BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

Civil Division

[Unreported]

Suit No: CV 1033 of 2010

BETWEEN

JERRY BRUCE EMTAGE, FRCS **APPLICANT/CLAIMANT**

AND

QUEEN ELIZABETH HOSPITAL BOARD **RESPONDENT/DEFENDANT**

Before The Honourable Madam Justice Maureen Crane-Scott,

Judge of the High Court

2011: April 7, 8, 12
2014: July 31

Mr. Ralph Thorne, Q.C. for the Applicant/Claimant and Sir. Maurice A. King, Q. C. for the Respondent/Defendant

DECISION

[1] **Crane-Scott, J:** On July 31, 2014, I held in favour of the Applicant on this application. I had undertaken to provide written reasons for my decision which I now do.

[2] **Introduction:** The claim involved an application for judicial review instituted by the Applicant (hereinafter sometimes referred to as "the Applicant" or "Dr. Emtage") pursuant to the ***Administrative Justice Act, Cap. 109B*** of the Laws of Barbados against the Queen Elizabeth Hospital Board (hereinafter sometimes referred to as the "Respondent Board" or the "Board").

[3] The application arose out of a decision, determination and/or administrative act of the Respondent Board (ostensibly acting pursuant to its statutory powers under **section 6(1)** of the ***Queen Elizabeth Hospital Act, Cap. 54***) by which it purported to terminate Dr. Emtage's contractual appointment and tenure as Consultant (Urology) within the Department of Surgery at the hospital - a post he had continuously held over a period of 19 years since August of 1990.

[4] More specifically, the application sought a review by the Court of the Respondent Board's failure or omission (following expiry on October 31st, 2009 of Dr. Emtage's last 3-year written contract) to formalize a new written contract for services with him on similar terms and conditions as had been contained in successive written contracts consistently issued to him from as far back as the year 1990.

[5] The Relief Claimed: The application was commenced by way of Fixed Date Claim Form supported by a Statement filed on the 30th day of July, 2010, claiming numerous relief and orders as follows:

(a) A ***Declaration*** that there is a subsisting renewed contract between the Applicant/Claimant and the Respondent/Defendant upon the terms and conditions of the pre-existing contract dated the 1st day of November, 2006;

(b) A ***Declaration*** that the Applicant/Claimant is entitled to all the rights and privileges granted by the said pre-existing contract dated the 1st day of November, 2006 and that the Applicant/Claimant and the Respondent/Defendant are bound to honor all obligations under the said pre-existing contract dated the 1st day of November, 2006;

(c) A ***Declaration*** that the Applicant/Claimant has a legitimate expectation that the subsisting renewed contract would be formalized and completed upon terms and conditions as practicably similar to the said pre-existing contract dated the 1st day of November, 2006'

(d) A ***Declaration*** that the Respondent/Defendant has by its conduct led the Applicant/Claimant to function in the belief and expectation that the said pre-existing contract dated the 1st day of November, 2006 was renewed subject only to the completion of mere formalities;

(e) A ***Declaration*** that the Applicant/Claimant is the holder of the post of "Consultant, Surgery (Urology)" at the Queen Elizabeth Hospital;

(f) An ***Order of Certiorari*** in quashing the decision of the Respondent/Defendant in declaring vacant the post of "Consultant, Surgery (Urology)";

(g) An ***Order of Certiorari*** in quashing the decision of the Respondent/Defendant in advertising the post of "Consultant, Surgery (Urology) lawfully held by the Applicant/Claimant.

(h) An ***Order of Mandamus*** requiring the Respondent/Defendant to draw, prepare and present to the Applicant/Claimant a formal,

written contract for signature and completion in accordance with terms and conditions as practicably similar to the said pre-existing written contract dated the 1st day of November, 2006;

(i) An ***Order of Prohibition*** prohibiting the Respondent/Defendant from further advertising the post of "Consultant, Surgery (Urology)" at the Queen Elizabeth Hospital;

(j) An ***Order of Prohibition*** prohibiting the Respondent/Defendant from receiving and considering new applications from anyone whosoever for the post of "Consultant, Surgery (Urology)" at the Queen Elizabeth Hospital;

(k) An ***Order of Prohibition*** prohibiting the Respondent/Defendant from appointing any persons other than the Applicant/Claimant to the post of "Consultant, Surgery (Urology)" at the Queen Elizabeth Hospital;

(l) An ***Injunction*** compelling the Respondent/Defendant to immediately formally and officially appoint the Applicant/Claimant to the post of "Consultant, Surgery (Urology)" with effect from the 1st day of November, 2009 and to draw prepare and present to the Applicant/Claimant a formal, written contract for signature and completion in accordance with the terms and conditions as practicably similar to the said pre-existing written contract dated the 1st day of November, 2006 which said renewed contract shall be for a period of no less than three years from the date of its commencement or for such longer period as the Court may determine;

(m) A ***Declaration*** that the decision of the Respondent/Defendant not to formalize the renewal of the Applicant/Claimant's contract

with effect from the 1st day of November, 2009 is invalidated by the acts and omissions of the Respondent/Defendant on the following grounds:-

(i) in carrying out an administrative act or omission in a manner that was unauthorized or contrary to law;

(ii) in exceeding jurisdiction;

(iii) in failing to satisfy or observe conditions or procedures required by law;

(iv) in breaching the principles of natural justice;

(v) in acting unreasonably or in the improper exercise of discretion;

(vi) in abusing power;

(vii) in acting in bad faith and upon irrelevant considerations;

(viii) in acting on instructions from an unauthorized person;

(ix) in acting in conflict with the policy of an Act of Parliament;

(x) in acting in error of law, whether or not apparent on the face of the record;

(xi) in acting in the absence of evidence on which a finding or assumption of fact could reasonably be based; and

(xii) in acting in breach of or omission to perform a duty.

(n) ***Damages;***

(o) ***Costs.***

[6] **<u>The Evidence</u>:** The evidence in this case consisted of affidavits and exhibits and a bundle of documents produced at the Court's request as follows.

[7] *For the Applicant:* An affidavit-in-support of the Applicant's Claim was filed by Dr. Jerry Bruce Emtage on the 30th day of July, 2010 together with the following 7 exhibits:

("JE 1") - Agreement dated the 1st day of November, 2006 and made between the Respondent Board and the Applicant whereby the Respondent Board appointed the Applicant as a Consultant within the Department of Surgery. The Agreement was expressly stated to be subject to the terms and conditions set forth in the First and Second Schedule thereto together with the Letter of Acceptance and Letter of Appointment both dated the 1st November, 2006 which was expressly declared to have been incorporated into the Agreement. In accordance with the First Schedule to the Agreement, the Applicant's term of engagement was expressed to be for a period of 3 years from the 1st day of November, 2006 until the 31st day of October, 2009;

("JE 2") - Copy of a letter dated the 13th day of April, 2010 on behalf of the Director of Human Resources, Queen Elizabeth Hospital and addressed to the Applicant giving notice of a new policy instituted by the Respondent Board to ensure that Consultants were professionally registered and possessed adequate insurance coverage.

