting with the Honourable Premier on 31st December 2015 in which he indicated that in the public interest, he did not see how his contract could be renewed.

[10] On 6th April 2016, the Minister of Communications and Works submitted a Paper to Cabinet seeking a determination of the BVIPA's Resolution. On that date, Cabinet met and decided not to renew the Claimant's contract of employment. The Cabinet Secretary asserts that the rationale for Cabinet's decision is set out at paragraph 4 of the Cabinet Paper which states:

> *"…it is in the best interest of the Territory to utilize other arrangements for the human resource needs of the Managing Director's position. The additional qualities required of the person holding the portfolio of Managing Director should include specialized management and strategic skills sets that can assist in harmonizing the function of the Ports Authority with the operations and functions of the new multi-million dollar cruise pier and landside development and harmonizing the two (2) operations. This will no doubt require legislative changes as the present Act does not provide for large scale commercial and retail landside services operated on ports property."*

[11] The Claimant states that he only became aware of Cabinet's decision through the Affidavit filed for the Permanent Secretary in the Ministry, Mr. Anthony McMaster filed on 3rd May 2016. The Claimant asserts that it was only later, on 28th June, 2016, that the Claimant became aware of Cabinet's reasons for its decision when he was served with the Second Affidavit of Mr. McMaster.

[12] On 27th September 2016, after a contested hearing, the Court granted leave to the Claimant to pursue judicial review of the Defendant's decision to refuse to approve his appointment as Managing Director of the BVIPA on the grounds of:

(a) Irrationality/unreasonableness;

(b) Failure to give reasons; and

(c) Natural justice/want of procedural fairness.

[13] The Claimant maintains that:

(a) The Defendant, pursuant to the statutory power given to it by section 20 of the Act, had a duty to:

(i) Act fairly and reasonably;

(ii) Take into account all proper matters/not taking into account improper matters;

(iii) Act rationally;

(iv) Adopt a fair and reasonable procedure in the carriage of its duty to properly consider the continuation of appointment and employment of the Claimant which it has failed to do.

(b) The Defendant's decision is unreasonable and irrational;

(c) The Defendant's treatment of the Claimant has caused him damage and loss, in particular damage to his reputation and career prospects.

[14] The Parties agree that the following issues arise for determination:

a. Whether the decision of Cabinet to refuse to approve the reappointment of the Claimant is amenable to judicial review?

b. Whether Cabinet has failed to provide adequate reasons for its decision to refuse to approve the BVIPA's recommendation?

c. Whether Cabinet's refusal to approve the BVIPA's recommendations was irrational/unreasonable?

d. Whether Cabinet failed to have regard to the principles of natural justice or procedural fairness when refusing to approve the BVIPA's recommendation?

e. If the response to questions (b), (c), or (d) is yes, what is the appropriate measure of damages?

A. Whether the decision of Cabinet, to refuse to approve the reappointment of the Claimant is amenable to judicial review?

THE PARTIES' ARGUMENTS

[15] Counsel for the Defendant commenced her arguments by referencing the nature and classification of public authorities. She conceded that generally, all public authorities serve a public function which would inure to the benefit of a public interest and so therefore the decisions of public authorities are *prima facie* susceptible of review. However, Counsel submitted that not all public bodies constitute central government. Public authorities could be divided into two discrete classifications; those which fall under the chapeau of the public/civil service and those which are classified as statutory bodies/bodies corporate. Counsel for the Defendant submitted that only those persons employed in central government are designated as public servants and she submitted that this distinction is fundamental to the determination of this issue.

[16] To illustrate this point, Counsel pointed to section 2 of the Virgin Islands Constitution, where the term "public service" is defined as *"the service of the Crown in a civil capacity in respect of the Government of the Virgin Islands"*. This acknowledges a distinction between members of the civil service and those appointed to statutory corporation/bodies corporate which has long been recognized at common law. In Tamlin v Hannaford[2], Lord Denning made the following pronouncement in relation to the British Transport Commission – a statutory corporation established by the Transport Act 1947:

> *"In the eye of the law, the corporation is its own master and is answerable as fully as any other person or corporation. It is not the Crown and has none of the immunities or privileges of the Crown. Its servants are not civil servants, and its property is not crown property. It is as much bound by Acts of Parliament as any other subject of the King. It is of course, a public authority and its purposes no doubt are public purposes, but it is not a government department nor do its powers fall within the province of government."*

[2] (1950) 1 KB 18

[17] Tamlin v Hannaford was cited with approval by the Privy Council in Perch and Others v Attorney General of Trinidad and Tobago.[3] In that case, the Board opined that employees of the Trinidad and Tobago Postal Corporation – a body established by Trinidad and Tobago Postal Corporation Act 1999 – were not to be regarded as in the service of the Government of Trinidad and Tobago in a "civil capacity" within the meaning of those words in section 3 (1) of the 1976 Constitution.[4] In the 2009 decision of Attorney General v Smith[5], the Board re-affirmed the dichotomy between central government and statutory corporations. At paragraph 16, Lord Walker, referred to the decision in Tamlin v Hannaford, and made clear that; "*Those employed in the local government of statutory corporations are working in the public sector (a much wider expression) but are not in the Crown Service."*

[18] Counsel for the Defendant submitted that the dichotomy between the public service and bodies corporate is an important feature of the current factual matrix because the starting premise has always been that employment decisions are not generally amenable to judicial review. Indeed, such matters normally fall under the rubric of ordinary master-servant relationships which can only be resolved through recourse to private law remedies.[6]

[19] By contrast, the employment of public servants is subject to a special immunity and insulation, recognized by the Privy Council in Endell Thomas v The Attorney General of Trinidad and Tobago[7]. In that case, Lord Diplock underscored the need to provide every member of the public service with security of tenure and insulation from political patronage.[8] Such insulation is manifest in the manner in which members of the public service are appointed. One becomes a public servant, by virtue of appointment by the Governor, after consideration of the recommendation advanced by the relevant Service Commissions. Concomitant with the necessity of insulating public servants in this manner, however, is the need to subject employment decisions concerning

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[3] [2003] UKPC 17

[4] Section 3 (1) of the 1976 The Constitution of the Republic of Trinidad and Tobago reads:

> "public service" means, subject to the provisions of subsection (4) and (5), the service of the Government of Trinidad and Tobago or of the Tobago House of Assembly established by section 3 of the Tobago House of Assembly Act, in a civil capacity.

[5] [2009] UKPC 50

[6] Dr. Astley McLaughlin v His Excellency The Governor of the Cayman Islands [2007] UKPC 50

[7] Privy Council Appeal No. 47 of 1980

[8] The principle was re-affirmed in the more recent Privy Council decision in Manning v Ramjohn [2011] UKPC 20, paragraphs 26 and 27

only members of the public service to the supervisory jurisdiction of the courts. In contrast, members of bodies corporate do not enjoy any such insulation.

[20] Counsel for the Defendant asserted that decisions concerning employment within a body corporate are not amenable to judicial review. She relied on the case of *Vidyodaya University of Ceylon and Ors. v Silva*[9], in which the Board held that the employment of a teacher amounted to no more than an ordinary contract of master and servant, despite the fact that the university was established by statute. At page 875, the Board re-affirmed the dicta in *Barber v Manchester Regional Hospital Board*[10] that: *"Here, despite the strong statutory flavor attaching to the plaintiff's contract I have reached the conclusion that in essence it was an ordinary contract between master and servant and nothing more."*

[21] Counsel garnered further support for her arguments from Agricultural Development Bank v Seebalack Singh Civil Appeal No. 61 of 2006 and Seth Quashie v The Tobago House of Assembly CV 2013 – 4226. In the latter case, the court was charged with determining whether a body corporate was performing a public function when refusing to renew the claimant's contract. At paragraph 30 of the judgment, the Court held that *"the Defendant was free to negotiate contracts of employment and this includes freedom to choose to renew or not to renew contract… there appears to be no structure or policy in relation to the selection criteria to be applied in the case of a further contract… there exists no obligation on the Defendant to renew a contract of employment upon expiration of time, it is a decision entirely based on discretion in the context of a contract for services."* Counsel submitted that this dictum applies *mutatis mutandis* to the case at bar.

[22] Counsel conceded that the position may be different if the Claimant was a public servant at the time of the application for appointment to the BVIPA post; however, he was not. In this context Counsel applied the judgment in the Trinidadian case of The North West Regional Health Authority v Ameena Ali which was heavily relied on by the Claimant.[11] In that case Mrs. Ali was

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[9] [1964] 3 ALL ER 865, 867 and see R v East Berks Health Authority, ex p Walsh [1984] 3 ALL ER 425, 4299 and the Caribbean Court of Justice case of Brent Griffith v Guyana Revenue Authority and Attorney General of Guyana CCJ Application No. 1 of 2006, which was applied with authority at paragraph 13 of the Eastern Caribbean Court of Appeal decision of Hazeline Maynard and Anor. v The Saint Christopher and Nevis Solid Waste Management Corporation and Anor. SKBHVCAP 2015/00069.

[10] [1958] 1 ALL ER 322, 331

[11] Civ. App. No. 11 of 2005

employed by the Regional Health Authority, a statutory corporation and yet was allowed to pursue judicial review proceedings by the Trinidadian Court of Appeal. However, in distinguishing that case, Counsel submitted that Mrs. Ali was actually a public servant, who had been seconded to the employ of the statutory corporation. Her substantive employment remained firmly rooted in her employment in the public service of central government. This was evidenced by the terms of her contract with the statutory corporation, which provided that her benefits, termination and discipline were all referable to the relevant Civil Service Act and Civil Service Regulations. Additionally, the relevant statute provided that an officer who opts for secondment should *"be treated no less favourably than if he were not so seconded"*. As such, Mrs. Ali remained a civil servant in central government despite the fact that, when her complaint arose, she was seconded to the statutory authority.

[23] Counsel submitted that this claim concerns aspirations to a post in a statutory corporation established under the Act. The Claimant does not allege that he was a civil servant and he was clearly seeking employment outside of the civil service. In such circumstances, Counsel submitted that the Claimant cannot avail himself of the insulation enjoyed by civil servants which permit their extraordinary recourse to judicial review of adverse employment decisions. She concluded that the entire claim is therefore misconceived and bound to fail.

[24] Counsel further submitted that the force of the Defendant's arguments is in no way diminished by the fact that the impugned Cabinet decision was made pursuant to statute. While this factor may imbue decisions concerning appointment as Managing Director of the BVIPA with a *"strong statutory flavour"*, it would not without more, render employment decisions to this body corporate susceptible to review. Counsel relied on R v East Berkshire Health Authority ex parte Walsh[12] in which the relevant central government authority, the Secretary of State for Social Services, had a similar statutory power to approve the decision under consideration. Despite this, it was maintained that the decision itself was not amenable to judicial review since it concerned employment with a statutory corporation. Counsel submitted that in the same way, the requirement for Cabinet's approval would not disturb the fact that the post to which the Claimant was seeking to be appointed did not fall within the ambit of the civil service.

[12] [1985] QB 152

[25] To demonstrate the point even further, the Defendant contended that if Cabinet made the impugned decision qua employer, judicial review would remain equally unavailable. The fact would remain that anyone appointed in this respect would not be a public servant or part of central government as defined by the Constitution. Not being a civil servant, there would be no entitlement to the insulation which permits such persons access to judicial review in respect of employment decisions.

[26] Counsel for the Defendant concluded that regardless of any other intervening factors, it cannot be debated that the Claimant was not a civil servant, not employed in central Government and by extension, not entitled to seek judicial review of employment decisions.

[27] In responding, Counsel for the Claimant commenced her submissions by relying on the decision in R v Derbyshire County Council ex parte Noble.[13] In that case, the Respondent had been employed by the county council to provide services to detained persons. Upon termination of his employment, the respondent initiated judicial review proceedings, challenging the dismissal. Lord Woolf (as he then was) acknowledged that though these elements may give rise to judicial review, there is no single universal test in determining whether there is a sufficient public law element or whether the issue is confined strictly to private law.

