[2025] JMCA Civ 12

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE SIMMONS JA
THE HON MR JUSTICE LAING JA (AG)

SUPREME COURT CIVIL APPEAL NO 53/2018

BETWEEN	**PETRO BURTON**	**APPELLANT**
AND	**THE COMMISSIONER OF POLICE**	**RESPONDENT**

Miss Shantel Jarrett instructed by Zavia Mayne & Co for the appellant

Mrs Taniesha Rowe-Coke instructed by the Director of State Proceedings for the respondent

25, 26 November 2024 and 26 May 2025

Judicial Review – Appeal – Whether learned judge considered section 32 of the Police Service Regulations and the delay in investigating and taking disciplinary action – Whether the respondent's action of dismissing the appellant was ultra vires and excessive – Whether the appellant had a right to claim damages for alleged unlawful administrative action

F WILLIAMS JA

Background

[1] This is an appeal brought by Petro Burton ('the appellant') against the decision of Bertram Linton J, ('the learned judge') who dismissed the appellant's challenge to orders made by The Commissioner of Police ('the respondent') confirming the result of disciplinary proceedings that were instituted against him. Those orders resulted in his dismissal from his employment as a member of the Jamaica Constabulary Force ('the JCF').

The appellant's case

[2] The appellant's evidence was contained in three affidavits: (i) the "Affidavit of Petro Burton in Support of Application for Leave to Apply for Judicial Review" filed on 19 June 2014; (ii) the "Supplemental Affidavit of Petro Burton in Support of Application for Leave to Apply for Judicial Review" filed on 11 August 2014; and (iii) the "Affidavit of Petro Burton in Support of Application for Judicial Review" filed on 3 December 2014.

[3] A summary of the appellant's version of facts leading to the institution of the disciplinary charges were that, on 7 September 2006, the appellant, then a member of the JCF, and one Corporal Hopeton Reid ('Cpl Reid') were on mobile patrol in the Naggo Head area of Portmore, Saint Catherine. Upon approaching the Texaco Petrol Station in that area, he said that they observed what he described as a suspicious looking motor vehicle and Cpl Reid used the police vehicle to block the path of that vehicle.

[4] On the appellant's case, as he approached the suspicious vehicle, he noticed that the driver had a firearm on his lap and appeared anxious and fidgety, so he pointed his rifle at the driver out of fear for his life and directed him to get out of the vehicle with his hands in the air. The driver identified himself as Detective Sergeant Patrick Walker ('Det Sgt Walker') who, according to the appellant, appeared to be very disgruntled. The appellant's evidence is that he and Cpl Reid spoke with Det Sgt Walker who was later joined by Constable Brennan Cohen ('Constable Cohen'). They both left the scene in the vehicle. The appellant said that, subsequently, he reported the matter to one Superintendent Terrence Bent ('Superintendent Bent'), his supervisor, and the appellant said that he was instructed by him to apologise to Det Sgt Walker and Constable Cohen.

[5] However, in November 2010, approximately four and a half years later, the appellant said that he was instructed to write and submit a report on the incident, and he did so on 22 November 2010. On or around 8 March 2011, the appellant was served with a letter dated 24 February 2011, informing him that disciplinary charges had been laid against him pursuant to regulation 47 of the Police Service Regulations 1961, ('the Regulations'). The charges on which he was later tried were:

> "Charge 1. Being a member of the Jamaica Constabulary Force, conducted yourself contrary to the discipline, good order and guidance of the Force in that you behaved unprofessionally when you pointed your firearm at the vehicle that Detective Sergeant Patrick Walker and Constable Cohen was [sic] sitting in and shouted to them saying, 'Pussy come out now', on Thursday the 7th of September, 2006 about 11:10 p.m. at Naggo's Head Portmore, St. Catherine.
>
> Charge 2. Being a member of the Jamaica Constabulary Force, conduced [sic] yourself contrary to the discipline, good order and guidance of the Force in that you behaved unbecoming when you uttered the following words to Detective Sergeant Patrick Walker 'Mi nuh care bout yu pussy hole rank, come out de vehicle', on Thursday the 7th of September, 2006 about 11:10 p.m. at Naggo's Head, Portmore, St. Catherine.
>
> Charge 3. Being a member of the Jamaica Constabulary Force, conducted yourself contrary to the discipline, good order and guidance of the Force in that you were disrespectful to your senior in rank Detective Sergeant Patrick Walker when he told you that he was a Detective Sergeant of Police, you replied, 'Mi nuh care bout yu pussy hole rank, come out de vehicle', on Thursday the 7th of September, 2006 about 11:10 p.m. at Naggo's Head, Portmore, St. Catherine."

[6] The letter also instructed him to state in writing, by 15 March 2011, the grounds on which he would be relying to exculpate himself. Subsequently, a hearing was conducted into the charges by a court of enquiry which was held between 29 June 2011 and 5 October 2011. During the hearing of the court of enquiry, the appellant did not give any evidence on his own behalf, and he did not call any witnesses. On 17 November 2011, the appellant was served with a notice stating that the charges against him were proved and that the respondent had ordered his dismissal from the JCF. The appellant then filed an internal appeal pursuant to the regulation. That appeal was considered but no result given. In January 2012, he attempted to re-enlist in the JCF, but this attempt was rejected. On 31 January 2014, he was served with a notice of suspension with effect from 17 November 2011, and on 17 March 2014, he was notified that his appeal was dismissed. Thereafter, on 21 March 2014, his dismissal was published in the JCF's weekly force orders.

The respondent's case

[7] Most of the respondent's case can be seen from the charges against the appellant, that have been set out verbatim in para. [5] above. The respondent contends that the three charges preferred against the appellant were proved, thus warranting his dismissal from the JCF. The respondent conducted a court of enquiry and, in those proceedings, called two witnesses, Det Sgt Walker and Constable Cohen, who both testified along the lines of what was contained in their statements regarding the incident.