("JE 3") - Copy of a letter dated the 13th day of May, 2010 from Attorney-at-Law, Mr. Alair Shepherd, QC, and addressed

to the Chief Executive Officer of the Queen Elizabeth Hospital, outlining the concerns of the Applicant regarding the renewal of his written contract with the Respondent Board.

("JE 4") - Copy of a letter dated 16th day of June, 2010 signed by the Director of Human Resources, Queen Elizabeth Hospital and addressed to the Applicant informing Dr. Emtage that the Board of Management had recommended that the post of Consultant, General Surgery be advertised externally from Sunday June 20th, 2010.

("JE 5") - An advertisement in the *'Sunday Sun'* newspaper dated June 20, 2010, inviting applications for the positions of "Consultant, Surgery (Urology)" and "Consultant, Pathologist" at the Queen Elizabeth Hospital.

("JE 6") - Copy of a letter dated June 24, 2010 from Ralph Thorne, QC, Attorney-at-Law for the Applicant, addressed to the Chief Executive Officer of the Queen Elizabeth Hospital, referring to the letter dated the 16th of June, 2010 from the Director of Human Resources at the Queen Elizabeth Hospital. The letter requested the immediate withdrawal of the advertisement of the post of Consultant Urologist and "*the long promised written contract"* to Dr. Emtage failing which proceedings would be filed in the High Court for appropriate relief.

("JE 7") - An article by Wade Gibbons in the 'Daily Nation' newspaper dated June 28, 2010, captioned "*Time for Change, Not business as usual at QEH, says Senior Official*" which had quoted "*a very senior QEH official"* who spoke to the newspaper on condition of anonymity about "*the public advertising for a consultant urologist and pathologist"*. The article quoted the official as having said that the hospital "*had the right to renew or not renew those contracts" of persons who were "hired on three-year contracts.*"

[8] *For the Respondent Board:* The Human Resources Director of the Respondent Board, Mrs. Charmaine Napoleon-Ramsay, filed an affidavit-in-response on 26th day of August, 2010 addressing the matters deposed to in the affidavit-in-support of Dr. Jerry Bruce Emtage filed on 30th day of July, 2010.

[9] The Respondent Board did not deny the Applicant's assertions that he had been employed as a Consultant at the Queen Elizabeth Hospital since about July 1990 to the present, nor that his written contracts had always been renewed largely on the same terms and conditions of the immediately pre-existing contract, nor that he had functioned as such at the Queen Elizabeth Hospital continuously until the present.

[10] Mrs. Napoleon-Ramsay however expressly denied the Applicant's allegation that the Department of Human Resources had communicated to other Departments of the Queen Elizabeth Hospital that the Applicant's post was vacant or that the Respondent Board had penned, authorized or sanctioned the newspaper article **("JE 7")** by Wade Gibbons in the 'Daily Nation' newspaper dated June 28, 2010, captioned "*Time for Change, Not business*

as usual at QEH, says Senior Official" about which the Applicant had complained.

[11] *The bundle of additional documents:* At the request of the Court, the Respondent obtained and provided the Court with a bundle of photocopied employment contracts evidencing the fact of Dr. Emtage's engagement with the Queen Elizabeth Hospital in the post of Consultant (Surgery) on successive contracts during the period 1st August, 1990 to 31st day of October, 2009.

[12] In the view of the Court, the bundle of successive contracts which were produced to the Court by the Respondent supported the Applicant's claim to have provided Consultancy services to the Hospital on a continuous basis and upon largely the same terms and conditions over a period of some 19 years. The Applicant's several contracts over the period are identified hereunder:

1. *Agreement dated the 24th day of September, 1990*: This Agreement was made between the Crown in right of its Government of Barbados and the Applicant. Clause 1 of the Agreement provided that the Applicant was appointed to the post of Consultant (Surgery) on the **1st day of August, 1990**. By Clause 1(1) of the Schedule to the Agreement, the Applicant's term of engagement was expressed to be for a tour of three (3) years service.

2. *Agreement dated the 17th of January, 1994*: The Applicant was re-appointed to the post of Consultant (Surgery) under and by virtue of a second Agreement made between the Crown in right of its Government of Barbados and the Applicant. By Clause 1(1) of the Schedule. It was provided that the Applicant's term of engagement

was for a tour of two (2) years service to commence from the **1st day of September, 1993.**

3. *Agreement dated the 3rd day of December, 1996*: The Applicant was further re-appointed to the post of Consultant (Surgery) under and by virtue of a third Agreement made between the Crown in right of its Government of Barbados and the Applicant. Clause 1(1) of the Schedule provided that the Applicant's term of engagement was for a tour of three (3) years service to commence from the **20th day of September, 1995**.

4. *Agreement dated the 19th day of October, 1998*: The Applicant was further re-appointed to the post of Consultant under and by virtue of a fourth Agreement made between the Crown in right of its Government of Barbados and the Applicant. Clause 1(1) of the Schedule provided that the Applicant's term of engagement was for a tour of two (2) years service to commence from the **20th day of September, 1998**.

5. *Agreement dated the 5th day of December, 2000:* The Applicant was further re-appointed to the post of Consultant (Surgery) for a tour of three (3) years service to commence from the **20th day of September, 2000** under and by virtue of a fifth Agreement made between the Crown in right of its Government of Barbados and the Applicant.

6. *Agreement dated the 20th day of September, 2003*: By letter dated October 17, 2003 the Applicant was informed that the Respondent Board had approved his appointment to the post of Consultant Urologist, Queen Elizabeth Hospital for a period of three (3) years with effect from **20th day of September, 2003** until the **19th day of**

September, 2006. The Applicant's appointment was formalized in a written Agreement dated 20th September, 2003 made between the Respondent Board and the Applicant respectively.

7. *Agreement dated the 1st day of November, 2006:* The Applicant was was re-appointed to the post of Consultant (Surgery) for a period of three (3) years under and by virtue of a second Agreement made between the himself and the Respondent Board from the **1st day of November, 2006** until the **31st day of October, 2009**.

[13] **The relevant facts**: Having reviewed the evidence, the Court found the following facts to have been established.

[14] The Applicant is a medical practitioner. He graduated from the University of the West Indies with a Bachelor of Medicine and Bachelor of Surgery (Hons) and became qualified to practice medicine in or about 1980. In or about 1986, he further qualified as a surgeon and specializes in urology.

[15] The Applicant was first appointed to the post of Consultant, Surgery (Urology) in the specialist area of Urology within the Department of Surgery at the Queen Elizabeth Hospital on the 1st of August, 1990. Since the date of his first appointment, he has continued to serve in the post of Consultant, Surgery (Urology) on a succession of fixed-term written contracts over a 19 year period.

