

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO COA2019CV00002

APPLICATION NO COA2019APP00038

BETWEEN	THE PUBLIC SERVICE COMMISSION	1st APPLICANT
AND	THE ATTORNEY GENERAL OF JAMAICA	2nd APPLICANT
AND	DALE AUSTIN	RESPONDENT

Mr Garth McBean QC and Ms Dian C Johnson instructed by Garth McBean & Co for the applicants

Ms Judith M Clarke, Ms Jamela Thomas and Mr Dale Austin instructed by Judith M Clarke & Co for the respondent

28 May, 6 June 2019 and 29 September 2025

Civil procedure – Application for stay of execution – Whether appeal has merit – Balance of injustice

Civil procedure – Costs – Criteria for granting special costs certificate – Civil Procedure Rules 64.6, 64.12 and 65.17(3)

IN CHAMBERS

D FRASER JA (AG)

Introduction

[1] On 28 May 2019, the court heard an application brought by the Public Service Commission ('the PSC') (1st applicant) and The Attorney General of Jamaica (2nd applicant) which was filed on 4 February 2019. The application requested a stay of execution of the decisions of the Full Court reflected in written judgments delivered in the matter of **Dale Austin v The Public Service Commission and The Attorney**

General on 28 November and 19 December 2018, both with neutral citations [2018] JMFC Full 6.

[2] The stay was sought until the hearing and determination of the substantive appeal. The application also prayed that costs of the application be costs in the appeal and that the court grant such further or other relief as the court deemed just. On 6 June 2019, the court refused the application and granted costs to the respondent. The issue of whether costs would be allowed for two counsel was reserved to the time of delivery of the written reasons. Through a significant oversight, those reasons are only now being delivered. I, therefore, at this early juncture extend sincere, copious apologies to the parties and counsel for the delay.

Background

[3] By letter dated 26 September 2011 from the Office of the Services Commissions (the OSC), the respondent, Mr Dale Austin, was engaged by the PSC, with effect from 3 October 2011, to work as an Assistant Crown Counsel in Chambers of The Attorney General. His employment was temporary, terminable by one month's notice in writing by either party, or in the case of the employer, by payment of one month's salary in lieu of notice.

[4] Mr Austin commenced duties on 3 October 2011. On 6 March 2012, having worked for about five months, he received a letter from the OSC dated 5 March 2012. It stated that, pursuant to regulation 19(b) of the 2nd Schedule of the Public Service Regulations, his employment was terminated with immediate effect. No reason was proffered for the termination. The letter also indicated that he would be paid one month's salary in lieu of notice, as well as compensation for his accumulated vacation leave.

[5] Later that same day Mr Austin received some indication of the reason. He was advised by then Solicitor General, Mr Douglas Leys QC, that someone at the OSC had advised him by telephone that the decision to terminate his employment was based on a "routine security vetting" which revealed that he had several debts and issues.

[6] Mr Austin retained counsel, who secured a meeting with the OSC on 7 March 2012. Counsel, however, was unable to attend the meeting as scheduled. Instead, he wrote a letter to the OSC, expressing concerns about the manner in which Mr Austin had been dismissed, particularly as he had not been given an opportunity to respond to the report. The OSC responded by letter dated 9 March 2012, outlining that security vetting is ordinarily done on applicants to assess their suitability, and the vetting of Mr Austin, had resulted in an adverse report. The OSC declined further requests to meet in respect of the matter.

[7] Subsequently, following enquiries made by the Solicitor General, the respondent was unofficially advised of the contents of the security vetting report that had informed his dismissal. The report, generated by the National Intelligence Bureau ('NIB') of the Jamaica Constabulary Force ('JCF'), was sent to the OSC by letter dated 16 February 2012. It outlined that, investigations revealed Mr Austin was financially indebted, as also, allegations of improper conduct by him in specified financial dealings. Based on those findings, the NIB had determined Mr Austin was of an "unreliable and dishonest" character and, therefore, unsuitable for the job.

[8] The report had been disseminated and was accessible by persons in other departments of government and international bodies. There was no dispute in the court below that this report had, however, not been made available to Mr Austin, nor its contents disclosed to him, prior to his dismissal. It was also never disputed by the PSC and The Attorney General that Mr Austin was not apprised of the allegations contained in the report and given an opportunity to respond.

