[2015] JMCA Civ 43

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 153/2011

BEFORE: **THE HON MR JUSTICE MORISSON JA**
THE HON MR JUSTICE DUKHARAN JA
THE HON MISS JUSTICE PHILLIPS JA

BETWEEN **KAREN THAMES** **APPELLANT**

AND **NATIONAL IRRIGATION COMMISSION LIMITED** **RESPONDENT**

Mrs Denise Senior-Smith instructed by Oswest Senior-Smith & Co for the appellant

Wentworth Charles instructed by Wentworth Charles & Co for the respondent

17, 25 February and 31 July 2015

MORRISON JA

[1] I have read in draft the judgment prepared by Phillips JA in this matter. I agree with it, and there is nothing that I can usefully add.

DUKHARAN JA

[2] I have read in draft the judgment of my sister Phillips JA and agree with her reasoning and conclusion. I agree that the appeal should be allowed in part and that the whole application be dealt with as a claim.

PHILLIPS JA

[3] This is an appeal by Karen Thames ("the appellant") against the decision of the learned Evan Brown J (Ag) delivered on 11 November 2011, in a claim she filed seeking, *inter alia*, judicial review of the decision made by National Irrigation Commission Limited ("the respondent") to terminate her employment and an award of damages. Evan Brown J refused to grant the relief sought by the appellant and that refusal is the basis of this appeal.

[4] During the course of litigation a number of documents were filed by both parties. I will list the ones that will be referred to in the course of this judgment since the facts set out below are distilled from affidavits filed by the respective parties. The appellant's affidavit in support of an application for leave to apply for judicial review dated 12 January 2010 has the following documents attached: (i) letter dated 12 August 2008 by Mr Milton Henry, chief executive officer (ag) of the respondent; (ii) the appellant's report dated 18 August 2008; (iii) letter dated 22 August 2008 by Mr Henry; (iv) letter dated 2 December 2008 by Mr Oliver Nembhard, chairman of the respondent's board; (v) letter dated 11 December 2008 by Mr Anthony Pearson, attorney-at-law for the appellant; (vi) letter dated 1 June 2009 by Donovan Stanberry, permanent secretary for the Ministry of Agriculture and Fisheries; and (vii) formal order dated 26 January 2010. In the appellant's second affidavit dated 19 July 2010 in response to Mr Henry's affidavit the documents attached included: (i) a memorandum of understanding for the public sector and (ii) memorandum dated 17 February 2004.

[5] Mr Henry filed affidavits on the respondent's behalf. In his affidavit dated 7 June 2010 in response to application for judicial review the following are attached: (i) the appellant's contract for the post of personnel assistant with effective date 1 February 1988; (ii) job description and job specification for the post of director of corporate and legal services/ company secretary; (ii) letter dated 7 August 2008 by Mr Nembhard; (iii) the National Irrigation Commission Limited Grievance Procedure and Disciplinary Code (disciplinary code); (iv) letter dated 16 December 2008 by Mr Stanley Rampair (chief executive officer); and (v) letter dated 7 February 1990 by Mrs Arlene J Lawrence, personnel/industrial relations manager. Mr Henry also filed an affidavit in response to the appellant's second affidavit dated 7 October 2010.

Background

[6] The appellant was employed to the respondent as a personnel assistant in or around February 1988. She was promoted to manager of human resources and industrial relations in or around January 1999 and in or around January 2008, she was appointed to act as director of corporate and legal services/company secretary.

[7] As director of corporate and legal services/company secretary, the appellant's job description included the following list of responsibilities: (i) assisting in negotiating contracts/agreements on the respondent's behalf; (ii) preparing the contract/agreement documents and having them properly stamped, signed, sealed, witnessed etc; and (iii) ensuring that all members of staff in the division were informed of changes and development policies, plans and objectives which affect their work or welfare.

[8] On 1 August 2008, the appellant went on vacation leave and was scheduled to resume duties on 19 August 2008. However, on 7 August 2008 Mr Nembhard provided written instructions to Mr Henry to notify the appellant of her interdiction and that she would be notified of a hearing date. Mr Henry by letter dated 12 August 2008, advised the appellant of possible disciplinary breaches on her part regarding the preparation of contracts for the National Irrigation Development Programme. The letter outlined four breaches of government guidelines as follows:

(i) Contracts were not submitted to the Ministry of Agriculture or the Ministry of Finance as required for all contracts.

(ii) The increase in compensation exceeded the government's approved guidelines of 15% and 7% for all new contracts.

(iii) Contracts should not have been extended for a period of three years, but rather for a period not exceeding three months ending with a gratuity payment.

(iv) Five days casual leave should have been given and not the 10 days casual leave that was granted.

[9] The letter also advised the appellant that she was placed on interdiction as per the disciplinary code with effect from 19 August 2008. It went on to request a written report on the matter which was to be submitted by 22 August 2008 at 4:00pm and further stated that the appellant would be informed of the date for a disciplinary hearing.

[10] The appellant responded to the correspondence by way of a report dated 18 August 2008 where she denied knowledge of any contractual breaches. The appellant said that having worked for the respondent for over 20 years, it had never been the respondent's practice to send contracts to the Ministry to be reviewed or approved. On the issue of leave entitlement, she stated that for the contract period April 2003 to March 2005, there was an agreement signed between the respondent and the University and Allied Workers Union, dated 14 February 2004, that granted persons employed to the respondent 10 working days casual leave per annum. The appellant asked for the interdiction to be reconsidered but did not expressly request a hearing in her report.

[11] By letter dated 22 August 2008, Mr Henry acknowledged receipt of the appellant's report and advised her that a response would be communicated to her soon.

[12] In a letter dated 2 December 2008, Mr Nembhard informed the appellant that she was dismissed effective 5 December 2008. The letter further stated that the appellant had been cited under clause 14 of the disciplinary code for unsatisfactory workmanship or work performance as a result of the breaches outlined in their earlier correspondence dated 12 August 2008. In that letter, Mr Nembhard noted that the respondent had opted to proceed with a decision on the basis of a written report instead of an oral enquiry, because the appellant in her written reply dated 18 August 2008, had not elected to have an oral enquiry into the matter pursuant to section 7.3 of the disciplinary code. He further stated that notwithstanding the appellant's response, it was inescapable that there had been a breach of government guidelines. Consequently,

the appellant had been found to be neglectful of the duties for which she was engaged and her contract was therefore terminated in accordance with section 2(a) of the disciplinary procedures in the disciplinary code.