[16] While the Applicant was engaged and worked between 1990 and 2003 as a Crown employee under five (5) successive contracts with the Crown in Right of its Government of Barbados, following the establishment of the Respondent Board as a body corporate on the 8th of October, 2002 under and by virtue of section 5 of the ***Queen Elizabeth Hospital Act, Cap 54*** of the

Laws of Barbados, his last two (2) contracts dated September 20th, 2003 and 1st November, 2006 respectively, were with the Respondent Board.

[17] The Applicant's seven (7) contracts all contained largely similar terms and conditions pertaining, *inter alia*, to the Applicant's terms of engagement, his duties, leave of absence and dismissal for cause. In particular, the contracts all provided that except in the case of the Applicant's dismissal for cause, for which provision had been separately made, the Applicant's term of engagement could be determined without cause: (i) in the case of the Respondent Board by giving three (3) months written notice to that effect or on paying him one (1) month's salary; or (ii) in the case of the Applicant, by his giving three (3) months notice in writing or on paying one (1) month's salary.

[18] On the 31st of December, 2009 the contract by which the Applicant was engaged as Consultant (Urology) at the Hospital expired. Notwithstanding the expiry of this Agreement, the Applicant continued providing services as Consultant (Urology) and the Respondent continued to pay him for these services.

[19] A series of events then occurred which directly led to the filing of the current proceedings. The following is a chronological account of the events which gave rise to the Applicant's complaint.

[20] On the 13th day of April, 2010, the Director of Human Resources at the Queen Elizabeth Hospital, Mrs. A. Goddard, wrote to the Applicant informing him of a new policy instituted by the Board of Management of the Hospital to ensure that Consultants employed by the Hospital were professionally registered and had adequate insurance coverage.

[21] The letter requested that the Applicant submit (1) his current curriculum vitae; (2) proof of current professional registration and (3) proof of current malpractice insurance coverage **"*prior to the approval of [his] new contractual appointment*."** The Applicant submitted the documents as requested.

[22] The Applicant still not having been presented with a new written contract, Mr. Alair Shepherd, Q.C., wrote to the CEO of the Queen Elizabeth Hospital on the Applicant's behalf on the 13th of May, 2010. Mr. Shepherd's letter noted that the Applicant had previously acted on a three (3) year written contract that had ended in November, 2009 and on expiry of this contract, the Applicant had continued to perform his duties "*with the verbal understanding that his contract was being renewed*".

[23] The letter complained that the Applicant had subsequently been informed that he was to work on a monthly basis *"pending a review of certain allegations made of frequent non-attendance and cancellation of clinics*." The allegations concerned were said to have been made by a member of staff in an internal memorandum that had been circulated but which the Applicant had not been given an opportunity to address.

[24] While referring to the allegations in question, Mr. Shepherd's letter clearly stated that the letter was not intended: "*in any way to answer fully the allegations made…but merely to point out that even the most cursory of investigations would have revealed that the allegations are and remain unfounded*".

[25] No response was received to Mr. Shepherd's letter of 13th of May, 2010.

[26] On the 16th of June, 2010, the Applicant received a letter from Mrs. Napoleon-Ramsay, the Respondent's Director of Human Resources. The letter indicated that she had been directed by the Board of Management to inform him that the post of Consultant, General Surgery, was to be advertised externally commencing from the 20th of June, 2010. He was informed that he was *"free to apply for the position if you so desire".* The letter concluded by stating:

> "*Please accept our appreciation for the contribution you have made to this institution and we wish you continued success in your future endeavours."*

[27] An advertisement inviting applications for the positions of "Consultant, Surgery (Urology)" and "Consultant, Pathologist" at the Queen Elizabeth Hospital then appeared on page 14 of the classified section of the Sunday Sun newspaper dated the 20th of June, 2010.

[28] On the 24th of June, 2010, Mr. Ralph Thorne, Q.C., Attorney-at-Law for the Applicant, wrote a letter addressed to the Chief Executive Officer of the Queen Elizabeth Hospital. Mr. Thorne, Q.C. referred to the letter dated the 16th of June, 2010, from Mrs. Napoleon-Ramsay to the Applicant and indicated that the said letter had demonstrated *"contemptuous disregard"* of the Applicant's rights.

[29] Mr. Thorne, Q.C. further advised that the Applicant was function according to the terms and conditions of his usual contract *"pending the many promises from the Department of Human Resources to attend to the usual formalities, as is customary."* He demanded the immediate withdrawal of the advertisement of the post held by the Applicant and also requested that the contract promised to Dr. Emtage be transmitted to him no later than the

28th of June, 2010, failing which proceedings would be filed in the High Court.

[30] The Applicant did not receive the contract promised to him on the 28th of June, 2010. On that date, however, an article appeared in the 'Daily Nation' newspaper. The article was written by Wade Gibbons and was captioned "*Time for Change, Not business as usual at QEH, says Senior Official*". The article quoted "*a very senior QEH official"* who had spoken to the newspaper. The article reported:

> *"…Speaking to the Daily Nation on condition of anonymity, and in the wake of BAMP's concerns over the public advertising for a consultant urologist and pathologist, the official said that consultants had been "ruling the QEH" for too long".*
>
> *He said that doctors in the public sector, including those at the QEH, were hired on three-year contracts and the hospital had the right to renew or not renew those contracts. He noted that the attitude of some consultants left a lot to be desired..."*

[31] The newspaper's anonymous source reportedly revealed the fact that some consultants appeared to be more interested in doing private cases as opposed to public cases, adding that their attendance at public clinic was very rare with many of the public cases being regularly cancelled or postponed and priority regularly being given to the consultants' private paying patients. The unnamed official referred specifically to Barbados' primary urologist and stated that the said urologist was in his 60's and one could not wait "*until he drops dead*" to have other options.

[32] On the 30th of July, 2010, just over one month following the publication of the newspaper article, the Applicant instituted the current proceedings seeking the relief identified above.

[33] **Issues**: This application raised a number of issues for the Court's determination which may be identified as set out hereunder.

i.) The first issue for the Court to determine was the preliminary issue raised by Counsel for the Respondent, whether the case is one that can be appropriately considered on an application for judicial review under administrative law. In other words, the Court had to consider whether there is a sufficient public law element to the dispute between the parties to justify an application for judicial review.

ii.) Should the first issue be decided in the affirmative, the Court then has to determine whether the Applicant had a substantive legitimate expectation to the renewal of his employment contract based on the practice of the Government of Barbados and the QEH Hospital Board since employing him as a consultant at the QEH and, if so, the nature of this legitimate expectation.

iii.) The Court also has to consider whether the Applicant also had a procedural legitimate expectation entitling him to be heard before any changes were made to the terms and conditions of his employment with the Respondent.

iv.) Finally, if the Court finds that the Applicant had obtained a substantive or procedural legitimate expectation which the Defendant had denied, the Court is required to consider whether it can and should grant relief in the form of the numerous orders sought.

