

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

Civil Division

[Unreported]

Suit No: 1618 of 2008

BETWEEN

HUGH ANTHONY ATHERLEY - APPLICANT

AND

THE CHIEF PERSONNEL OFFICER - RESPONDENT

*Before The Honourable Madam Justice Maureen Crane-Scott, Q.C.
Judge of the High Court*

2010: March 16, 17 and 30

Mr. Errol Niles for the Applicant

**Miss. Sharon Deane in association with Mr. Roger Barker for the
Respondent**

DECISION

- [1] **Crane-Scott J:** This is an application for judicial review brought by the Applicant, (hereinafter sometimes referred to as “Mr. Atherley”) against the Chief Personnel Officer pursuant to the *Administrative Justice Act, Cap.109B* of the Laws of Barbados.
- [2] The application calls into question certain acts of the Chief Personnel Officer, a public official, in the exercise of the statutory duties conferred on her by regulation 9 of the *Service Commissions (Public Service) Regulations, 1978*.
- [3] Regulation 9 regulates the duties of the Chief Personnel Officer and mandates that she:
- “(a) submit matters to the Commission for decision;*
(b) attend meetings of the Commission, when required to do so by the Commission;.
(c) give effect to the decisions of the Commission; and
(d) to ensure that all documents and papers relating to any matter being or to be considered by the Commission are made available to the Commission.”
- [4] In his Originating Notice of Motion and Statement in support filed on October 16th, 2008 Mr. Atherley initially sought the following relief:

- (a) An order of Mandamus directing that the Chief Personnel Officer perform her statutory duty as required by regulation 9 (a) and (d) of the *Service Commissions (Public Service) Regulations, 1978* and submit the recommendation by the Permanent Secretary (ag) in the Ministry of Public Works and Transport, Mr. Edison Alleyne made on or about December 2007 that Mr. Atherley be appointed to the post of Chief

Licensing Officer, Barbados Licensing Authority with effect from January 1, 2008;

(b) An order of Certiorari quashing the decision of the interviewing panel on the 22nd day of May, 2008 chaired by the Chief Personnel Officer....denying Mr. Atherley's promotion to the post of Chief Licensing Officer, Ministry of Public Works and Transport;

(c) A Conservatory Order that no other appointment be made to the post of Chief Licensing Officer, Barbados Licensing Authority until the substantive matter is determined by the Court; and

(d) Costs.

[5] On November 17th, 2008 following an *ex parte* application, a Conservatory Order was put in place in order to maintain the *status quo* and prevent a permanent appointment to the vacant post of Chief Licensing Officer, Barbados Licensing Authority from being made until the substantive application was determined by the Court.

[6] **The Amended Statement:** When the matter eventually came on for hearing in March, 2010, Counsel for the Applicant, Mr. Niles informed the Court that Mr. Atherley was no longer pursuing his claim for an order of Mandamus. He sought, and was granted leave of the Court to amend the Applicant's Statement to clarify the grounds upon which relief in the form of an order of Certiorari would proceed.

[7] The amendments, he said, had become necessary, in view of the facts which were now before the Court. He referred specifically the Public Service Commission Paper P.S.C. 2008/139 of February 7, 2008 ("GA4") which had since come to light in the affidavit of Gail Atkins filed on February 5, 2009 and which, he said, had impacted on the Applicant's case as originally conceived.

- [8] Counsel for the Applicant submitted that until the Public Service Commission Paper (“GA 4”) had been put into evidence, both Mr. Atherley and himself had been labouring under the now obviously mistaken view that the Chief Personnel Officer had not submitted to the Public Service Commission a recommendation which had been made by the then acting Permanent Secretary of the Ministry of Public Works & Transport, Mr. Edison Alleyne, for Mr. Atherley to be appointed to act in the vacant post of Chief Licensing Officer with effect from January 1, 2008 for a one (1) year probationary period before being ultimately confirmed in the appointment.
- [9] **Scope of the application:** Following the required amendments to the Applicant’s Statement (which were not objected to by Counsel for the Respondent) the sole ground upon which Mr. Atherley’s application for judicial review proceeded at the trial was:

“(h) That pursuant to Section 9 of the...Service Commissions (Public Service) Regulations, 1978, the Respondent misdirected herself by including the name Winston Dash along with the recommendation of the Permanent Secretary as Head of the Ministry that the Applicant was the only person with the requisite qualifications for appointment to the post of Chief Licensing Officer from January 1, 2008 before forwarding the said recommendation to the Services Commission. This amounts to an error of law and/or was ultra vires and which frustrated the legitimate expectation of the Applicant to act in the said post.”

- [10] The gist of the complaint is that having received a recommendation from the acting Permanent Secretary of the Ministry of Public Works & Transport, Mr. Edison Alleyne for Mr. Atherley to be appointed to act in

the post, it was the duty of the Chief Personnel Officer under regulation 9(a) of the *Service Commissions (Public Service) Regulations, 1978*, to have simply transmitted that recommendation to the Public Service Commission for its decision.

- [11] Counsel for the Applicant contended that having received a recommendation from the acting Permanent Secretary for Mr. Atherley to act in the post of Chief Licensing Officer from January 1, 2008, the Chief Personnel Officer ought not (as Commission Paper “GA 4” clearly establishes that she did) to have included in her submission to the Commission, the name of any other candidate for the post other than that of the Applicant.
- [12] Mr. Niles argued that by submitting the name of Mr. Winston Dash to the Commission alongside Mr. Atherley’s name and further, by inviting the Commission to decide whether both applicants for the post should be interviewed, the Chief Personnel Officer committed an error of law and/or had acted *ultra vires*.
- [13] Mr. Niles contended further that by not transmitting the recommendation from the acting Permanent Secretary to the Commission exactly as it had been received, the Chief Personnel Officer also frustrated what, he said, was the Applicant’s ‘legitimate expectation’ that he would have been appointed to act in the post in accordance with the recommendation of the acting Permanent Secretary who regarded the Applicant as the *only* candidate with the requisite qualifications, and who had assured him that he would be appointed to act in the post in the manner he had recommended.
- [14] Other complaints and grievances: Apart from the foregoing ground for relief set out in his amended Statement, Mr. Atherley, in numerous affidavits (filed subsequently and without leave) also complained about 3 separate occasions when persons other than himself had been appointed

to act in the post of Chief Licensing Officer. These acting appointments, he alleged, were made in breach of the *Public Service Recruitment and Employment Code* contained in the First Schedule to the *Public Service Act, 2007/170*, and were also made without these persons having the statutory qualifications for the post as stipulated in the *Civil Establishment (Qualifications) Order, 2001*.

- [15] These new allegations were, however, not expressly set out as grounds for relief in his original Statement filed in support of the application in October 2008. Nor did his Counsel, Mr. Niles seek, at the hearing of the motion, to amend the Applicant's Statement to have them added as additional grounds for relief.
- [16] In the circumstances, the Court has found it prudent to expressly hold that the additional matters complained of by Mr. Atherley in relation to the 3 acting appointments are not properly before the Court, form no part of the current application and cannot be the subject of judicial review on this application.
- [17] In declining jurisdiction to review Mr. Atherley's other complaints, the Court has adverted to rule 4(1) of the *Judicial Review (Application) Rules, 1983* which provides, *inter alia*, that '...no grounds shall be relied upon or any relief sought at the hearing except the grounds and the relief set out in the Statement.'
- [18] Before moving on, the Court wishes to observe that the practice (which was unfortunately adopted in this case) whereby an applicant in judicial review proceedings constantly files additional affidavits and continually places new facts before the Court thereby raising new matters not initially complained of in the Statement filed in support of the application, is inconsistent with the procedure laid down in rules 2(2) and 4 of the *Judicial Review (Application) Rules, 1983*.