[13] In a letter dated 16 December 2008, the respondent's chief executive officer listed the appellant's entitlement upon termination and urged the appellant to make arrangements to receive the same.

[14] The appellant retained the services of an attorney-at-law who wrote to the respondent on 11 December 2008 requesting a disciplinary hearing. The appellant also sought the intervention of the Ministry of Agriculture and by letter dated 1 June 2009, the said Ministry promised to investigate the matter with the hope of an early resolution.

[15] The appellant applied for an extension of time within which to apply for leave to apply for judicial review and for leave to apply for judicial review. The application was responded to by Mr Henry on the respondent's behalf. On 13 January 2010, Frank Williams J (Ag) granted the extension of time within which to apply for leave to apply for judicial review and leave to apply for judicial review.

Application for judicial review

[16] By an order dated 17 February 2011, the appellant's amended fixed date claim form dated 25 February 2011, sought *inter alia* the following:

(i) A declaration that the appellant's termination of employment and the removal of the appellant from the post of director of corporate and legal services/company secretary were void.

(ii) An order of certiorari to quash the respondent's decision to terminate the appellant's employment.

(iii) That damages be awarded in a sum equivalent to what the appellant would have earned for the period from the date of her termination to March 2011. This sum should include all allowances that the appellant was in receipt of and sums in lieu of all vacation leave for which she would have been entitled had she been at work during the said period.

[17] Mr Henry deposed in his further affidavit that before the decision was taken to terminate the appellant, full consideration had been given to the disciplinary code and the principles of natural justice. He further stated that the allegations made against the appellant consisted of serious breaches of government rules and guidelines and additionally, on 7 February 1990, the appellant had been reprimanded for her frequent late attendance at work. In her second affidavit, the appellant stated that the four breaches advanced as the bases for her dismissal were without merit and that the respondent had breached the disciplinary code when it failed to hold a hearing. Mr. Henry, in response to the appellant's second affidavit, reiterated the respondent's view that the appellant had committed serious breaches of government guidelines.

[18] This claim was heard by Evan Brown J and in his written reasons for judgment he divided the claim into three issues:

1) Is the respondent subject to judicial review?
2) Is the respondent's decision to terminate the appellant subject to judicial review?
3) If the respondent's decision to terminate the appellant is not subject to judicial review, how should the court treat the claim?

[19] In deciding whether or not the respondent was subject to judicial review, Evan Brown J examined cases such as **R v panel on Takeovers and Mergers, ex parte Datafin plc** [1987] 1 All ER 564 and **Griffiths v Barbados Cricket Association** (1989) 41 WIR 48 to show that despite the respondent being a private corporation it nonetheless has a public reach and hence it was amenable to judicial review.

[20] To determine whether the respondent's decision was subject to judicial review, Evan Brown J first looked at the relationship between the appellant and the respondent. In relying on cases such as **Ridge v Baldwin and Others** [1963] 2 All ER 66, **Eugennie Ebanks v Betting Gaming and Lotteries Commission** Claim C.L. 2002/E020 delivered 10 November 2003, **Malloch v Aberdeen Corporation** [1971] 2 All ER 1278 and **Charles Ganga-Singh v The Betting Gaming and Lotteries Commission** Suit No M-156 of 2002 delivered 11 January 2005, he found that the respondent's decision was not subject to judicial review because: (i) the appellant was not appointed to the civil service; (ii) there was no legislative underpinning of her

employment; and (iii) there was no statutory restriction on the manner in which the applicant's employment may be terminated. As a consequence, Evan Brown J found that the relationship between the appellant and the respondent was that of master and servant and judicial review was inapplicable to such a relationship.

[21] Evan Brown J also found that there no evidence of provenance of the disciplinary code and it was only an internal guide. Consequently, the disciplinary tribunal was purely domestic or private and so the public law remedy of certiorari cannot be used to quash its decision.

[22] In relation to the third issue, Evan Brown J held that since the relationship between the applicant and the respondent was that of master and servant, the appellant's remedy was in private law in a claim for breach of contract. He nonetheless refused to exercise his power under rule 56.10(3) of the Civil Procedure Rules (CPR) to convert the claim into private law claim, because he was of the view that by so doing, the court would be acting in vain, since all the appellant would be entitled to was three months salary in lieu of notice and she had already received this sum.

The appeal

[23] The appellant has now appealed Evan Brown J's denial of her application for judicial review and/or his refusal to give directions under rule 56.10(3) of the CPR. The grounds of appeal being advanced (as set out in the further amended notice and grounds of appeal dated 16 February 2015) are that the learned Evan Brown J erred or misdirected himself in fact or law as follows:

1) when he concluded that the appellant did not have the right to be heard after being advised in writing that she would be informed of a hearing date.
2) when he failed to consider that the appellant had a legitimate expectation or reasonable expectation that there would be a hearing before any decision was made to terminate her employment since the respondent's letter stated that she would be informed of the hearing date.
3) when he concluded that the disciplinary code needed legislative authentication before reliance could be placed on it by the appellant.
4) when he concluded that the disciplinary code was an internal guide and hence an employee dismissed in breach of the disciplinary code was incapable of challenging the respondent's decision using judicial review.
5) when he found that that the disciplinary code cannot transform the master and servant relationship although it was used as the basis for dismissal.
6) he failed to conclude that the respondent was bound to follow the procedures in the disciplinary code since it initiated disciplinary proceedings under it, adopted it and published it.
7) where having concluded that the appellants remedy was in private law, failed to give directions as set out in Rule 56.10(3) as

he found that the appellant had received her entitlement and there was nothing more to litigate.

8) when he concluded that the issue before the court was whether or not the appellant was lawfully dismissed.

[24] The appellant is asking this court for the following orders:

1) That the judgment of Evan Brown J be set aside.
2) A declaration that the respondent's decision was in beach of the principles of natural justice and that the respondent was bound to follow the disciplinary code in dismissing the appellant.
3) In the alternative that the claim be referred to the Industrial Disputes Tribunal.
4) Costs.
5) Such further and other relief as this honorable court deems fit.