[9] Mr Austin stoutly maintained that the allegations were untrue. Consequently, on 15 March 2012, he filed a notice of application for leave to apply for judicial review to challenge the actions of the OSC. Following the grant of leave on 16 March 2012, on 28 March 2012 he filed a fixed date claim form ('FDCF') (later amended more than once) seeking, among other things, an order of *certiorari* to quash the decision of the PSC to terminate his services, as well as an order of *mandamus* reinstating him in his position at

the Chambers of the Attorney General. He also sought several declarations concerning what he alleged to be the unlawful, unfair and unreasonable actions of the PSC.

[10] In their defence, the PSC and The Attorney General resisted the claim, maintaining that, given the nature of the respondent's employment status at the time, the OSC had the authority to dismiss Mr Austin without giving a reason.

The hearing and decision of the Full Court

[11] The matter was heard by the Full Court between 27 and 29 March 2017. On 28 November 2018, the Full Court unanimously gave judgment for Mr Austin in respect of the following orders:

- “1. An Order of Certiorari to quash the decision to terminate the appointment of [Mr Austin] is granted.
2. An Order of Mandamus directing the [PSC] to reinstate [Mr Austin] as of the 5th day of March 2012 is granted.
3. A declaration that at all material times, [Mr Austin] was acting in a substantive post and was not a temporary employee within the meaning of the **Public Service Regulations** is granted.
4. A declaration that [Mr Austin] was denied a fair hearing is granted.
5. A declaration that the failure to give [Mr Austin] a fair hearing was unlawful and in breach of the rules of natural justice is granted.
6. A declaration that [Mr Austin's] purported termination in reliance on schedule 2 of regulation 19(b) of the **Public Service Regulations** was procedurally invalid and unlawful is granted.
7. A declaration that by his dismissal [Mr Austin] was deprived protection under section 125 of the **Constitution** and the **Public Service Regulations** is granted.

8. A declaration that [Mr Austin] was deprived of having the benefit of the principles of due process is granted.
9. A declaration that [Mr Austin] has a legitimate expectation to be treated consistently and in the same manner that the **Public Service Regulations** stipulate that public officers are to be treated when adverse allegations are made against them is granted.
10. A declaration that [Mr Austin's] termination was in breach of natural justice is granted.
11. A declaration that the purported termination of [Mr Austin] is null and void is granted.
12. A declaration that the purported dismissal of [Mr Austin] was Wednesbury unreasonable is granted.
13. A declaration that public officers occupying posts created under the **Civil Service Establishment Order** cannot be engaged by way of contract on such terms and on conditions as the Offices of the Services Commissions sees fit is granted.
14. An order that the police report be remitted into the custody of [Mr Austin] is granted.
15. Damages to be assessed on a date set by the Registrar within the Hilary term of 2019."

[12] The Full Court, however, declined to grant the following declarations sought:

- "1. [Mr Austin] had a legitimate expectation that he would be subject to an assessment and, if successful, would be appointed permanently.
2. [Mr Austin's] right to privacy has been breached.
3. [Mr Austin] had been reinstated."

[13] The issue of costs was reserved. On 19 December 2018, the Full Court awarded costs to Mr Austin.

The appeal

[14] On 8 January 2019, the applicants appealed all the orders granted by the Full Court, sought to have them set aside and have costs awarded in their favour. The appeal was based on the following grounds:

- a. The Full Court erred in finding that [Mr Austin] is not a temporary employee. The Full Court so erred having regard to the fact the definition of temporary as having only for a limited time which the Court applied could apply to the status of [Mr Austin] whose temporary status would last only for a limited time to when he was either appointed or not appointed.
- b. In erring as it did in ground of appeal (a) herein the Full Court also erred in finding that the termination in reliance on schedule 2 of Regulation 19(b) of the Public Service Regulations was invalid and of no effect.
- c. In erring as it did in ground of appeal (a) the Full Court also erred in finding that the [Mr Austin's] temporary employment by simple contract was void and the termination of his employment was of no effect.
- d. The Full Court erred in finding as it did that the [Mr Austin] is a public officer. The Court so erred having regard to the fact that section 1 of the Constitution defines a public officer as a holder of public office and public service is defined by the Civil Service Establishment Order as service of the Crown in a civil capacity permanent in nature.
- e. The Full Court erring as it did in ground of appeal (c) also erred in finding that [Mr Austin] was entitled to have his employment terminated in accordance with Regulation 43 of the Public Service Regulations and/or the Constitution.
- f. In erring in findings as it did in grounds of Appeal (a), (b), (c) and (d) herein the Full Court also erred in finding that [Mr Austin] was entitled to be informed of the allegations made against him and be given an opportunity to respond.
- g. The Full Court erred in finding that [Mr Austin] held a pensionable post. The Full Court so erred having regard to the provisions of Section 15(3)(a) of the Pension Regulations

which expressly excludes any period of temporary service which was not immediately followed by a permanent appointment, such as in the case of [Mr Austin].