[28] Lord Woolf went on to crystallize the correct approach that a court should take:

> *"As I understand the approach which the courts now adopt, and which has been made clear in a series of cases, it is to look at the subject matter of the decision which it is suggested should be subject to judicial review and by looking at that subject matter then come to a decision as to whether judicial review is appropriate.*
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> *That approach is an approach that can be found, for example, in Reg. v Secretary of State for Foreign and Commonwealth Affairs ex parte Everett in which this court had to decide whether or not the issue or refusal to issue a new passport to the applicant was a matter which was appropriate for judicial review. Having referred to the speeches in Council for the Civil Service Unions v Minister for the Civil Service O'Connor LJ, in giving the judgment of the court, said:*
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> > *'Three of their Lordships, Lord Diplock, Lord Scarman and Lord Roskill unequivocally held that judicial review did lie of decisions taken under the prerogative. Lord Scarman in his speech stated that it was not the origin of the administrative power, but it was the actual factual application which had to be considered.'*
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> *I would echo those remarks of O'Connor LJ and suggest that what one does is to look at the actual, factual approach."*[14]

[13] [1990] ICR 808
[14] At page 819A

[29] In considering the actual factual application, the court in ex parte Noble concluded that the issue arose directly out of the employment relationship.

[30] A further example of a case in which the actual factual application demonstrated that the employment relationship was amenable to judicial review is R v Civil Service Appeal Board, ex parte Bruce[15]. In that case, the Civil Service Appeal Board was an independent body, set up under the prerogative, whose decision was not that of the employer, and with whom the applicant had no direct relationship. The Claimant asserts that as in Ex Parte Bruce, his complaint is not against any action of his employer, the BVIPA. The Claim does not seek remedies in respect of a breach of his contract of employment. In fact, there is no employment relationship between the Claimant and the Defendant in this suit. He asserts that the said contract is merely peripheral to the issues raised in this action. The grievance is entirely against a party who had a statutory role to perform and which is therefore entirely governed by the duty imposed upon it by the statute. Counsel submitted that it is the Cabinet, which operates as a prerogative decision-maker, in this case independent of the BVIPA. Its decision not to approve the continuation of the Claimant's employment as Managing Director was not the decision of the employer. The Claimant has no direct relationship with the Cabinet. The Claimant has no possible cause of action against his actual employer.

[31] Counsel argued that the legal principles to be gleaned from both Ex Parte Walsh and Ex Parte Noble must be regarded in the context that the complaints made were breaches of express contractual terms. She submitted that neither Ex Parte Walsh nor Ex Parte Noble identified an alleged abuse of power by the public authority. Instead, Counsel for the Respondent submitted that the more relevant authority is Regina v Civil Service Appeal Board ex parte Bruce.

[32] Counsel for the Claimant referred to several cases relied on by the Defendant including Agricultural Development Bank of Trinidad and Tobago v Seebalack Singh[16], which she submitted are distinguishable from the case at bar. The key issue in Seebalack Singh was whether the employee could challenge his dismissal by the Appellant bank, which had been established as a statutory body corporate, by way of judicial review proceedings. In other words,

[15] [1988] ICR 649; [1989] 2 ALL ER 907
[16] Seth Quashie v The Tobago House of Assembly and The Public Services Association v The Minister of Health and The Regional Health Authorities

whether the bank was exercising a public law function in terminating his employment. On appeal, and applying the test set out in ex parte Noble of examining what "*actual factual application*" the decision maker was engaged in the Trinidadian Court of Appeal held that the bank was exercising an employment function pursuant to the contract of employment, which was therefore a private law issue.

[33] Counsel for the Claimant also relied on the dictum of Waller J in R v Lord Chancellor ex parte Hibbit and Sanders[17]:

> *"In considering whether a decision can be judicially reviewed, it is critical to identify the decision and the nature of the attack on it. Unless there is a public law element in the decision, and unless the allegation involves suggested breaches of duties or obligations owed as a matter of public law, the decision will not be reviewable*."

[34] Counsel submitted that the public law element is present in the case at bar because the Legislature directly required the Cabinet to consider and approve the appointment of the Managing Director of the BVIPA and the Cabinet at first refused and or neglected to do so in abuse of its power. Eventually, when the Cabinet did exercise that power, (refusing to approve the continuation/appointment of the Claimant), it did so on an irrational basis and followed an unfair process.

[35] Counsel submitted that it is indisputable that the decisions of the Cabinet are that of a public body acting in the public interest. The power given to the Cabinet is to be exercised in the public interest and the public has an interest in ensuring that this power is not abused. The Claimant finds support for this in the redacted Cabinet Paper disclosed by the Defendant. He submits that it is obvious that the appointment of the Managing Director was considered in the context of legislative changes that would affect the economic viability of the Territory's ports specifically and the economic welfare of the country generally.

[36] Counsel submitted that the court has an obligation to exercise its supervisory power over decision-makers in connection with interests protected by public law, in order to promote better quality decision making in the public interest. Where a decision involves the exercise of a power granted by statute to a public body, Counsel submitted that there is enough of a public law element to make review by the court available. Then, when there is merit to the challenge, i.e. an arguable public

[17] The Times, March 12, 1993 [1993] COD 326, referred to in Quashie v The Tobago House of Assembly

law ground, looking at the factual application of the decision, the court has a duty to intervene to prevent or correct irrational or unfair decisions or abuse of power.[18] Counsel further submitted that where there is an overlap of public law and private law issues, the court should decide in favour of granting relief in these proceedings particularly where there is no alternative private law remedy available.

[37] The Claimant relied on the Ameena Ali case in which the Court of Appeal determined the issue of whether the claim was based in private or public law by asking what was the 'actual factual application' in which the decision maker was engaged. The court concluded that it was not merely question of breach of contract, but rather, whether the rights and obligations created by the statutory provision of section 29(4) of the Regional Health Authorities Act were observed and whether in terminating the respondent's employment, the appellant had acted lawfully.

[38] In the case at bar, the Claimant asserts that the issue is whether the Defendant has (a) carried out its function as decision maker pursuant to the Act or has abused its power by refusing/failing to do so and/or (b) properly carried out its function in the decision that it purportedly arrived at by acting fairly, reasonably and rationally.

COURT'S ANALYSIS AND CONCLUSION

[39] Having reviewed the Parties written legal submissions and having heard the oral arguments, the Court can find no fault with the case law cited or the reasoning contained therein. It is now trite law that for a decision to be the subject of a claim in judicial review, it must fall within the realm of public and not private law.

[40] The Court is satisfied that the correct approach to be adopt by a court considering the reviewability of a decision is that prescribed by Lord Woolf in ex parte Noble. In that case, the court found that although the applicant's engagement involved the carrying out by him of certain functions of a public nature, his complaint was directed to the circumstances surrounding his dismissal. The court in that case was concerned not with any breach by the council, but with such private rights as the applicant might be entitled to by virtue of his private contract of employment with the council.

[18] De Smith's Judicial Review, 6th ed., 3-060 set out in paragraph 14 of Quashie v Tobago House of Assembly

The court therefore, concluded that there was no element of public law which was necessary to enable the applicant to proceed by judicial review.

[41] After noting that there is no universal test which will be applicable to all circumstances which definitively prescribe when judicial review is or is not available, at page 819 of the judgment, Lord Woolf stated:

> "*As I understand the approach which the courts now adopt, and which has been made clear in a series of cases, it is to look at the subject matter of the decision which it is suggested should be subject to judicial review and by looking at that subject matter then come to a decision as to whether judicial review is appropriate."*

[42] In applying this approach, this Court has also considered the following excerpt of Lord Diplock's speech in Council of Civil Service Unions v Minister for the Civil Service:

> *"To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him too. It must affect such other person either: (a) by altering rights or obligations of that person which are enforceable by or against him in private law; or (b) in depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has had an opportunity to comment; or (ii) he has received assurance from the decision-maker will not be withdrawn without first giving him an opportunity of advancing reasons for contending that they should not be withdrawn*."
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> *"For a decision to be susceptible to judicial review the decision-maker must be empowered by public law (and not merely, as in arbitration, by agreement between private parties) to make decisions that, if validly made, will lead to administrative action or abstention from action by an authority endowed by law with executive powers, which have one or other of the consequences mentioned in the preceding paragraph. The ultimate source of the decision-making power is nearly always nowadays a statute or subordinate legislation made under the statute; but in the absence of any statute regulating the subject matter of the decision the source of the decision-making power may still be the common law itself, i.e., that part of the common law that is given by lawyers the label of "the prerogative." Where this is the source of decision-making power, the power is confined to executive officers of central as distinct from local government and in constitutional practice is generally exercised by those holding ministerial rank."*

[43] No doubt it is the application of this approach which has resulted in the generally held view that judicial review should not be extended to a pure employment situation.[19] There can now be no doubt that employees of statutory corporations do not generally enjoy the protections of public employment and cannot *without more* seek to invoke the court's supervisory jurisdiction to seek to obtain remedies stemming from a breach of any right arising out of their employment contract.

[19] R v BBC ex parte Lavelle [1983] 1 WLR 23 at 30C

[44] Ex parte Walsh is illustrative. In that case, a district nursing officer who had been dismissed for misconduct sought judicial review to quash the decision on the ground that there had been a breach of natural justice and that the district nursing officer had no power to dismiss him. In that case, two factors played a prominent part in the decision to refuse judicial review:

i. the absence of any special statutory element underpinning the employment relationship:

> *"As Lord Wilberforce said, it is the existence of these statutory provisions which injects the element of public law necessary in this context to attract the remedies of administrative law. Employment by a public authority does not per se inject any element of public law. Nor does the fact that the employee is in a "higher grade" or is an "officer". This only makes it more likely that there will be special statutory restrictions upon dismissal or other underpinning of his employment (see per Lord Reid in Malloch (supra)). It will be this underpinning and not the seniority which injects the element of public law. Still less can I find any warrant for equating public law with the interest of the public. If the public through Parliament gives effect to that interest by means of statutory provisions, that is quite different, but the interest of the public per se is not sufficient." per Sir J. Donaldson*

ii. the presence of a contract between applicant and respondent.

> *"At the end of the day I find myself returning to the basic question, did the remedies sought by Mr. Walsh arise solely out of a private right in contract between him and the authority or on some breach of the public duty placed on that authority which related to the exercise of the powers granted by statute to them to engage and dismiss him in the course of providing a national service to the public? In my judgment there is no arguable case which can be mounted upon the facts disclosed even if they are all assumed in favour of Mr. Walsh to the effect that the remedies sought by him stem from a breach which can be related to any right arising out of the public rights and duties enjoyed by or imposed upon the health authority. The only remedies sought by Mr. Walsh arise solely out of his contract of employment with it, as opposed to any public duty imposed upon the health authority*."

> *"However, in my judgment, the relationship between the applicant and the Health Authority was one which fell within the category of "pure master and servant" although the powers of the authority to negotiate terms with their employees were limited indirectly by statute and subordinate legislation. Any breach of those terms of which Mr. Walsh complains related solely to the private contractual relationship between the Health Authority and him and did not involve any wrongful discharge by the Health Authority of the rights or duties imposed upon it qua Health Authority. The rules of natural justice may well be imported into a private contractual relationship, vide the category of employee/master relationship envisaged in the first of the three categories described by Lord Reid in Ridge v. Baldwin (1964) AC 40 to which the Master of the Rolls has already referred but in such circumstances they would go solely to the question of rights and duties involved in the performance of the contract of employment itself. The manner in which the authority terminated, or purported to terminate, Mr. Walsh's contract of employment related to their conduct as employers in a pure master and servant context and not to the performance of their duties, or exercise of their powers as an authority providing a health service for the public at large. per Purchas LJ*."