- [19] Rule 2(2) clearly envisages that an applicant for judicial review should ordinarily support the application, *inter alia*, “...by affidavit, to be filed before the application is made, verifying the facts relied on.”
- [20] If at the hearing of the motion, the applicant applies for, and is granted leave to amend his Statement, whether by specifying additional grounds for relief or otherwise, rule 4 provides that the Court may allow further affidavits to be used if they deal with new matters arising out of an affidavit of any other party to the application.
- [21] The rules appear to suggest that an applicant for judicial review should resist the temptation of filing additional affidavits in support of the application without first seeking leave of the Court to amend the Statement or to file additional evidence. Furthermore, if following a thoughtful review of his application, an applicant considers that new facts should be placed before the Court, care should be taken to ensure that the new evidence is relevant to the specific grounds set out in the Statement for the Court’s review and more importantly, that the new material does not, in effect, introduce new grounds not expressly outlined in the Statement.
- [22] In the Court’s view, if a more thoughtful and analytical approach to judicial review applications is adopted, it will greatly enhance the proceedings and ensure that the Court which ultimately hears the application is not bombarded (as in this case) with a mass of facts many of which have no relevance to the specific grounds for which relief in the Statement is sought.
- [23] In this case Mr. Niles applied for, and was granted leave at the hearing to amend the Applicant’s Statement in the manner outlined at paragraph [9]. He did not seek leave to adduce additional evidence but was permitted to rely on such of the facts set out in any of the affidavits as would support

the single ground for relief set out at paragraph (h) of the amended Statement.

[24] With these preliminary observations, the Court turns now to consider the evidence which was adduced by both parties and the merits of the *single* ground for relief set out at paragraph (h) of the Applicant's amended Statement which was formally filed on March 18, 2010.

[25] **The Evidence:** The evidence consisted of a total of 6 affidavits together with various exhibits filed on behalf of both parties as follows:.

[26] The Applicant's 4 affidavits:

1) Affidavit of Hugh Anthony Atherley filed October 16, 2008 to which 9 exhibits were attached as follows:

(“HAA1”) - Vacancy Notice published in the local newspapers during July 2007 regarding the vacant post of Chief Licensing Officer, Barbados Licensing Authority, Ministry of Public Works and Transport;

(“HAA2”) - Circular dated July 2, 2007 circulated within the Public Service by the Personnel Administration Division containing details of the vacant post of Chief Licensing Officer and inviting applications from suitably qualified persons;

(“HAA3”) – Letter dated January 31, 2008 signed by the Deputy Secretary General, National Union of Public Workers (NUPW) and addressed to the Chief Personnel Officer enquiring as to the status of Mr. Atherley's appointment and calling on the office of the Chief Personnel Officer to “*make good the appointment or to show justification why Mr. Atherley should not be appointed to the post.*”

(“HAA4”) – Follow-up letter dated March 14, 2008 signed by the Deputy Secretary General, National Union of Public Workers (NUPW) and addressed to the Chief Personnel Officer requesting “*a meeting to address any difficulties attending the matter.*”

(“HAA5”) – Further letter dated May 30, 2008 signed by the Grievance/Industrial Relations Officer, National Union of Public Workers (NUPW) and addressed to the Chief Personnel Officer complaining that Mr. Atherley had been wrongfully denied the opportunity to act in the vacant post until a permanent appointment could be made and requesting “*reasons for continually overlooking Mr. Atherley in favour of persons that are junior and less qualified.*”

(“HAA6”) – Letter dated February 22, 2008 signed on behalf of the Chief Personnel Officer and addressed to the National Union of Public Workers refuting matters outlined in the Union’s letter of January 31, 2008 and advising that the post had been advertised and that interviews for the post would be held shortly;

(“HAA7”) - Circular No.3/2003 M.P.6105/4 Vol. I dated March 18, 2003 circulated within the Public Service to Permanent Secretaries and Heads of Department by the Permanent Secretary, Ministry of the Civil Service clarifying the effect of the *Civil Establishment (Qualifications) Order, 2001* on the eligibility for appointment of officers who had been acting continuously in a post for 3 years or more before the coming into effect of the Order and where the officer had met the previous qualification requirements for appointment to that post;

(“HAA8”) - *The Public Service Recruitment and Employment Code* contained in the First Schedule to the *Public Service Act, 2007/170* and setting out the procedures for recruitment and employment in the Public Service;

(“HAA9”) – Letter dated August 12, 2008 addressed to Mr. Atherley by the Chief Personnel Officer thanking him for attending the interviewing process for the post of Chief Licensing Officer and informing him that he was unsuccessful in gaining promotion at this time.

- 2) Affidavit in Reply of Hugh Atherley filed February 23, 2009 answering matters raised in the Affidavit of Gail Atkins filed on February 5, 2009 and annexing the following exhibits:

(“HAA10”) – Extract from section 99 of *the Constitution of Barbados* setting out the manner in which appointments are to be made to specified public offices identified in section 99(2) of the Constitution;

(“HAA 11”) - Another copy of the *Public Service Recruitment and Employment Code* contained in the First Schedule to the *Public Service Act, 2007/170* and setting out the procedures for recruitment and employment in the Public Service;

- 3) Further affidavit of Hugh Atherley filed on April 22, 2009 annexing the following further exhibits:

(“HAA 12”) - Copy letter dated May 28, 2008 sent to Mr. Allen Thomas, Ministry of Transport and Works by the Chief Personnel Officer and explaining the effect of section 13 of the *Public Service Act, 2007*;

(“HAA 13”) - Internal Memorandum dated 2008-07-16 from the Financial Controller, Ministry of Public Works and

Transport addressed to all staff within the Ministry of Public Works informing staff of the dates of her vacation leave and informing them that accounting matters should be referred in her absence to the Senior Accountant (ag).

- 4) Supplemental Affidavit of Hugh Atherley filed November 11, 2009 annexing the following additional exhibits:

(“HAA 14”) - Copy letter dated May 13, 2009 signed by the General, National Union of Public Workers (NUPW) and addressed to the Chief Personnel Officer raising issues in relation to the *draft* Public Service Qualifications Order, 2008 and in particular the meaning of the term ‘relevant experience’ as proposed in the draft order;

(“HAA 15”) - Copy letter dated September 21, 2009 signed by the Industrial Relations Officer, National Union of Public Workers (NUPW) and addressed to the Chief Personnel Officer raising concerns regarding the acting appointment to the post of Chief Licensing Officer of Mr. Virgil Knight made in April 2009

(“HAA 16”) - Copy letter dated October 1, 2009 addressed to the General Secretary, NUPW on behalf of the Chief Personnel Officer advising that the concerns raised in the Union’s letter of September 21, 2009 were being researched.

[27] *The Respondent’s 2 affidavits:*

- 1) Affidavit of Gail Atkins filed February 5, 2009 together with the following 7 exhibits:

(“GA 1”) - Copy minute dated 2006-03-15 addressed to the Chief Personnel Officer by the Permanent Secretary, Ministry of Transport Works and International Transport recommending that applicants for the vacant post of Chief

Licensing Officer be interviewed and that a selection panel comprising specific persons be convened to conduct the interviews;

(“GA 2”) - Copy Memorandum dated April 10, 2007 from Permanent Secretary (Civil Service), Ministry of Labour and Civil Service addressed to the Permanent Secretary, Ministry of Public Works and Transport advising that approval had been granted to amend the qualification for appointment to the post of Chief Licensing officer and setting out the approved qualifications;

(“GA 3”) - Extract from section 99 of *the Constitution of Barbados* setting out the manner in which appointments are to be made to specified public offices identified in section 99(2) of the Constitution;

(“GA 4”) - Copy of Public Service Commission Paper P.S.C. 2008/139 dated February 7, 2008 which was submitted by the Chief Personnel Officer to the Commission for consideration and advice in connection with a) the conduct of interviews for the post of Chief Licensing Officer, the composition of the interviewing panel and b) filling the vacancy on an short-term acting basis pending the outcome of the interviewing process;

(“GA 5”) - Extract from section 94 of *the Constitution of Barbados* setting out the fact that power, *inter alia*, to make appointments to public offices is vested in the Governor general, acting in accordance with the advice of the Public Service Commission;

(“GA 6”) - Copy of minute dated 2007-12-11 addressed to the Chief Personnel Officer by the acting Permanent

Secretary, Ministry of Public Works & Transport, Mr. Edison Alleyne, recommending the appointment of Mr. Atherley to the post of Chief Licensing Officer on a one (1) year probationary period before confirmation of the appointment. The minute contained the further recommendation that if an interview of the candidates who had applied was preferred, an interviewing panel comprising specific persons be convened.

(“GA 7”) - Another copy of the *Public Service Recruitment and Employment Code* contained in the First Schedule to the *Public Service Act, 2007/170* and setting out the procedures for recruitment and employment in the Public Service.

2) Second Affidavit of Gail Atkins filed March 13, 2009 in response to the affidavit of Hugh Atherley filed on February 23, 2009.