[34] **Discussion**: The issues will be discussed *seriatim* under the italicized sub-headings which follow:

[35] *Preliminary Issue: Is there a sufficient public law interest in this matter to permit judicial review?* Counsel for the Respondent, Sir Maurice King, Q.C. submitted by way of a preliminary challenge to the Court's jurisdiction, that judicial review was concerned with rights derived from public law and was not available to enforce private law rights. Judicial review, he submitted, was only available against public authorities in public law matters. He argued that while there was no doubt that the Respondent Board was a public authority and that the Applicant was employed by the Board, these facts were not enough to inject a sufficient public law element into the dispute so as to entitle the Applicant to institute a claim for judicial review.

[36] In his oral submissions at the hearing, Sir Maurice also contended that there was no evidence that Dr. Emtage was the only urologist in Barbados or that without his presence and participation the public health care service in Barbados would collapse. The public-at-large, he argued, would not be prejudiced by the failure of Dr. Emtage to obtain a new contract from the Respondent.

[37] In response, Counsel for the Applicant, Mr. Ralph Thorne, QC, submitted that the dispute was indeed one that was amenable to judicial review because it concerned the interests of the public in that it affected not only the Applicant's security of tenure, but the health and welfare of patients under the Applicant's care.

[38] Mr. Thorne further submitted that the Applicant was a public service officer who was, pursuant to his contract with the Respondent, performing a public service at the sole public hospital on the Island. In doing so, he argued, Dr.

Emtage was serving the interests of the public as he was hired to do by the Respondent Board, a statutory body. Mr. Thorne conceded that the Applicant had a private law relationship with the Respondent, but argued that there was a wider public interest to be served by that private law relationship since the Applicant treated members of the public at the hospital as a result of it.

[39] Discussion of Issue (1): Counsel for the Respondent Board challenged the jurisdiction of the Court to hear the claim on the ground that the dispute was grounded in private law and therefore not properly amenable to judicial review. The Court must thus consider whether a claim in judicial review is available to an individual in a dispute arising out of the employment relationship between that individual and a public body.

[40] Counsel for the Applicant, Mr. Thorne, argued that the conduct of the Respondent Board towards his client gave rise, upon expiry of the Applicant's last written contract with the Respondent, firstly, to a substantive legitimate expectation to have a written contract on the same terms as his earlier contracts; and secondly, to a procedural legitimate expectation to be heard if the Respondent Board intended to vary the conditions on which the Applicant was to be employed. In his submissions, Mr. Thorne, did not directly address the issue raised by the Respondent as to whether or not the dispute was one properly amenable to judicial review but proceeded on the assumption that it was so as the Respondent was a statutory entity.

[41] It is important to point out that the existence of a "legitimate expectation" on the part of an applicant does not by itself provide the necessary public law element for instituting a claim in judicial review: ***Romain v Water and***

Sewage Authority (unreported) High Court of Trinidad and Tobago Suit No. 2005 of 1996, Decision of January 17, 1997, per Ramlogan, J. In order for a claimant to successfully argue legitimate expectation, whether substantive or procedural, the dispute must be one amenable to judicial review since the doctrine of legitimate expectation exists only in administrative law: ***Ibid***.

[42] Primarily as a consequence of the decision of the House of Lords in ***O'Reilly v Mackman [1983] AC 237***, subsequent English decisions and texts on administrative law consider it a well-established principle of public or administrative law (as developed by the English common law) that judicial review is only available against public law bodies in public law matters: ***Clive B. Lewis, Judicial Remedies in Public Law (First Edition) at para 2-110; Michael Supperstone, Q.C. and James Goudie, Q.C. Judicial Review (Second Edition) 2.2-2.3 and Professor David Feldman (ed.), English Public Law (Second Edition) at pp 780-792***.

[43] This principle has been interpreted to mean that an application for judicial review is not generally appropriate where public bodies are involved in disputes in which the issues under consideration do not involve public law matters but pertain to private law rights, such as those that arise under a contract of employment: see ***Judicial Remedies in English Public Law (supra) at pp 68-9 para 2-131; English Public Law (supra) at p. 790 para 17.88 and Henry Woolf et al, De Smith's Judicial Review (Sixth Edition) pp 143-4, para 3-066***.

[44] While this principle is considered indisputable under English common law, it is recognized that the Courts have struggled with its application and have

found it difficult in determining when a private law right actually exists: ***English Public Law (supra) at p. 780 para 17.66***.

[45] In ***McLaren v Home Office [1990] I.C.R. 824 at 829***, cited by Counsel for the Respondent, Dillon, LJ noted that:

> *"There are however unfortunately some cases where it is not immediately clear whether the rights which the plaintiff claims and which he claims have been infringed by a public authority, are truly to be classified as rights under public law or rights under private law, or to put it another way, where it is not immediately clear whether or not there is a sufficient "public element," to use the phrase used by Sir John Donaldson M.R. in Reg. v. Panel on Take-overs and Mergers, Ex parte Datafin Plc. [1987] Q.B. 815 , 838. In such cases the result often is, as here, the expenditure of a lot of time and costs in determining whether the proceedings have been properly brought by an ordinary action or, as the case may be, by an application for judicial review."*

[46] The Courts have also recognized that *"no universal test...applicable to all circumstances which will indicate clearly and beyond peradventure as to when judicial review is or is not available"* has been developed: ***R. v Derbyshire CC Ex p. Noble [1990] I.C.R. 808 at 814 per Woolf, L.J***.

[47] While the Courts have had difficulty in determining whether or not a matter involves public law or private law rights, they have firmly established that the mere fact that a person is employed by a statutory or public authority does not by itself "inject any element of public law" into the employment relationship and such employment does not make a dispute between the employer and employee a matter of public law to which judicial review is applicable: ***R v East Berkshire Area Health Authority ex parte Walsh [1985] QB 152 at p 164, per Sir John Donaldson, M.R***. which has been followed in ***R v Derbyshire CC, ex parte Noble [1990] ICR 808*** and ***McLaren v Home Office [1990] ICR 824***.

[48] It is also clear that a public law element referred to in ***ex parte Walsh*** cannot be equated with public interest; the interest of the public in the dispute, as wide as this may be, is not by itself sufficient to make it a public law matter: ***Ex parte Walsh (supra) at p 814; R v Derby County Council ex parte Noble [1990] ICR 808.***

[49] It has been judicially recognized, however, that a dispute between a public authority and one of its employees may become a public law matter, where the employment relationship is one that has some statutory underpinning. ***Ex parte Walsh (supra)*** Thus, where disciplinary matters in relation to prison officers were regulated by statute, as in ***R v Secretary of State for the Home Department ex parte Attard (1990) 2 Admin. L.R. 641 and R v Secretary of State for the Home Department ex parte Benwell [1985] QB 554***, judicial review was permitted by the English courts.