- h. The Full Court erred in finding at paragraph 84 of its judgment that the principle of Equity regards as dome [sic] what ought to be done could and did cause the irregularities in [Mr Austin's] employment, thereby entitling him his office under the Legislation and/or Common law. The Court so erred because the formalities for appointment pursuant to the Public Service Regulations and the Constitution could not be cured by this equitable principle which has no application to these circumstances.
- i. In erring as it did in grounds of appeal (a) to (h) herein, the Full Court also erred in finding as it did that the actions of the [PSC] was unreasonable in the Wednesbury sense.
- j. The Full Court erred in finding as it did at paragraph 137 of the judgment that the need to approach the Respondent's termination justly is underscored by the undisputed evidence that the Respondent's work had been consistently regarded as being of high or excellent standard. The Full Court so erred having regard to the fact that although it is undisputed that [Mr Austin] had excellent Performance evaluation reports these were not available to [The PSC and The Attorney General] on March 5th 2012, the date of termination of the Appellant's [sic] employment, as the said reports are dated July 3rd 2012, July 21st 2013 and August 5th, 2014, all after the date of the letter of termination.
- k. The Full Court erred in awarding costs of the Claim to [Mr Austin]. The Full Court so erred as [Mr Austin] had not succeeded in the whole of his claim and it was not reasonable for him to pursue particular allegations or issues."

The application

[15] The application for the stay asserted that the appeal had a real prospect of success, which would be rendered nugatory should the stay not be granted and the appeal was successful. Therefore, it was just that the orders sought be granted and they would also further the overriding objective. The application was supported by the affidavit of Marlene Roper, Legal Officer, OSC, filed 4 February 2019.

[16] On 21 May 2019, Mr Austin filed an affidavit resisting the application essentially on the grounds that (i) the application was not made promptly; (ii) the applicants did “not have an arguable appeal with a real prospect of success”; and (iii) he would suffer grave prejudice if a stay was granted. He also asked the court that if the stay was to be granted, it should be on condition that the applicants pay all costs (and accrued interest) taxed by the Supreme Court to date.

The evidence and submissions

For the applicants

[17] Ms Roper deponed in her affidavit that she was advised by the attorneys-at-law for the applicants that the appeal had a real prospect of success. Further, she averred that if the stay was not granted and the appeal was successful, the appeal would be rendered nugatory as:

- a) Mr Austin would have to be reinstated to, confirmed in his substantive post and paid retroactive salaries and increments accordingly;
- b) The original police report relating to Mr Austin would have to be delivered to him; and
- c) The applicants would have to pay to Mr Austin the costs awarded by the Full Court.

[18] It was on that basis the applicants sought a stay until the hearing and determination of the appeal.

[19] Mr McBean QC submitted that, pursuant to rule 2.11(1)(b) of the Court of Appeal Rules (‘CAR’), a judge of this court may grant a stay of execution of a judgment or order until the hearing and determination of the appeal. He relied on **Caribbean Cement Company Limited v Freight Management Limited** [2013] JMCA App 29 for the outline of the requirements for an applicant to obtain the stay sought.

[20] Mr McBean contended that the appeal had a real prospect of success as the Full Court erred in construing the definition of “temporary” and by holding that Mr Austin was not a “temporary employee”. From that error, he argued, flowed the flawed findings that:

- a) Mr Austin’s termination under the Public Service Regulations (‘PSR’) was invalid.
- b) He was:
 - i) a public officer,
 - ii) entitled to termination in accordance with regulation 43 of the PSR and/or the Constitution,
 - iii) entitled to be informed of the allegations made against him and given an opportunity to respond, and
 - iv) the holder of a pensionable post in light of the provisions of regulation 15(3)(a) of the Pensions Regulations.