[28] **The relevant facts:** Having reviewed the evidence, the facts which the Court has found to be relevant to the ground for relief set out at paragraph (h) of the amended Statement are set out below:

[29] The post of Chief Licensing Officer became vacant on August 27, 2005 when its holder, Mr. Vincent Dottin retired from public office. The vacancy was then advertised on February 24, 2006 for the first time, with a view to its being filled by way of a permanent appointment. Some 6 applicants responded to the advertisement in 2006, including the Applicant.

[30] In accordance with the *Civil Establishment (Qualifications) Order, 2001* in force at that time, the qualification requirements for appointment to the post of Chief Licensing Officer were: “*The Higher National Diploma in Mechanical Engineering; and not less than seven years relevant experience*”.

- [31] None of the 6 candidates who applied for the post when it was first advertised in 2006 had the technical qualifications for permanent appointment as laid down in the Order. Accordingly, no further action was taken to permanently fill the post and the recruitment process was put on hold. The Ministry of Transport, Works and International Transport then initiated action in conjunction with the Ministry of Labour and the Civil Service to amend the qualification requirements for the post.
- [32] By Memorandum dated April 10, 2007, (“GA2”) the Ministry of Labour and the Civil Service advised the Ministry of Transport, Works and International Transport that the qualifications for the post of Chief Licensing Officer had been duly amended as set out hereunder:

- (a) A degree in Business Management, Public Sector Management or Accounting and not less than seven years’ relevant experience; or*
- (b) A diploma or an associate degree with a major in Accounting and not less than ten years’ relevant experience; or*
- (c) An associate degree in Auto mechanics or Mechanical Engineering and a certificate in Management and not less than nine years’ relevant experience.*

- [33] The amendments to the qualification requirements having been made, the recruitment process to fill the vacancy on a permanent basis was re-started in 2007.
- [34] The process of filling the vacancy was driven by the Public Service Commission which, acting in accordance with regulation 10 of the *Service Commissions (Public Service) Regulations, 1978*, at its meeting of June 11, 2007, considered the matter and advised the Governor-General that the post of Chief Licensing Officer should be re-advertised.

- [35] In accordance with her statutory duty under regulation 9(c) of the *Service Commissions (Public Service) Regulations, 1978*, to give effect to decisions of the Commission, the Chief Personnel Officer then made arrangements for the post of Chief Licensing Officer to be re-advertised.
- [36] The fact of the vacancy and details of the vacant post (including the new qualification requirements) were duly advertised in the Barbados Advocate and Nation newspapers on July 4th, 2007. (See “*HAA1*”). Details of the vacant post were also circulated internally within the Public Service by Circular dated July 2, 2007 issued by the Personnel Administration Division. (See “*HAA2*”)
- [37] The closing date for the submission of applications was August 7, 2007 and some 4 candidates applied to fill the vacancy. The applicants were:
- a) Mr. Edwin Lawrence;
 - b) Mrs. Marcia Hinkson;
 - c) Mr. Winston Dash;
 - d) Mr. Hugh Atherley.
- [38] On August 22, 2007, in keeping with standard practice, the Chief Personnel Officer sent the file containing the 4 applications which had been received for the vacant post of Chief Licensing Officer to the Permanent Secretary, Ministry of Public Works and Transport for the short-listing of the applicants.
- [39] By minute dated December 11, 2007 (“*GA6*”), the acting Permanent Secretary, Ministry of Public Works and Transport, Mr. Edison Alleyne made the following comments and recommendations:
- (a) that from the list of applicants, Mr. Hugh Atherley was the *only* applicant who had the requisite qualifications for the post and should be the only person to be interviewed to determine his suitability;

- (b) that Mr. Atherley should be appointed on probation for 1 year from January 1, 2008 to provide sufficient time to evaluate his performance and recommend him for the relevant training; and
- (c) that if the interview process was the preferred method to confirm the selection, a panel comprising 5 persons identified in the minute be convened.

- [40] On receipt of the acting Permanent Secretary's comments and recommendations ("GA6"), the Chief Personnel Officer recognized that another applicant for the post, Mr. Winston Dash also appeared to meet the qualification requirements for appointment to the post.
- [41] Before making the submission to the Commission, the Chief Personnel Officer accordingly sought to independently verify Mr. Edison Alleyne's representation to her that Mr. Atherley was the *only* applicant who had the requisite qualifications for the post and should be the only person to be interviewed to determine his suitability.
- [42] The Chief Personnel Officer then forwarded the file with the applications to the Permanent Secretary (Civil Service), Ministry of Labour and Civil Service for that Ministry's independent advice regarding the qualifications and experience of Messrs. Dash and Atherley and their eligibility for appointment to the post of Chief Licensing Officer.
- [43] Having reviewed the qualifications and experience of both candidates as requested, the Ministry of the Civil Service informed the Chief Personnel Officer that both Messrs. Dash and Atherley were considered eligible for appointment.
- [44] In the face of the obviously conflicting opinions regarding the eligibility for appointment of Messrs. Atherley and Dash, the Chief Personnel Officer then prepared a Commission Paper ("GA4") in which she advised the Commission of the fact that despite the recommendations which she had received from the acting Permanent Secretary, there was in fact

another qualified applicant, apart from Mr. Atherley, who was eligible for appointment to the post.

[45] The Chief Personnel Officer also recommended to the Commission that both Messrs. Dash and Atherley be interviewed for the post and invited its decision in relation to whether interviews should be held.

[46] Explaining the reason for including Mr. Winston Dash's name in the Commission Paper ("GA4") and her recommendation to the Commission that both applicants be interviewed, the Chief Personnel Officer deposed at paragraphs 13 and 16 of her affidavit filed on March 13, 2009 that she viewed it as part of her mandate as Chief Personnel Officer to ensure that no eligible candidate was being overlooked and that no eligible candidates for appointment are excluded from consideration by the Commission.

[47] The Chief Personnel Officer also recommended to the Commission that (i) the successful candidate be appointed to act in the first instance, for a period of 3 months and (ii) the Permanent Secretary be requested to evaluate the officer's work performance and submit a report on his findings and recommendations.

[48] With respect to the issue of making a permanent appointment to the post, the Chief Personnel Officer at paragraph 16 of the Commission Paper ("GA4") and in accordance with her statutory duty under regulation 9(a) of the *Service Commissions (Public Service) Regulations, 1978* invited the Public Service Commission to consider the issues raised in the Paper and to advise whether or not:

- (i) interviews of Messrs. Atherley and Dash should be conducted;
- (ii) A selection panel comprising named persons should be appointed to conduct the interviews; and

- (iii) (i) the successful candidate be appointed to act in the first instance, for a period of 3 months and (ii) the Permanent Secretary be requested to evaluate the officer's work performance and submit a report on his findings and recommendations.

[49] At its meeting of April 21, 2008, the Public Service Commission considered the matter and decided that Messrs. Dash and Atherley should both be interviewed for the post. The Commission also approved the names of the persons who would comprise the interviewing panel.

[50] Following the Commission's decisions, and in accordance with her statutory duty under regulation 9 (c) of the *Service Commissions (Public Service) Regulations, 1978* to 'give effect to the decisions of the Commission', the Chief Personnel Officer then arranged for Messrs. Dash and Atherley to be interviewed by the selection panel.

[51] Ultimately following the interviews, Mr. Atherley was not selected for appointment to the post of Chief Licensing Officer and by Memorandum dated August 12, 2008 ("HAA9") he was duly informed that he had failed in his bid for promotion to the post of Chief Licensing Officer. On October 16, 2008, dissatisfied that he had not been appointed to act in the post in the manner suggested by the acting Permanent Secretary, Mr. Atherley instituted the current proceedings seeking, *inter alia*, an order of certiorari to quash the decision of the interviewing panel which had denied him promotion to the post of Chief Licensing Officer.

[52] **Submissions for and against the relief sought:** Counsel for the Applicant, Mr. Niles submitted that having in December 2007 received a recommendation ("GA6") from the then acting Permanent Secretary, Public Works and Transport, Mr. Edison Alleyne for Mr. Atherley to act in the vacant post of Chief Licensing Officer on probation for 1 year from January 1, 2008, the Chief Personnel Officer erred in law and/or acted

ultra vires when, instead of forwarding that recommendation to the Commission for decision, she included the name of Mr. Winston Dash along with that of Mr. Atherley in the Commission Paper (“GA4”) which she then submitted to the Public Service Commission for decision.