[50] The exception has been even more widely interpreted by some courts in the Commonwealth Caribbean so as to permit employees of public authorities whose contracts incorporated statutory regulations to bring actions in judicial review against their employers: ***Ulama Finn-Hendrikson v the Minister of Education [2008] SC (Bermuda) 7 Civ (15 February, 2008)*** and ***Leyoni Junos v the Minister of Tourism and Transport [2009] SC (Bermuda) 23 Civ (25 April, 2009)***.

[51] The fact that the Applicant was employed by a statutory or public body in the Respondent and that there was a degree of public interest in the job or function provided by the Applicant are not by themselves sufficient to make the dispute between the Applicant and Respondent a matter of public law to which judicial review is applicable under the common law as determined by ***ex parte Walsh*** and the line of cases decided subsequent to it.

[52] It may have been possible for the Applicant to argue, although Counsel for the Applicant, Mr. Thorne Q.C. did not actually do so, that the contract of employment between the Applicant and Respondent had a statutory underpinning that transferred the dispute from the realm of private law to public law since the Applicant's written contracts, first with the Government of Barbados and then subsequently with the Respondent Board, all contained words to the effect that the Applicant was to: *"conform to the* ***Public Service Regulations****, such* ***General Orders****,* ***rules, standing orders*** *or other* ***instructions*** *as may be in force from time to time in so far as the same are applicable".*

[53] The Court, however, need not consider whether the incorporation of the Public Service Regulations and General Orders into the relevant contracts between the Board and Dr. Emtage provided a sufficient statutory underpinning so as to come under the exception mentioned in ***ex parte Walsh*** for as conclusive as the English cases are in determining the common law as it currently exists in England, their usefulness in the Barbadian context may be questioned.

[54] In ***Franklin v Permanent Secretary in the Ministry of Finance et al (unreported) High Court of Barbados Suit No. 525 of 2002, Decision of July 30, 2003***, at paragraph 16, Reifer, J. observed, correctly so, that: *"The Caribbean is developing its own jurisprudence in this area and the English authorities are not analogous."*

[55] While Reifer, J.'s observation was made while she was considering the remedies which a Court had the discretion to grant on an application for judicial review, the observation is equally relevant with respect to the point raised by the Respondent as to whether the claim is properly brought by an

action in judicial review. The enactment of ***Administrative Justice Act*** has steered Barbados away from the course of English common law. It is essential to appreciate that, as Professor Albert Fiadjoe observed in ***Commonwealth Caribbean Public Law (Third Edition),*** administrative law in Barbados has *"a far more extensive basis than in the UK"* as a result of the existence and influence of the ***Constitution*** and the ***Administrative Justice Act***.

[56] It must, accordingly, be stressed that ***ex parte Walsh*** and the English cases in which it was applied were determined in a legal context in which there was (and remains) no equivalent to the ***Administrative Justice Act*** of Barbados. The relationship between the decision in ***ex parte Walsh*** and the Act, and the effect of the provisions of the Act, must therefore be considered in order to determine whether the principles formulated in the former are applicable to this case in particular, and Barbadian cases more generally.

[57] The ***Administrative Justice Act, Cap 109B*** of the Laws of Barbados, establishes a procedure for the granting of relief against administrative wrongdoings by certain public authorities or bodies in Barbados, providing in ***section 3,*** that an application for relief against *"an administrative act or omission"* may be conducted by way of judicial review.

[58] ***Section 2*** of the ***Administrative Justice Act*** defines *"act"* to include a *"decision, determination, advice or recommendation made under a power or duty conferred or imposed by the Constitution or by any enactment."* The section then provides in effect that a reviewable decision (ie: *"administrative act or omission"*) means *"an act or omission of a Minister, public official, tribunal,* ***board****, committee or other authority of the*

Government of Barbados exercising or purporting to exercise any power or duty conferred or imposed by the Constitution or by any other enactment".

[59] Unlike the ***Judicial Review Act of Trinidad and Tobago*** which indicates in ***section 5(1)*** that the decision that may be reviewed must be that of a public authority acting in the exercise of a public duty or function, the ***Administrative Justice Act*** of Barbados does not in any way indicate in ***section 2*** or elsewhere that the act or omission must be one concerned with public law rights as opposed to private law rights, but provides that it must simply be one that is exercised or purported to be exercised by an authority of the Government of Barbados under the Constitution **or any statute**.

[60] In the Barbados High Court case of ***Erskine King v National Sports Council, B'dos H.C. Suit No: 857 of 2008***, the applicant, who held the position of Director of Sports at the National Sports Council, commenced judicial review proceedings against his employer, National Sports Council, the statutory corporation established by the ***National Sports Council Act***. When the chairmanship of the Council changed in 2008, the Council directed the applicant to immediately take his accumulated holiday of 215 days in its entirety, whether or not he wanted to do so.

[61] The applicant brought a claim for judicial review under the ***Administrative Justice Act***, seeking a declaration that the Council's decision was wrong in law, as well as an order of certiorari quashing the decision. The applicant argued that the Council had failed to comply with the ***Holidays with Pay Act, Cap 348*** and that its failure to do so, amounted to an "administrative act or omission" which entitled him to invoke the jurisdiction of the Court under the ***Administrative Justice Act***.

[62] Like Sir. Maurice in the current proceedings, Counsel for the National Sports Council in ***King***, relied on ***ex parte Walsh*** to urge that the Applicant's claim under the ***Administrative Justice Act*** should not be entertained by the Court as it was concerned with breach of an employment contract, which was a private law right. The following extract from the decision of Richards, J. in ***King*** speaks for itself:

> *"[60] The Respondent in the present case relied on* ***Walsh****, one of a number of cases decided in the United Kingdom that held that the commercial and contractual obligations of public authorities are enforceable by ordinary action and not by judicial review. See for example* ***R v. British Broadcasting Corporation ex parte Lavelle [1983] 1 WLR 23; R v Derbyshire CC ex parte Noble [1990] I.C.R. 808; R v Lord Chancellor's Department ex parte Nangle [1992] 1 All E. R. 897; R v Lord Chancellor ex parte Hibbit and Saunders [1993] COD 326; and R v Crown Prosecution Service ex parte Hogg (1997) 6 Admin L.R. 778****."*

[63] Although the applicant was ultimately unsuccessful, Richards, J. held that ***ex parte Walsh*** had to be construed in the backdrop of the ***Administrative Justice Act*** which did not restrict the "administrative act or omission" on which judicial review may be brought to public law matters. The following paragraphs taken from the Judgment of Richards, J. in ***King*** are worthy of reproduction and speak for themselves:

> *"[62] Clearly the Respondent was not acting in the exercise of any power, duty or public purpose, imposed by the* ***National Sports Council Act****, when the applicant was asked to take his accumulated holiday. However, the definition of an "administrative act or omission" in* ***Cap 109B*** *is not restricted to the exercise of any public power, public duty or public purpose. It may well be that Parliament intended to improve administrative justice by allowing judicial review to encompass the exercise of statutory power or duty by a government authority, even where the exercise of the power or duty is in relation to contractual or commercial obligations. And cases*