[21] Mr McBean stressed that, if what he argued was the error and the Full Court’s interpretation was allowed to stand, it would render Schedule 2 of the PSR a “dead letter” resulting in service wide implications.

[22] Mr McBean also submitted that the Full Court erred in finding that Equity cured the irregularities in Mr Austin’s employment, because the formalities for appointment pursuant to the PSR and the Constitution could not be so cured. He further advanced that the Full Court also erred in holding that the actions of the PSC were “Wednesbury unreasonable” and that the subsequent positive performance reports of Mr Austin that were unavailable at the time of termination, required Mr Austin’s termination to be approached “justly”. He additionally argued that the Full Court erred in awarding costs of the claim to Mr Austin, as he had not succeeded in all of his claim and it was unreasonable for him to have pursued particular allegations or issues.

[23] Mr McBean also advanced that if Mr Austin successfully defended the appeal there was no risk that he would be unable to enforce the judgment in his favour as the appellants were well established Government entities. Finally, Mr McBean submitted that, if the court thought fit, it could grant the stay on condition that the applicants paid Mr Austin's taxed costs awarded in the Supreme Court.

[24] After the ruling was handed down and Ms Clarke requested costs for two counsel, Mr McBean opposed that application on the basis that there was nothing particularly difficult or novel in the application, requiring costs to be awarded for more than one counsel.

For the respondent

[25] Mr Austin in his affidavit in response opposing the stay highlighted the following:

- a) The application was not made promptly coming six weeks after the notice of appeal was filed.
- b) He had been advised by his attorneys-at-law that the applicants do not have an arguable appeal with a real prospect of success because:
 - i) He was dismissed without being told the reason or given a chance to respond to the allegations against him.
 - ii) The Full Court having quashed the decision on the combined bases of (1) breach of natural justice and procedural fairness; (2) irrationality (the decision was *Wednesbury* unreasonable); and (3) illegality, made the prospect of the appeal's success highly unlikely.
 - iii) The applicants had been found liable for defamation based on the report which precipitated his dismissal, and they had not appealed.
- c) He would continue to suffer grave prejudice if the stay was granted as:

- i) The Full Court had ordered the original defamatory report to be remitted to his custody. If this did not occur, there would be continued reputational injury (in an extremely reputationally sensitive profession) as the original report had been used to provide copies to internal and outside stakeholders, which might continue were they to retain control of the original report. This would diminish the prospects of re-establishing his standing.
- ii) It would prevent the payment to him of the shortfall in his emoluments particularly the payment of salary increments that he had not received, which led to his salary being fixed since 2011 and him being the lowest paid attorney-at-law in his department for the past eight years, despite his having received successive successful special and annual performance appraisals. This had caused financial hardship for his family which included two small children.
- iii) The applicants had not paid costs owed to him awarded in his favour since 2013 continuing through to 2018, having been taxed since at least 2016, even as significant further costs were being incurred due to continuing litigation in the matter. He highlighted that he had incurred “tremendous costs” related to his engagement of at least six law firms, and at least 53 scheduled hearings which had yielded several judgments including seven written. The costs remained unpaid despite an unless order which was made in November 2015 and a final costs certificate that was issued 23 November 2017, which is legally required to be paid within 14 days. His current attorneys advised that his costs for the current proceedings (including the hearing of the appeal) would be at least \$12,000,000.00.
- d) If the court was minded to grant the stay, he requested that the order be made conditional on all the taxed costs and interest due being paid to him. In any

event he sought an order from the court that all the costs due to him were paid within 14 days of the court's order, failing which the notice of appeal filed by the applicants would stand as struck out without the need for any further order of the court. (The request in this latter order was withdrawn by counsel during arguments).

[26] Ms Judith Clarke submitted that the relevant legal principles were that a) in order to grant a stay, the court must conclude there is some merit in the appeal. If not, the stay will not be granted and b) if there is merit, the court has then to consider "whether there is a risk of injustice to one or the other or both parties if it grants or refuses a stay". She cited the authorities of **Arc Systems Limited v Atradius Credit Insurers NV** [2014] JMCA App 9 which relied on **Hammond Suddard Solicitors v Agrichem International Holdings Ltd** [2001] EWCA Civ 2065 and **Combi (Singapore) Pte Limited v Ramanath Sriram and Sun Limited FC** [1997] EWCA 2164, and also **Paymaster Jamaica Limited v Grace Kennedy Remittance Service Limited and anor** [2011] JMCA App 1.