- [53] He submitted that by making the submission to the Commission which she made, the Chief Personnel Officer also frustrated Mr. Atherley’s ‘legitimate expectation’ that he would have been appointed to act in the post in the manner recommended by the acting Permanent Secretary.
- [54] Taking what would appear to be a very narrow view of the duties of the Chief Personnel Officer set out in regulation 9(a) of the *Service Commissions (Public Service) Regulations, 1978*, Mr. Niles contended that the Chief Personnel Officer could lawfully do no more than submit the recommendation of the acting Permanent Secretary to the Commission.
- [55] He further submitted that the Chief Personnel Officer had exceeded her powers and acted unlawfully when she included Mr. Dash’s name together with that of Mr. Atherley in the Commission Paper (“GA4”) which she then submitted to the Public Service Commission for its decision along with a recommendation that both applicants be interviewed by an interviewing panel in connection with the permanent appointment.
- [56] According to Mr. Niles, the submission by the Chief Personnel Officer of both names to the Commission, frustrated the proposal and recommendation which the acting Permanent Secretary had made for Mr. Atherley to act in the post for a 1 year probationary period before ultimately being confirmed in the post.
- [57] Mr. Niles submitted that Mr. Atherley had been led by conversations with, and express representations made by the acting Permanent Secretary, and by the then Minister of the Public Service, Mr. Gline

Clarke, to believe, and consequently harboured a ‘legitimate expectation’ that due to his superior qualifications and experience, as well as the strength of his knowledge of licensing matters, he would have been appointed to the post of Chief Licensing Officer.

[58] Additionally, he had been informed by the Deputy Permanent Secretary, Mr. Chesterfield Atherley and led to believe that a favourable appraisal report prepared by him, had been submitted to the Chief Personnel Officer along with the recommendation by the acting Permanent Secretary and that his appointment to the post would be assured.

[59] Mr. Niles contended that the several representations which had been made to Mr. Atherley constituted, what he termed, a “chain of communications” which, together with what Mr. Atherley believed to be the “*usual practice*” of the Civil Service that “*so long as a recommendation was made by a Permanent Secretary and forwarded to the Chief Personnel Officer it would automatically be submitted to the Services Commission for ratification*”, were sufficient to give rise to a ‘legitimate expectation’ in Mr. Atherley that would have been appointed to act in the post of Chief Licensing Officer in the manner which had been recommended by the acting Permanent Secretary.

[60] In support his arguments, Counsel for the Applicant cited the cases of *Pearson Leacock v. The Attorney General, [Unreported] H.C. B’dos Civil Jurisdiction No.1712 of 2005* and *Attorney General for New South Wales v. Quin [1992] LRC (Const) 751*.

[61] Mr. Niles concluded his submissions by urging the Court to grant an order of Certiorari to quash the decision of the interviewing panel which met on the 22nd day of May, 2008 under the chairmanship of the Chief Personnel Officer and which denied the Applicant’s promotion to the post of Chief Licensing Officer.

- [62] For her part, Counsel for the Respondent, Miss. Sharon Deane submitted that the Licensing Authority was a department of Government with its own establishment under the Ministry of Transport, Works and International Transport as set out in the *Public Service (General) Order, 2008*.
- [63] She further submitted that the post of Chief Licensing Officer was an office the holder of which was the head of a department of the Government within the meaning of s.99(2) of the *Constitution of Barbados*. Consequently she contended, in accordance with section 99(1)(a) of *the Constitution*, the power to make an appointment to the post of Chief Licensing Officer was, expressly vested in the Governor-General, acting on the recommendation of the Public Service Commission made after the Commission has consulted with the Prime Minister.
- [64] Referring to sections 4 and 5 of the *Public Service Act, No. 170 of 2007*, Miss. Deane submitted that the Public Service is managed, *inter alia*, by the Service Commissions in accordance with *the Constitution; the Services Commissions (Public Service) Regulations, 1978; the Services Commission (Police Service) Regulations, 1964*; and the provisions of *the Codes* set out in the Schedules to the Act.
- [65] Miss. Deane specifically referred to section 5(1)(a) of the *Public Service Act* and to the fact that each Commission is mandated to be responsible for giving such advice or making such recommendation, as the case may be, in respect of appointments in the Public Service in both established and temporary offices.
- [66] Counsel for the Respondent submitted that the Commission derived its power to give advice or make recommendations in respect of appointments in the Public Service directly from *the Constitution* and submitted that contrary to the Applicant's belief, it has never been the

practice for the Commission to ratify recommendations made by Permanent Secretaries regarding appointments to posts in the Public Service.

- [67] Turning to the Commission Paper (“GA4”) prepared by the Chief Personnel Officer, Miss. Deane pointed out that it was obvious from paragraphs 16 and 17 of the Paper that the Chief Personnel Officer had submitted two distinct matters to the Commission for its advice and decision.
- [68] According to Miss. Deane, perusal of the Commission Paper would reveal that the first matter which the Chief Personnel Officer had submitted to the Commission related to a request for its advice as to the whether an interview panel should be instituted to determine which of two qualified candidates who had applied for the post should be permanently appointed to the post of Chief Licensing Officer.
- [69] Counsel for the Respondent submitted that the second matter which the Chief Personnel Officer had submitted to the Commission for decision related to the filling of the vacancy as an interim measure by means of a temporary acting appointment pending the outcome of the interviews to be conducted in relation to filling post on a permanent basis.
- [70] Miss. Deane submitted that as clearly appears from the evidence of Gail Atkins, the issue of making a permanent appointment to the post had first come before the Commission in 2005 when the post had become vacant and had been advertised but could not be filled since none of the 6 persons who applied met the qualification requirements.
- [71] She pointed to the evidence of Gail Atkins that following the amendment which had been made to the qualification requirements, the Commission had at its meeting of June 11, 2007 advised that the post be re-advertised.
- [72] In making the submission, the Chief Personnel Officer in keeping with standard practice, briefed the Commission on the number of applicants

who had applied for the post following its re-advertisement in 2007. The Commission was also informed of the steps which had been taken to shortlist the candidates and to identify the candidates who had met the qualification requirements for the post.

[73] Counsel for the Respondent submitted that as part of her duties under regulation 9(d) of the *Service Commissions (Public Service) Regulations, 1978* to ensure that all documents and papers relating to any matter to be considered by the Commission, the Chief Personnel Officer had placed before the Commission the recommendations which the acting Permanent Secretary had made in relation to Mr. Atherley, together with the advice which she had received from the Ministry of the Civil Service that Mr. Winston Dash also met the qualification requirements for permanent appointment to the post.

[74] Miss. Deane submitted that section 5 of the *Public Service Act, 2007* provides that in carrying out its functions under the *Constitution* in respect of appointments to posts in the Public Service, the Commission could, *inter alia*, appoint panels or other bodies for the purpose of recruitment or promotion any other matter it thinks fit. There was accordingly, she submitted, nothing unlawful in the Chief Personnel Officer having recommended to the Commission that a panel be established to interview the applicants for the post.

[75] Miss. Deane then proceeded to address Mr. Atherley's contention that the unlawful and/or *ultra vires* act of the Chief Personnel Officer in including the name of Mr. Winston Dash along with the recommendation of the acting Permanent Secretary had frustrated his legitimate and settled expectation that he would have been appointed to the post in the manner recommended by the acting Permanent Secretary.

[76] She submitted that the doctrine of 'legitimate expectation' had two main tenets and that Mr. Atherley had failed to establish on the evidence that

either applied in relation to him. With respect to the first tenet, Counsel for the Respondent submitted that it was clear from the evidence that no express promise had been made to Mr. Atherley upon which he could legitimately rely.

[77] While it is clear from his evidence that Mr. Atherley believed the representations made to him by the acting Permanent Secretary, the then Minister and a variety of other persons that because of his qualifications and experience he was the *only* candidate suitable for appointment to the post, Miss. Deane submitted that it was equally obvious that none of the persons with whom he had communicated was in any position to guarantee his appointment to the post since the power to make appointment was not vested in any of them but rather in the Governor General acting on the advice of the Public Service Commission after consultation with the Prime Minister. In such circumstances, she contended, Mr. Atherley could have no ‘legitimate expectation’ that his appointment to the post of Chief Licensing Officer would be guaranteed.

[78] Miss. Deane further contended that the recommendation which the acting Permanent Secretary had made was nothing more than that. It did not amount, she argued, to an express promise on which Mr. Atherley could legitimately rely, nor could it bind or fetter the Public Service Commission in any way.