[45] In the Court's judgment, rather than the status enjoyed, by the applicant – whether by contract or appointment, a court must ultimately consider the facts and circumstances of the case that is to say the nature of the allegations and the nature of the acts complained of as well as the actual rights alleged to be infringed.[20]

[46] It is clear that this case does not fall to be determined on a purely master- servant employment basis. The decision under challenge was not made by the Claimant's employer but rather by the Cabinet of Ministers. The Court has not lost sight of the fact that this Claimant does not seek relief as against his employer but rather against the Cabinet whose decision to withhold approval ensured that his employer could not act to continue to employ him.

[47] Section 20 (1) of the Act provides that the BVIPA shall, with the approval in writing of the Governor in Council (Cabinet) appoint a Managing Director. This provision makes it clear that the appointment of the managing director requires the approval of Cabinet in writing. It follows that BVIPA is statutorily obliged to consult with and secure the approval of Cabinet before any appointment can be made. Inversely, the Act provides that Cabinet must consider the BVIPA's recommendation and signify its consent or refusal and it is that decision-making process which is the subject of this Application.

[48] Section 20 (2) defines employment relationship and makes it clear that it is the BVIPA who is the Claimant's employer. It provides that the Managing Director shall, subject to the general direction of the Authority, be the Chief Executive Officer and be charged with the direction of the business of the Authority. The Claimant's complaints therefore do not relate solely to the private contractual relationship between the BVIPA and himself and do not involve any wrongful discharge by the BVIPA of the rights or duties imposed upon it under the Act. In the same way, the remedies sought by the Claimant do not arise solely out of a private right in contract between himself and the BVIPA.

[20] Boxhill et al v Port Authority of Trinidad and Tobago CA No.11 of 2018, judgment delivered 28/2/2013

[49] Counsel for the Defendant has submitted that these factors are of no moment. She submitted that the fact that the impugned Cabinet decision was made pursuant to statute may imbue the matter with a *"strong statutory flavour"*, it would not *without more*, render employment decisions concerning this statutory corporation susceptible to review. Counsel contends that the case of Ex Parte Walsh supports this contention because in that case the relevant central government authority, (the Secretary of State for Social Services) had a similar statutory power to approve the decision under consideration. She submitted that despite this obvious fact, the Court held that the decision itself was not amenable to judicial review. She submitted that in the same way, the requirement for Cabinet's approval should not disturb the fact that the post to which the Claimant was seeking to be appointed did not fall within the ambit of the civil service.

[50] In the Court's judgment this argument fails to acknowledge the very obvious fact that the decision maker in Ex Parte Walsh was the claimant's employer and not the Secretary of State and that the matter under review was his dismissal and not the Secretary of State's refusal to approve his conditions of service. It is therefore not surprising that May LJ concluded:

> *"Thirdly, although the relevant statutory instrument provided that where conditions of service of, for instance, senior nursing officers had been the subject of negotiations by a negotiating body (a normal civil service Whitley Council) and had been approved by the Secretary of State, then Mr. Walsh's contract should include those conditions, I doubt whether it can be said that Mr. Walsh's conditions of service were "fortified by statute" in the sense meant by Lord Wilberforce. It could have been different had Mr. Walsh's claim been that in some respects his contract with the appellants had not incorporated the agreed conditions: but that is not his claim in the present proceedings which is merely that his employers failed to comply with some of such conditions, express or implied."*

[51] In the Court's judgment, this case is not on all fours with the case at bar. In the event that the Claimant was seeking remedies against his employer relative to his terms of employment or his renewal or dismissal, the Court is satisfied that on the authorities relied on by the Claimant, he would be obliged to pursue a private law claim. However, the case at bar is not as straightforward. While the Claimant's non-renewal may have given rise to private law rights, the Claim herein alleges that the decision to refuse to approve the BVIPA's recommendation for his reappointment was invalid and should be set aside because Cabinet has violated substantive principles governing the exercise of public law power.

[52] When the Court considers the "actual factual application" in which this decision maker was engaged, it is clear that the issue is not whether there has been a breach of contract by the decision maker carrying out an employment function. Rather, this matter concerns the lawfulness of the decision to exercise a statutory function. The Court is of the view that there is a clear statutory underpinning to this challenge giving rise to a sufficient element of public law which would make judicial review appropriate.

[53] The case at bar raises a challenge which appears to be unprecedented. The Parties were unable to put before the Court any authority which is directly on point. However, the Court has considered the authority of Patrick Manning v Feroza Ramjohn: (1) Patrick Manning (2) Public Service Commission v Ganga Persad Kissoon[21] which concerned a somewhat similar power as in the case at bar. Under review was the exercise of the Prime Minister's powers under section 121 of the Constitution of Trinidad and Tobago. Section 121 (3) – (6) provides:

> "(3) Before the Public Service Commission makes any appointment to an office to which this section applies, it shall consult the Prime Minister.
>
> (4) A person shall not be appointed to an office to which subsection (3) applies if the Prime Minister signifies to the Public Service Commission his objection to the appointment of that person to that office."

[54] The second appeal, in which Ganga Persad Kissoon was the respondent, concerns the Prime Minister's exercise of his section 121(4) power (referred to as the power of veto). The Trinidad and Tobago Court of Appeal found that the Prime Minister had acted contrary to the rules of natural justice in vetoing Mr. Kissoon's appointment, proposed by the PSC, as Commissioner of State Lands in the Ministry of Agriculture, Land and Marine Resources.

[55] When the matter came up before the Board, it first considered whether the Prime Minister, in the exercise of his power of veto under section 121 (4) is a person acting in the exercise of a public duty or function in accordance with any law within the meaning of section 20 of the 2000 Judicial Review Act. The Board then considered the reason for the Prime Minister being given a power of veto in respect of the section 121 (4) offices. The Board referred to the 1974 Report of the Constitution Commission (at para 288) (following which the 1962 Constitution veto was maintained in the 1976 Constitution):

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[21] [2011] UKPC 20

> *"These officials are so directly concerned with the formulation of the policy and the supervision of its implementation that they must be acceptable to the political chiefs with whom they must have a close working relationship. This does permit some measure of political influence in purely public service appointments but is necessary on purely practical grounds. We would mention that this recommendation of ours is in keeping with the views of the Public Service Associations as expressed to us."*

[56] The Board had no hesitation in concluding that there was no reason to doubt that in the exercise of his power the Prime Minister is exercising a public duty or performing a public function so as to be required by section 20 of the 2000 Act to do so in accordance with the principles of natural justice or in a fair manner.

[57] While the provision under section 20 of the Act are not couched in precisely the same terms, they imply a similar power as set out in at section 121 of the Trinidad and Tobago Constitution. They imply the executive arm of the Government should have the power to approve or disapprove (veto) appointment of any applicant to the post of managing director of the Territory's ports. Given the important and critical impact which this may have on the national economy, it is not surprising that some level of executive control would be desirous. The Court similarly has no reservations in concluding that there is a sufficient public law element here to engage the supervisory jurisdiction of the courts.

[58] In the Court's judgment, the case at bar can be regarded in light of the approach adopted by the English courts in Cocks v. Thanet District Council.[22] The Court acknowledges that there is a public/private law dichotomy, however it is clear that there is significant room for overlap and that the same factual scenario may give rise to issues of both public and private law – so-called collateral claims. While the court in that case considered a dissimilar framework, the Court is satisfied that there are principles which may be extrapolated and applied.

[59] The Court must first consider whether there is a duty owed or a benefit conferred on an individual. Where the responsibility for making such determination lies with a public body, the supervisory jurisdiction of the court may be invoked to ensure that that public body adheres to the principles of administrative law. Disputes as to whether there is in fact a duty owed or benefit conferred, should properly be ventilated in the context of a public law or judicial review action. The second tier would

[22] [1983] 2 AC 286; and see: Cato v Minister of Agriculture, Fisheries and Food

arise where the public body has determined that the duty is owed or a benefit should be conferred. Once the public body has made its decision, thereafter private law rights may arise which should properly be considered in a private law action.

[60] By way of illustration, in Cocks v. Thanet District Council, the applicant had been given temporary accommodation under the Act. He sought to enforce the obligation on the respondent to house him permanently by an action in the county court. The authority said the action should have been by judicial review. The Court held that where the action impugned the authority's performance of its statutory duties as a pre-condition to enforcing private law rights, the correct way was to do so within judicial review proceedings. The authority's decision could not be challenged by an ordinary action.

[61] In the Court's judgment, Cabinet's approval was a necessary precondition to the creation of private law rights which would have arisen from the consequential contract of employment between the BVIPA and the Claimant. This is a discrete challenge and in circumstances where the Claimant seeks to test the Defendant's discretionary decision to essentially veto the BVIPA's Resolution to reappointment him, it seems to the Court that this public law decision could only be challenged in public law proceedings.

[62] The Court will now turn to the substantive ground raised in this Claim. The Claimant first asks the Court to find that the Defendant had a duty to give adequate reasons for its decision and has failed to do so.

Whether Cabinet has failed to provide adequate reasons for its decisions to refuse to **approve the BVIPA's recommendation?**

THE PARTIES' ARGUMENTS

[63] Counsel for the Claimant noted that the previously held legal principle that administrative bodies are under no general duty to give reasons is rapidly losing force. Counsel found support in the judgment in R v Secretary of State for the Home Office ex p Doody[23], where Lord Mustill

[23] [1994] 1 AC 531

observed that even where there is no statutory duty to give reasons, "*nevertheless it is broadly beyond question that such a duty may in appropriate circumstances be implied*." Counsel also referred the Court to the following excerpt of the judgment of Sir Louis Blom-Cooper in R v Lambeth London Borough Council ex parte Walters:[24]

> "*Open government dictates that the exercise of a decision-making power or duty in a way which affects others is less likely to be, or at least appear to be, arbitrary and irrational if the decision-maker formulates and provides reasons for the decision. The continuing momentum in administrative law towards openness of decision-making was given significantly by Lord Mustill as a ground for departure from the decision of the Court of Appeal in Payne v Lord Harris of Greenwich [1981] 1 WLR 754 where the court had declined to recognize any duty to give reasons to a prisoner seeking parole. The stage may be said not yet to have been reached where it is a general prima facie requirement of the common law that the administrative decision-maker is bound to furnish reasons for the exercise of the statutory decision-making power or duty. Nevertheless, the movement towards establishing such a general rule is undeniable. No one who is involved in the administrative of this jurisdiction can fail to be acutely aware that the absence of a general duty to give reasons is widely regarded as the greatest single defect of – indeed a blot on – administrative law."*

[64] Counsel for the Claimant argued that the obligation to provide reasons is generally and widely accepted as a salutary principle of fairness in cases where the decision adversely affects others and especially so where the decision is aberrant, in other words, contrary to what would be expected.

[65] This position was reiterated in Padfield v Minister of Agriculture and Fisheries:[25]

> "*I do not regard a Minister's failure or refusal to give any reasons as a sufficient exclusion of the Court's surveillance. If all the prima facie reasons seem to point in favour of his taking a certain course to carry out the intentions of Parliament in respect of a power which it has given him in that regard, and he gives no reason whatever for taking a contrary course, the court may infer that he has no good reason and that he is not using the power given by Parliament to carry out its intentions. In the present case, however, the Minister has given reasons which show that he was not exercising his discretion in accordance with the intentions of the Act."*

[66] Counsel for the Claimant further relied on R v Secretary of State for Trade and Industry ex p Lonrho[26] in which the Court held that where all other known facts and circumstances appear to point overwhelmingly in favour of a different decision, the decision maker, who has not provided reasons, cannot complain if the court draws the inference that he has no rational reasons for his decision.

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[24] (1994) 26 HLR 170 526
[25] [1968] AC 997 per Lord Pearce at pages 1053G – 1054A
[26] [1989] 1 WLR 525 at pages 539H – 540B

[67] In responding to the Claimant's contentions, Counsel for the Defendant submitted that there is no general duty on a public authority or officer to provide reasons save where fairness demands. She further submitted that the onus is on the Claimant to demonstrate that fairness requires that reasons be given for a particular decision.[27] In this context, she submitted that fairness is not an immutable concept but largely contingent on the relevant facts under consideration.[28] Counsel concluded that there would have been no requirement to provide reasons in the case at bar because as at December 2015, the Claimant was no more than a mere applicant seeking employment as Managing Director of the BVIPA. She submitted that the mere fact that he was also the current officeholder would not, without more elevate his status to more than an applicant.