[27] Ms Clarke advanced that there was no merit in the appeal as, in point of law, the declaratory orders could not be stayed. Further, the executory orders granted by the Full Court quashing the termination of his appointment and directing his reinstatement, were made on the independent though overlapping bases that the impugned decision was unfair, irrational and illegal. Counsel submitted all three bases were equally compelling and inescapable such that, even if the applicants were successful on one ground, it was unlikely that the overall outcome would change. She relied on the cases of **Dr Astley Mclaughlin v His Excellency the Governor General of the Cayman Islands** [2006] UKPC 83 and **Horace Fraser v The Judicial and Legal Services Commission** [2008] UKPC 25.

[28] She argued that, for the applicants to succeed on appeal they had to establish that the orders of *certiorari* and *mandamus* could not stand on the basis of any of the declaratory pronouncements made by the Full Court, and that there was no basis for the

offending report to be remitted to Mr Austin. This especially in light of the report having already been adjudged to be defamatory in related proceedings, which finding had not been appealed.

[29] Ms Clarke contended that it was inconsistent for the applicants to maintain that there was no need to give a reason for termination, so the fact that the reason provided was flawed cannot be assailed. She argued that, as Mr Austin was dismissed for a reason, it cannot be that he should not be given an opportunity to dispute the reason.

[30] Ms Clarke also advanced that, even if the court found that the appeal had a real prospect of success, the balance of injustice between the parties favoured the refusal of the stay. Firstly, Ms Clarke submitted that the statement made in Ms Roper's affidavit that if the stay was not granted the appeal would be rendered nugatory was a bald assertion without any evidential support to justify the order sought as the law requires. She relied on the case of **Paymaster Jamaica Limited v Grace Kennedy Remittance Service Limited and anor**. Counsel emphasised that there was no evidence that if Mr Austin was reinstated and benefits and costs paid to him, he could not reasonably be required to repay what he may not have been due, if the appeal was successful.

[31] Counsel highlighted the outline of affidavit evidence of hardship which Mr Austin indicated he suffered and would continue to suffer, if a stay was granted. She submitted that clearly, he would be the one prejudiced if the stay was granted. Counsel advanced that Mr Austin should be allowed a path of upward mobility given his successful performance in the eight years since the dismissal decision. Performance that the applicants benefit from, hence they would sustain no losses. Regarding pension payments, as Mr Austin was not yet entitled to those sums which were to be paid into a superannuation fund on his behalf, there would be no risk to the applicants as no sums would be paid out to him. He was merely accumulating years of service that would determine the amount of pension to which he would be entitled in the future.

[32] Regarding costs, Ms Clarke submitted that costs orders are not considered the fruits of the judgment but recompense for costs to be paid or already paid, and without special circumstances should be enforced. She relied on **Farrell & Ors v National Commercial Bank Jamaica Limited** [2012] JMCA App 16. She argued there was no evidence of special circumstances to displace the general rule.

[33] After the ruling was handed down, Ms Clarke requested costs for two counsel. She argued that it was not a simple matter and depth of research was required on the issue whether there was merit in the appeal. Further, the presentation of the matter benefitted from the presence of two counsel. Additionally, given the historical context of the matter two counsel were required. Thus, she submitted, the input of two counsel should be recognised in costs.

The law

[34] There is no dispute between the parties on the applicable law. Rule 2.10(1)(b) of the CAR empowers a single judge of this court to grant a stay of execution of any judgment or order against which an appeal has been made, pending the determination of the appeal.

[35] Several cases from our court have accepted that the current approach to determining whether that power should be exercised, is that outlined in the case of **Combi (Singapore) Pte Limited v Ramanath Sriram and Sun Limited FC**. These cases include **Arc Systems Limited v. Atradius Credit Insurers NV, Myrna Douglas and Jacqueline Brown v Easton Douglas, Paymaster Jamaica Limited v Grace Kennedy Remittance Service Limited and anor, Harold Brady v General Legal Council** and **Kenneth Boswell v Selnor Developments Limited**.

[36] In summary the principles are that:

- i) The starting point is that normally there should not be a stay.

- ii) For a stay to be considered there must be some merit in the appeal. If the appeal has no merit, a stay will not be granted.
- iii) Where there is merit in the appeal the court should make the order which best accords with the interests of justice. Thus, where whichever order is made there is a risk of harm to one party or another, the alternatives have to be balanced by the court to determine which of them is less likely to produce injustice.