Appellant's submissions

[25] In relation to grounds one, two and seven, Mrs Denise Senior-Smith, attorney-at-law for the appellant, submitted that in construing cases such as **Central Council for Education and Training in Social Work v Edwards** The Times 5 May 1978 the fact that the hearing was expressly promised to the appellant by the respondent, the respondent should have conducted one.

[26] Mrs Senior-Smith's submission in relation to grounds three and four were that the respondent had adopted, published and instituted proceedings under the

disciplinary code and so it was bound by the principles of Administrative Law to follow it. This disciplinary code was the only instrument available in writing, published by the respondent setting out the rules, guidelines, processes and punishment in respect of disciplinary matters and hence was more than an internal guide. She further posited that section 67 of the Irrigation Act supports a statutory transfer of employees to the respondent on the same terms and conditions as those held before the transfer date. Since the disciplinary code was relied on to address all disciplinary issues involving employees of the respondent, it cannot merely be an internal guide and the provisions therein must be followed.

[27] In relation to grounds five and eight, Mrs Senior-Smith contended that the judge erred when he addressed the issue of whether the appellant was lawfully dismissed because the issue before Evan Brown J, was whether the respondent had breached the principles of natural justice when it failed to apply the disciplinary code.

[28] Mrs Senior-Smith's assertion in relation to ground six was that Evan Brown J's refusal to convert the claim was misconceived because the appellant was entitled to much more than three months notice salary in her claim for damages. She cited cases such as **Maharaj v Attorney General of Trinidad and Tobago (No. 2)** (1978) 20 WIR 3102 and **Guntin v London Borough of Richmond upon Thames LBC** [1980] 2 All ER 577 to show that damages can also include recompense for inconvenience and distress suffered by the appellant during the period and the salary she would have been entitled to up to the period of the hearing, respectively.

Respondent's submissions

[29] Mr Wentworth Charles, attorney-at-law for the respondent, in seeking to affirm the Evan Brown J's decision, divided his submissions into four main issues:

1) Whether the respondent is a body subject to judicial review?
2) Is the respondent's decision to terminate the appellant amenable to judicial review?
3) What is the nature of the relationship that existed between the respondent and the appellant?
4) Are natural justice principles applicable in the present case?
5) What is the contractual status of the disciplinary code?

[30] In relation to the first issue, Mr Charles posited that Evan Brown J, in applying **ex parte Datafin**, examined the type of function performed by the respondent and the source and nature of its power. By so doing, he submitted that the learned judge was correct to conclude that the nature of the power exercised by the respondent made it a body that was susceptible to judicial review.

[31] In determining whether the respondent's decision was subject to judicial review, however Mr Charles urged the court to consider the nature of the relationship that existed between the parties. In applying **Ridge v Baldwin** he submitted that it was clear that the relationship between the applicant and the respondent was that of master and servant and so the appellant had no right to be heard before dismissal from her employment. He cited **Ebanks v Betting Gaming and Lotteries Commission**, **Charles Ganga-Singh v Betting Gaming and Lotteries Commission** and **R v Dr.**

A. Binger, N.J. Vaughn, and Scientific Research Council, ex parte Chris Bobo Squire (1984) 21 JLR 118 to show that the absence of evidence that the appellant was a public officer and the absence of evidence of legislative underpinning to the appellant's employment, blocked the applicability of public law remedies to the case at bar.

[32] Mr Charles' contention on the third issue was that the nature of the relationship between the applicant and the respondent was governed by a contract of employment. This contract was not underpinned by any public law element and so did not give rise to the exercise of the court's discretion to grant the public law remedy of certiorari being sought by the appellant.

[33] On issue four, Mr Charles cited the cases of **Ridge v Baldwin**, **Malloch v Aberdeen** and **ex parte Bobo Squire** to show that the principles of natural justice, being the right to a fair hearing and legitimate expectation, were not applicable to a pure master and servant relationship. As a consequence the appellant could not rely on these principles.

[34] Mr Charles' submissions in relation to the contractual status of the disciplinary code were that the disciplinary code did not have the effect of law and was used by the parties for ease and convenience. He therefore submitted that, Evan Brown J was correct to find that the disciplinary code was a mere guideline. He argued further that the lack of evidence of the incorporation of the disciplinary code into the appellant's employment contract meant that the disciplinary code had no contractual status.

Analysis and issues to be considered

[35] Based on the grounds of appeal filed by the appellant and submissions advanced by counsel in support of or against these grounds, it is my view that this appeal raises five issues for consideration as follows:

1) Is the respondent's decision to terminate the appellant subject to judicial review? (grounds 1, 2, and 8)
2) Is the respondent bound to follow the disciplinary code in dismissing the appellant? (grounds 3, 4, 5 and 7)
3) What is the effect of the possible breach by the respondent of the appellant's employment contract, by not holding an oral enquiry into the matter or by failing to consider the appellant's reasonable expectation that there would have been a hearing? (grounds 1, 2 and 8)
4) What is the effect of the judge's failure to convert the matter to a private law claim? (ground 6)
5) Can the court of appeal refer a matter to the Industrial Disputes Tribunal?

[36] The issue as to whether the respondent was amenable to judicial review was no longer a dispute on appeal as it was in the court below and so was not argued in the appeal. It is clear that in determining whether a body is amenable to judicial review the source and nature of the power being exercised by the body must be examined. There were many authorities referred to in the court below which canvassed this principle

namely, **Council of Civil Service Unions and Others v Minister for the Civil Service** [1984] 3 All ER 935, [1985] AC 374, **ex parte Datafin**, and **ex parte Chris Bobo Squire**. If the body is supported either directly or indirectly by a periphery of statutory powers and penalties or the nature of functions it performs and generates public interest, it will be amenable to judicial review. By contrast, if the function it performs generates no public interest or if it is not regulated by statute it will not be subject to judicial review.