[79] Referring to extracts from the *Pearson Leacock Case* (*supra*), Miss. Deane submitted that it was clear from the reference to Professor Stanley de Smith’s work, “*Judicial Review of Administrative Action*” that the representation (whether express or implied from past practice) had to come from the decision maker and that in this case, there was no evidence that any member of the Commission had expressly promised or represented anything to Mr. Atherley.

- [80] Turning to the second tenet on which, in her view, a legitimate expectation could possibly be founded, Miss. Deane submitted that despite having frequently referred to the existence of a settled practice in the Public Service that the recommendations of Permanent Secretaries are invariably submitted to the Commission for ratification, no evidence of any such practice had been adduced. In short, she submitted, Mr. Atherley had failed to establish his claim to a substantive legitimate expectation of appointment to the post based on past practice and is not entitled to the relief sought.
- [81] In support of her submissions, Counsel for the Respondent cited the following authorities: *Padfield and others v. Minister of Agriculture, Fisheries and Food et al*, [1968] A.C. 997; *The Queen v. The Commissioners for Special Purposes of the Income Tax (1888) LR 21 Q.B.D. 313*; *Schmidt and anor v. Secretary of State for Home Affairs* [1969] 2 Ch. 149; *O'Reiley et al v. Mackman et al* [1983] A.C. 237; *Council of Civil Service Unions v. Minister for the Civil Service* [1984] 3 All ER 935; *Attorney General v. K.C. Confectionery Ltd (1988) 34 WIR 387*; *Pearson Leacock v. Attorney General (supra)*.
- [82] In his rebuttal, Mr. Niles took issue with Miss. Deane's submissions that appointments to the post of Chief Licensing Officer were governed by section 99(1)(a) of *the Constitution*. He submitted that a department exists where there is enabling legislation controlling the affairs of the department. He referred the Court to a photocopy of an extract from sections 1, 2 and 3 of the *Highways Act, Cap. 289* which, he contended, gave duties to the Chief Technical Officer and not the Chief Licensing Officer. This, he said, supported his submission that the Licensing Authority was not a department of Government. He also referred to section 2 of the *Road Traffic Act, Cap. 295* which defines the expression

“Licensing Authority” as such person or authority as the Minister appoints for the purposes of the Act.

- [83] He submitted further that under the *Revised General Orders of the Public Service, 1997*, the expression “Head of Department” means in relation to a Ministry, the Permanent Secretary. He also contended that the Chief Personnel Officer should not have ignored without some compelling reason, the recommendation which the acting Permanent Secretary, Mr. Edison Alleyne (as Head of Department) had made in relation to Mr. Atherley.
- [84] He urged the Court to quash the decision which the Chief Personnel Officer had made to include the name of Mr. Winston Dash in her submission to the Commission together with her recommendation to the Commission that interviews of both candidates be conducted. This, he said, was an error of law and/or was *ultra vires* and frustrated Mr. Atherley’s legitimate expectation that he would have been appointed to act in the post in the manner suggested by the acting Permanent Secretary, Mr. Alleyne in his minute of December 11, 2007 (“GA6”).
- [85] **Discussion:** The Applicant’s complaint against the Chief Personnel Officer calls into question the procedures which were employed by her with a view to obtaining a decision by the Public Service Commission (as the legal decision-maker) as to how the vacant post of Chief Licensing Officer was to be filled on a permanent basis.
- [86] As Counsel for the respective parties held opposing views regarding which provision of *the Constitution* is to be invoked when an appointment to the post of Chief Licensing Officer is to be made, it will be useful, at the outset of this discussion to consider this issue and clearly identify the relevant provision of *the Constitution* governing how, and by whom, the power to make an appointment to the office of Chief Licensing Officer is to be exercised.

- [87] The Court has taken judicial notice of the relevant *Civil Establishment (General) and (Qualification) Orders*, and is satisfied that the post of Chief Licensing Officer is a ‘public office’ established in accordance with the *Civil Establishment Act, Cap. 2*. The office is also ‘an office of emolument in the service of the Crown in a civil capacity in respect of the government of Barbados’ within the meaning of section 117 of *the Constitution*.
- [88] It appears from an examination of Part VIII of the Constitution relating to the Public Service, that although an appointment to the ‘public office’ of Chief Licensing Officer could *prima facie* be made by the Governor General acting on the advice of the Public Service Commission in accordance with section 94(1) of *the Constitution*, that section is clearly expressed to be subject to other provisions of the Constitution.
- [89] Section 99 then provides, in effect, that notwithstanding section 94(1), an appointment under section 94(1) may not lawfully be made if the office is one to which section 99(1)(a) of *the Constitution* applies.
- [90] The Court is therefore satisfied that sections 94(1) and 99 of *the Constitution* are intended to operate conjointly and that they effectively carve out a special category of ‘public office’ in respect of which the appropriate Service Commission is mandated to hold consultations with the Prime Minister before recommending to the Governor General that an appointment be made.
- [91] While the rationale for Prime Ministerial consultation is nowhere to be found in section 99, in providing for such consultation to take place, it can reasonably be assumed that the framers of *the Constitution* thought it desirable that an additional check and balance be provided, if only because the persons to be appointed to the several public offices specified in section 99(2) would, judging from the strategic importance of the offices themselves, be required, following their appointment, to perform

crucial administrative, technical, professional or advisory roles within the government over which the Prime Minister presides.

[92] Section 99 of *the Constitution* accordingly provides:

‘99(1) Notwithstanding anything contained in the preceding provisions of this Chapter-

(a) Except as provided in paragraph (b), power to make appointments to the offices to which this section applies is hereby vested in the Governor General, acting on the recommendation of the appropriate Service Commission made after that Commission has consulted with the Prime Minister...

(b) ...

(2) This section applies to the offices of Solicitor General, Director, Finance and Planning, Secretary to the Cabinet, Permanent Secretary, Commissioner of Police, Chief establishments Officer, Chief Personnel Officer, Chief Training Officer, chief or deputy chief professional or technical adviser or officer in a Ministry of the Government (by whatever name called), and head or deputy head of a department of the Government.’

[93] At the hearing, Counsel for the Applicant contended that section 94(1) applies where an appointment to the post of Chief Licensing Officer is to be made. The Licensing Authority, he submitted, was not a department of Government within the meaning of section 99(2) and accordingly section 99(1)(a) was inapplicable and that therefore consultation with the Prime Minister was not required before the appointment could be made. He cited various definitions found in the *Road Traffic Act* and in the *Revised General Orders of the Public Service, 1997* in an attempt to establish that the Licensing Authority was a not a department of government and that

the Chief Licensing Officer was not the head of a department of government within the meaning of section 99(2).

[94] On the other hand, Counsel for the Respondent submitted that section 99(1)(a) would apply since the post of Chief Licensing Officer was caught by section 99(2) and is a ‘public office’ the holder of which is the administrative head of the Licensing Authority - a department of Government.

[95] Although the expression “Licensing Authority” is, as Mr. Niles pointed out, defined under the *Road Traffic Act*, the Court is of the view that that definition must be limited to its use in that Act alone. It ought not (as Mr. Niles has attempted to suggest) to be used as an aid to interpreting section 99 of *the Constitution* and has no bearing whatsoever on the question whether, the Licensing Authority is or is not, from an organizational point of view, a department of the Government within the meaning of section 99(2) of *the Constitution*.

[96] Equally, the fact that the expression “Head of Department” is defined in the *Revised General Orders of the Public Service, 1997* as referring, in relation to a Ministry, to the Permanent Secretary, does not necessarily mean, as Mr. Niles submitted, that the holder of the office of Chief Licensing Officer is consequently not a head of a department of Government within the meaning of section 99(2) of *the Constitution*.

[97] The Court is satisfied that the Public Service is, first and foremost, a creature of *the Constitution*. Its existence and its operations are supported by other provisions of *the Constitution* itself, by a variety of other enactments governing the public service and by numerous regulations, circulars, orders and statutory instruments made in connection therewith. Long standing practices and conventions have also developed around the Constitutional and statutory framework, all of which must be kept in view

if a thorough appreciation of the multifaceted operations of the Barbados Public Service is to be achieved.

[98] Considerable care should therefore be employed when extraneous definitions found in unrelated enactments such as the *Road Traffic Act* are invoked (as Mr. Niles has done) as an aid to determining whether the post of Chief Licensing Officer is one caught by section 99(2) of *the Constitution*.