[8] Both men testified that they were in an unmarked service vehicle about 11:00 pm on 7 September 2006 at the gas station located at Naggo Head. Det Sgt Walker and Constable Cohen were seated in a white 1991 Nissan Sunny service vehicle, refuelling it, when a marked police vehicle pulled up in front of it, almost blocking its path. The appellant, who was in the front passenger seat of the service vehicle exited and, pointing a firearm at the vehicle, said "pussy come out now". The appellant was dressed in plain clothes and had an earring in his left ear. According to the evidence of both witnesses, Det Sgt Walker identified himself and told the appellant to be careful with the firearm, to which he said the appellant responded "Me nuh care bout yu pussy hole rank, come out of de vehicle". Det Sgt Walker then reversed the vehicle from the gas pump and had a conversation with the appellant and the other policeman who was with him, in which he told them that their conduct would be reported. Det Sgt Walker said that, in response to this, the driver of the vehicle said "Gwan go do wah yu wan do, a my party in power, yuh should a lucky say a yah so we deh". Det Sgt Walker also said that, as he tried to write down the licence plate number of the service vehicle, the driver said "yu wan mi number to - 8375 Corporal Duppy bat do weh yuh want".

[9] After leaving the gas station, Det Sgt Walker and Constable Cohen went to the Portmore Police Station and made a report to one Sergeant Allison and a Woman Sergeant Richie, who were on duty there, and made an entry in the station diary. It was there that they discovered the identities of the appellant and Cpl Reid, who they learnt were attached to the Portmore Police Station. In the court below, the respondent relied on

evidence contained in the affidavits of Senior Superintendent Bent and Dr Carl Williams ('Dr Williams'). Superintendent Bent deponed that he knew the appellant since 2006 while stationed at the Portmore Police Station of the Saint Catherine South Division. He said he did not recall meeting Det Sgt Walker personally prior to the court of enquiry. He denied speaking with any party for the purpose of dealing with the matter summarily or otherwise and denied that he had told the appellant to apologise to Det Sgt Walker and Constable Cohen.

[10] The evidence of Dr Williams, who was the Commissioner of Police at the time, was that the personnel file of the appellant was held at the Administration Branch. Unfortunately, the appellant's file was incorrectly labelled as "Constable Barton" during the investigation process, and that error was not corrected until 21 July 2010, which resulted in confusion and delays. According to Dr Williams that was the reason why a statement was not obtained from the appellant until November 2010. In addition, Cpl Reid's unwillingness to cooperate resulted in further delay and his statement would have been critical as he was the officer in charge of the appellant at the time of the incident. Dr Williams also stated that a lack of human resources and significant backlog also contributed to the delay in the investigation in the complaint against the appellant.

[11] Dr Williams further deponed that the appellant, by way of letter from the respondent dated 20 January 2011, was notified that the allegation of professional misconduct against him was being investigated. By another letter dated 24 February 2011, the respondent notified the appellant of the specific disciplinary charges against him. Dr Williams' evidence was that on 15 March 2011, the appellant responded and acknowledged receipt of the letter outlining the disciplinary charges preferred against him and indicated that he would reserve his defence until the hearing. The appellant was present at the court of enquiry and, at the end, the charges against him were found to have been proven. On 17 November 2011, the respondent made the decision to dismiss the appellant and notified him of the decision by way of a notice of suspension dated 31 January 2014.

Judicial review

[12] Being dissatisfied with the respondent's decision to dismiss him from the JCF, the appellant sought and was granted leave to apply for judicial review by Dunbar Green J, (as she then was). Pursuant to this grant, the appellant, on 3 December 2014, filed a fixed date claim form in which he sought a number of orders, including an order of mandamus to compel the respondent to re-instate him to the JCF as an active member and an order of certiorari to quash the respondent's decision on 17 November 2011, to dismiss him from the JCF. The fixed date claim form came up for final hearing on 18 September 2017 and the learned judge, in her written judgment, reported as: **Petro Burton v The Commissioner of Police** [2018] JMSC Civ. 64, made the following orders:

> "i. judgment for the Defendant; and
>
> ii. No order as to cost [sic]."

The grounds of the appeal

[13] Displeased with these orders, the appellant filed a notice and grounds of appeal on 29 May 2018. The grounds of appeal are stated as follows:

> "The Applicant/Appellant craves leave to argue the following Grounds of Appeal:
>
> 1. The Order of the learned judge the Honourable Mrs. Justice Bertram Linton, in the Supreme Court of Jamaica delivered April 23, 2018 is unreasonable and cannot be supported by the intrinsic circumstances of the case.
>
> 2. The Learned Judge failed to address her mind to the distinction between re-enlistment and re-instatement in the circumstances of the case as the Appellant was a member of the Jamaica Constabulary Force (JCF) at the time of his dismissal. [This ground was later abandoned.]
>
> 3. The Learned Judge failed to address her mind to the provisions of section 32 of the Police Services

[sic] Regulations within the circumstances of the case in that the delay of 7½ years was abusive, a breach of process and therefore the Appellant was irremediably prejudiced.

4. The Learned Judge erred in her findings that the dismissal of the Appellant was not ultra-vires and excessive.

5. The Learned Judge erred by failing to address her mind to the fact that the dismissal was in contradiction of section 52(4) of the Police Service Regulations given that the Appellant was not afforded the facility to provide character evidence as to his character. [This ground was later abandoned.]

6. The Learned Judge erred in her finding that a right does not exist to claim damages for a loss that is created through an unlawful administrative action as damages for an administrative action can arise where there is the failure to [be] fair or reasonable as in the instant case and it is trite law that the remedies in judicial review are discretionary."

[14] As previously indicated, the appellant subsequently abandoned grounds two and five, thus the grounds remaining are one, three, four and six:

Issues

[15] I have reviewed the grounds and submissions from both counsel involved. However, for the purposes of this judgment, I will summarise only the points directly relevant to the issues.

[16] The main issue for determination in this appeal is:

Whether the orders of the learned judge, delivered on 23 April 2018, are unreasonable and erroneous in law, based on the circumstances of the case. This issue turns on the sub-issues of:

I. Whether the learned judge considered the provisions of section 32 of the Police Service Regulations and addressed her mind to the seven and a half years it took the respondent to investigate and take disciplinary action against the appellant and the possible effect of prejudice to him.

II. Whether the learned judge erred in her findings that the appellant's dismissal was not ultra-vires and or excessive.

III. Whether the learned judge erred in finding that the appellant did not have a right to claim damages for his alleged loss as a result of the respondent's administrative action to dismiss him from the JCF.

Sub-issue I - Whether the learned judge considered the provisions of section 32 of the Police Service Regulations and addressed her mind to the 7 ½ years it took the respondent to investigate and take disciplinary action against the appellant and the possible effect of prejudice to him.

Summary of submissions

For the appellant

[17] Miss Jarrett submitted that the learned judge erred when she accepted the respondent's explanation for the delay despite: (i) the four years that had elapsed before the investigation commenced and (ii) her findings that the investigation process was not as efficient as it should have been.