[37] Evan Brown J's finding that the respondent was a body that was subject to judicial review, was therefore inescapable. Sections 3 and 57 of the Irrigation Authority (Licensing of the National Irrigation Commission Limited) Order, 2001 states that the respondent is a company incorporated under the Companies Act and section 9 of the said Act provides that the respondent may enter into contract subject to Ministerial approval. These sections prove that the respondent is not a department of government but an entity with a life of its own. However, when one examines the Irrigation Act, it is pellucid that the respondent is subject to statutory regulation and the function it performs generates public interest as follows:

i) Section 4 gives the respondent the responsibility for the implementation of the provisions of the Act in relation to all irrigation areas and restricted areas and grants it the power to collect all revenue and charges. Where the respondent requires additional money, this may be granted with Ministerial approval and is to be paid from the Consolidated Fund.

ii) Sections 5, 6, 7 and 21 give the respondent considerable power over the management, creation and termination of irrigation areas across the island, subject to Ministerial approval. The respondent is even given the power to enter upon land if necessary after giving notice, and can force members of the public to maintain or clean drains, and withhold water on land for which payment is in arrears.

iii) The fact that the respondent is subject to statutory regulation is made clear in sections 54 and 55 because it requires the accounts of the respondent to be audited once every financial year by an auditor approved by the Minister and it requires the submission of financial statements to the Minister at the end of every financial year.

[38] From an examination of the legislation which governs the respondent, it is clear that its source of power comes from statute, it is subject to statutory regulation, the functions and duties it performs generates considerable public interest and hence it is a body that is amenable to judicial review.

Is the respondent's decision to terminate the appellant subject to judicial review?

[39] Although the respondent is subject to judicial review, every decision it makes is not so susceptible. In determining whether a decision is amenable to judicial review, it has been held that one must examine whether there was a public law element to the

particular decision, by looking at the nature of the decision and whether the decision was made under a statutory power. This test was illustrated by Lord Diplock in **Council of Civil Service Unions** at pages 949-950 where he said:

> "To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision maker, although it may affect him too. It must affect such other person either (a) by altering rights or obligations of that person which are enforceable by or against him in private law or (b) by depriving him of some benefit or advantage which either (i) he has in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational ground for withdrawing it on which he has been given an opportunity to comment or (ii) he has received assurance from the decision maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn… For a decision to be susceptible to judicial review the decision maker must be empowered by public law (and not merely, as in arbitration, by agreement between private parties) to make decisions that, if validly made, will lead to administrative action or abstention from action by an authority endowed by law with executive powers…"

[40] In relation to the case at bar, the crucial question to be answered is whether judicial review is applicable to all decisions involving dismissal from employment. The test for so deciding was devised by Lord Reid in **Ridge v Baldwin** where he examined three broad categories of dismissal cases and the applicability of judicial review to each, at pages 71-72:

> "i) Dismissal of Servant by his master: In relation to the first category Lord Reid stated that the law regarding master and servant is not in doubt. There cannot be specific performance of a contract of service and the master can terminate the contract with his servant at any time and for any reason or for none. But if he does so in a manner not warranted by the contract he must pay damages for breach of contract. So the question in a pure master and servant does not at all depend on whether the

master has heard the servant in his own defence; it depends on whether the facts emerging at the trial prove breach of contract.

ii) Dismissal from office held during pleasure: Such an officer has no right to be heard before dismissal and can be dismissed without reasons.

iii) Dismissal from an office where there must be something against a man to warrant his dismissal: In the third class this officer cannot be lawfully dismissed without first telling him what is alleged against him and hearing his defence or explanation."

[41] **Ridge v Baldwin** has been cited with approval in a number of recent cases such as **R (on the application of Shoesmith) v Ofstead and others** [2011] All ER (D) 293 (May) and **Mattu v University Hospital of Coventry and Warwickshire NHS Trust** [2012] 4 All ER 359. It has also been approved by this court in **ex parte Bobo Squire** and **Rosmond Johnson v Restaurants of Jamaica Limited T/A Kentucky Fried Chicken** [2012] JMCA Civ 13 and has been applied by the Judicial Committee of the Privy Council in **Vidyodaya University of Ceylon and Others v Silva** [1964] 3 All ER 865.

[42] In explaining the reasons for the lack of applicability of judicial review to dismissals in the first and second categories of dismissal, Lord Wilberforce in **Malloch v Aberdeen Corporation** [1971] 2 All ER 1278, at 1294 said that:

"The argument that, once it is shown that the relevant relationship is that of master and servant, this is sufficient to exclude the requirements of natural justice, is often found in one form or another in reported cases. There are two reasons behind it. The first is that, in master and servant cases, one is normally in the field of the common law of contract inter partes, so that principles of administrative law, including those of natural justice, have no part to play. The second relates to the remedy: it is that in pure master and servant cases, the most that can be obtained is damages, if the

> dismissal is wrongful; no order of reinstatement can be made, so no room exists for such remedies as administrative law may grant, such as a declaration that the dismissal is void."

[43] Lord Reid's third category of dismissal contemplates a situation where the person being dismissed is a public servant or the power to dismiss the person is derived solely from statute. Indeed in **Ridge v Baldwin** the decision to dismiss the chief constable (a public servant) was held to be void since he was dismissed without *inter alia* giving him an opportunity to mount a defence in contravention of the police service regulations. The Privy Council in **Vidyodaya University v Silva** held that since there was no legislative provision giving a right to be heard or a right to appeal to any other body a professor's relationship with the university was that of ordinary master and servant.

[44] The majority of the House of Lords in **Malloch v Aberdeen**, while accepting the three classes of dismissal enunciated by Lord Reid in **Ridge v Baldwin**, has found a fourth category of cases where the common law relationship of master and servant was fortified by statute. In **Malloch v Aberdeen** the appellant was dismissed from his employment as a teacher because he refused to register pursuant to a code that required him to do so. After being dismissed he used judicial review proceedings to challenge his dismissal on the ground that the respondent breached the principles of natural justice by refusing to receive his written representations and by denying him an opportunity to be heard before dismissal. The respondent argued that the appellant's employment was at the respondent's pleasure and so he had no right to be heard before dismissal, he was not entitled to have the dismissal nullified and they were legally bound to dismiss him. However, under the Public School (Scotland) Teachers

Act, 1882 no teacher shall be dismissed from office without due notice to the teacher and due deliberation on the part of the school board.