> *such as **Walsh** and **Griffith** should be construed against the backdrop of the necessary statutory underpinning having been provided by a seemingly generous definition of an "administrative act or omission" in **Cap 109B**.*
>
> *[63] Except for the reference to **Walsh**, no additional arguments have been advanced on behalf of the Respondent to demonstrate why the definition of an "administrative act or omission" should be interpreted narrowly to exclude judicial review where the exercise of the power or duty is in relation to private law rights. In the circumstances, if the Applicant had proved a breach of **section 3(7)** of the **Holidays with Pay Act** in relation to him, the Court would have entertained the application as falling within the scope of **section 2** of the **Administrative Justice Act**. The Court is not unmindful of the possible conundrums arising from either the generous drafting or generous interpretation of **section 2** of **Cap 109B**. But the function of the Court is to interpret legislation without encroaching on or usurping the legislative role of Parliament."*

[64] The Caribbean Court of Justice has referred firstly in ***Edwards v. Attorney General of Guyana [2008] CCJ 10 (AJ) at para [15]*** and then subsequently in ***Campbell v Attorney General of Barbados [2009] CCJ 3*** to what it terms the *"dual dimension of the public employment relationship"*. The Court noted in the latter case that the relationship between the public office holder and his employer is likely to have *"significant contractual elements"* although these will "be affected by statutory rights and obligations", giving the employee the option of resorting to administrative law remedies where the contractual remedies are not adequate. ***Campbell (supra) at para [40]***.

[65] While the employment arrangement between Dr. Emtage and the Board is undoubtedly a contractual one, clearly grounded in private law, I am satisfied that the relationship also has a dual dimension, grounded in public law. The public law dimension in this case is to be found under the

Administrative Justice Act which empowers the Court to review the Board's decisions, determinations and other *"acts",* and in particular, to review its *"administrative acts or omissions"* conferred under an enactment, to wit: the ***Queen Elizabeth Hospital Act.***

[66] I am accordingly satisfied that this Court has jurisdiction to review the purported exercise by the Respondent Board of its power under **section 6(1)** of the ***Queen Elizabeth Hospital Act,*** *inter alia:*

> *"(i) to appoint all members of staff of the Hospital and to exercise discipline over such staff, including the suspension or termination of employment."*

[67] I am therefore satisfied that there is in this case, a sufficient public law element to entitle Dr. Emtage to institute, as he has done, a claim for judicial review under the ***Administrative Justice Act.*** The mere fact that the dispute in the instant case arose in the context of the private law employment relationship between the Applicant and the Respondent Board as a body corporate, in no way precludes the Applicant from applying for judicial review of the purported exercise by the Board of powers conferred on it by the ***Queen Elizabeth Hospital Act***.

[68] In the circumstances, the Respondent Board's preliminary challenge to the Court's jurisdiction to hear the substantive application is dismissed and the Court turns to consider the substantive issues raised on the application and for convenience, issues (2) and (3) will be considered together.

[69] *Issues (2) and (3): Does the Applicant have a legitimate expectation substantive and/or procedural to which the Court will pay heed?* Counsel for the Applicant, Mr. Ralph Thorne, Q.C. submitted that the Applicant had

continued to work with the Respondent Board as a Consultant in Urology subsequent to the expiry of his written contract dated 1st day of November, 2006 and that the Respondent Board had not only permitted him to do so, but had continued to pay him a monthly salary for his services. He submitted that such conduct by both the Applicant and the Respondent Board demonstrated that there was a subsisting contract between them after the expiry of the written contract dated 1st day of November, 2006. In making this submission he relied on the case of ***Brogden v Metropolitan Railway Co. (1877) 2 App. Cas. 666***.

[70] Counsel for the Applicant also cited the cases of ***McCutcheon v David MacBrayne Ltd (1964) 1 WLR 125*** and ***Hardwick Game Farm v SAPPA (1969) AC 31*** as authority for the submission that terms could be implied into a contract as a result of a prior "course of dealing". He argued that there was an established "course of dealings" between the Applicant and the Respondent Board and it was clear that on the basis of this "course of dealings" the subsisting contractual agreement had continued on the same terms and conditions as had existed under the expired written contract dated 1st day of November, 2006.

[71] Although Mr. Thorne, Q.C. conceded that the Applicant did not have any legal right to have the oral contract between himself and the Respondent formalized and completed in writing, he argued that the Applicant nonetheless had a 'legitimate expectation' that entitled him to the benefit of a formal written contract. This expectation, he contended, was legitimate as the absence of a formal written contract placed the Applicant's tenure at the hospital in some jeopardy and exposed him to the risk of summary termination or termination at short notice.

[72] Mr. Thorne also argued that the need for the Applicant to have a secure tenure lay at the very centre of the public benefit offered by a free medical service and was connected to the stability of the health care system. Counsel for the Applicant submitted that Dr. Emtage's legitimate expectation arose from the previous practices of the Respondent Board and its predecessor and the fact that the Board had acted in a manner that amounted to representations to the Applicant that his contract had been, or would be renewed subject only to the completion of formalities.

[73] Counsel for the Applicant maintained that Dr. Emtage had been engaged by the Respondent Board and by the Crown in right of its Government of Barbados on successive written contracts for periods of no less than 3 years from 1990 until 2009, with each contract being on largely the same terms. He indicated that upon the expiry of a contract by which Dr. Emtage was engaged, Dr. Emtage, while awaiting the subsequent contract, continued to function without a formal contract sometimes up to 4 months into the new contractual period. Mr. Thorne argued that the Applicant was entitled to consider that this situation which had subsisted after the expiry of each contract continued to apply after the expiry of the contract dated the 1st day of November, 2006 unless the Respondent Board indicated otherwise and the Board had not done so.

[74] Quite to the contrary, Mr. Thorne reminded the Court that the Respondent Board had, by its letter of the 13th of April, 2010 requested that the Applicant submit certain documents prior to the approval of a *"new contractual appointment".* Mr. Thorne argued that the Board's reference to a *"new contractual appointment"* can be regarded as properly referring to the preparation of a formal written contract.

[75] He contended that the April 13th letter was not only evidence of the contract which subsisted between the Applicant and Board after the expiry of the written contract dated the 1st day of November, 2006, but also amounted to a representation made to the Applicant on behalf of the Respondent Board that the contract would be formalized. This representation was, he contended, of some weight. It gave Dr. Emtage hope and a reasonable expectation that his employment would continue on the same terms and further, that a new written contract would soon be issued by the Board.

[76] Mr. Thorne also sought to rely on paragraph 8 of the First Affidavit of the Applicant in which the Applicant deposed that an officer of the Respondent had represented to his Administrative Assistant that the pending formalities would soon be completed.