Issue 1: Is there some merit in the appeal?

[37] The first hurdle for the applicants was to convince the court that they had a real prospect of success in their appeal. Queen's Counsel Mr McBean argued that the success of the appeal hinged primarily on whether the Full Court correctly construed Mr Austin's status as not being temporary and that he was the occupier of a pensionable post. Those findings, he submitted, impacted whether Mr Austin was entitled to security of tenure, pension, salary increments and a right to be heard before he was dismissed. If the conclusions of the Full Court on those issues were flawed, he maintained that even the appeal to natural justice would be unavailable to Mr Austin.

[38] The Full Court, in its review of the concept of temporary employee, found that it was not defined in the 2nd Schedule of the PSR and thus resorted to the definition of "temporary" found in the Oxford dictionary. Regarding regulation 19(b) of the PSR, relied on by the PSC as grounding Mr Austin's termination, the Full Court found that the category of workers with which "temporary employees" was grouped did not include Mr Austin as an Assistant Crown Counsel.

[39] The Full Court also found inconsistencies in the methods of appointment outlined under the Constitution, the PSR and the Staff Orders of the Public Service. Recourse was had to Equity to cure the legislative and regulatory gap—an approach criticised by the applicants—to prevent Mr Austin's engagement being declared *void ab initio*.

[40] It is clear that the methods of appointment into the Public Service prescribed under the Constitution, the PSR, and the Staff Orders differ. Similarly, there were differences highlighted in the methods of termination depending on the source of the power being construed. The Full Court's conclusion was that even if it was incorrect that Mr Austin was a public officer and thereby entitled to certain procedural safeguards before termination, Mr Austin's treatment should still have been in accord with the Constitution and the laws of natural justice.

[41] At an application for a stay a mini hearing of the appeal should not be conducted. The decision of the Full Court turned significantly on interpretation of the governing legal framework, gaps in which were identified. It is useful for those interpretations to be tested on appeal, but that does not necessarily equate to a finding that the appeal has a reasonable prospect of success. Without proffering a view on the Full Court's interpretations, I was attracted by the arguments advanced by Ms Clarke for Mr Austin that even if the applicants were successful in one or more of their grounds, given the many bases on which Mr Austin succeeded — (1) fundamental unfairness (breach of natural justice) and procedural fairness; (2) irrationality (the decision was *Wednesbury* unreasonable); and (3) illegality — it was unlikely that the ultimate result would change.

[42] The importance of the fundamental concept of natural justice identified by the Full Court cannot be discounted in this analysis. In the case of **Dr Astley McLaughlin v His Excellency the Governor of the Cayman Islands**, at para. 14, it was stated that:

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

[43] This case supports the view that, as a public officer, Mr Austin was entitled to the benefit of natural justice, which it is undisputed he did not receive. However, so fundamental is the concept of natural justice, it is arguable that, even if he was a temporary employee, notwithstanding the provisions of section 45 of the PSR and by extension section 19 of the 2nd Schedule of the PSR, some due process mechanism should be read into them through interpretation.

[44] Further and alternatively, the case of **Horace Fraser v The Judicial and Legal Services Commission & Anor** supports the view that, even if Mr Austin was not a public officer but an ordinary employee under contract, the decision to terminate him summarily would still be vitiated by a breach of fundamental fairness. At para. 18 it is stated that, "...The constitutional protection... operates over and above any contractual provisions for termination against the officer's will of the engagement prior to its natural expiry date". The sole ground of fundamental unfairness may well therefore have been sufficient for the Full Court to base the orders of *certiorari* and *mandamus*, and as such, a successful challenge to any of the other grounds would not result in a successful appeal.

[45] I, therefore, did not find that there was a reasonable prospect of success that would create a foundation for a consideration whether a stay should be granted.

Issue 2: Where does the balance of injustice lie?

[46] In my ruling on 6 June 2019, I indicated that my conclusion on issue 1 was still being refined. However, I found then, that, whatever the outcome on issue 1, given the relative circumstances of the parties, the history of the matter and the conduct of the applicants, the balance of the risk of injustice lay firmly in favour of Mr Austin. As such the stay should not be granted.