[45] The court, by a majority, held that had the status of Scottish teachers been governed purely by the common law then the appellant had no right to be heard. However, the appellant's common law position was fortified by statute that provided for notice to be given and deliberation to be conducted before a teacher was dismissed. Consequently, the respondent's failure to afford the appellant this opportunity meant that the decision to dismiss him was a nullity. In delivering the judgment of the court, Lord Wilberforce at pages 1295-1296, said that while he fully agreed with the position of Lord Reid in **Ridge v Baldwin** that an officer employed at pleasure had no right to be heard before dismissal he went on to state that:

> "The difficulty arises when, as here, there are other incidents of the employment laid down by statute, or regulations, or code of employment or agreement. The rigor of this principle is often, in modern practice, mitigated for it has come to be perceived that the very possibility of dismissal without reason being given --action which may vitally affect a mans career or his pension – makes it all the more important for him, in suitable circumstances, to be able to state his case and, if denied the right to do so, to be able to have his dismissal declared void. So, while the courts will necessarily respect the right, for good reasons of public policy, to dismiss without assigned reasons, this should not, in my opinion, prevent them from examining the framework and context of the employment to see whether elementary rights are conferred on him expressly or by necessary implication and how far these extend."

[46] This fourth category of dismissal has been recognized and cited with approval in a number of cases. In **R v East Berkshire Health Authority, ex parte Walsh** [1984] 3 All ER 425 the applicant was employed by the respondent as a senior nursing

officer under a contract of employment that pursuant to legislation incorporated certain terms and conditions. The applicant was suspended and ultimately dismissed and he sought judicial review of the dismissal on the grounds that there was a breach of the principles of natural justices in the procedures used to dismiss him. The respondents argued that judicial review was not applicable to the decision to dismiss the applicant. It was held that there was no special statutory provision bearing directly on the applicant's dismissal and as a consequence his contract was one of ordinary master and servant and he was only entitled to private law remedies. Sir John Donaldson MR in delivering the judgment of the court said at page 431:

> "The ordinary employer is free to act in breach of his contracts of employment and if he does so his employee will acquire certain private law rights and remedies in damages… Parliament can underpin the position of public authority employees by directly restricting the freedom of the public authority to dismiss, thus giving the employee 'public law' rights and at least making him a potential candidate for administrative law remedies. Alternatively, it can require the authority to contract with its employees on specified terms with a view to the employee acquiring 'private law' rights under the terms of the contract of employment…If however, the authority gives the employee the required contractual protection, a breach of that contract is not a matter of 'public law' and gives no rise to administrative law remedies."

[47] In **R v British Broadcasting Corp, ex parte Lavelle** [1983] 1 All ER 241 the applicant was employed by the British Broadcasting Corporation (BBC) as a tape examiner under a contract of employment that expressly included BBC staff regulations. The police found tapes belonging to the BBC at the applicant's home and the applicant was charged with theft. The BBC decided to conduct a disciplinary hearing on the applicant's actions as they amounted to misconduct that justified dismissal. She was

given one hour notice of this hearing. This short notice meant that the applicant was unable to get someone to represent her. She was dismissed. She appealed her dismissal to the managing director but did not insist on her right to be represented at the disciplinary hearing. She also asked for the hearing to be postponed until the completion of the criminal proceedings on the ground that the hearing of the appeal would prejudice her defence. This request was refused and the managing director confirmed the decision to dismiss the applicant. She applied for judicial review of the decision to dismiss her and sought, inter alia, certiorari to quash both decisions and an injunction.

[48] Woolf J, at pages 252 and 255, in delivering his judgment accepted that an application for judicial review had not been and should not be extended to a pure employment situation. However, he went on to posit that the absence of judicial review did not prevent the applicability of civil law remedies to the particular case. He said that looking at the framework and context of the employment, since the BBC had engrafted into its ordinary principles of master and servant an elaborate framework of appeals, then the rights of the applicant were altered from what they would have been at common law. The applicant was therefore entitled to civil law remedies (although in that case these remedies were not afforded to the applicant because she had not satisfied the court that there would have been a real miscarriage of justice if it had not intervened.)

[49] The list of cases from **Ridge v Baldwin**, **Vidyodaya University v Silva**, **Malloch v Aberdeen**, **ex parte Walsh**, and **ex parte Lavelle** all accept that once

the contract or terms of employment is not regulated or established by statute, the relationship between the parties is that of pure master and servant and public law remedies would not apply. However, the decision of the full court in **R v The National Water Commission, ex parte Desmond Alexander Reid** (1984) 21 JLR 62 seems to stand alone in its suggestion that once a public body adopts and publishes a disciplinary code it is bound by the principles of public law to follow it.

[50] In **ex parte Desmond Reid**, the applicant was an employee of the National Water Commission (NWC). A formal charge was preferred against him and he was suspended. He responded in writing but did not elect to have the charges dealt with on the basis of a written reply or an oral enquiry. The respondent decided to hold an oral enquiry and the applicant's attorney-at-law objected to the persons sitting on the enquiry because this was in breach of the disciplinary procedures and sought an order of prohibition. Smith CJ in delivering the judgment of the full court at page 65 said

> "The Water Commission was a statutory corporation established for public purposes. Having adopted and published procedures to be followed in the exercise of its powers of disciplinary control over its employees, it was, in my judgment, bound thenceforward by the principles of administrative law to follow those procedures until they are validly altered. This, if an employee was dismissed in breach of the procedural requirements he would have a right to challenge the decision by seeking a judicial declaration or an order of certiorari, as appropriate. The employees to whom disciplinary procedures applied, therefore, held their employment subject to the observance of those procedures in relation to them without the necessity for their express formal incorporation into their terms of employment. By virtue of the transitional provisions contained in paragraph 7 of the second schedule, … the NWC acquired these employees with the observance of the procedural requirements as a condition of their employment."

[51] On careful analysis of Smith CJ's judgment in **ex parte Desmond Reid**, I must say with some hesitation that the learned chief justice did not seem to examine or accept the distinction between the body being subject to judicial review and the decision it makes being so susceptible. Smith CJ may well have thought that the statutory provisions enabling the transition of Water Commission staff to the NWC provided sufficient legislative underpinning of the employment contract to imbue it with a public law element. Therefore, that case can be distinguished from the instant case as it turned on its own special facts. It is interesting to note that **Ridge v Baldwin**, **Vidyodaya University v Silva** and **Malloch v Aberdeen** were not mentioned in his judgment.