[18] Counsel also referred to regulation 32 and emphasised that, even though the term "as soon as possible thereafter" was not defined therein, the respondent was obliged to act within a reasonable time. She cited the case of **Hui Chi-Ming v R** (1992) 1 AC 34, to explore the meaning of 'abuse of process'. Miss Jarrett also cited **R v Chief Constable of Merseyside Police ex parte Calveley and Others** (1986) 1 QB 424, ('**R v Chief Constable of Merseyside Police**') to submit that, in the instant case, the appellant was not given an early opportunity to give a denial or an explanation and to collect evidence in support of either. She contended that, while regulation 32 did not specify a time period within which a charge may be brought, the respondent's act of waiting four

years before informing the appellant of the complaint and instituting disciplinary proceedings against him resulted in an abuse of process.

[19] Miss Jarrett also referred to paras. 48 and 49 of the learned judge's written judgment to submit that the learned judge failed to appreciate that, regardless of the reason for the delay, the appellant should have been informed earlier and given an opportunity to respond. She argued that the delay of seven and a half years it took the respondent to investigate the matter and take disciplinary action against the respondent was contrary to the objective of the Regulations, which is to deal with matters fairly.

[20] The following cases were cited by counsel to submit that the period of delay in the instant appeal was unreasonable and amounted to an abuse of process: **R (on the Application of Rycroft) v Royal Pharmaceutical Society of Great Britain** (2010) EWHC 2832 (Admin), ('**Royal Pharmaceutical Society**'); **R (Gibson) v General Medical Council and Another** (2004) EWHC 2781 (Admin); **Attorney General's Reference (No 1 of 1990)** (1992) 1 QB 630 and **Blencoe v British Colombia Human Rights Commission** (2000) 2 SCR 307.

[21] Counsel also maintained that the delay was the fault of the respondent and that the lengthy delay would have affected the recollection of the witnesses called to give evidence. The case of **Bell v DPP and Another** (1985) AC 937 was referred to by counsel to submit that, although the appellant did not lead evidence of the specific prejudice to him, it did not mean there was no prejudice.

For the respondent

[22] In response, Mrs Rowe-Coke submitted that the resolution of this issue was twofold and would require the consideration of the questions of: (i) whether the delay was unreasonable; and (ii) the effect, if any, that this delay would have had on the appellant's case. Counsel further argued that the appellant inaccurately relied on the case of **R v Chief Constable of Merseyside Police**, on the basis that, while in that case the failure to comply with regulation 7 of the Police (Discipline) Regulations 1977, was found

to be an abuse of process; the focus of regulation 7 in that case was different from the focus of regulation 32 in the instant appeal. Counsel contended that in **R v Chief Constable of Merseyside Police**, the court found that there was evidence before it regarding the departure from the disciplinary procedure which had resulted in "irremediable prejudice" to the applicants. Whereas, in the instant case, the learned judge found that instituting disciplinary charges against the appellant four years later was not prejudicial to the appellant, given the circumstances of this case.

[23] The crux of Mrs Rowe-Coke's argument was that delay by itself does not necessarily amount to prejudice and that it was the appellant's duty to provide evidence to the court that he suffered prejudice, which the learned judge found that he had not done. Counsel further argued that the appellant did not advance any argument to the court of enquiry regarding the delay so he should not be allowed to rely on the issue of delay now.

Analysis

[24] The starting point for this discussion is regulation 32(1) of the Regulations which states:

> "Any report of misconduct on the part of a member shall be made to the Commissioner and dealt with under this Part as soon as possible thereafter."

[25] Based on regulation 32(1), it is quite obvious that there was no stipulated time period within which a report ought to be made to the Commissioner and for him to deal with any report of misconduct. Nonetheless, this court is of the view that 'as soon as possible thereafter' is to be given its regular meaning which we can agree is 'within the shortest time possible'.

[26] In the case of **Royal Pharmaceutical Society**, Wyn Williams J, at para. 39 said:

> "39. Although the Claimant has identified aspects which clearly amount to prejudice in the way that this word is normally understood (not least the fact that allegations have

> been hanging over his head for far too long thereby causing him financial loss) Mr Dingemans QC was frank enough to concede that it could not be established that the delay was such that a fair hearing was not possible or that it was unfair to proceed against the Claimant."

[27] According to this dictum in **Royal Pharmaceutical Society**, a period of delay of approximately two years and five months, by itself, was not enough to constitute an unfair proceeding. It has to be proven that there was some prejudice suffered as a result of the delay. Therefore, this court will examine the judgment from the court below to determine whether the learned judge, in arriving at her findings, considered (i) the period it took the respondent to deal with the appellant's case; and (ii) the effect, if any, that the delay had on the proceedings.

[28] The learned judge, at paras. 48 to 50 of the judgment, reasoned the matter thus:

> "[48] There is no doubt that the delay in question was significant, and without more I agree that 4 years is a long time in which to investigate a complaint. However, I do not agree with Counsel for the Claimant that no reason was given for the delay by the Defendant. In his Affidavit in response to the Fixed Date Claim Form filed by Mr Burton, Dr Carl Williams gave an explanation as to why there was a delay between September 2006 when the altercation took place and January 2011 when Mr Burton was first informed that disciplinary action would be taken against him. I have considered that the delay was largely administrative and to some extent involved internal investigation done by the JCF themselves before charges were laid. In particular, Dr. Williams noted that Corporal Reid would not comply with the investigation and this accounted for some of the delay as well as the backlog in cases to be investigated. The question is whether this Court, having considered the reasons submitted, would agree that the delay is unreasonable.
>
> [49] I have considered that Corporal Reid was charged as well and understandably reluctant to cooperate. Also, the JCF is a large organization and based on Dr. Williams' evidence of reduced human resources, the investigation process was not as efficient as it should be. As such, I do not find that the

> explanation for delay, based on the evidence, is unreasonable having regard to the circumstances presented before me.
>
> [50] Is there prejudice as a result of this delay? I have not accepted the Claimant's arguments on this point as being legitimate in terms of the delay affecting the availability of witnesses since it not [sic] reasonable to presume that he had other witnesses and he has not indicated otherwise. In any event, I am not sure what prejudice would have arisen as the case would still depend on the credibility of witnesses and he himself did not give evidence. I will not delve into the specifics of the hearing itself but as I see it, Mr Burton did not raise any issues of witnesses being in or around the area at the time of the incident nor did Sergeant Walker and Constable Cohen. As such, I find that there was no prejudice to the Claimant as a result of the delay in the disciplinary proceedings."