[47] The stated reason the applicants applied for the stay was their concern that the appeal would be rendered nugatory if the stay was not granted and they subsequently were successful in the appeal. Nothing was however advanced to show that, were the fruits of the judgment of the Full Court implemented, they could not be reversed should

the result change on appeal. Any appointment could be revoked and Mr Austin required to return emoluments paid to him which he would not then be due. His pension will not soon ripen into a present entitlement, therefore, if he is subsequently held not to be a pensionable officer that would only require an administrative adjustment.

[48] The situation faced by Mr Austin was wholly different. His affidavit outlined the negative effects of his professional stagnation for almost a decade. He detailed financial hardships affecting his young family as he remained stuck as the lowest paid attorney-at-law in the Attorney General's Chambers, exacerbated by the heavy financial burden he bears due to the protracted litigation. While stagnant in his level, from the positive performance evaluations he received after the purported termination, he provided services of value to the Attorney General's Chambers. Accordingly, there would be no loss to those Chambers if required to pay him commensurate to the value he was now contributing.

[49] The order likely to cause less injustice was, clearly therefore, the refusal of the stay sought.

Issue 3: _____ For how many counsel should costs be allowed?

[50] Parts 64 and 65 of The Supreme Court of Jamaica Civil Procedure Rules (2002) ('CPR') which deal with the award of costs are, with necessary modifications, applicable to this court by virtue of rule 1.18(1) of the CAR. Rule 1.18(4) of the CAR identifies specific rules within part 65, as well as appendices A and B, that are inapplicable to the Court of Appeal. Those latter rules were, however, not relevant for the determination of the issue of the award of costs in this matter.

[51] In accordance with rule 64.6 of the CPR, on 6 June 2019, following the general rule that costs follow the event, costs were awarded to Mr Austin as the successful party. The outstanding question was whether costs should be allowed for one or two counsel.

[52] Rules 64.12, and 65.17(3) of the CPR provide guidance on the factors to be considered in the determination whether costs should be ordered for more than one attorney-at-law for an application in chambers.

[53] Rule 64.12 provides as follows:

“Special costs certificates

- 64.12 (1) When making an order as to the costs of an application in chambers the court may grant a “special costs certificate”.
- (2) In considering whether to grant a special costs certificate the court must take into account -
- (a) whether the application was or was reasonably expected to be contested;
 - (b) the complexity of the legal issues involved in the application; and
 - (c) whether the application reasonably required the citation of authorities and skeleton arguments.
- (3) The court, having regard to the matters set out in rule 65.17(3), may direct that the costs of the attendance of more than -
- (a) one attorney-at-law on the hearing of an application; or
 - (b) two attorneys-at-law at the trial,
- be allowed.
- (The grant of a ‘special costs certificate’ entitles the receiving party to a higher level of basic costs under Appendix B, Table 2 to this Part.)”

[54] Mr Austin having waited so long to realise the outcome achieved by the decision of the Full Court, it was reasonable to expect he would contest the application. The legal

issues in the application were complex in the sense that they were novel and involved the interpretation of the Constitution, legislation, regulations and staff orders. While this was not the hearing of the appeal, issues relevant to the merit of the appeal had to be considered and addressed. This in a context where there is no indication that the peculiar situation addressed by the Full Court had legal precedent and where the Full Court identified inconsistencies and gaps in the applicable legal framework. Authorities were cited and skeleton arguments provided in the form of detailed speaking notes.

[55] Regarding rule 65.17(3), the factors relevant to this case are: (1) the conduct of the parties before as well as during the proceedings; (2) the importance of the matter to the parties; (3) the time reasonably spent on the matter; (4) whether the matter is appropriate for a senior attorney-at-law; and (5) the novelty, weight and complexity of the matter. The experience of Mr Austin adumbrated in his affidavit including his inability to obtain costs awarded to him against the applicants as well as the impact of the events leading to this point on Mr Austin's life are thus significant considerations. The novel nature of the matter also supports a finding that it required the attention of a senior attorney-at-law and reasonably required considerable time in preparation. Given these considerations, it is appropriate to conclude that this matter merits the grant of a special costs certificate, allowing the costs of two attorneys-at-law for Mr Austin.

[56] Accordingly, in addition to the order made on 6 June 2019, the following is the order of the court in relation to costs:

The respondent, Mr Austin, is granted a special costs certificate allowing for the costs of two counsel, in respect of the application.