[52] Overall, the four categories of dismissal being advanced in the various cases are: (i) dismissal from office in a pure master and servant case where there is no right to prerogative remedies; (ii) dismissal from office held at pleasure where there is no right to prerogative remedies; (iii) dismissal from office where there must be something against the man to warrant his dismissal and (iv) dismissal from office where the common law relationship of master and servant has been fortified by statute or given additional administrative law protection.

[53] In order for the appellant to be entitled to the order of certiorari sought in the court below, her dismissal would have to fall within the third or fourth category. To assess whether or not the appellant's dismissal fell into the third category of dismissal, one must assess whether there is any public law element to the dismissal, that is,

whether the individual is a public servant. Carberry JA in **ex parte Bobo Squire**, at page 150 stated that:

> "…unless there is present the "public element" certiorari will not issue, and the appropriate remedy if any is the action for a declaration… They will not be made in a simple case of master and servant; nor in a case where office is held at pleasure; but may be made where the person is an "officer" or the holder of public office… To decide whether a servant or employee is the holder of "public office" in the sense in which that term is used in this context, as distinct from being a servant in a simple master and servant relationship, there must be some element of a public nature that marks out the office…"

[54] One might therefore ask, who is a public officer? Section 1(1) of the Constitution defines 'public office' as any office in the public service and a 'public officer' as the holder of any public office and includes any person appointed to act in any such office. Section 125(1) provides that the power to make appointments to public office is vested with the Governor-General acting on the advice of the Public Services Commission. Section 125(3) directly enshrines the right of a public officer to be subject to the principles of natural justice by stating that the Governor-General must inform the public officer of any advice made to him by the Public Service Commission about disciplinary control.

[55] Various courts have explored the applicability of judicial review to dismissal cases by having regard to whether that employee was a public officer. In **Eugennie Ebanks v Betting Gaming and Lotteries Commission**, Ms Ebanks was employed to the Betting gaming and Lotteries Commission as director of administration and her services were terminated with immediate effect some years later. In considering Ms Ebanks'

employment status, G Smith J examined her appointment letter which read that she was subject to the rules and regulations of the commission. It was held that since she was not appointed by the Governor-General on the advice of the Public Service Commission, her relationship with the commission was based on ordinary contract and subject to those terms and conditions. In **ex parte Bobo Squire**, the appellant was employed to the council on the terms and conditions of the council and was therefore found not to be a public officer. Similarly in **Charles Ganga-Singh v Betting, Gaming and Lotteries Commission**, Mangatal J found that the applicant was not a public servant because he was appointed by the Betting, Gaming and Lotteries Commission and not by the Governor-General acting on the advice of the Public Services Commission.

[56] In the case at bar, both the appellant (at paragraph 5 of the affidavit of Karen Thames dated 12 January 2010) and the respondent (at paragraph 7 of the affidavit of Milton Henry dated 7 June 2010) agree that the appellant was appointed by the respondent. It therefore follows that the appellant was not appointed by the Governor-General acting on the advice of the Public Services Commission and so she was not a public officer. Since she was not a public officer, her employment was based on the ordinary contract of employment and she was subject to its terms and conditions. It therefore follows that since the appellant's contract of employment was based on ordinary contract, Evan Brown J was correct to find that the relationship between the appellant and the respondent was that of pure master and servant.

[57] Having accepted that the relationship between the appellant and the respondent was one of master and servant, I will now go on to address whether the appellant falls within the fourth category of dismissal, that is, whether this master and servant relationship has been fortified by statute or given additional administrative law protection. To make this assessment, one must examine the framework and context of the appellant's employment. Section 67 of the Irrigation Act provides that persons employed to the respondent immediately before 26 March 1999 are employed by the respondent on the same terms and conditions of employment. The only terms and conditions of employment disclosed to the court are contained in a letter of appointment for the appellant dated 23 April 1991, relating to her post of personnel assistant. There is no such document outlining the terms and conditions attached to the post of manager of human resources and industrial relations and director of corporate and legal services/company secretary. However, by virtue of section 67 of the Irrigation Act, it would seem that the same terms and conditions were adopted into other posts the appellant occupied.

[58] The appointment letter itself seems to be an ordinary contract with basic terms and conditions. It speaks to salary, leave entitlement, notice, pension and health benefits. It also makes the appellant subject to the rules and regulations of the respondent and the disciplinary code. However, the contract itself is also void of any statutory restriction or any public element. From a reading of the affidavits filed on behalf of both parties and the legislation that governs the respondent, no arguments were advanced and/or documentary proof provided that elementary rights of natural

justice were conferred on the appellant either expressly or by implication. The disciplinary code itself was not adopted into the Irrigation Act or its subsidiary legislation.

[59] As a consequence, there was no legislative underpinning to the appellant's employment and the disciplinary code. The relationship between the parties remains one of pure master and servant and does not fall within the fourth category of dismissal that would entitle the appellant to judicial review. For the reasons stated in paragraph [51] herein, **ex parte Desmond Reid** would not entitle the appellant to any public law remedies. The decision to dismiss the appellant from the respondent's employment was therefore not susceptible to judicial review and she was not entitled to an order of certiorari or a declaration in the terms sought (as stated in paragraph [16] herein).

Is the respondent bound to follow the disciplinary code in dismissing the appellant?

[60] In order for the respondent to be bound to follow the disciplinary code it must be either: (i) fortified by statute or (ii) expressly or impliedly made a term of the appellant's employment contract. Mangatal J in **Charles Ganga-Singh v Betting Gaming and Lotteries Commission** (at paragraph 19) having applied **ex parte Walsh** held that

> "… the mere fact that an applicant is employed by a public authority does not itself inject the necessary element of public law so as to attract the remedies of administrative law or judicial review. Whether a dismissal from employment by a public authority is subject to public law remedies depended on whether there were special statutory restrictions on dismissal which underpinned the employee's position and not on the fact of employment by a public authority per

> se or the employee's seniority or the interest of the public in the functioning of the authority."