[68] Counsel argued that the Claimant has not proffered any authority which supports the contention that an individual is entitled to reasons as to why his application for employment was refused. Rather, she submitted that such a contention has been completely debunked by the English Court of Appeal in R v City of London Corporation, ex p Matson where the Court endorsed its previous dicta[29], and asserted that:

> *"The principles of public law will require that those affected by decisions are given the reasons for those decisions in some cases, but not in others. A classic example of the latter category is a decision not to appoint… an employee or office holder."*

[69] The rationale for this would be obvious since it would be impractical and unjustifiable if every job applicant were to be entitled to the reasons why their application was refused or another's application was preferred. Counsel therefore concluded that fairness would not dictate that reasons be provided to the Claimant.

[70] In the event that the Court was of a contrary view, Counsel for the Defendant invited the Court to find that sufficient reasons have in fact been provided by the Defendant. Counsel relied on South Bucks District Council and Anor. v Porter FC[30] in which the House of Lords held that, in providing reasons, it is not necessary to *"rehearse every argument"* once the reasons provided "enables the appellant to understand on what grounds the appeal has been decided… and what

[27] see paragraph 27 of Peerless Limited v Gambling Regulatory Authority and Others [2015] UKPC 29
[28] R v Secretary of State for the Home Department, ex p Doody [1994] 1 A.C. 531, 560
[29] R v Civil Service Appeal Board, Ex p Cunningham [1992] ICR 816, 824
[30] [2004] UKHL 33 paragraphs 24, 26, 27, 34 and 36

conclusions… [were] reached on the principal important controversial reasons". The Defendant submitted that this test has been satisfied in this case.

[71] Counsel pointed out that the reasons for the Defendant's decision are disclosed in paragraph 4 of the Cabinet Paper of 6th April 2016 which reflected that Cabinet had a desire to source an individual with *"specialized management and strategic skill sets that can assist in harmonizing the functions of the new multi-million dollar cruise pier and landside development"*. It was also decided that there would ultimately be a need for *"legislative changes"* due to shortcomings in the current statutory framework. For further elucidation, Counsel pointed to the Affidavit of the Permanent Secretary, Mr. McMaster whose evidence spoke to the significance of tourism to the national economy and by corollary, the significance of the management of the cruise pier to the tourism industry. In considering the exercise of its powers under s.20 of the Act, the Defendant is concerned to ensure that the most-qualified and best-suited individual is placed in the post of Managing Director.

[72] In the past, the post of Managing Director has been filled after a transparent and accountable process, including the conduct of interviews.[31] Counsel submitted that there was therefore a desire to engage a recruitment procedure which would ensure that whoever is selected for the post is the most suitable candidate to perform the functions, especially given the increased responsibilities that inevitably attach to the new multi-million dollar cruise pier facility. Counsel submitted that such a rationale is entirely sound in all the circumstances. According to paragraphs 20 and 25 of Mr. McMaster's Affidavit, the Claimant would be entitled to participate in the contemplated competitive process and submit himself for consideration.

[73] Moreover, if the Defendant determined that such an approach was in the best interests of the Territory, Counsel for the Defendant submitted that the Court should be hard-pressed to determine otherwise. In that regard Counsel referred the Court to the 2016 Privy Council decision in The United Policy Holders Group and Ors. v The Attorney General of Trinidad and Tobago[32] which re-iterated that it is inappropriate for courts to intervene where macro-political and macro-economic decisions are concerned. Given the relationship between the BVIPA and management of the cruise and, by extension, the tourism industry, Counsel argued that the decision being

[31] See paragraph 35 of the Claimant's Affidavit filed on 7th February 2017
[32] [2016] UKPC 17 at paragraphs 32, 74, 101 and 121

impugned has macro-political and macro-economic implications. Counsel therefore concluded that the reasons which have been gratuitously provided are clear, comprehensive and adequate. In the premises, Counsel submitted that there is no proper basis for disturbing Cabinet's refusal to accept the BVIPA's recommendation based on any alleged insufficiency of reasons.

COURT'S ANALYSIS AND CONCLUSION

[74] There can be no doubt that the traditional approach at common law has been that there is no general rule of law that reasons should be given for public law decisions. This view appears to have been crystallized in R v Secretary of State of Home Department ex parte Doody.[33] However, recent judicial authorities have indicated that this is only a general principle. If fairness requires it in any particular situation, courts have now begun to insist that decision makers provide reasons for their decisions.

[75] Admittedly, this has not evolved in any structured way, but emerging from the case law is a decided inclination to more often than not infer a duty to give reasons where (1) the decision affects an individual's fundamental rights, (2) the decision is one for which the person affected needs reasons in order to know whether he should appeal or seek judicial review, (3) a formal decision is required following a hearing or inquiry and (4) it would not be administratively impracticable for the decisions maker to give reasons for a decision.

[76] The Court is guided by Lord Mustill in Ex parte Doody who underscored that the vital and central question to be posed is: "Is refusal to give reasons fair?" In the Court's judgment this question must be considered in the particular context of the decision which is being challenged. In that regard, the Court has considered the Parties' submissions and the Court is satisfied that on the facts of this case that fairness dictated that reasons be provided for the Defendant's decision. The Court is not persuaded that the Claimant was a mere applicant and therefore not entitled to reasons for the refusal to extend his appointment. That argument ignores material and relevant factors which are at play in the case at bar. It ignores that fact that this Claimant would have been acting pursuant to the terms of his contract of employment which mandated that in the event that he wished to extend his contract of employment, he must at least three months prior to the

[33] [1994] 1 AC 531

completion of the term, give notice of his desire to continue employment. Thereafter, the BVIPA will decide whether to offer him further employment, on terms to be mutually agreed.

[77] It is not disputed that the Claimant would have satisfactorily performed his duties under his contract and in the wake of his notice, the evidence reveals that the Claimant and the BVIPA thereafter negotiated terms which were mutually agreeable and that these terms along with the BVIPA's Resolution recommending his reappointment were submitted to the Defendant for approval. It is also clear that the Claimant continued to work even past the end of his term of employment with the obvious consent of the BVIPA and no doubt in anticipation of the Defendant's approval. Clearly, all the other known facts and circumstances appear to point overwhelmingly in favour of a different decision to the one taken by the Defendant. Where the Defendant had determined that such approval should not be forthcoming, these circumstances demanded that the Claimant be provided with reasons for such refusal.

[78] While there is some parallel between the facts in the case at bar and an applicant seeking employment, it is by no means exact. In the case at bar, the Claimant had the endorsement and recommendation of his employer set out in Board's Resolution No. 7 of 2015. In those circumstances, he was effectively the sole candidate for continued employment. He was not a man who was being considered for a post in competition with others. Further, the post in question is a very public one, and in circumstances where his employer had apparently no difficulty with reappointment and in fact had recommended it, his rejection would almost certainly have adverse consequences for him not only for his livelihood but for his reputation.

[79] The Court has considered the persuasive dictum in R v City of London Corporation ex parte Matson,[34] in which the English Court of Appeal held that the Court of Aldermen of the City of London was under a duty to give reasons when deciding whether or not to ratify the election of an alderman. The court concluded that fairness and natural justice required that this decision should not be allowed to go unexplained. Mr. Matson was standing for public office in which he wished to serve his constituents and the City of London. He was democratically elected by a substantial majority. In the absence of reasons, he could not know the basis for his rejection or whether he should stand again.

[34] [1997] 1 WLR 765; R v Higher Education Funding Council, ex p Institute of Dental Surgery [1994] 1 WLR 242, per Sedley J at page 257; Flannery v Halifax Estate Agencies Ltd. [2000] 1 WLR 377

[80] In the Court's judgment, fairness dictated that the Claimant know whether there were any reasons or what the reasons were for his rejection. It would certainly be a matter of importance and interest to his potential employer, the BVIPA who wholeheartedly recommended the Claimant's reappointment. There are obvious advantages. As Sedley J. put it in R v Higher Education Funding Council[35]:

> *"The giving of reasons may amongst other things concentrate the decision maker's mind on the right questions: demonstrate to the recipient that this is so; show that the issues have been conscientiously addressed and how the result has been reached; or alternatively alert the recipient to a justiciable flaw in the process."*

[81] Having determined that there was a duty to provide reasons in this case, the Court must now consider whether reasons have in fact been provided and whether these purported reasons are adequate. In that regard, the Defendant relies on the paragraph 4 of the Cabinet Paper as appropriately setting out the reasons for its decision. The Second Affidavit of the Cabinet Secretary, Sandra Ward put the position this way:

> *"I wish to confirm, having been present at the deliberations and being responsible for the minutes which were recorded and finalized thereafter, that Cabinet's decision in this regard was ultimately based on the rationale provided at paragraph 4 of the Cabinet Paper, which has been annexed and marked "S.W.2" herein."*

[82] Paragraph 4 of the extract of the relevant Cabinet Paper, provides that:

> *"…it is in the best interest of the Territory to utilize other arrangements for the human resource needs of the Managing Director's position. The additional qualities required of the person holding the portfolio of Managing Director should include specialized management and strategic skills sets that can assist in harmonizing the function of the Ports Authority with the operations and functions of the new multi-million dollar cruise pier and landside development and harmonizing the two (2) operations. This will no doubt require legislative changes as the present Act does not provide for large scale commercial and retail landside services operated on ports property."*

[83] Counsel for the Claimant does not accept that Defendant has given reasons for its decision not to approve his reappointment as Managing Director of the BVIPA. Counsel submitted that no reasons have been set forth in the Cabinet Paper and Extract from the Minutes. Rather, the statement in question was taken from the Cabinet Paper prepared for the Defendant's consideration. Further, as the Cabinet Paper in question has been heavily redacted, Counsel submitted that it is impossible for the Claimant to know whether the preceding paragraphs made the argument in favour of the renewal of appointment, in order to present both sides of the case to

[35] [1994] 1 WLR 242 at page 256

Cabinet for discussion. She further noted that even the first sentence of the extract relied on has been redacted and she concluded that it is unacceptable that a court would be asked to accept an incomplete statement as evidence of the decision-maker's reasons.

[84] Counsel for the Claimant further submitted that the Permanent Secretary's evidence does not assist the Defendant's case. First, she questioned the propriety of the Permanent Secretary conveying Cabinet's decision when he was not present during the deliberations and there is no indication that he would have been suitably briefed. Given the confidential nature of Cabinet proceedings she argued that the basis of the Mr. McMaster's information and belief is implausible. Counsel asserted that Mr. McMaster's evidence is intended to provide an ex post facto rationalization for the decision which was taken and she submitted that this supports the Claimant's contention that the decision is irrational.

[85] The Court has considered the totality of the evidence. At paragraph 2 of Ms. Ward's affidavit, she states that she was authorized by the Defendant to make the Affidavit on its behalf. At paragraph 3, she indicated the basis for the information disclosed in her Affidavit. At paragraph 5, she describes her duties which include attending meetings of Cabinet, keeping minutes and conveying its conclusions. At paragraph 8, she confirms that she was present during the relevant deliberations and she states that as she is responsible for the minutes, she can confirm that the decision was "*based on the rationale provided at paragraph 4 of the Cabinet Paper*."

[86] It appears that no formal reasons were ever provided by the Defendant. Instead, it is advanced that the Claimant's reappointment was not supported by the responsible Ministry in its Cabinet Paper and that the Defendant accepted the rationale advanced by the Ministry and espoused the same as its reasoning. Where the Cabinet Secretary who is authorized to speak on behalf of the Respondent and who was present during the relevant deliberations avers in sworn untraversed evidence the Defendant's reasons for its decision, the Court can find no basis to doubt the veracity of this evidence.

[87] Counsel for the Claimant has questioned the fact that the document relied on has been heavily redacted. However, the Court notes that there was no application made in respect of this before the trial of this matter. Now it is not lost on this Court that the purported reasons would have been

communicated in October 2016, well after the actual decision was taken and only after this litigation had commenced.