[29] A careful review of the judgment makes it is clear that the learned judge considered the respondent's delay and the reasons for the delay in arriving at her findings. She also considered whether the appellant was prejudiced by the delay. We are of the view that the learned judge correctly exercised her discretion in accepting the respondent's evidence as to the reasons for the delay and in rejecting the appellant's contention that he was prejudiced by the delay. These were conclusions at which the learned judge was entitled to arrive, based on the evidence before her. It is also fair to say that they were conclusions at which any other judge could reasonably have arrived, based on the evidence and the circumstances of the case.

[30] The next question to consider is whether the appellant proved to the learned judge that he suffered prejudice as a result of the delay. Both counsel referred to the case of **R v Chief Constable of Merseyside Police**. This court accepts Mrs Rowe-Coke's argument in relation to the usefulness of that case on the basis that the circumstances in the instant appeal are distinguishable from those in that case. To appreciate the differences, it is helpful to briefly explore the facts. In that case, on 21 June 1981, complaints were filed against five officers of the Merseyside Police. In essence, five men charged with being drunk and disorderly alleged that they were assaulted by the

policemen in the police van whilst being taken to the police station. An investigating officer was appointed on 30 June of that year, however, no formal notification of the complaints under regulation 7 of the Police (Discipline) Regulations 1977, was given until November or December 1983 (some two years after).

[31] A disciplinary hearing took place in September 1984. Despite the officers' submissions that the delay had caused irremediable prejudice (since records and logs from the time of the incident had been destroyed), the Chief Constable rejected their submissions. The officers were found guilty and were either dismissed from the force or required to retire. They appealed the Chief Constable's decision under section 37 of the Police Act 1964, and also sought judicial review. However, the Divisional Court refused their application for judicial review to quash the decision of the Chief Constable, deeming it premature due to the availability of an alternative appeal process. On appeal to the Court of Appeal, it was held that:

> "… the judicial review jurisdiction would not normally be exercised where there was an alternative remedy by way of appeal, save in exceptional circumstances; that the speed of the alternative procedure, whether it was as convenient and whether the matter depended on some particular or technical knowledge available to the appellate body were all factors to be taken into account in considering whether the circumstances were exceptional; that (per May L.J.) where the basis of the application was delay in taking the necessary proceedings judicial review should only be granted where the delay amounted to an abuse of process, and that in the circumstances, despite the expertise of the appeal tribunal, the delay of over two years before the service of the regulation 7 notices was a serious departure from the disciplinary procedure (per May L.J. amounting to an abuse of process) which had prejudiced the officers and which justified the grant of judicial review…"

[32] For a full exploration of **R v Chief Constable of Merseyside Police**, we will also look at regulation 7, which provides:

> "The investigating officer shall, as soon as is practicable (without prejudicing his or any other investigation of the matter), in writing inform the member subject to investigation of the report, allegation or complaint and give him a written notice - (a) informing him that he is not obliged to say anything concerning the matter, but that he may, if he so desires, make a written or oral statement concerning the matter to the investigating officer or to the chief officer concerned, and (b) warning him that if he makes such a statement it may be used in any subsequent disciplinary proceedings."

[33] The case of **Reg v Secretary of State for the Home Department, Ex parte Miller** (unreported), 4 May 1983, is also relevant. In that case the question of whether compliance with regulation 7 was mandatory or directory was considered and a divisional court consisting of Robert Goff LJ and Glidewell J held that it was directory, relying in part on a previous decision of that court: **Kilduff v Wilson** [1939] 1 All ER 429.

[34] It is significant to note that, in the case of **R v Chief Constable of Merseyside Police**, there were verified reports of routine destruction of divisional incident reports, including radio messages and logs relating to 21 June 1981, as well as routine destruction of "parade states", showing what other officers were on duty on the said date. The absence of these records, in the circumstances, could clearly have hindered the policemen in the presentation of their defences. In the instant appeal, however, there was no contention of any witness being present or of any record that might have assisted the applicant having been destroyed. There was, therefore, nothing put forward to support an allegation of prejudice; nor was an allegation of actual prejudice made at all.

[35] Additionally, in the instant appeal, we see where, unlike in **R v Chief Constable of Merseyside Police**, despite the delay in initiating the investigation and notifying the appellant (Regulation 32), the respondent gave reasons in the affidavit of Dr Williams, which could reasonably have been accepted by the learned judge who acted in accordance with the requirements of regulation 47 (which I shall shortly consider). I find that the learned judge considered the provisions of regulation 32 and addressed her mind to the seven and a half years it took the respondent to investigate and take disciplinary

action against the appellant. I am of the view that the learned judge also gave fair consideration to the possible effect of prejudice to the appellant. Having done so, she arrived at the reasoned and reasonable conclusion that it had not been demonstrated that he suffered any prejudice at all.

[36] This court also accepts Mrs Rowe-Coke's submission that delay in and of itself does not necessarily amount to prejudice. In fact, this is illustrated by one of the cases cited by the appellant – that of **Gibson**. In that case, the delay amounted to some five years and, although there was a finding that the delay was unsatisfactory, it was still deemed permissible and fair for the hearing to proceed. The court took that view although the disciplinary proceedings against the appellant (who was a doctor) in that case, were brought after he had retired. One important ruling that the court made in that case may be seen at para. 26 of the judgment where it was observed that:

> "…in order for a stay to be justified, the party seeking the stay must establish either that a fair trial would not be possible, or that for some other compelling reason it would be unfair to try him."

[37] In the case below, we see no demonstration that the hearing after the delay would have been unfair or that some other compelling reason existed for the hearing not to have been conducted, despite the delay.

[38] Further, I agree with the learned judge's findings that the appellant did not suffer any prejudice as a result of the delay, given the fact that he did not provide any evidence to support this argument and it is an accepted principle in law that he who alleges must prove. Therefore, I cannot reasonably find that the learned judge erred in any respect in her treatment of this issue. As a result, I conclude that this ground has no merit.

Sub-issue II- Whether the learned judge erred in her findings that the appellant's dismissal was not ultra-vires and/or excessive.

Summary of submissions

For the appellant

[39] Miss Jarrett referred to the case of **Council of Civil Service Unions v Minister for the Civil Services** (1985) AC 374, which was also cited by the learned judge in para. 55 of her judgment. Counsel adopted a dictum of Lord Diplock at page 410 para. G, to submit that the respondent's decision was irrational in the circumstances and cannot be supported by the facts of the case. Counsel also referred to regulation 46(2) and the evidence of Superintendent Bent to submit that the actions for which the appellant was dismissed were minor and the respondent's sanction of dismissal was disproportionate, oppressive and unreasonable, based on the circumstances of the case and the appellant's service record.