[61] As discussed herein at paragraphs [56]-[59], there was no legislative underpinning to the appellant's employment and the disciplinary code. Without legislative restrictions or authentication, the disciplinary code is purely domestic in nature and could not be used as a means by which the appellant could obtain administrative law remedies (see **R v Lord Chancellor's Department, ex parte Nangle** [1992] All ER 897). However, if the disciplinary code was expressly or impliedly made a term of the appellant's employment contract then the respondents would have been bound to follow it. Since pursuant to section 67 of the Irrigation Act she would have been employed on the same terms and conditions, it follows that the code was expressly accepted as a term of the appellant's employment contract. This fact that the disciplinary code is a term of the appellant's employment contract is further illuminated by the respondents when they: (i) claimed to have charged the appellant under clause 14 of the disciplinary code; (ii) applied section 7.3 of the disciplinary procedures within the disciplinary code to decide whether she was entitled to a hearing and (iii) dismissed the appellant in accordance with section 2(a) of the disciplinary procedures within the disciplinary code. I therefore find favour in the submissions made by Mrs Senior Smith that the respondents were bound to follow the disciplinary code since it had been an expressed term of the appellant's contact and furthermore they published, adopted and relied upon it.

The effect of the possible breach by the respondent of the appellant's employment contract, by not holding an oral enquiry into the matter or by

failing to consider the appellant's reasonable expectation that there would have been a hearing?

[62] It has already been stated that the principles of judicial review are not applicable to a master and servant relationship and so an enquiry into whether the respondent breached the principles of natural justice in its application of the disciplinary code would be ineffectual. However, having found that the code was a term of the appellant's contract and that the respondents were bound to follow it, it is necessary to make an assessment of whether any of the provisions of the disciplinary code may have been breached.

[63] The appellant contends that she was dismissed in breach of the disciplinary code that was a part of her contract and the facts seem to support this assertion. Section 7 of the disciplinary procedure within the disciplinary code sets out the procedure for dismissal as follows:

> "7.1 The responsible Director shall as soon as practicable cause to be delivered to the employee written charges specifying the nature of the offence and shall require that the employee provide a written reply to the charges and any observations the employee may desire to make thereon must be received by the appropriate Director within seven (7) days (or such longer period as the appropriate Director may permit) of the delivery of the written charges.
>
> 7.2 The employee may attach to the written reply statements from his witnesses.
>
> 7.3 The employee may elect in his written reply either to have the charges dealt with by the appropriate Director on the basis of the written reply and the statements (if any) of the employee's witnesses or to have an oral enquiry before such person as the appropriate Director may appoint for the purpose; and that if no election is made the employee will be

> presumed to have elected to have the charges dealt with on the basis of the written reply."

[64] Section 7.1 states clearly that written charges specifying the nature of the offence must be delivered to the employee. Mr Henry's letter dated 12 August 2008 (see paragraph [4] herein) did not outline any written charges and highlighted 'possible disciplinary' breaches of government of Jamaica guidelines as the basis for the appellant's interdiction. However, Mr Nembhard's letter dated 2 December 2008 cited breaches under clause 14 of the disciplinary code as the basis for the appellant's dismissal. There seems to be a clear contradiction between the letter written by Mr Henry as to possible disciplinary breaches and Mr Nembhard's letter that referred to these breaches as charges. In addition, both letters failed to particularize specific breaches of government guidelines and so failed to fully explain the nature of the offence. As a consequence, no formal written charges were delivered to the appellant and the nature of the offence was not fully explained to the appellant which may have resulted in a breach of the disciplinary code.

[65] Mr Nembhard said that the appellant was cited under clause 14 of the disciplinary code for unsatisfactory workmanship or work performance. Clause 14 of the code states that for the charge of unsatisfactory workmanship or performance the penalties are reprimand, seven days suspension or dismissal for the first, second and third offence respectively. The appellant says that this was the first such offence and so she should have been reprimanded. Mr Henry (in his affidavit dated 7 June 2010 at paragraph 18) noted that the appellant had been reprimanded for her frequent late

attendance at work in a letter dated 7 February 1990 (also attached to the said affidavit). However, given the fact that clause 3 of the disciplinary code creates a separate offence for lateness to work, this letter of reprimand has no relation to offences under clause 14 of the disciplinary code. The use of the most severe penalty of dismissal for the first offence may also have resulted in a breach of the disciplinary code.

[66] In the letter dated 12 August 2008, the appellant was told that a disciplinary committee was established to conduct full investigations into the possible disciplinary breaches and to conduct the necessary hearings. It further stated that the appellant would be informed of the date for disciplinary hearing. In the letter dated 22 August 2008, Mr Henry told the respondent that she would be hearing from them shortly. Then on 2 December 2008, after having told the appellant that a committee was established to investigate the matter and that a hearing date would be set, the respondent went ahead and conducted a hearing in her absence and, in applying section 7.3, dismissed the appellant because she did not elect to have an oral enquiry into the matter. In my opinion, on the face of it, it would appear wrong for the respondent to opt to conduct a hearing, inform the appellant that there would have been a hearing and then dismiss her without a hearing. The appellant also provided information that leave entitlement was ten days and not the five days asserted by the respondent and no mention had been made by the respondent in respect of its findings on that breach. It would therefore be a matter for the court to decide whether there was a breach of the disciplinary code.

What is the effect of Evan Brown J's failure to convert the matter into a private law claim?

[67] Although judicial review is inapplicable to the case at bar, this does not mean that this is the end of the case. The court has the discretion to order a claim to continue as if it had not been started under part 56 of the CPR. Rule 56.10(3) states:

> "The court may however at any stage –
>
> a) direct that any claim for other relief be dealt with separately from the claim for an administrative order; or
>
> b) direct that the whole application be dealt with as a claim and give appropriate directions under Parts 26 and 27; and
>
> c) in either case, make any order it considers just as to costs that have been wasted because of the unreasonable use of the procedure under this Part."

[68] In the present case, although Evan Brown J recognized that the court is empowered by rule 56.10(3) of the CPR to direct that any claim for other relief can be dealt with separately from the claim for an administrative order, he nonetheless refused to exercise his discretion. This was because he felt that there was nothing more to litigate since the appellant, although she had sought damages for the financial, emotional and physical loss she suffered, was only entitled to three months salary in lieu of notice and she has already received the same. I do not agree.