[88] The Court accepts that in certain circumstances it has the jurisdiction to accept late reasons.[36] However it is clear that some level of caution is required as was indicated in R (Nash) v Chelsea College of Art Design:

> *(i) "Where there is a statutory duty to give reasons as part of the notification of the decision, so that (as Law J put it in Northamptonshire County Council ex p D) "the adequacy of the reasons is itself made a condition of the legality of the decision", only in exceptional circumstances if at all, will the Court accept subsequent evidence of the reasons.*
>
> *(ii) In other cases, the Court will be cautious about accepting late reasons. The relevant considerations include the following, which to a significant degree overlap:*
>
> *(a) Whether the new reasons are consistent with the original reasons.*
>
> *(b) Whether it is clear that the new reasons are indeed the original reasons of the whole committee.*
>
> *(c) Whether there is a real risk that the later reasons have been composed subsequently in order to support the tribunal's decision, or are a retrospective justification of the original decision. This consideration is really an aspect of (b).*
>
> *(d) The delay before the later reasons were put forward.*
>
> *(e) The circumstances in which the later reasons were put forward. In particular, reasons put forward after the commencement of proceedings must be treated especially carefully. Conversely, reasons put forward during correspondence in which the parties are seeking to elucidate the decision should be approached more tolerantly."*

[89] Applying these propositions, it is apparent that in the case at bar there is no statutory duty to provide reasons. In the premises, paragraph (i) does not assist the Claimant. In the same vein, paragraphs (ii) (a), (b) and (c) do not assist the Claimant. Inconsistency does not arise because no earlier reasons were provided and there is no doubt that the deponent was authorised to speak on behalf of the actual sole decision maker. However, the Court is satisfied that paragraphs (ii) (d) and (e) are pertinent factors which must be considered. The Court accepts that the delay and the

[36] R (Nash) v Chelsea College of Art and Design [2001] EWHC 538 (Admin)

context in which the reasons were provided demand that the evidence be weighed with some caution.

[90] The courts have frequently described the substance of the duty to provide reasons as, "[r]equir[ing] reasons that are clear and adequate and deal with the substantial issues in the case... what are good reasons in any particular case depends on the circumstances of the case".[37] Depending on the particular context, it is clear that brief reasons will often be sufficient provided that they are clear and ample enough to enable the person affected to judge whether a legal challenge can or should be instituted.

[91] The House of Lords in South Bucks District Council v Porter (No. 2)[38] considered the proper approach to be adopted in providing reasons under a statutory duty. The Court provided that:

> *"The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such an adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration..."*

[92] It is unfortunate that in this case, the relevant Cabinet decision itself does not set out the reasons for its decision in any detail. Instead, the Defendant has also advanced that the reasons for its decision have also been communicated subsequent to the decision – in the affidavit evidence filed in these proceedings by Mr. McMaster who has attempted to provide elucidation.

[93] The Court is guided by the dicta of Simon Brown J in R v Legal Aid Area No. 8 Appeal Committee ex parte Angel[39]:

> *"Naturally the Courts will look circumspectly at additional reasons; these clearly cannot carry quite the same authority as reasons properly given as part of the actual decision, and of course, anything suggestive of ex post facto reasoning, let alone anything in the way of inconsistency with previous reasons, would be particularly scrutinized. Certain bodies, moreover, will clearly be held to the reasons expressed with their decision — for instance, the Secretary of State on planning appeals and tribunals of the kind in question in Machinery and ex*

[37] R v Immigration Appeal Tribunal ex parte Jebunisha Kharvaleb Patel [1996] Imm AR 161, 167.
[38] [2004] 1 WLR 1953, HL, para 36 *per* Lord Brown
[39] (1990) 3 Admin LR 189

parte Khan. Furthermore, whenever as here a public body files evidence, it is desirable that each member should approve the supplementary reasoning disclosed in the individual deponent's affidavit as the actual basis for the decision earlier taken. But given these sorts of qualification, there seems to me much to be said in favour of allowing affidavits to supplement reasons, and little against either in the way of legal or practical objection. Of course, the supplementary reasons go only to the question whether the decision reached was erroneous in point of law; they cannot repair the breach of duty involved in having provided inadequate reasons in the first place…" Emphasis mine

[94] At paragraph 2 of his Affidavit, Mr. McMaster swears that he is duly authorized to depose to the Affidavit on behalf of the Defendant. At paragraph 13 of his Affidavit, he indicates that the evidence which follows is in direct response to the Claimant who described the reasons advanced as "hollow". Mr. McMaster's states:

> *"I am able to shed light as to the explanation provided at paragraph 4 of the said Cabinet Paper, having been instrumental in the preparation of the said Paper and having been briefed after the decision was rendered so that Cabinet's concerns could be addressed in my capacity as PS of the line Ministry and as such as an ex officio member of the BVIPA."*

[95] The Defendant contends that Mr. McMaster is authorised to provide deeper insight because of his involvement in framing the rationale which was relied upon and exposed by the Defendant. Paragraphs 13 – 16 of Mr. McMaster's affidavit set out the underlying reasons why the Ministry came to the position which it did and it is apparent that a prospective change in the scope of responsibility precipitated a decision to engage in an open recruitment process and consequentially resulted in the refusal to approve the Claimant's further appointment. His evidence does not disclose any significant inconsistency with the Cabinet Paper.

[96] The Court has considered the reasoning in R (Hereford Waste Watchers Ltd) v Hereford Council[40] which sets ought the rationale for a cautious approach. At paragraphs 44 – 46 of the judgment that Court stated:

> *"I consider that in accordance with these principles there should be no absolute bar to considering supplementary reasons, even if given in the course of the judicial review itself. The report was produced by non-lawyers, and it covered significant ground. It will sometimes be the case that certain matters may not be analysed with the clarity or detail which is desirable, and it is surely proper to allow further explanation in an appropriate case.*
>
> *However, as the principles enunciated in Nash and indeed the decision in Ermakov make plain, any supplementary reasons must elucidate or explain and not contradict the written reasons. It will*

[40] [2005] EWHC 191

be rare indeed for an inconsistent explanation, given in the course of the judicial review proceedings, to be accepted as the true reason for the decision.

This is in accordance with basic principles of fairness. Plainly the courts must be alive to ensure that there is no rewriting of history, even subconsciously. Self-deception runs deep in the human psyche; the truth can become refracted, even in the case of honest witnesses, through the prism of self-justification. There will be a particular reluctance to permit a defendant to rely on subsequent reasons where they appear to cut against the grain of the original reasons."

[97] In light of the prolonged delay and the factual circumstances of this case, the Court is satisfied that the approach to the Defendant's evidence must be consistent with that commended by Ex Parte Nash and the plethora of cases which have since applied its dicta. Notwithstanding that it was filed over 16 months after the decision, the Court is not satisfied that the evidence of Ms. Ward or Mr. McMaster was grounded was an attempt to rewrite history. Given that there is no statutory duty to give reasons and in fact no previous reasons had been provided which could give rise to inconsistency, the Court will not ignore or disregard this evidence.

[98] In providing reasons, a decision maker must be careful to provide the person affected with sufficient materials which will enable them to verify whether he has made an error of law in reaching its decision.[41] The vires of the reasoning aside, it cannot be said that the Affidavits contain "*meaningless generalizations*" which are indecipherable or inadequate. Indeed, at paragraph 17 of her Affidavit, Ms. Ward confirms that there is no other Cabinet decision concerning the refusal of the Claimant's reappointment. While the Court's is satisfied that it is not consistent with the principles of good administration for persons adversely affected by decisions to be expected to extrapolate or infer from the circumstances, what are the true reasons for a decision, a combined reading of the Affidavits of Ms. Ward and Mr. McMaster discloses an intelligible and adequate explanation which would enable the Defendant to understand how the conclusions were reached.

[99] The case at bar does not disclose a statutory obligation to provide reasons for the Defendant's decision, however the duty can be implied from the relevant circumstances. In the Court's judgment the late reasons in this case cannot be ignored and when considered in the context of Ex Parte Nash, the Court is not satisfied the Defendant's initial failure to provide timely reasons should be a basis upon which the Court should set aside the Defendant's decision.

[41] Alexander Machinery (Dudley) Ltd. v Crabtree [1974] ICR 120 at 122

Whether Cabinet's refusal to approve the BVIPA's recommendation was irrational/unreasonable?

THE PARTIES' ARGUMENTS

[100] The Claimant takes issue with the fact that it took the Defendant fifteen (15) months to consider the BVIPA's resolution. Counsel noted that no explanation was proffered for this delay neither was any attempt made to explain why the issue of the Claimant's re-appointment was only considered after the expiration of his contract. Counsel submitted that this delay constituted a failure to act in accordance with its statutory power and an abdication of the Defendant's statutory role.

[101] Moreover, Counsel for the Claimant referred to the Claimant's unchallenged evidence that he was told that the issue of his reappointment would be deferred until after the next general election. She submitted that the BVIPA Resolution was indeed not considered prior to that June date, although the Board had delivered its Resolution to the Ministry of Communications and Works on 28th January 2015. Further, it is the Claimant's evidence that on 31st December 2015, prior to the Cabinet meeting which was to be held three months later in April 2016, the Premier informed him that "*he didn't see how [the] contract could be renewed because of the Territory's interest*." At that time, he states that there was no explanation offered for this cryptic statement.

[102] Counsel submitted that these factors raise doubts as to the bona fides of the decision-making process. Counsel submitted that these doubts are intensified by the conflicting evidence which demonstrates that there were numerous public pronouncements made in the months prior to April 2016, which indicated that the Defendant would have been considering the matter. This contradicts the evidence of Ms. Sandra Ward where at paragraph 10, she noted that the matter was considered for the first time in April 2016. Further, Counsel pointed to the Claimant's unchallenged evidence that the Minister of Communications as well as several other members of Cabinet made individual assurances to him between March 2015 and February 2016 that the Defendant would give favourable consideration to his continued appointment as Managing Director.

[103] Counsel for the Claimant submitted that the Defendant's reasons for refusing to approve the Claimant's reappointment must be looked at in the context of the pending lawsuit against it and the public utterances by the Minister of Communications and by the Governor that the Claimant's contract was at an end and therefore there was nothing to discuss because "*the ports and Government have moved on*".[42] Counsel submitted that the 6th April 2016 meeting, instructed by the Minister's Cabinet Paper No. 096/2016, must therefore have been convened with a view to completing formalities which the Defendant could then present to the Court as a plausible rationale.

[104] Counsel further argued that at no time was the Claimant consulted in order to determine whether he had the necessary qualities and skill-set required. Moreover, no attempt was made to explain how a person with these specialized managerial and strategic skills-set would effectively manage the ports any better than the Claimant. This is particularly so in light of the positive feedback that he received from several members of the Cabinet concerning his performance.

[105] In this regard, Counsel sought to rely on Section 6 of the Cabinet Handbook which deals with Boards, Committees, Working Groups and Appointments. Section 6.7 of the Handbook provides that in considering appointments, the sponsoring Minister should be prepared to provide justification for the appointment or re-appointment. Section 6.8 deals with the procedures for recommending appointments. Section 6.8(e) provides that he must ensure that persons being proposed meet the requisite qualifications and experience.

[106] Counsel posited that the BVIPA was not notified that there were any specific qualifications required, neither was he advised that there were any gaps in his qualifications and experience. Further, it appears that the supposed qualifications were submitted without the benefit of any consultation with the Board, who is charged with management of the BVIPA. Counsel submitted that it was the sponsoring Minister's responsibility to properly lay these details before Cabinet in accordance with the Handbook's Guidelines. Thereafter, it was the Defendant's responsibility to recognize that it did not have all the relevant information before it in order to give due consideration to the matter.