[40] The cases of **R v Crown Court at St Albans, ex p Cinnamond** (1981) QB 480, and **Dad v General Dental Council** (2000) WLR 1538, were also prayed in aid to submit that the learned judge erred when she found that the respondent's decision to dismiss the appellant was not irrational in the circumstances of the case.

For the respondent

[41] Mrs Rowe-Coke, in response, submitted that the learned judge correctly considered the relevant facts and case law to arrive at the decision that she made. Counsel referred to Superintendent Bent's evidence where he said that, in his view, the offence was minor, and submitted that this was not the conclusion that ought to be drawn. She also directed the court to the evidence of the former Commissioner of Police, Dr Williams at para. 19 and submitted that, according to Dr Williams, the appellant was charged for a serious offence. Mrs Rowe-Coke also mentioned the Second Schedule to the Regulations, which, she argued, outlined a list of minor offences and emphasised that the offence for which the appellant was charged was not listed therein. On this basis, she submitted that the appellant was not charged with a minor offence. As a result, she argued, the Commissioner acted within the scope of the Regulations to institute disciplinary proceedings against the appellant and ultimately dismiss him.

[42] Counsel cited **Linton Allen v His Excellency, The Right Honourable Sir Patrick Allen & The Public Services Commission** [2017] JMSC Civ. 24, and argued that, in that case, the penalty imposed on the claimant was a reduction in rank and the court found that the claimant did not present evidence of similar cases where a lesser penalty was imposed. In applying that case to the instant appeal, counsel submitted that the appellant did not present evidence of cases with similar circumstances where a lighter penalty was imposed. Therefore, she concluded, the appellant had no basis on which to argue that the dismissal was excessive and *ultra vires.*

Analysis

[43] It is trite law that the court's function in matters of judicial review is supervisory in nature. The case of **Associated Provincial Picture Houses Limited v Wednesbury Corporation** [1948] 1 KB 223, ('**Associated Provincial Picture Houses**') is quite helpful to the instant appeal. **Associated Provincial Picture Houses** establishes a key principle of judicial review regarding the reasonableness of discretionary decisions made by local authorities. The Privy Council upheld the decision of the lower court that the local authority was within its rights to have imposed the condition restricting children under 15 years' old from attending Sunday cinema performances under the Sunday Entertainments Act, 1932 and the Cinematograph Act, 1909.

[44] The ruling in **Associated Provincial Picture Houses** emphasises the point that, when an authority has broad discretionary powers, the court's role is not to substitute its own judgment for that of the authority. Instead, judicial review is limited to assessing whether the authority: (i) considered irrelevant factors, (ii) failed to consider relevant factors, (iii) acted beyond its legal powers (*ultra vires*); or (iv) acted unreasonably. The 'Wednesbury unreasonableness principle' established in that case clearly states that an authority's decision is only unlawful if it is so unreasonable that no reasonable authority could have made it.

[45] In **Associated Provincial Picture Houses**, Lord Greene, MR, at page 228, said:

> "What, then, is the power of the courts? They can only interfere with an act of executive authority if it be shown that the authority has contravened the law. It is for those who assert that the local authority has contravened the law to establish that proposition. On the face of it, a condition of the kind imposed in this case is perfectly lawful. It is not to be assumed prima facie that responsible bodies like the local authority in this case will exceed their powers; but the court, whenever it is alleged that the local authority have [sic] contravened the law, must not substitute itself for that authority. It is only concerned with seeing whether or not the proposition is made good. When an executive discretion is entrusted by Parliament to a body such as the local authority in this case, what appears to be an exercise of that discretion can only be challenged in the courts in a strictly limited class of case. As I have said, it must always be remembered that the court is not a court of appeal. When discretion of this kind is granted the law recognizes certain principles upon which that discretion must be exercised, but within the four corners of those principles the discretion, in my opinion, is an absolute one and cannot be questioned in any court of law." (Emphasis added)

[46] Based on the authorities, I have concluded that, in the instant case, the learned judge could reasonably have found the respondent's act of dismissing the appellant from the JCF to be reasonable. This court would not interfere with the decision of the learned judge unless we were to find it to be so unreasonable that other judges in her position, having considered all the relevant evidence, could not have arrived at that decision, and we have not so found.

[47] It is important to note that the learned judge considered the 'Wednesbury unreasonableness principle' quoting a section from **Associated Provincial Pictures**, in para. 34 of her judgment, and considered it against the backdrop of regulation 47 to determine whether the respondent acted in keeping with the stipulations of that regulation.

[48] This now brings us to regulation 47(1) and (2), which state:

"47.- (1) Subject to the provisions of these Regulations a member may be dismissed only in accordance with the procedure prescribed by this Regulation.

(2) The following procedure shall apply to an investigation with a view to the dismissal of a member-

(a) the Commission or, in relation to a member below the rank of Inspector, the Commissioner (after consultation with the Attorney-General if necessary) shall cause the member concerned to be notified in writing of the charges and to be called upon to state in writing before a specified day (which day shall allow a reasonable interval for the purpose) any grounds upon which he relies to exculpate himself;

(b) if the member (being of or over the rank of Inspector) does not furnish such a statement within the time so specified or he fails to exculpate himself the Governor-General shall on the recommendation of the Commission appoint a court of enquiry consisting of one or more persons (who may include the Commissioner, or other Officer) to enquire into the matter; the members of the court shall be selected with due regard to the rank of the member concerned, and to the nature of the charges made against him;

(c) if a member below the rank of Inspector does not duly furnish such a statement as aforesaid or if he fails to exculpate himself the Commissioner shall appoint a court of enquiry (constituted as under sub-paragraph (b)) to enquire into the matter;

(d) the court shall inform the member charged that on a day specified the court will enquire into the charges and that he will be permitted to appear before the court and defend himself;

(e) if witnesses are examined by the court the member shall be given an opportunity of being present and of putting questions to the witnesses on his own behalf, and no documentary evidence shall be used against him unless he has previously been supplied with a copy thereof or given access thereto;

(f) the court may in its discretion permit the member charged or the person or authority preferring the charges to be represented by another member or by a member of the public service or by a solicitor or counsel and may at any time, subject to such adjournment as in the circumstances may be necessary, withdraw such permission; so, however, that where the court permits the person or authority preferring the charges to be represented the member charged shall be given the like permission;