[99] The Court has, as it is entitled to do under section 117 of the *Evidence Act, Cap. 121*, perused several *Official Gazette Notices* published over the years, in which various Ministerial appointments and the assignment of ministerial portfolio responsibilities have been made by the Governor General acting in accordance with the advice of the Prime Minister under section 72(1) of *the Constitution*.

[100] Judicial notice has been taken of the fact that from an organizational perspective, the Licensing Authority has been consistently recognized in the said *Gazette Notices* as a distinct agency or department falling under a broader division of Public Works within the Ministry to which responsibility for the Public Works portfolio was assigned. The Court is satisfied that this has consistently been the practice whenever Ministerial assignments have been made, even in spite of the fact that the Ministry responsible for Public Works has from time to time often been re-named.

[101] The Court has also taken judicial notice of the fact that under the relevant *Civil Establishment (General) Orders*, made from time to time under the *Civil Establishment Act, Cap. 21*, the Licensing Authority has (as Miss. Deane correctly pointed out) historically been recognized as a self-contained agency with its own establishment headed by the Chief Licensing Officer and is an department which is organizationally separated from the overall Ministry responsible for Public Works.

[102] Paragraphs 9 and 10 of the affidavit of the Chief Personnel Officer filed on February 5, 2009 which deposes that consultation with the Prime Minister took place before an acting appointment to the post of Chief Licensing Officer was made during 2007, also lends considerable weight to the view that appointments to the post of Chief Licensing Officer have in practice proceeded on the basis that the holder of that post is the administrative head of the Licensing Authority, a department of the Government of Barbados and that the office is one requiring consultation between the Public Service Commission and the Prime Minister before a recommendation for an appointment is made in accordance with section 99(1)(a) of *the Constitution*.

[103] It appears to the Court that whatever doubt may have existed prior to February 8, 2010 as to whether the Licensing Authority was a department of government within the meaning of section 99(2) of *the Constitution* has, since the commencement of the *Public Service (Amendment) Act, 2010-1*, been put to rest by the recent amendment to section 2 of the principal Act and the insertion of Part II in the Eighth Schedule to the principal Act.

[104] The amendment specifically identifies the several departments of Government and specifies the several offices the holders of which are administrative heads of departments for purposes of the Act. Significantly also, the Licensing Authority is now clearly listed in Part II of the Eighth Schedule to the *Public Service Act* as a department of government the administrative head of which is unequivocally identified as the Chief Licensing Officer.

[105] Having examined the foregoing matters, the Court is satisfied that the post of Chief Licensing Officer is a '*public office*' an appointment to which, in accordance with section 99(1)(a) of the *Constitution*, requires the appropriate Service Commission to consult with the Prime Minister

before recommending to the Governor General that an appointment be made.

[106] Having made the necessary preliminary determination as to which provision of *the Constitution* governs the making of an appointment to the post of Chief Licensing Officer, the Court returns to a consideration of the substantive issues raised on the application.

[107] **The Issues:** The Court finds that the amended application raises 2 distinct issues for determination namely:

i) whether the Chief Personnel Officer acted unlawfully and/or *ultra vires* in submitting both names to the Public Service Commission for its decision despite the recommendation by the acting Permanent Secretary that Mr. Atherley was the *only* applicant who had the requisite qualifications for the post and should be the only person to be interviewed to determine his suitability?; and

ii) whether the Applicant is entitled to claim that he had a 'legitimate expectation' which was frustrated by an unlawful and/or *ultra vires* act of the Chief Personnel Officer?

[108] These issues will now be discussed seriatim under the following italicized sub-headings:

[109] *Did the Chief Personnel Officer err in law and/or act ultra vires as alleged in paragraph (h) of the Amended Statement?:* The Court accepts that the Chief Personnel Officer is the administrative head of the Personnel Administration Department. In addition to her functions as administrative head of that department, specific statutory functions are conferred on her *ex officio* under regulation 9(a) of the *Service Commissions (Public Service) Regulations, 1978* which requires her to submit matters for decision of the Commission.

[110] It is not in dispute that the Chief Personnel Officer prepared and submitted to the Commission for its decision, a Commission Paper (“GA4”) in which she advised, *inter alia*, that despite the recommendation of the acting Permanent Secretary who viewed Mr. Atherley as the *only* applicant with the requisite qualifications, there was in fact another qualified applicant eligible for appointment to the post. In her submission, the Chief Personnel Officer also recommended to the Commission that both Messrs. Dash and Atherley be interviewed for the post and invited its decision in relation to whether interviews should be held.

[111] Taking an exceedingly narrow and restricted view of the scope of regulation 9(a), Counsel for the Applicant contended that it was no part of the Chief Personnel’s statutory function to verify the accuracy of the recommendation made by the acting Permanent Secretary that Mr. Atherley was the *only* applicant with the requisite qualifications for appointment to the post.

[112] Furthermore, it was, he says, “*the usual practice of the Public Service at the material time that so long as recommendations were made by Permanent Secretaries and forwarded to the Chief Personnel Officer...they would be automatically sent to the Services Commission for ratification.*” To the extent that another name was included in the Chief Personnel Officer’s submission to the Commission, she committed an error of law, exceeded her powers and in so doing, frustrated what he alleges is his “legitimate expectation” that he would have been appointed to the post in the manner recommended by the acting Permanent Secretary.

[113] For her part, the Chief Personnel Officer denies any wrong doing. She submits that regulation 9(a) ought not to be read in such a narrow and restrictive manner. She asserts that it is part of her mandate as Chief

Personnel Officer to ensure that no eligible candidate for appointment is overlooked or excluded from consideration by the Commission. This was, she says, the reason why before she submitted the matter to the Commission for its decision, she sought an independent opinion of the Ministry of the Civil Service regarding the eligibility of both candidates for appointment.

[114] Furthermore, she denies the existence of any usual practice as alleged by Mr. Atherley whereby recommendations of Permanent Secretaries are merely submitted to the Service Commissions for ratification. Recommendations she states, are never sent to the Service Commissions for ratification but rather, the Service Commissions make their decisions based upon all the information that has been submitted to them and after the matter is thoroughly discussed at Commission meetings.

[115] The Court is satisfied that despite the Applicant's allegations with respect to the existence of a usual practice within the Public Service of Commissions ratifying or rubber-stamping the recommendations of Permanent Secretaries in relation to appointments, no evidence of any such practice has been placed before the Court. It is not enough for Mr. Atherley simply to depose (as he has done throughout his affidavit) to his belief that such a practice existed. As the Applicant in these proceedings, the burden of proof rests upon him to show *by evidence* that such a practice in fact exists and the Court is satisfied that he has not done so.

[116] The Court is also of the view that even if Mr. Atherley were in a position to establish the existence of such a practice, it would represent such a serious abdication by the Commissions of their central role in the Public Service appointment process under *the Constitution* that no Court could give effect to it. Again, if such a practice were to exist, it would in reality mean that Permanent Secretaries rather than the Commissions would be the ones making the decisions in relation to appointments to public

offices and exercising powers in the Public Service appointment process which they were never intended by *the Constitution* to exercise.

[117] The power to decide and to make recommendations to the Governor General in relation to appointments to public offices is a power which is conferred on the Commissions by *the Constitution* itself. It is a well established rule of statutory interpretation that a function conferred by statute cannot be transferred or delegated either by the depository or by anybody else without express statutory authority. [See *Thornton; Legislative Drafting, 3rd Edition @ p. 244.*]

[118] In accordance also with the rule of statutory interpretation encapsulated in the maxim, *delegatus non potest delegare*, the Court is satisfied that the Service Commissions cannot lawfully delegate the power vested in them to anyone else, nor may they permit the power which has been conferred on them to be usurped by anyone else. In short, the Court finds that any alleged practice of the Commissions ratifying or rubber stamping recommendations of Permanent Secretaries in relation to appointments, if it were ever established, would offend against sections 94(1) and 99(1)(a) of *the Constitution* and be contrary to law.

[119] As to Mr. Atherley's complaint that the Chief Personnel Officer exceeded her powers set out in regulation 9(a) of the *Service Commissions (Public Service) Regulations, 1978* and/or erred in law, the Court is satisfied that the Applicant has taken too narrow a view of the Chief Personnel Officer's role in the appointment process which re-commenced in 2007 when the Public Service Commission met and recommended to the Governor General that the vacant post be re-advertised.