[42] Press Conference - Minister Vanterpool 2nd February 2016

[107] Counsel further argued that it is not clear why the contemplated legislative changes would impact the role of Managing Director and the proper consideration of the Claimant who had actually successfully implemented the Government's plan for the cruise pier project. Further, Counsel submitted that the cruise ship pier project was put in motion in 2012 and yet what is now being suggested is that it has taken Defendant four years to come to this awareness and yet in 2017 the policy still has not been "fully hammered out".

[108] Applying the relevant law, Counsel for the Claimant submitted that a decision is irrational if it is lacking ostensible logic or comprehensible justification. Where the evidence and the ostensible reasons for the decision simply do not add up, such decisions are rendered unlawful: Council of Civil Service Unions v Minister for the Civil Service.[43] While she agreed that the Defendant must obviously have discretion in the manner in which it approaches its functions, Counsel submitted that untrammeled discretion risks arbitrariness and is the antithesis of reasonableness. The position was helpfully set out in the judgment of Lord Mansfield CJ in R v Askew[44] in which he held that the conduct of the party even when engaged in discharging an administrative or executive function ought to be fair, candid and unprejudiced; not arbitrary, capricious, or biased; much less, warped by resentment, or personal dislike. The Claimant relied on a number of cases which demonstrate this principle including R v Tower Hamlet London Borough Council ex p Khalique[45] in which a decision on whether to award a housing settlement accommodation was deferred or withheld for some improper or illicit reason and was held to be unlawful and R v Parliamentary Commissioner for Administration, ex p Balchin (No.1)[46], in which the Ombudsman's decision was quashed based on his disregard for a plainly relevant consideration.

[109] In responding, Counsel for the Defendant also relied on the seminal case of Council of Civil Service Unions v Minister of the Civil Service in which the House of Lords defined an irrational decision as one *"which is so outrageous in its defiance of accepted moral standards that no sensible person who had applied his mind to the question to be decided would have arrived at it."*[47] It is therefore not surprising that the Privy Council has described a claimant's burden of

[43] [1985] AC 374, at 399 A – B, 414 G – H
[44] (1768) 4 Burr 2186, 2188 – 89; 98 ER 139, 141
[45] (1994) 26 HLR 517
[46] [1998] 1 PLR 1, 13 E – F
[47] [2015] UKPC 15

establishing a decision as irrational or unreasonable as one which is *"notoriously heavy"*: Gookool and Others v Permanent Secretary of the Ministry of Health and Quality of Life and Anor.[48]

[110] Counsel for the Defendant submitted that a court can therefore quash a decision as irrational only where it is "so unreasonable that no reasonable body could ever have come to it": Associated Provincial Picture Houses Limited v Wednesbury Corporation.[49] In that regard, she submitted that it would be surprising, if a court were to determine that it is irrational or unreasonable for Cabinet to attempt to ascertain the qualifications of anyone willing to fill the post of Managing Director by means of a fair, open, transparent and competitive process. Counsel argued that it is for the Claimant to satisfy the Court that the rationale provided for the Defendant's refusal to accept the BVIPA's recommendation in the absence of such a process being utilized, is in *"defiance of accepted moral standards"*.

[111] The Defendant posited that the Claimant's burden would not only be *"notoriously heavy"* but an insurmountable herculean task. As a result, the Defendant contends that Cabinet's decision cannot be impugned as being irrational and this ground of judicial review must also fail.

COURT'S ANALYSIS AND CONCLUSION

[112] The courts have generally pitched the standard of irrationality or unreasonableness at a high level[50] and in so doing they have also adopted a cautious approach which prescribes that a court must always be careful not to substitute its own decision for that of the decision of the decision-maker, if his decision is within the confines of reasonableness.

[113] However, recent judicial authorities have increasingly drifted away from such extreme formulations as prescribed by Lord Diplock in Council of Civil Service Unions and Others v Minister of the Civil Service[51] who defined this ground in this way:

> *"By "irrationality", I mean what can now be succinctly referred to as Wednesbury unreasonableness…It applies to a decision which is so outrageous in its defiance of logic or of*

[48] [2008] UKPC 54, paragraph 18
[49] [1947] 2 ALL ER 680, 683
[50] R v Secretary of State for the Environment ex parte Nottinghamshire City Council [1986] AC 240 at 246 H; Reid v Secretary of State for Scotland [1999] 2 AC 512, at 541 G and 542
[51] [1984] 3 ALL ER 935 at 951

accepted moral standards that no sensible person which had applied his mind to the question to be decided could have arrived at it…"

[114] The modern view is that terminology such as "perverse", "absurd" implying that the decision maker has taken leave of his senses, may set the standard to review too high and may effectively deprive citizens of their only means of redress. Lord Cooke in R v Secretary of State for the Home Department ex parte Daly[52] put the position this way:

> "*And I think that the day will come when it will be more widely recognised that Associated Provincial Picture Houses Ltd v Wednesbury Corp. [1948] 1 KB 223 was an unfortunately retrogressive decision in English administrative law, in so far as it suggested that there are degrees of unreasonableness and that only a very extreme degree can bring an administrative decision within the legitimate scope of judicial invalidation. The depth of judicial review and the deference due to administrative discretion vary with the subject matter. It may well be, however, that the law can never be satisfied in any administrative field merely by a finding that the decision under review is not capricious or absurd."*

[115] The case law now reflects that unreasonableness in public law should be a flexible standard capable of enhanced or relaxed scrutiny. It is now regarded as a "spectrum, not a single point"[53]. A decision may not be "perverse", "absurd" or 'immoral", but it may still be open to a court to intervene where there is evidence that the decision maker took into account factors that ought not to have been taken into account, or evidence that he failed to take into account factors that ought to have been taken into account. Associated Provincial Picture Houses Ltd v Wednesbury Corporation[54] is frequently cited as the classic explanation of unreasonableness or irrationality.

> *"It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ in Short v Poole Corporation [1926] Ch. 66, 90, 91 gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another." Emphasis mine*

[52] [2001] 2 AC 532, cited with approval in R (Farrakhan) v Secretary of State for the Home Department [2002] EWCA Civ. 606
[53] R v Education Secretary, ex parte Begbie [2000] 1 WLR 1115
[54] [1948] 1 K.B. 223

[116] The Court endorses this approach but is mindful that it is not for this Court to supplant the Defendant's exercise of discretion. Instead, the Court must decide whether the power under which the decision maker acts (a power normally conferring a broad discretion) has been properly exercised or insufficiently justified. In that regard, the Claimant's challenge appears to be multifaceted. However, it must be regarded within the relevant context of decision making. In the case at bar, the statutory framework dictates that the appointment to the post of managing director must have the approval of the "Governor in Council". This term was amended under section 2 of the British Virgin Islands Ports Virgin Authority (Amendment) Act, 2016 which replaced all references to "Governor in Council" with the term" Cabinet."

[117] Established under Chapter 4 of the BVI Constitution Order 2007, this body has the constitutional responsibility for the formulation of policy and for directing the implementation of such policy. Membership includes the Premier, four other Ministers and one *ex officio* member, namely the Attorney General and its proceedings are presided over by the Governor. In carrying out its functions, the Cabinet operates corporately. Generally, no business may be transacted at any meeting of the Cabinet if there are less than three Ministers present, one of whom shall be the Premier or the Minister performing the functions of the Premier under section 55 of the Constitution.

[118] Subject to the Constitution, the Cabinet has the power to determine its own rules of procedure for the conduct of its business and these have been helpfully set out in the Cabinet Handbook. In her Second Affidavit, Cabinet Secretary, Ms. Sandra Ward summarises the process by which decisions are made in Cabinet. At paragraph 7 she states:

> *"In the usual course of things, Cabinet papers, containing proposed Government policies, are compiled and forwarded to the Cabinet Office for presentation at a Cabinet meeting: clause 4.5 of the Cabinet Handbook. The Cabinet Steering Group meets weekly to determine the agenda (business) for the next meeting of Cabinet: clause 3.3 of the Cabinet Handbook. Among other considerations, the strategic importance or development significance of the issue or matters due for consideration would determine the priority accorded to the matters tabled for discussion. Clause 7.13 of the Cabinet Handbook states that Cabinet business agendas are not to be circulated publicly or discussed outside of Members. The subject matter of each Cabinet Paper on the agenda is then discussed during the relevant meetings of Cabinet and a decision arrived at. Minutes are recorded during or after these meetings: clause 4.23 of the Cabinet Handbook. Pursuant to clause 4.31 of the Cabinet Handbook it is only when the minutes are confirmed that Cabinet's decision are declared final and can be announced as decisions of Government. Once confirmed, the relevant Cabinet decision are declared final and can be announced as decisions of Government. Once confirmed, the relevant Cabinet decision is excised from the Minutes and reduced to a Cabinet Minutes Extract. Clause 4.29 of the Cabinet Handbook provides that the said*

Extract should then be circulated to Ministries, departments and other agencies which are specially required to take action or on a need to know basis."

[119] The Court finds this summary to be instructive. It demonstrates that matters are submitted to Cabinet through a Cabinet Paper, advanced by the relevant ministry prioritized by the Steering Group and that the deliberations are confidential. Decisions are final only after deliberations by an appropriate quorum and minutes are recorded and confirmed. It follows that the decision to approve or not approve the Claimant's appointment could not have properly been discussed prior to the corporate deliberations of the Cabinet. Certainly, it would have been entirely inappropriate, for individual members, to hold out any assurances prior to the actual deliberations and decision by the entire body.

[120] The Cabinet Handbook explains the rationale. It speaks to the constitutional convention of collective responsibility which is the basis on which this system of ministerial government rests[55]. Collective responsibility prescribes that members of Cabinet must publicly support all governmental decisions made in Cabinet even if they do not privately agree with them. It consists of two principle features. The first is Cabinet solidarity which prescribes that while minister may express their views privately, once a decision has been made by the Cabinet, it is binding on all members of Cabinet and they must publicly show a unified position. The principle rests on the notion that the executive ought to appear as a collective entity able to maintain cohesion. The second feature, Cabinet confidentiality has been described as the natural correlative of collective responsibility. This prescribes that so long as a minister remains a minister, he may not speak in public or in private against a decision of Cabinet or against an individual decision of another minister. Further, no minister may, in the Parliament or in public speeches, commit the Government to any course of action save in accordance with the policy of Cabinet. If any member of the Cabinet seriously dissents from the opinion and policy approved' by the majority of his colleagues, collective responsibility dictates that it is his duty to resign because it is not possible for ministers simultaneously to remain in office and to seek to disagree or disassociate themselves from the collective view of the Government.

[55] Section 47 (3) of the BVI Constitution Order 2007

[121] Cabinet collective responsibility is therefore dependent on the mutual agreement and collective unity of the Cabinet and its members. It effectively prevents government policy from being determined unilaterally since it is the Cabinet as a whole which decides, and it ensures that Cabinet decisions are based on principles and not on personalities.

[122] The Cabinet Handbook makes it clear that Cabinet is the centre of the executive branch of government. It sets the broad policy directions, approves the broad strategy and takes the most important operational decisions of government. It follows from this that Cabinet would have a keen interest in the proper management of key areas of the national economy. It is not disputed that the BVIPA oversees a critical component of the national economy and so it is therefore not surprising that the Act reflects a significant degree of executive oversight of the BVIPA and the Territory's ports. It no doubt explains why section 20 of the Act makes it clear that all appointments to the post of managing director must have the approval of the executive. A similar rationale was referenced in the judgment in Patrick Manning v Feroza Ramjohn: (1) Patrick Manning (2) Public Service Commission v Ganga Persad Kissoon[56] where the Privy Council quoted from the 1974 Report of the Trinidad and Tobago Constitution Commission:

> "These officials are so directly concerned with the formulation of the policy and the supervision of its implementation that they must be acceptable to the political chiefs with whom they must have a close working relationship. This does permit some measure of political influence in purely public service appointments but is necessary on purely practical grounds. We would mention that this recommendation of ours is in keeping with the views of the Public Service Associations as expressed to us."