(g) if during the course of the enquiry further grounds of dismissal are disclosed, and the Commission thinks fit to proceed against the member upon such grounds, the Commission shall cause the member to be furnished with the written charge and the same steps shall be taken as those prescribed by this regulation in respect of the original charge;

(h) if having heard the evidence in support of the charges the court is of the opinion that the evidence is insufficient it may report accordingly to the Commission without calling upon the member for his defence;

(i) the court shall furnish to the Commission a report of its findings (which may include a report on any relevant matters) together with a copy of the evidence and all material documents relating to the case; if the Commission is of opinion that the report should be amplified in any respect or that further enquiry is desirable, it may refer any matter back to the Court for further enquiry or report accordingly;

(j) if the Commission is of opinion that the member should be dismissed the Commission shall recommend to the Governor-General that an order be made accordingly;

(k) if the Commission is of opinion that the member deserves some punishment other than dismissal, it shall recommend to the Governor-General what other penalty should be imposed;

> (l) if the Commission is of opinion that the member does not deserve to be dismissed by reason of the charges alleged, but that the proceedings disclose other grounds for removing him from the Force in the public interest, it may recommend to the Governor-General that an order be made accordingly, without recourse to the procedure prescribed by regulation 26."

[49] Regulation 47 outlines the procedure that ought to be followed by the respondent when investigating a member with a view to dismissing him. I find that the learned judge gave careful consideration to the applicability of regulation 47 to the case before her in order to arrive at her decision. Paras. 41 to 43 of the judgment, which show that this was done, read thus:

> "[41] By way of letter dated 24th February, 2011, from the Commissioner's office, Mr Burton was informed that disciplinary charges were laid in accordance with Regulation 47 and he had the option to make a statement to exculpate himself no later than March 15, 2011. Attached to this letter, were the charges which were laid, statements from Sergeant Walker and Constable Cohen and a copy of the Portmore Station Diary. On 15th March, 2022, Mr Burton acknowledged service charges [sic], statements and a copy of the Station Diary. He also chose to reserve his defence until the hearing.
>
> [42] The Court of Enquiry proceedings began on the 29th June, 2011 and ended on 5th October, 2011. Notes of the Proceedings indicate that Mr Burton was present on all occasions and was represented by a member of the Police Federation at each hearing. This representative was allowed to cross-examine witnesses and at the end of the trial, Mr Burton and his legal representative chose to rest his case on the No Case Submission made on his behalf.
>
> [43] Therefore, I find that all the requirements of Regualtion 47 have been met."

[50] In addition, the learned judge considered whether the respondent acted in a manner that was *ultra vires*. She did this in the course of general exploration of the questions as to whether there was irrationality and/or illegality on the part of the respondent, and/or whether the respondent considered irrelevant factors, and/or failed

to consider relevant factors and/or acted in bad faith and/or used his powers for an illicit purpose. At para. [69] of her written judgment, the learned judge considered the case of **Glenroy Clarke v Commissioner of Police and Another** (1996) 33 LJR 50, and at para. [70] of her written judgment she said:

> "Even if I had found that Mr. Burton was given an unfair hearing, the Court would still not be able to grant an order of mandamus for the very reason that the Court has no jurisdiction to determine the standard of members of the JCF. This was an important point underpinning the findings outlined in the case of **R v [T]he Commissioner of Police ex parte Courtney Ellis** [2014] JMSC Civ. 97."

[51] She also gave consideration to the case of **Ridge v Baldwin and Others** [1963] 2 ALL ER 66 ('**Ridge v Baldwin**'). While the facts of that case are not relevant to those in the instant appeal, the principles stated therein, especially as they relate to natural justice, are applicable. Lord Hodson, at page 114 para. E of **Ridge v Baldwin**, made the following observation:

> "If it be said that this makes natural justice so vague as to be inapplicable, I would not agree. No one, I think, disputes that three features of natural justice stand out — (1) the right to be heard by an unbiased tribunal, (2) the right to have notice of charges of misconduct, (3) the right to be heard in answer to those charges. The first does not arise in the case before your lordships, but the two last most certainly do and the proceedings before the watch committee therefore, in my opinion, cannot be allowed to stand."

[52] The case underscores the importance of notifying the appellant of the charges against him, facilitating a fair hearing before an unbiased tribunal and allowing the appellant to answer to the charges. In applying the principles of **Ridge v Baldwin** to the instant appeal, it is clear that, had the respondent failed to comply with the requirements of regulation 47, the decision to dismiss the appellant would have been rendered void or voidable, as the respondent would have acted in contravention of the requirements of natural justice. However, this is not the case in the instant appeal. There was full compliance with regulation 47.

[53] Counsel for the appellant also referred to regulation 46(2). The point in respect of which the appellant referred to this regulation can be dealt with shortly. Regulation 46(2) reads as follows:

> "46(2) Where –
>
> (a) it is represented that a member below the rank of inspector has been guilty of misconduct; and
>
> (b) the authorized officer is of the opinion that the misconduct alleged is not so serious as to warrant proceedings under regulation 47 with a view to dismissal,
>
> the authorized officer may make or cause to be made an investigation into the matter in such manner as he may think proper…" (Emphasis added).

[54] In the Regulations, "authorized officer" is defined as meaning: "the Commissioner or any other Officer not below the rank of Assistant Commissioner of Police or, except in relation to a member of or above the rank of Inspector, a commanding Officer".

[55] On the plain words of this regulation, the "authorized officer" is given a discretion, as indicated by the use of the word "may" and of the additional phrase "as he may think proper". A decision whether or not to have an investigation conducted is entirely within the remit of the authorised officer, and there are no words used, or circumstances outlined delimiting the width of that discretion. The fact that the appellant was tried pursuant to regulation 47 leads to the reasonable conclusion that that was considered to be the appropriate regulation under which to charge and try him for the offences alleged. In the result, I find that that point was not made out.

[56] Having read the judgment from the court below, I find that the learned judge considered the relevant regulations and weighed them against the facts before her, regarding the actions of the respondent when dealing with the investigation and hearing against the appellant. I must also state that it is not, strictly speaking, necessary to

determine whether the offences the appellant was charged with were minor or major. However, considering that they do not appear among the minor offences listed in the Second Schedule, it would be reasonable to conclude that they could not fairly be regarded as minor. This court's main concerns, however, were with the manner in which the investigation was done, the time that elapsed and with whether the respondent acted within the powers outlined in the Regulations and in keeping with the principles of natural justice. In my finding, he did, and, on the evidence before her, the learned judge was entitled to have so found. I have also considered whether the decision of the respondent to dismiss the appellant in the circumstances, and given the facts before him, were so unreasonable that no other court of enquiry or Commissioner would have arrived at the same decision. This court cannot, in all the circumstances, answer this question in the affirmative. This ground therefore fails.