[77] Counsel for the Respondent Board, Sir. Maurice King objected to Mr. Thorne's reliance on the said paragraph and Mr. Thorne readily conceded that the paragraph was problematic because it contained hearsay and its evidential value was questionable. He nonetheless emphasized that this was not the only representation on which the Applicant sought to rely.

[78] According to Mr. Thorne, where a public authority has promised to follow a certain procedure, it is in the interest of good administration that the authority act fairly and implement its promise as long as doing so does not interfere with its statutory duty. It was therefore unfair and inconsistent with good administration, he said, for the Respondent to deny the Applicant a formal written contract on the same terms as before.

[79] He maintained that Dr. Emtage had a 'substantive legitimate expectation', that is, an expectation capable of giving rise to an entitlement to a

substantive benefit that the Applicant asserts cannot be denied to him, and not merely an entitlement to be consulted or heard.

[80] However, he also submitted that the legitimate expectation of the Applicant included a procedural element, namely, a proper opportunity to address the Board on any concerns that might have been raised with regard to the Applicant's contractual status and the formal renewal of his contract by the Respondent. Such an opportunity, he contended, should have been given to Dr. Emtage prior to the Respondent Board's letter of 16th of June, 2010 which informed him of the Board's intention to advertise his post externally.

[81] In support of his submission on legitimate expectation Counsel for the Applicant cited the cases of ***AG of Hong Kong v. Ng Yuen Shiu (1983) 2 ALL ER 346; Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374; R v Ministry of Agriculture Fisheries and Food, ex parte Hamble (Offshore) Fisheries Limited (1995) 2 ALL ER 714; R v Secretary of State for the Home Department, ex parte Ruddock and others (1987) 2 ALL ER 518; Ex p Khan (1984) 1 WLR 1337; R v Devon County Council, ex parte Baker and another (1995) 1 ALL ER 73; Attorney – General v K C Confectionary Ltd (1985) 34 WIR 387; Marks v Minister of Home Affairs (1984) 35 WIR 176*** and ***Naidike (Robert), Naidike (Timi) and Naidike (Faith) v. Attorney General (2004) 65 WIR 372.***

[82] Mr. Thorne also addressed paragraph 5 of the affidavit of Mrs. Napoleon-Ramsay which stated that: "The Act establishing the Respondent/ Defendant came into effect on the 5th day of September 2005." He argued that although the establishment of the Respondent Board by the ***Queen Elizabeth Hospital Act*** (which was actually enacted in October, 2002) changed the entity with

which the Applicant contracted it did not have any practical effect on the contractual status of the Applicant.

[83] He submitted that the Respondent Board had provided no evidence to establish that the enactment of the ***Queen Elizabeth Hospital Act*** had interrupted the Applicant's contractual relationship or varied the terms and conditions of his employment at the hospital. Mr. Thorne further submitted that following its establishment as a body corporate in 2002, the Respondent Board had both factually and legally adopted Dr. Emtage's then subsisting 3 year contract dated December 5th, 2000 and had thereafter, itself issued two successive 3-year contracts to Dr. Emtage in 2003 and 2006 respectively, "largely upon the same terms and conditions" as had previously been issued.

[84] According to Mr. Thorne, the statutory transition which had taken place in October 8th, 2002 under section 5 of the ***Queen Elizabeth Hospital Act*** from Dr. Emtage's employment with the Crown in right of the Government of Barbados to his employment with the Respondent Board as a body corporate**,** did not affect Dr. Emtage's expectation that he would receive a renewed contract in writing upon the same terms and conditions.

[85] Discussion of Issues (2) and (3): At the outset the Court should state that it is well established that administrative law does not only concern itself solely with strictly enforceable rights, but may in some cases protect interests, not amounting to legal rights, in which an individual has a "legitimate expectation".

[86] The expression 'legitimate expectation' refers to 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***.

[87] As this Court has previously had occasion to observe:

> *"The doctrine* [legitimate expectation] *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. 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."* ***See Hugh Anthony Atherley v.The Chief Personnel Officer, [Unreported] B'dos High Court Civil Suit No: 1618 of 2008; decision of 2010-03-30.***

[88] A 'legitimate expectation' means "no more than a reasonable expectation". ***Pearson Leacock v Attorney General (unreported) Barbados Court of Appeal Suit No. 1712 of 2005, Decision of October 27, 2005*** per Simmons, CJ.

[89] Professor Albert Fiadjoe in his groundbreaking text, ***Commonwealth Caribbean Public Law (Third Edition) at pp 267-8***, observed that the doctrine of 'legitimate expectation':

> *"…seeks to resolve the basic conflict between the desire to protect the individual's confidence in expectations raised by administrative conduct and the need for administrators to pursue changing policy objectives. The principle means that expectations raised as a result of administrative conduct may have legal consequences. Either the administration must respect those expectations or provide compelling reasons why the public interest must take priority."*

[90] George, C. in ***Kent Garment Factory Ltd. v. A.G. et al (unreported) Court of Appeal of Guyana Decision of July 8, 1991*** said of the doctrine that:

> *"It is a concept that is based on the desirability, and indeed the necessity for propriety and good faith on the part of a public official or authority towards a citizen, not to depart from a course of action which the latter had been led to believe or expect would be pursued or adopted and which departure would adversely affect his property or liberty, without due and adequate notice, and, if appropriate, permitting for an opportunity to be heard."*

[91] A 'legitimate expectation' may arise from an express or implied promise given on behalf of a statutory or public authority, or from the existence of a regular practice which the claimant can reasonably expect to continue. ***Council of Civil Service Unions v Minister of Civil Service [1985] AC 374 per Lord Fraser of Tellybetton***.

[92] The evolution of the doctrine of 'legitimate expectation' was traced by Simmons, CJ in ***Pearson Leacock's case*** *(cited above).* Simmons, CJ asserted at paragraph 46 that:

> *"Thus, it can now be said with confidence that the doctrine of legitimate expectation which originated as a public law innovation to ensure procedural fairness, such as to give a right to be consulted or heard, has now evolved and expanded to protect benefits, advantages or interests of a substantive nature which an applicant can reasonably expect to be permitted to enjoy."*

[93] ***Pearson Leacock's case*** provides one very obvious example in Barbados in which Chief Justice, Sir David Simmons who heard the matter, had absolutely no difficulty in assuming jurisdiction under the ***Administrative Justice Act*** to review the actions complained of and to grant relief on grounds which included the doctrine of 'legitimate expectation'.

[94] The Court therefore accepts that it is permissible in Barbados for an applicant to invoke, as Mr. Emtage has done in this case, the doctrine of

'legitimate expectation' as a specific ground for relief upon an application for judicial review, notwithstanding that the term, 'legitimate expectation' does not appear 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.