[123] It is within this decision-making context and from the persuasive evidence of Ms. Ward, that the relevant Cabinet Paper to determine the reappointment of the Claimant was only submitted by Ministry of Communications on 6th April 2016 and a decision taken by Cabinet recorded and finalized on 13th April 2016. It follows that the purported delay of some fifteen months cannot be said to be at the instance of the Defendant. Indeed, the evidence reveals that it would have been the line Ministry which would have been responsible for the unexplained delay in advancing the matter. It therefore cannot be a basis upon which the Court could declare the Defendant's decision to be irrational or unreasonable.

[56] [2011] UKPC 20

[124] At paragraph 17 of his First Affidavit, the Claimant asserted that at least 3 ministers assured him that the Cabinet Paper dealing with the matter of his reappointment had inexplicably been withdrawn from the Cabinet agenda in December 2015. While the individual ministers in question have chosen not to address these allegations, Ms. Ward (who is a member of the Steering Group responsible for setting the agenda) has unequivocally averred that no decision which touches and concerns these proceedings was taken on 2nd December 2015.

[125] Moreover, the Claimant avers that during this period, he received repeated assurances from individual ministers. No doubt they would have led the Claimant to a false sense of security and created a hapless expectation that his employment would continue. This is indeed unfortunate not least because it would have been a marked departure from the rules and procedures which govern the conduct of business. However, it is clear that whatever representations may have been made to the Claimant by individual ministers would be of little to no moment in impugning the corporate decision which was taken on 13th April 2016. They would not, without more, make the final collective decision which was taken, by Cabinet, irrational or illogical because while the Act provides in many instances that the Board is to take directions from the responsible minister, in so far as it relates to the appointment of the managing director, the Act makes it clear that this is a decision which must be approved by the Cabinet and not by any one minister acting in his individual ministerial capacity.

[126] During the leave stage of these proceedings, this Court ruled that legitimate expectation could not be maintained as a ground of review on the evidence advanced. The Court therefore finds very little utility in referencing the individual assurances, positive or negative which may have been given by ministers of Government whether on their own behalf or otherwise. The uncontested evidence is that none of these alleged assurances were given by Cabinet as a whole. The Claimant has not produced evidence of any document or statement issued by Cabinet as a whole body providing any such assurance. In fact, at paragraphs 17 to 19 of the Affidavit of Ms. Sandra Ward makes it clear that no such document or statement exists.

[127] The Claimant also contends that decisions may be rendered unlawful if the decision maker did not have all the relevant information before it in order to give due consideration to the matter. In this case, the Claimant submitted that Cabinet did not take sufficient steps to assure itself that he had

the requisite skills and qualities required to assist in harmonizing the functions of the BVIPA with the functions of the new multi-million dollar cruise pier and landside development. The Claimant suggests that the BVIPA should have been consulted and further information solicited which may have revealed that the Claimant had the requisite qualifications.

[128] Again, the Court must consider the decision-making context of this case. It has not been advanced that this Claimant possessed security of tenure and it is clear that he would not have been entitled as of right to be reappointed. What is at issue here is the decision to refuse to approve the Claimant's reappointment as managing director of a statutory corporation. As at the date when the matter of his reappointment was tabled before the Defendant, his contract had determined by effluxion of time by several months. Indeed, it is clear that he had effectively vacated office by December, 2015.

[129] The Court is guided by the 2018 Privy Council decision in Harding v Attorney General of Anguilla.[57] In that case, the Appellant claimed that she was removed from office before the expiry of her final term in breach of the Constitution of Anguilla, and that she had a legitimate expectation of reappointment which was violated by the failure to reappoint her. Having found that her contract had expired by effluxion of time and that there was no repudiation of her contract or premature dismissal Lord Sumption at page 5 of the judgment stated:

> *"In those circumstances, Mrs. Harding's only possible complaint was that she should have been reappointed. Contractually, she had no right to be reappointed. Her appointment was for a limited term and provided that six months before the expiry of that term her job would be advertised. She does not claim that the constitution gives her security of tenure. That would have been an impossible contention given the absence of any express right to tenure in the Constitution and the well established principle that the holder of a lower judicial office may properly be employed on a fixed term contract: see Hinds v The Queen [1977] AC 195, 218 (Lord Diplock).*

[130] In dealing with the appellant's contention that she had a legitimate expectation of reappointment, the Board held that:

> "In principle, it would have to be an expectation as to the procedure by which the appointment process would be conducted as the expiry of her term approached. However, the only aspect of the procedure which he could point to as conflicting with her expectation was the requirement that she should attend for interview. She refused to do that because she considered that she was entitled as of right to be reappointed. If she had been entitled to reappointment as of right, she would no doubt have been justified in refusing to be interviewed for the job. But if not, she could properly be required to submit to any

[57] [2018] UKPC 22 and see: Seth Quashie v The Tobago House of Assembly Claim CV2013-4226 HC Trinidad and Tobago at paragraphs 39 – 41

> requirement which it was reasonable to impose on candidates generally, including an interview. It therefore follows from the Board's conclusion that she had no substantive legitimate expectation of reappointment, that she had no relevant procedural legitimate expectation either." Emphasis mine

[131] It is settled law that disregard of a material fact in and of itself may render a decision irrational or unreasonable.[58] However, it is also generally accepted that courts in judicial review should leave the assessment of evidence and fact to the primary decision maker who is often better positioned than a court to accurately evaluate the facts of a case and to decide on their merits. The factual context of this case commends such an approach. In 2012, this Claimant would have been selected and approved as managing director following an open recruitment process. It is apparent that he satisfactorily discharged his contractual obligations and that he had the endorsement of his employer. However, it is also apparent that these factors were outweighed by policy considerations which urged the Defendant to consider a fresh, competitive and open recruitment process. At paragraph 15 of his Affidavit, Mr. McMaster who speaks as the Permanent Secretary in the Ministry which advanced the relevant Cabinet Paper and as an ex officio member of the BVIPA states:

> *"…it was thought prudent to consider the availability of potential candidates who may possess specialized management and strategic training and experience…the proposed candidate therefore would not only need to have the ability to manage the multimillion dollar facility, but would also need to have the vision and wherewithal to take the cruise pier project to the next level while still effectively managing all the other aspects of the ports' operations. In this context, the Government's aim is merely to explore all available options with a view to identifying the most suitable candidate for the post.*

[132] Under the Act, the approval of the Claimant's reappointment was clearly a matter for the exercise of the Defendant's discretion. In exercising such discretion, the Court is satisfied that the matters taken into account in this context would be relevant.

[133] The Court has considered the Claimant's submission that it is not clear why the contemplated legislative changes would impact the role of managing director. Counsel further submitted that the cruise ship pier project was put in motion in 2012 and yet even in 2017 the relevant policies have still not been "fully hammered out". She concluded that the evidence and the ostensible reasons for the decision simply do not add up in the circumstances.

[58] R v Secretary of State for Health ex parte March [2010] EWHC 765

[134] On the way that this argument has been framed, this Court is not satisfied that these are matters which could properly impact the reasonableness of the decision. If there are delays in implementation, this would not without more lead to the conclusion that the decision does not add up, is capricious or is otherwise irrational. Moreover, Courts are generally reluctant to interfere with the exercise of discretion by the executive when its aim is the pursuit of policy [59] and in this context, the Court is not inclined to impose an obligation which would effectively elevate the Claimant's employment status to that of a tenured employee.

[135] Critically, Mr. McMaster has described the recruitment process which ultimately resulted in the Claimant's appointment in 2012. Among the applicants in this open recruitment process was the Claimant's predecessor. The course adopted by Cabinet in 2016 is therefore not without precedent and given the polycentric public interest considerations, this Court is unable to conclude that the decision to refuse approval of a direct appointment in favour of an open recruitment process was so illogical as to be irrational.

[136] During the course of the trial, Counsel for the Claimant raised two additional points of argument which must be addressed. First, she relied on sections 6.1 – 6.8 of the Cabinet Handbook which regulate how Cabinet considers appointments to boards, committees and working groups. In the Court's judgment, while these provisions could provide invaluable assistance in the context of appointments to the BVIPA, they could not provide definitive assistance to the Claimant who seeks appointment as managing director under section 20 of the Act. Secondly, Counsel submitted that it is arguable on the wording of section 20 of the Act and his contract of employment that there was no need for the BVIPA to seek approval for the Claimant's reappointment. Having obtained approval in 2012, Counsel submitted that any reappointment thereafter would be governed by clause 9 of his contract. The Court was not persuaded by this argument because such an interpretation would fly in the face of the executive oversight mandated by the legislation.

Whether Cabinet failed to have regard to the principles of natural justice or procedural **fairness when refusing to approve the BVIPA's** recommendation?

[59] R v Secretary of State for Trade and Industry ex paret Lonhro Plc. [1989] 1 WLR 525; R Dworkin – Political Judges and the Rule of Law 1978 64 Proceedings of the British Academy 259 "It is not for judges to weigh utilitarian calculations of economic and political preference."

P**ARTIES' ARG**UMENTS

[137] Counsel for the Claimant submitted that the Defendant had a duty to act fairly and in accordance with the highest public standards and she submitted that the Defendant failed to discharge that duty. First, she submitted that the Defendant failed to act fairly in that representations were made to the Claimant by the Minister and or the Ministry with statutory responsibility for the BVIPA. The Court has already dealt with these contentions earlier in this judgment but will reiterate that while the individual representations and conduct of the Ministers were unfortunate, there is no basis upon which their purported conduct and representations could be used to impugn the collective decision-making process and the resultant conclusions arrived at by Cabinet.

[138] Counsel for the Claimant then called into question the conduct of Cabinet in holding on to the BVIPA's Resolution and abdicating their duty to give due consideration and permitting the Claimant to continue in his post beyond the purported date of his termination and then remaining silent and giving no indication that his contract had not been extended. Again, the Claimant seeks to lay blame on the wrong party because it is undisputed that the relevant Cabinet Paper was only submitted to the Defendant in April 2016 and thereafter the decision recorded shortly thereafter. In circumstances where it is not alleged that the Defendant had any control over when the proposal would be submitted, it cannot therefore be asserted that the Defendant was deliberately sluggish in addressing the matter or that it deferred consideration of the matter until after the general elections. The Court cannot ignore the clear and unequivocal evidence of Ms. Ward, the Cabinet Secretary and member of the Steering Group that beyond the decision arrived at the meeting conducted on 6th April 2016, there is no other Cabinet decision concerning the BVIPA's Resolution.

[139] Moreover, bearing in mind that it is the BVIPA and not the Defendant who was the Claimant's employer under his contract of employment, any matters concerning his service would, by virtue of section 20(2) of the Act fall to the BVIPA. It follows that if the Claimant continued to perform after his contract had expired by effluxion of time, in contemplation of his impending reappointment, it would be the responsibility of his employer, or perhaps the responsible Ministry to ensure that this position was regularized.

[140] Finally, Counsel for the Claimant also submitted that at no time did the Defendant communicate its reservations or concerns about his reappointment to him or to the BVIPA and so they had no opportunity to make representations about any gaps in his skills, qualifications or experience. Counsel relied on the case of R (Interbrew SA) v Competition Commission[60] to support his contention that the failure to divulge full reasoning and to give a claimant an opportunity to make representation on the issues considered could render a decision void for unfairness. Moses J noted:

> "*There can be no doubt but that the Commission owed a duty of fairness in conducting its investigation as to the merger. The content of the duty will vary from case to case but generally it will require the decision maker to identify in advance areas which are causing him concern in reaching the decision in question (see e.g. R -v- The Home Secretary ex parte Fayed [1998] 1 WLR 763 at 773H to 774A). Where Convention rights are at stake those adversely affected should be involved in the decision making progress to a degree sufficient to provide them with the "requisite protection of their interests." Absent such participation the interference will not be regarded as necessary (see McMichael -v- United Kingdom at paragraph 87 [1995] 20 EHRR 205 (a case concerning Article 8). The jurisprudence of the European Court of Justice is to like effect:-*
>
> > *"Any person who may be adversely affected by a decision should be placed in a position in which he may effectively make his views known, at least as regards the matters taken into account by the Commission as the basis for its decision."*

[141] The Defendant argued that the facts of this case disclose no procedural unfairness. While the Defendant agrees that the principle of natural justice and procedural fairness are inextricable linked with the principle of fairness, the Defendant submits that the concept of fairness is not immutable but depends on the context of the relevant decision.[61]

[142] Counsel for the Defendant reiterated that in the case at bar, the Claimant is no more than a mere applicant for a position and that fairness does not require that applicants for employment in the public sector be afforded an opportunity to be heard before their application is refused. Were it otherwise, there would be a need to notify every applicant even before being short-listed and notify them of the intention to discard their application at this stage and afford them an opportunity to make representations. Such an argument places an unduly onerous burden on those charged with overseeing the employment process and no doubt would protract the process and ultimately render it an exercise in futility.