Sub - issue III - Whether the learned judge erred in finding that the appellant did not have a right to claim damages for his alleged loss as a result of the respondent's administrative action to dismiss him from the JCF

Summary of submissions

For the appellant

[57] Miss Jarrett, in her written submissions, quoted rule 56.10 of the Civil Procedure Rules, 2002 ('the CPR') to submit that a claimant who makes an application for judicial review may be awarded damages along with another remedy. She also referred to para. [73] of the written judgment where the learned judge relied on **Berrington Gordon v The Commissioner of Police** (2012) JMSC Civ. 46, ('**Berrington Gordon**'), to rule that the appellant was not entitled to an award of damages as a part of his application before her. Counsel referred to that case to submit that the denial of a claim for damages was not based solely on the judge's assessment of whether the administrative action was unlawful but was also done on the premise that the claimant had failed to sufficiently set out his case. Miss Jarrett encouraged this court to bear that distinction in **Berrington Gordon** from the instant appeal and submitted that, in the instant case, the lack of proof

of malice on the part of the respondent does not prevent a tribunal from making the appropriate order for damages.

[58] In concluding her submissions, counsel contended that, despite the learned judge's findings that there was no unlawful administrative act, she erred in her statement of the law. Miss Jarrett further emphasised that where a claim for damages is included in a claimant's statement of case, in which he is seeking judicial review, the court has the power to grant the relief sought or make case management orders, rather than imposing a requirement for a separate claim to be filed in respect of the claim for damages.

For the respondent

[59] In response, Mrs Rowe-Coke submitted that the learned judge was correct in not awarding damages to the appellant. She argued that, in order for there to be an award of damages in a claim for judicial review, there had to be a claim in private law or a cause of action for which damages could have been awarded. To support her argument, she quoted para. 54.3.8 of the White Book: Civil Procedure, and applied it to the instant case by submitting that the appellant neither had a claim nor cause of action in private law.

[60] Counsel also referred to page 289, para. 25.3.1, of the 6th Edition of the Judicial Review Handbook by Michael Fordham, which, she contended, emphasised the principle of law that there is no general right to damages for public wrongs. The cases of: **R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs** [2005] UKHL 57, [2006] 1 AC 529 at [96], (**Quark Fishing Ltd**') and **Berrington Gordon**, were cited to reiterate the principle that there is no general right to damages in public law. In closing, Mrs Rowe-Coke contended that there was no cause of action in tort in the instant appeal and thus, the appellant could not have been entitled to an award of damages.

Analysis

[61] Having regard to how the other issues have been decided, it is not necessary to determine this issue Nevertheless, I will give brief consideration to it. On the point of

whether the appellant has a right to claim damages for his loss as a result of the respondent's administrative action to dismiss him from the JCF; I will briefly explore the case of **Quark Fishing Ltd**. In that case, Baroness Hale of Richmond, at para. 96 said:

> "[96] …Our law does not recognise a right to claim damages for losses caused by unlawful administrative action (although compensation may sometimes be available to the victims of maladministration). There has to be a distinct cause of action in tort or under the Human Rights Act 1998. No-one suggests that there is an action in tort here."

[62] This dictum establishes the principle that there is no right to claim damages for losses caused by administrative action unless a distinct cause of action arises in tort.

[63] Another relevant authority is **Berrington Gordon,** which was referred to in Mrs Rowe-Coke's written submissions and in the learned judge's judgment. At para. [2] of that case, Sykes J (as he then was) opined:

> "The relief of damages can be dealt with summarily. It is well established that unlawful administrative action does not generally give rise to a claim for damages. It is true that a functionary can be held liable in damages in negligence, breach of statutory duty and misfeasance in public office but that is because the conduct of the functionary goes beyond mere unlawful conduct. Judicial review is about process not merits and an unlawful process does not usually give rise to damages unless there is some other kind of conduct than just, for example, a failure to be fair. Usually, for damages to be claimed because of an unfair process there usually has to be an assertion (supported by evidence) that the decision maker acted out of malice or spite towards the applicant for judicial review. Also, it is my view that if the claimant is seeking damages the pleaded case ought to set out the factual basis for such a claim. To simply state the claim for damages in the fixed date claim form without following up, in the affidavit, with stating the facts on which the claim is based is not sufficient." (Emphasis added)

[64] In applying both cases to the instant appeal, it is evident that the appellant was still actively employed to the JCF from the date of the incident until he was served with

a notice of suspension on 31 January 2014. It can reasonably be inferred that he was still being paid during that period of time. It was, therefore, logical for the court below to find that the appellant did not suffer any prejudice as a result of the extended period it took for the respondent to: complete its investigation; hold the court of enquiry; and make its final decision to dismiss the appellant. It could be said that the appellant was actually still benefiting from being a member of the JCF until the investigation and hearing were completed. Prior to 21 March 2014, when his dismissal was published in the weekly force orders, he was not deprived of his entire wages and so from a financial standpoint he would not have been prejudiced.

[65] Moreover, the appellant did not furnish the court below with evidence of his loss (**Berrington Gordon**) and so it is unreasonable to expect that the learned judge could have made an award of damages in support of it when no evidential basis existed for calculating any such loss. In relation to his claimed right to damages, the appellant failed to adhere to that trite principle of law that he who alleges must prove. I also agree with the learned judge that the appellant's dismissal did not give rise to a cause of action in tort, thus, he had no claim to damages for the administrative decision of the respondent to dismiss him. Based on the foregoing, this ground also fails.

A procedural point

[66] During the course of argument by the appellant, counsel for the respondent raised a procedural point along the lines of an objection that could have been made as a point *in limine*. The substance of it is set out at para. 2 of brief written submissions we directed counsel to prepare and serve, and is as follows:

> "2. The Respondent submits that the Appellant, having appealed his dismissal from the Jamaica Constabulary Force ("JCF") by the Respondent to the Local Privy Council, is bound by the decision of the Privy Council, is bound by the decision of the Privy Council, [sic] and the Respondent's decision is therefore moot and he is not a property party in the circumstances of these proceedings (neither in the Judicial Review Court below nor the Court of Appeal herein)."