[120] Based on the facts set out at paragraphs [34] and [35] which the Court has accepted, the Court is satisfied that the actions of the Chief Personnel Officer must be viewed against the background of the Commission's

earlier decision in 2007 to re-advertise the vacant post of Chief Licensing Officer.

[121] Following the Commission's decision to re-start to process of filling the post on a permanent basis, the Court finds that the Chief Personnel Officer, acting in accordance with her statutory duty under regulation 9(c) to give effect to decisions of the Commission, lawfully made the necessary arrangements for the post to be advertised, and in or about the month of July 2007 the advertisement appeared in the local newspapers and an internal Circular was published within the Public Service.

[122] Four applicants (including the Applicant) applied for the post. Thereafter, in accordance with what the Chief Personnel Officer says is the usual practice within the Personnel Administration Department, the file with the applications was then forwarded for short-listing to the acting Permanent Secretary, in the Ministry of Public Works and Transport which is the Ministry having portfolio responsibility for the Licensing Authority, a department falling under the Ministry.

[123] A sequence of events then followed, which the Court has already accepted, and which led directly to Mr. Atherley's complaint and the filing of the current application. *[See paragraphs [38] to [51] above.]*

[124] Having reviewed the actions of the Chief Personnel Officer, the Court finds that the Chief Personnel Officer committed no error of law or any *ultra vires* act as Mr. Atherley has alleged. On the contrary, having observed that the acting Permanent Secretary, Mr. Edison Alleyne had made a recommendation which appeared to favour Mr. Atherley over Mr. Winston Dash, another applicant who in her view also appeared to have the statutory qualification requirements for the post, the Chief Personnel Officer then took the necessary precaution of obtaining independent verification and advice from the Ministry of the Civil Service as to Mr. Winston Dash's eligibility for appointment.

- [125] Counsel for the Applicant argues that it was no part of the Chief Personnel Officer's duty under regulation 9(a) to verify the accuracy of recommendations received from a Permanent Secretary and that the recommendation made by the acting Permanent Secretary ought to have been submitted for the Commission's decision exactly as it was received. In so doing, he argues, she committed an error in law and exceeded her powers.
- [126] The Court cannot accept that regulation 9(a) is as limited in its scope as Mr. Niles contends. In addition, the Court is satisfied that taken to its logical conclusion, such an interpretation of regulation 9(a), would have the unintended effect of reducing the role of the Chief Personnel Officer to that of a mere post box!!
- [127] Furthermore, if the Chief Personnel Officer were to be precluded from herself checking on and seeking independent verification of the correctness of a recommendation received from a Permanent Secretary as to which of two candidates for a vacant post is eligible for appointment she would, on a restricted view of regulation 9(a), be obliged to place obviously incorrect and erroneous information before the Commission for its decision. The narrow interpretation of the regulation would also permit unfair manipulation of the appointment process, compromise fairness and transparency and bring the entire public service recruitment process into disrepute!
- [128] Most importantly, such an interpretation would undermine the Public Service appointment process laid down in *the Constitution* by in effect permitting a Permanent Secretary, rather than the Commission, to decide which of two or more eligible candidates should be recommended for appointment to a vacant post in the public service.
- [129] The role of the Chief Personnel Officer is undoubtedly much more than that of a mere post box. As regulation 9 clearly shows, the holder of the

office of Chief Personnel Officer is the person directly responsible for coordinating the work of the various Commissions and for ensuring that their various decisions are carried into effect. The Chief Personnel Officer is also required to attend meetings of the Commissions and to ensure that all relevant information is placed before them so that the decisions and recommendations which are made in relation to the appointment, transfer and discipline of public officers are well informed and the appointment process is conducted in a manner that is procedurally fair and correct.

[130] In considering the scope of regulation 9(a), the Court has derived assistance from section 19(3) of the *Interpretation Act, Cap. 1* which provides that “*Where an enactment empowers any person or authority to do any act or thing, all such powers shall be deemed to be also given as are reasonably necessary to enable that person or authority to do that thing or are incidental to the doing thereof.*”

[131] The Court is satisfied that nothing in regulation 9(a) authorizes the Chief Personnel Officer to submit to the Commission for decision, any matter (including a recommendation received from a Permanent Secretary or any other person) which appears to her to be erroneous or which misrepresents the true facts relevant to the matter to be placed before the Commission for decision.

[132] The Court has also taken judicial notice of regulation 12 of the *Service Commissions (Public Service) Regulations, 1978* which expressly requires the Commission, in every case where a vacancy has occurred in the public service, *inter alia*, to consider the eligibility of *all* officers for promotion.

[133] Against the background of the Commission having earlier recommended to the Governor General that the vacant post of Chief Licensing Officer be re-advertised, the Court has determined that it was both necessary, as

well as reasonably incidental to the performance of her functions under regulation 9, for the Chief Personnel Officer to have taken such steps as she considered necessary to ensure that no eligible candidate for appointment was overlooked, and further, to ensure that when her submission was made, the Public Service Commission had correct and accurate information before it and was thereby in a position, as far as was humanly possible, to fulfill its functions under regulation 12 (and under section 99(1)(a) of *the Constitution*) to properly consider the eligibility for appointment of all applicants having the qualification requirements who had applied for the post.

[134] The Court is therefore satisfied that having first properly obtained independent confirmation from the Ministry of the Civil Service that another applicant for the post apart from Mr. Atherley had the statutory qualification requirements for appointment to the post, the Chief Personnel Officer acted lawfully and entirely within her powers under regulation 9(a) of the *Service Commissions (Public Service) Regulations, 1978* when she included in her submission to the Public Service Commission (“GA4”), the name of Mr. Winston Dash alongside that of Mr. Hugh Atherley and further recommended to the Commission that both applicants be interviewed.

[135] In the result, the Court finds as a matter of law that when the Chief Personnel Officer submitted the names of both applicants to the Commission for its decision, she committed no error in law and further, her actions in verifying the information received from the acting permanent Secretary before making the submission were reasonably necessary to and incidental to her duty under regulation 9(a) and were not ultra vires.

[136] The application having failed on these two grounds, the Court turns to consider the final issue raised on the application, namely, Mr. Atherley’s

claim to have had a legitimate expectation that he would have been appointed to act in the post.

[137] Did Mr. Atherley have a legitimate expectation which was frustrated by an unlawful and/or ultra vires act of the Chief Personnel Officer?: It was urged on Mr. Atherley's behalf that by not submitting the recommendation from the acting Permanent Secretary to the Commission in the exact form as it had been received, the Chief Personnel Officer frustrated the Applicant's "legitimate expectation" that he would have been appointed to act in the post in accordance with the recommendation of the acting Permanent Secretary who regarded him as Mr. Atherley as the *only* candidate with the requisite qualifications and had further assured him that he would be appointed to act in the post from January 1, 2008, in the manner he had recommended.

[138] It is generally accepted that 'legitimate expectation' is a common law doctrine, the seeds of which were first sown by Lord Denning in 1969 in his landmark decision in *Schmidt v. Secretary of State for Home Affairs*[1969] 1 All ER 904.

[139] The doctrine was still in its early infancy in 1980 when the *Administrative Justice Act* came into force in Barbados and it is perhaps for that reason that the term, 'legitimate expectation' is nowhere to be found among the several grounds listed in section 4 of the Act for which the High Court may grant relief upon an application for judicial review.

[140] Due, however, to the inclusive manner in which section 4 is framed, the categories of judicial review in Barbados are not closed and it may be said that Parliament in 1980 deliberately left the door open to permit developments in the common law to continually find their way into the framework of the Act, thereby enabling the High Court, in appropriate cases, to grant relief.

[141] *Pearson Leacock's Case* (*supra*) provides one very obvious example in which the learned Chief Justice who heard the matter, had absolutely no difficulty in assuming jurisdiction under the Act to review the actions complained of and to grant relief on grounds which included the doctrine of legitimate expectation.