[69] Evan Brown J may have well thought that by virtue of **Addis v Gramophone Co Ltd** [1909] AC 488 damages ought to be restricted to definable pecuniary losses, that is, payment in lieu of notice and nothing more and not for injury to feelings and

the harshness of the dismissal. However, **Addis v Gramophone Co Ltd** is a century old case and since then, the law has been in a developing mode. The House of Lords has acknowledged the existence of an implied term of trust and confidence into an employment contract which if breached may entitle a claimant to additional damages in a number of cases, namely **Malik and Mahmud v Bank of Credit and Commerce International** [1999] AC 20, **Eastwood v Magnox Electric plc**, **McCabe v Cornwall County Council** [2004] 3 All ER 991, **Blackburn v Aldi Stores Ltd** [2013] IRLR 846 and **Yapp v Foreign and Commonwealth Office** [2014] EWCA Civ 1512. Indeed in **Blackburn v Aldi Stores Ltd**, the House of Lords held that serious breaches of the employers internal disciplinary and grievance procedures, at both original and appellate stages, was a breach of the implied term of trust and confidence. I acknowledged this new development in the law in **Lafette Edgehill, Dwight Reid and Donnette Spence v Greg Christie (Contractor General of Jamaica)** [2012] JMCA Civ 16, at paragraph [75]. However, this doctrine was not argued in the court below or in this appeal and has not yet been judicially examined by this court.

[70] It will be a matter for the trial judge hearing the claim to say whether expressed or implied terms of the appellant's employment contract were breached and whether she is entitled to additional damages or other civil law remedies. In finding, as he did, that there was nothing more to litigate, Evan Brown J was stating a conclusion on the very matter that he was being asked to direct to be dealt with as a claim under rule 56.10(3) of the CPR. In my view, that conclusion could only have been made by a judge after a trial of the claim and after full submissions by the parties on the material that

has been placed before the court for its consideration and decision. It seems therefore that Evan Brown J fell into error by declining to give effect to this rule.

Can the court of appeal refer a matter to the Industrial Disputes Tribunal

[71] The appellant is also asking this court to refer the matter to the Industrial Disputes Tribunal (IDT). There is a strong desire by the courts not to allow the use of essentially public law remedies to circumvent the jurisdiction of an employment tribunal which is the proper forum for exceptional dismissal cases. This may be the reason why there is no legislative provision given to allow this court to refer a matter to the IDT. Sections 11, 11A and 11B of the Labour Relations and Industrial Disputes Act (LRIDA) clearly states that referrals to the IDT are made by the Minister as follows:

> "11 (1) Subject to the provisions of subsection (2) and sections 9 and 10 the Minister may, at the request in writing of all of the parties to any industrial dispute, refer such dispute to the Tribunal for settlement.
>
> (2) If the Minister is satisfied that any collective agreement in force between the parties which have requested him to refer a dispute to the Tribunal under this section includes procedure for the settlement of that dispute he shall not refer that dispute to the Tribunal under this section unless attempts were made, without success, to settle that dispute by such other means as were available to the parties.
>
> (3) If all the parties which have requested the Minister to refer a dispute to the Tribunal under this section inform the Minister in writing, before the Tribunal begins to deal with the dispute, that they no longer wish such dispute to be settled by the Tribunal, the Minister shall not refer the dispute to the Tribunal or, if he has already done so, he shall withdraw the reference.
>
> 11A. (1) Notwithstanding the provisions of sections 9, 10 and 11, where the Minister is satisfied that an industrial dispute exists in any undertaking, he may on his own initiative-

(a) refer the dispute to the Tribunal for settlement-

(i) if he is satisfied that attempts were made, without success, to settle the dispute by such other means as were available to the parties; or

(ii) if, in his opinion, all the circumstances surrounding the dispute constitute such an urgent or exceptional situation that it would be expedient so to do;

(b) give directions in writing to the parties to pursue such means as he shall specify to settle the dispute within such period as he may specify if he is not satisfied that all attempts were made to settle the dispute by all such means as were available to the parties.

(2) If any of the parties to whom the Minister gave directions under paragraph (b) of subsection (1) to pursue a means of settlement reports to him in writing that such means has been pursued without success, the Minister may, upon the receipt of the report, or if he has not received any report at the end of any period specified in hose directions, he may then, refer the dispute to the Tribunal for settlement.

(3) Nothing in this section shall be construed as requiring that it be shown, in relation to any industrial dispute in question, that-

(a) any industrial action has been, or is likely to be, taken in contemplation or furtherance of the dispute; or

(b) any worker who is a party to the dispute is a member of a trade union having bargaining rights.

11B. Notwithstanding the provisions of sections 9, 10, 11 and 11A, where an industrial dispute exists in any undertaking which relates to disciplinary action taken against a worker, the Minister shall not refer that dispute to the Tribunal unless, within twelve months of the date on which the disciplinary action became effective, the worker lodged a complaint against such action with the Minister."

[72] At the time of the appellant's dismissal access to the IDT was not open to her since the LRIDA was amended on 23 March 2010, approximately two years after her

dismissal, permitting an employee who is not a member of a trade union or is not engaged or about to be engaged in industrial action, direct access to the IDT. Even with access now being given to the appellant, referrals to the IDT can only be made by the Minister within 12 months from the date of the disciplinary action taken against the employee. Consequently, the appellant's hope of access to the IDT has elapsed. The Court of Appeal cannot make a referral to the IDT as pursuant to the provisions of the LRIDA, a referral must be made by the Minister.

Conclusion

[73] In light of the above it is clear that that the respondent is a body that is amenable to judicial review but its decision to dismiss the appellant from its employment is not so susceptible. Since the relationship between the respondent and the appellant was one of master and servant, the only remedies to which the appellant would be entitled were those in civil law. There may have been breaches of the appellant's employment contract (due to improper application of the disciplinary procedures and a breach of the implied duty of trust and confidence) which may have entitled her to additional damages. She certainly was entitled to a direction under rule 56.10(3) of the CPR. As a consequence, I would allow the appeal in part. I would affirm Evan Brown J's judgment to the extent that he refused the orders of certiorari and the declaration sought. I would, pursuant to rule 56.10(3) of the CPR direct that the whole application be dealt with as a claim and I would also direct, pursuant to part 26 and 27 of the CPR that a case management conference should be scheduled at the earliest possible time. I would also make no order as to costs.

MORRISON JA

ORDER

Appeal allowed in part. Evan Brown J's judgment affirmed to the extent that he refused the orders of certiorari and the declaration sought. Pursuant to rule 56.10(3) of the Civil Procedure Rules the application is ordered to be dealt with as a claim. Case management conference in the Supreme Court to be scheduled at the earliest possible time. No order as to costs.