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[60] [2001] EWHC Admin 367

[61] Ex parte Doody

[143] To further bolster this argument, Counsel for the Defendant relied on Patrick Manning v Feroza Ramjohn: (1) Patrick Manning (2) Public Service Commission v Ganga Persad Kissoon.[62] In that case, the Board considered section 121 of the Constitution of Trinidad and Tobago which confers on the Prime Minister certain powers with regard to appointments to particular public offices. The Board held that in the case of Ms. Ramjohn, the power to make an appointment on transfer was exercised based on certain allegations which Ms. Ramjohn was not afforded an opportunity to answer. The exercise of the power in those circumstances was deemed unfair. By contrast, in relation of Mr. Ganga Persad Kissoon, the veto power was not based on any specific allegation against him, so fairness would not have required any advance notice of the veto. However, the Board concluded that because Mr. Kissoon was cognizant of the fact that he had topped the promotion interviews, fairness required that he at least be provided with a rational explanation for being bypassed. At paragraph 45 of *Manning*, the Board asserted the principle:

> *"…the power of veto is subject only to comparatively narrow limitations and…the obligation to act fairly must be viewed in that light…If, obviously, the ground of objection was some specific allegation…then fairness would require that it be put to the candidate. But if the Prime Minister was objecting on general grounds involving no particular 'case'… fairness would not demand any advance notice of the veto".*

[144] Counsel also pointed out that the Privy Council was at pains to point out that, in cases of appointment (even in the public service), recourse to judicial review would only very rarely succeed. At paragraph 52, the principle was adumbrated thus:

> *"This judgment should certainly not be regarded as a charter for those disappointed in their applications for public service appointments routinely to challenge the process. On the contrary, only exceptionally is it likely that such challenges will succeed."*

[145] Counsel for the Defendant submitted that the statutory power exercised by Cabinet in the case at bar could be likened to the Prime Minister's power of veto in Manning. Cabinet's decision hinges on a general reason – the desire to recruit the most qualified candidate in a transparent process – and not a specific allegation against the Claimant. The starting position therefore, is that fairness did not require advance notice of the proposed decision or any opportunity to be heard.

[146] Counsel for the Defendant did not concede that the Claimant's position is on all fours with that of Mr. Kissoon in Manning. She argued that the Claimant is not a public servant and he was not the beneficiary of a recommendation for appointment which was made after the conduct of an open, transparent and competitive process. Nonetheless, even for Mr. Kissoon, the Privy Council opined

[62] [2011] UKPC 20

that all fairness required was the provision of a rationale and *not* an opportunity to be heard. Counsel therefore concluded that the Claimant's case is far weaker than that of Mr. Kissoon in the Manning decision and therefore he cannot be said to be entitled to more than the mere provision of reasons. Counsel posited that the Claimant has in fact been furnished with sufficient reasons explaining the rationale behind Cabinet's decision. In these circumstances, Counsel argued that no more could be demanded by the Claimant under the guise of fairness.

[147] At paragraph 32 of his affidavit of 7th February 2017, the Claimant contends that he was entitled to be heard and that he was not afforded an opportunity to advance details of his experience and qualifications and the fact that he had been the successful candidate in the interview process conducted 2011 – 2012. Counsel for the Defendant submitted that these are not matters for the Court's consideration. Rather, they are matters which the Claimant would be entitled to present fully during the open recruitment process. It would then be a matter for the persons charged with considering and interviewing applicants to consider the suitability of the Claimant as against those of any other applicant. She further submitted that in arguing that there was no prior mention of any inadequacy in his performance or skills as managing director, the Claimant has misunderstood the issue entirely. It may very well be that the Claimant is selected at the end of the process once applications received and persons interviewed. On the other hand, the fact that there may be a willing individual with superior qualifications to the Claimant who seeks appointment to the post is not an indictment on the Claimant's performance or character and would not justify granting the reliefs sought.

[148] Finally, Counsel for the Defendant pointed to what she described as the irony of the Claimant's case. She pointed out that the Claimant, who was the beneficiary of an open recruitment process in 2012, which involved his predecessor is now attempting to prevent a similar open and transparent process of appointment. Counsel submitted that it would be antithetical to good governance for a Court to allow such a process to be frustrated.

COURT'S ANALYSIS AND CONCLUSION

[149] Where a person's rights are liable to be detrimentally affected by the action taken by the public body, there is a necessary implication that the principles of natural justice will be observed. These

principles dictate that the relevant public authority has a duty to ensure that procedural rules are put in place so that the person affected will not be disadvantaged. The common law imposes minimum standards of procedural fairness or due process. The elements are summarized in the following terms: [1] there must be notification of the case to be met. This will require the decision maker to identify in advance, areas which are causing him concern in reaching the decision in question, R -v- The Home Secretary ex parte Fayed [1998] 1 WLR 763 at 773H to 774A and; [2] there must be a fair opportunity to correct or contradict the case.

[150] As the dictum of Lord Denning in Kanda v Government of the Federation of Malaysia helpfully illustrates[63]:

> *"If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence is given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them... it follows, of course, that the Judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other."*

[151] However, it is also clear that the rules of fairness or natural justice were not rigid but depend on the particular context. In considering whether a particular decision was fair, a court should take into account the administrative structure of the body making the decision and the nature and purpose of the decision itself.[64] In this context, the Court has had regard to the peculiar context presented in this case. First, it is clear to the Court that the Defendant in this case is not the Claimant's employer but rather the body with the statutory authority to approve or disapprove his appointment. Second, at the time when the matter was considered by the Defendant, the Claimant's contract of employment had lapsed by effluxion of time and he was essentially an individual who was seeking a further appointment.

[152] The second appeal in Manning reveals somewhat similar circumstances. Much like that case[65], the only evidence disclosed on behalf of the Defence came not from the decision maker itself but from the Cabinet Secretary who asserted that the decision to decline approval was taken having taken into account the matters set out in the Cabinet Paper.[66] These matters were later edified in the affidavit evidence of the Permanent Secretary Mr. McMaster, who would have been

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[63] [1962] AC 322
[64] Regina v Avon County Council, ex parte Crabtree Times 29-Nov-1995
[65] Paragraph 41 of Manning
[66] Paragraph 8 of the First Affidavit of Sandra Ward, paragraph 15 of the Second Affidavit of Sandra Ward and paragraphs13–16 of the Affidavit of Anthony McMaster.

instrumental in the preparation of the Paper and who would have been briefed after the decision was rendered so that Cabinet's concerns could be addressed in his capacity as Permanent Secretary of the line Ministry and as an ex officio member of the BVIPA.[67] Having set out the critical role importance of the tourism industry and the Cruise Pier to the national economy the Permanent Secretary states:

> *"The functions to be performed by anyone appointed to the post of Managing Director of the BVIPA would have significant implications to the national community. As such, it was thought prudent to consider the availability of potential candidates, who may possess specialized management and strategic training and experience. Such qualifications being even more crucial in light of the fact that the cost-to-date of the cruise pier has been calculated as the sum of $82,155,193.67. The proposed candidate therefore, would not only need to have the ability to manage the multi-million dollar facility, but would also need to have the vision and wherewithal to take the cruise pier to the next level; while still effectively managing all the other aspects of the ports' operations. In this context, the Government's aim is merely to explore all available options with a view to identifying the most suitable candidate for the post."*

[153] It is within this context that the Court must consider the obligation of fairness in the Defendant's decision-making process. In Manning, the Court of Appeal held that fairness "*requires that before the veto is exercised in relation to an applicant who is proposed by the Commission for appointment he is informed of what there is against him and given an opportunity to make representations on his behalf. This is required in all cases."*

[154] The Board however disagreed with that conclusion. At paragraph 45 of the judgment:

> *45. "In the Board's view that (and the declaration that followed) goes altogether too far. Rather their Lordships are disposed to accept Mr. Knox's submission that the power of veto is subject only to comparatively narrow limitations and that the obligation to act fairly must be viewed in that light…..If, obviously, the ground of objection was some specific allegation – as in Ms. Ramjohn's case – then fairness would require that it be put to the candidate. But if the Prime Minister was objecting on general grounds involving no particular "case" against the candidate, fairness would not demand any advance notice of the veto."*

[155] On the face of it, it seems that the Defendant *without more* treated the Cabinet Paper as a sufficient basis for exercising its discretion to disapprove the Claimant's appointment and it is apparent from the *ex post facto* explanation proffered, that the increased scope of responsibility of the proposed appointment informed the decision to engage an open recruitment process rather than a direct appointment of the incumbent. It appears that this course was not without precedent. While the Claimant may well have had discussions with individual ministers of Government, there is no evidence that there was any communication between the Cabinet or the Cabinet Office and

[67] Paragraph 42 of Manning

the Claimant in relation to the recommendation that he be appointed to the post and there is no evidence that there was any specific allegation which fairness would have dictated should be put to him.

[156] Indeed, it is apparent that the Defendant's concern was based on much wider policy considerations and not anything specific to the Claimant. The Defendant's case indicates that a competitive recruitment process would benefit the BVIPA as well as the Territory because it would permit the objective assessment of all applicants, their qualifications, experience and expertise so that the most suitable candidate for the post could be identified.

[157] Mr. McMaster has intimated that in the wake of the Defendant's decision, the BVIPA has directed its focus to reviewing the current job description so that candidates would be equipped with the requisite education, training and qualifications. This is a clear indication that the Defendant and the BVIPA have embarked on a process of rationalization and implementation which is still in its primary stages with the fine details still being fleshed out. Given these circumstances, any representations as to the Claimant's suitability would likely be premature.

[158] Although, the Manning decision originates from Trinidad and Tobago, the Court considers the reasoning of the Board to be sound and persuasive. The Court is satisfied that the challenge to the fairness of the Defendant's decision-making process here cannot be on the basis of a failure to give the Claimant the opportunity to address the policy considerations in advance. The Claimant would however, clearly be entitled to the reasons for the decision in circumstances where he was unreservedly endorsed by the BVIPA, his potential employer. The fact that these reasons were only forthcoming in *ex post facto* evidence filed in these proceedings is unfortunate. It certainly could not have assisted what would have already been significant inconvenience caused by the Ministry's delay in laying the matter before the Defendant and when this is taken together with the multiple conflicting representations made to the Claimant while he continued to await word on his reappointment, it is not surprising that he would feel substantively injured and seek some form of relief. However, when the law is applied to the factual matrix in this case, the Court is not satisfied that the Defendant's decision should be quashed. It follows that the other claims for relief will also fail.

COSTS

[159] CPR 56.13(6) provides that no order for costs may be made against an applicant for an administrative order unless the Court considers that the applicant has acted unreasonably in making the application or his conduct was in some way worthy of censure in bringing it. Despite the failings of this case, the Court does not accept that this case falls within that matrix. It is clear that were it not for this litigation, the Claimant would have been left with no indication of the matters which informed Cabinet's decision. The fact that he was ultimately unsuccessful in quashing the decision, does not in the Court's view make his action unreasonable or warrant censure. There will therefore be no order as to costs.

CONCLUSION

[160] It is therefore ordered as follows:

i. **The Claimant's claim is dismissed.**

ii. There is no order as to costs.

Vicki Ann Ellis
High Court Judge

By the Court

Registrar