[142] It is therefore permissible in Barbados for an applicant to invoke, as Mr. Atherley has done, the doctrine of 'legitimate expectation' as a specific ground for relief upon an application for judicial review. However, it is also obvious from the decided cases that it is not every applicant who asserts that he has a 'legitimate expectation' who will necessarily obtain relief. In every case where the ground is raised, it will be for the Court hearing the application to ask the question posed by *Lord Scarman* in *Re: Findlay [1985] AC 318 @ 338* and similarly posed by *Simmons C.J.* in *Leacock's Case* and which this Court now asks on this application, "*But what is [the Applicant's] legitimate expectation?*"

[143] The answer to this question is to be found by testing Mr. Atherley's claim to hold a 'legitimate expectation' against the common law principles which have been distilled from the numerous decided cases in common law jurisdictions where the doctrine of legitimate expectation has been considered and taken root. Fortunately, much of the work in distilling the principles from the decided cases has already been undertaken by the learned authors of various administrative law textbooks and the Court need not itself embark on such an exercise on this application. The following excerpt from Professor Stanley de Smith's text, "*Judicial Review of Administrative Action*" *Fifth Edition (1995)* accordingly provides, in the view of the Court, the ideal starting point for assessing the validity of Mr. Atherley's claim:

“The terms of the representation by the decision-maker (whether express or implied) from past practice) must entitle the party to whom it is addressed to expect, legitimately, one of two things:

- (i) That a hearing or other appropriate procedures will be afforded before the decision was made; or*
- (ii) That a benefit of a substantial nature will be granted or, if the person is already in receipt of the benefit, that it will be continued and not be substantially varied.”*

[144] It is evident from the foregoing that to successfully establish that he holds a legitimate expectation which the law will recognize, Mr. Atherley must establish that a representation (whether express or implied from past practice) was made to him **by the decision-maker** (*emphasis supplied*). Mr. Atherley must also establish that the representation entitled him to expect either i) that he would be accorded procedural fairness in the form of a hearing or that other appropriate procedures would be followed before the decision was made; or ii) that a benefit of a substantial nature would be granted to him.

[145] As is apparent from Mr. Atherley’s initial affidavit, there is no doubt that express representations were made to him by several persons, most notably, by the acting Permanent Secretary, Mr. Edison Alleyne, the Minister of Public Works & Transport, Mr. Gline Clarke, and by the Deputy Permanent Secretary, Mr. Chesterfield Atherley.

[146] The Applicant asserts that their several assurances and representations led him to expect, legitimately, that he would have been appointed to act in the vacant post of Chief Licensing Officer with effect from January 1, 2008 in the manner outlined by Mr. Alleyne’s minute (“GA6”) dated 2007-12-11 addressed to the Chief Personnel Officer.

[147] The Court is, however, satisfied that as none of these persons who gave Mr. Atherley these assurances was clothed with the legal power or authority to recommend his appointment to the Governor-General in accordance with section 99(1)(a) of *the Constitution*, Mr. Atherley was not entitled to expect, legitimately that a substantial benefit in the form of an appointment to the post of Chief Licensing Officer would thereby be conferred on him.

[148] In short, despite the several assurances which these government officials obviously gave to Mr. Atherley that he would be appointed to act in the post of Chief Licensing Officer with effect from January 1, 2008, neither Mr. Alleyne, nor Mr. Clarke, nor Mr. Chesterfield Atherley had the legal power to guarantee that the appointment would be made. Put differently, none of these officials was the legal decision-maker vested with the power to make the ultimate decision under section 99(1)(a) of *the Constitution* that he be appointed to the post.

[149] As the Court has already determined, the ultimate decision-maker in relation to the issue of the appointment was the Public Service Commission acting in accordance with section 99(1)(a) of *the Constitution*. Furthermore, it is clear from the evidence that no member of the Commission, nor the Commission itself, had ever made any form of representation to him regarding the appointment.

[150] In the circumstances, the Court is satisfied that Mr. Atherley's claim (based on an express representation) to have held a legitimate expectation which was frustrated by the actions of the Chief Personnel Officer cannot succeed.

[151] Turning to Mr. Atherley's claim that his 'legitimate expectation' was based on, what he asserts is, the "usual practice" within the Public Service in relation to, what he alleges, is the routine ratification by the Commissions of recommendations for appointment made by Permanent

Secretaries, the Court has already determined that such a practice, if it were shown to exist, would be contrary to the appointment procedures laid down in *the Constitution* and unlawful.

[152] Furthermore, unlike the applicant in the *Pearson Leacock Case* (who was able to adduce uncontroverted evidence of a regular practice within the Royal Barbados Police Force where police officers who had graduated with an LL.B degree were routinely granted study leave to proceed to the Hugh Wooding Law School to read for the Legal Education Certificate) Mr. Atherley has made no effort in this case to place before this Court any evidence capable of establishing the existence of a practice (past or present) within the Public Service whereby recommendations for appointment to public offices by Permanent Secretaries are routinely submitted by the Chief Personnel Officer to the Commission for ratification.

[153] The Court has already held that from a procedural point of view, the Chief Personnel Officer acted within her powers and committed no error of law when (having herself observed and sought independent verification that there was another candidate, apart from Mr. Atherley who was eligible for appointment to the post) she included the name of Mr. Winston Dash along with the recommendation she had received from the acting Permanent Secretary requesting that Mr. Atherley be appointed to act in the post from January 1, 2008.

[154] Procedural fairness also dictates that all candidates who have responded to an official advertisement regarding a vacancy in the Public Service, and who hold the prescribed qualification requirements for appointment to the post, must each have a procedural and substantive 'legitimate expectation' that their names will be submitted by the Chief Personnel Officer to the relevant Service Commission for its consideration.

[155] Furthermore, every candidate who has applied for promotion to a vacant post in the Public Service is, having regard to regulation 12 of the *Service Commissions (Public Service) Regulations, 1978*, also entitled to legitimately expect that the relevant Service Commission would be fully briefed by the Chief Personnel Officer, given accurate information and placed in a position, *inter alia*, to consider the eligibility for appointment of *all* candidates having the prescribed qualifications before a decision is made. Such an expectation would also arise in all applicants for permanent appointment to public office irrespective of whether the appointment is to be made by the Commission pursuant to section 94(1) or 99(1)(a) of *the Constitution*.

[156] Though not expressly set out in any statute or regulation, the Court is satisfied that it may nonetheless find that the Chief Personnel Officer was under an implied duty (reasonably incidental to her mandate under regulation 9 of the *Service Commissions (Public Service) Regulations, 1978*) to ensure that no eligible candidate who had applied for permanent appointment to the post of Chief Licensing Officer was excluded from consideration by the Commission.

[157] Furthermore, having herself observed that Mr. Winston Dash also held the stipulated qualification requirements for appointment to the post of Chief Licensing Officer, the Court is satisfied that it would have been an improper exercise of her statutory duties under regulation 9 and unlawful for the Chief Personnel Officer to have knowingly omitted his name from consideration by the Commission for the appointment, merely because the acting Permanent Secretary appeared to favour Mr. Atherley for the post and had recommended him to act.

[158] In summary, it was the duty of the Chief Personnel Officer to ensure that the appointment process was conducted fairly and transparently and in this case, the Court is satisfied that all actions taken by her following

receipt of the recommendation from the acting Permanent Secretary (“GA6”) were lawfully taken and with this duty firmly in mind.

[159] Had the Chief Personnel Officer failed to include Mr. Dash’s name in her submission (“GA4”) to the Commission, the Court is satisfied that she would have acted unfairly to Mr. Dash and fallen into error. This Court is also in no doubt that such an omission by the Chief Personnel Officer would have frustrated Mr. Dash’s legitimate expectation (both procedural and substantive) that the Public Service appointment process would have been conducted fairly to all eligible candidates and in accordance with *the Constitution* and other applicable laws.

[160] In conclusion, the Court has found no fault with the actions taken by the Chief Personnel Officer in the matter under review and is satisfied that the process by which the issue of a permanent appointment to the post of Chief Licensing Officer was submitted by her to the Public Service Commission for decision, was conducted in a manner which was procedurally fair and correct, lawful and within her statutory and implied powers.

[161] Finally, Mr. Atherley has failed to establish that he holds a ‘legitimate expectation’ (whether in the form of an entitlement to a procedural right or a substantive benefit) which was frustrated by an unlawful and/or *ultra vires* act of the Chief Personnel Officer and in respect of which the Court may grant him relief.

[162] **Disposal:** For the reasons which the Court has just outlined, the order of Certiorari is refused, the Conservatory Order made on November 17th, 2008 is discharged and the application is dismissed. At the request of

Counsel for the Applicant, the issue of an award of costs on the application is reserved for argument.

**Maureen Crane-Scott
Judge of the High Court**