[67] In support of this point, Mrs Rowe-Coke cited the authorities of **Nyoka Segree v The Police Service Commission** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 142/2001, judgment delivered 11 March 2005, ('**Nyoka Segree**') and **Leroy Thompson v The Commissioner of Police and The Attorney General of Jamaica** [2012] JMSC Civ 166 ('**Leroy Thompson**'). The brief additional background that formed the basis of this submission was that the appellant appealed the respondent's decision to the local Privy Council and the Privy Council dismissed the appeal and upheld the respondent's decision.

[68] In response to this point, Miss Jarrett submitted that the cases cited by the respondent did not assist the respondent and are distinguishable from the case at bar. She also argued that the process at the local Privy Council would not have allowed for any issues that might have been raised by the appellant to have been fully ventilated. Further, counsel also contended that the appellant can raise issues before the Court of Appeal whether or not he raised those issues at the local Privy Council.

[69] In her written submissions, Miss Jarrett cited **Board of Management of Bethlehem Moravian College v Dr Paul Thompson and the Teachers Appeals Tribunal** [2015] JMCA Civ 41, to submit that all stages in a statutory decision-making process were amendable to judicial review. The case of **Council of Civil Service Unions v Minister for the Civil Service** [1984] 3 ALL ER 935, was also cited to emphasise that the role of the court in judicial review proceedings is to review whether the actions of public bodies are lawful rather than to appeal the decision. Counsel's main contention in relation to this procedural point is that the respondent is indeed the proper party to the proceedings and the decision of the local Privy Council did not prevent the court from examining the lawfulness of the respondent's actions. The main arguments advanced might be seen in paras. 15 and 16 (and a part of para. 19) of the appellant's submissions in response as follows:

> "15. In the case at bar, the Appellant seeks to review **the actions** of the Commissioner of Police in arriving at his decision that the Appellant ought to be dismissed from the

> Jamaica Constabulary Force (JCF). The Appellant's contention is that in arriving at his decision the Commissioner of Police acted unlawfully and breached the principles of natural justice.
>
> 16. It is submitted that there is therefore no need in the instant case to add the Local Privy Council as a party to the judicial review proceedings. There is no challenge by the Appellant in respect of the decision-making process of the Local Privy Council, which merely reviewed the decision of the Commissioner of Police. There are also no actions by the Local Privy Council which give rise to a breach of the rules of natural justice.
>
> …
>
> 19. …The decision being later reviewed and affirmed by the Local Privy Council does not prevent the court from exercising its powers to review the Commissioner's actions. We submit that based on the circumstances of this case, it would have been an improper exercise of the court's function in a judicial review proceeding to embark upon an exercise to examine the order of the Governor-General."

Discussion

[70] In light of how the matter has otherwise been resolved, it is not strictly necessary to determine this issue. However, I will do so briefly.

[71] In **Nyoka Segree**, Downer JA, writing on behalf of this court, opined, at page 13 of the judgment, that:

> "…Even if there had been no fair hearing by the Commission, so that the decision would have to be quashed, Inspector Segree still would have been bound by the decision of the Privy Council which accepted the advice of the Police Service Commission."

It was further observed at page 17 that:

> "…Even if the order of the Police Service Commission were to be quashed, since there was a reference to the Privy Council and that body had decided to confirm the advice of the Police

> Service Commission, the order of the Governor-General in Privy Council would still stand…"

[72] That is the substance of the decision, upon which the later case of **Leroy Thompson** was based. The focus was (as it is in the respondent's submissions in this case) on the non-joinder of the Governor General to the case as a basis for challenging his decision, which, it must be recognised, was an undeniable part of the entirety of the actions taken in this case. The appeal to the Governor General was an important part of the process, and that right of appeal is granted by the Regulations. Although the appellant contends that he is not challenging the decision-making process of the Privy Council, the fact of the matter is that that body has, in essence, confirmed a decision and a process that he contends on several grounds to be fundamentally flawed. Surely, then, a part of his contention must be that an error was also made in that regard. It is our view that the significance of the Privy Council's decision as outlined in **Nyoka Segree** must also apply to this case. We would therefore rule that to challenge the entire process set out in the regulations, the appellant ought properly to have joined the Governor General, for what that might have been worth. The respondent's procedural point, therefore, succeeds.

Conclusion

[73] It is clear that the appellant failed to furnish the court below with the evidence needed to prove that the delay (albeit significant and unfortunate) was prejudicial to him and that he suffered a loss that would support his claim for damages. This court must also reiterate that remedies in judicial review are discretionary, and the learned judge had sufficient evidence before her to have arrived at the decision that she did. Having resolved the sub-issues in the manner that we have, there is only one way in which to resolve the main issue in this appeal. I find that the orders of the learned judge were reasonable and unassailable, having regard to the facts and circumstances of the case and so would dismiss the appeal.

[74] Additionally, given that the appellant is unsuccessful in all of the grounds advanced, no reason exists for us to depart from the general rule in the award of costs

of the appeal, which is that costs follow the event. I will, however, propose that he be permitted to make submissions on costs if he disagrees with the order.

[75] In the result, I propose the following orders:

i. The appeal against the orders of Bertram Linton J, made on 18 September 2017, is dismissed.

ii. The appellant is permitted to file and serve submissions on the costs of the appeal within seven days of the date of this order.

iii. The respondent, within seven days of being served with the appellant's said submissions, is permitted to file and serve submissions in response on the costs of this appeal and the court will, thereafter, make its final ruling on costs on paper.

iv. Should the appellant fail to file and serve the said submissions in accordance with order ii above, the final order of the court shall be costs of the appeal to the respondent to be agreed or taxed.

SIMMONS JA

[76] I have read, in draft, the judgment of F Williams JA. I agree with his reasoning and conclusion and have nothing to add.

LAING JA (AG)

[77] I, too, have read the draft judgment of F Williams JA and agree with his reasoning and conclusion.

F WILLIAMS JA

ORDER

i. The appeal against the orders of Bertram Linton J, made on 18 September 2017, is dismissed.

ii. The appellant is permitted to file and serve submissions on costs of the appeal within seven days of the date of this order.

iii. The respondent within seven days of being served with the appellant's said submissions is permitted to file and serve submissions in response on the costs of this appeal and the court will, thereafter, make its final ruling on costs on paper.

iv. Should the appellant fail to file and serve the said submissions in accordance with order ii above, the final order of the court shall be costs of the appeal to the respondent to be agreed or taxed.