[95] 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 ***Pearson Leacock's case*** and which this Court now asks on this application*, "But what is Mr. Emtage's legitimate expectation?"*

[96] Legitimate expectations are now generally classified into two types: (1) "procedural legitimate expectations" which refer to the existence of a procedural right that the applicant claims to possess; and (2) "substantive legitimate expectations" that denote situations where the applicant seeks a particular benefit or commodity such as a licence: ***English Public Law (supra) at p. 730, para 16.34.***

[97] Counsel for the Applicant in the instant case claims that the Applicant had obtained both a substantive and procedural legitimate expectation and these will therefore be examined in turn.

[98] <u>*Substantive legitimate expectation*</u>*:* It is clear from decided cases that the doctrine of 'legitimate expectation' may be successfully invoked by an applicant who can establish that as a result of a course of dealing on the part of a public official or authority or by reason of other administrative conduct, he has been led to believe or to reasonably expect that he would be the

recipient of a substantive interest or right of which it would not be fair to deprive him without hearing what he has to say.

[99] The Applicant in this case says that based on administrative conduct and in particular, a course of dealing with his successive employers over the past 19 years, he has a 'substantive legitimate expectation' in being employed with the hospital under a written contract, departure from which practice, he says, would adversely affect him and of which it would not be fair to deprive him without giving him an opportunity to be heard.

[100] In determining whether the conduct of the Respondent Board in the instant case gave rise to a 'substantive legitimate expectation' in favor of the Applicant, the case of ***Magloire v Judicial and Legal Services Commission and the Attorney-General (unreported) High Court of St. Lucia, Suit No. SLUHCV 0372 of 2005, Decision of January 25, 2007*** is instructive.

[101] The claimant in ***Magloire*** was an attorney-at-law who had been employed by the Government of St. Lucia as a magistrate pursuant to a fixed term contract for 4 successive contractual periods of 1 year each. It was the practice of the Government to prepare and execute each fixed term contract during the contractual period itself. The claimant usually remained in office and continued to perform his duties after the expiration of a given contractual period until his eventual re-appointment and renewal of the contract.

[102] On the expiration of the contractual period starting on January 4th, 2003 and ending on January 4th, 2004, the claimant remained in office and continued to function as he usually did with the expectation that his contract would be renewed. However, by letter received in April, 2004, the claimant was

informed that the Defendant purported to employ him on a month-to-month basis for a period of 4 months.

[103] The claimant was never informed of the reasons for the change in policy and commenced an action claiming, *inter alia*, that he had a 'legitimate expectation' that his contract would be renewed along the same terms and conditions of the prior contract.

[104] Edwards, J. of the High Court of St. Lucia held that:

> *"I accept the undisputed evidence of Mr. Magloire and that of 2 other former magistrates, who deposed to the established practice, for the re-appointment of Magistrates in St. Lucia. I accept that they are re-appointed long after their period of engagement has expired by effluxion of time, and long after they have continued in office upon the expiration of their fixed contractual term. In my view, this practice can support the conclusion that Mr. Magloire was entitled to have a legitimate expectation that his contract would be renewed for one year, commencing 4th January, 2004 to 3rd January, 2005."*

[105] While the Court found that the Claimant in ***Magloire*** had a 'legitimate expectation' to have his contract renewed, it also held that he was not entitled to the relief claimed because neither Defendant possessed the discretion to determine whether to renew his contract for the duration of any such renewal and were therefore not the proper parties to the action.

[106] It is clear from the evidence in this case, and the Court so finds that the Board's conduct, including its practice of renewing Dr. Emtage's contracts after the start of the contractual period, together with the representations

made on its behalf by its Director of Human Resources in her letter dated April, 13th 2010, have given rise to a 'substantive legitimate expectation' in favor of the Applicant by which he is entitled to have his subsisting employment with the Board formalized by way of a written contract on terms and conditions as practicably similar to his pre-existing contract with the Board dated the 1st November, 2006.

[107] <u>*Procedural legitimate expectation:*</u> Counsel for the Applicant, Mr. Thorne also argued that the Applicant was entitled to be heard about his contractual status before the terms and conditions under which he was employed were varied in any way. Counsel for the Respondent, Sir Maurice King submitted that no rights possessed by the Applicant had been denied him. He argued that the Applicant did not have a right to be heard as no allegations had been made against him about malfeasance or anything else and that he had therefore not been denied his procedural rights.

[108] Legitimate expectations and 'procedural legitimate expectation' in particular, originated from the Court's wish to ensure fairness and justice to persons affected by the acts or omissions of public bodies. Singh, J. in ***Re Guyana Telephone and Telegraph Co. Ltd. High Court of Guyana, Suit No. No. 4491 of 1995*** described 'legitimate expectation' as being firmly embraced on one side by justice and on the other by fairness.

[109] Cenac, J. noted in ***Elwin v the Public Service Commission (unreported) High Court of Dominica, Suit No. 493 of 1998, Decision of May 5, 2000*** that:

> *"Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner, which is fair in all the circumstances. The standards of fairness are not immutable. They may change with the passage of time,*

> *both in general and in their application to decisions of a particular type. The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision and this is to be taken account in all its aspects. (per Lord Mustill in* ***Regina v Secretary of State for the Home Dept., ex parte Doody (HOL) [1993] 13 WLR 168****)"*

[110] Courts have consistently held that where a person has an expectation of retaining a particular benefit, this expectation may attract procedural protection where a decision of a public body has the effect of:

> *"…depriving him of some benefit or advantage which….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 grounds for withdrawing it on which he has been given an opportunity to comment…."* ***per Simon Brown, LJ in R v Devon CC ex parte Baker; R v Durham CC ex parte Curtis [1995] 1 All ER 73, 88-89.***

[111] In both ***Marks v Minister of Home Affairs (1984) 35 WIR 176*** and ***Naidike (Robert) et al v Attorney-General (2004) 65 WIR 372***, the Bermudan Court of Appeal and Privy Council respectively held that an applicant whose work permit had been consistently and automatically renewed had a legitimate expectation, arising from the previous renewals, that the renewal of his permit would not be refused except for good reason and only after he had been granted a proper opportunity to make representations to the public authority responsible, addressing any concerns that may have arisen to prevent the work permit from being renewed.

[112] In this case it is clear that the written contracts by which the Applicant was employed were consistently renewed since the expiry of the first contractual

agreement by which he was employed. This practice has clearly given rise to a legitimate expectation that the terms and conditions under which the Applicant was employed would not be varied without the Applicant first having the opportunity to make representations before the Respondent.

[113] In the circumstances, the Court is satisfied and declares that at the date of filing of his Application, the Applicant in this case had a legitimate expectation (both substantive and procedural) that:

a) his subsisting renewed contract would be formalized and completed by way of a written contract upon terms and conditions as practicably similar to the said pre-existing contract dated the 1st day of November, 2006; and

b) the terms and conditions under which the Applicant was employed under his subsisting contract of employment would not be varied without the Applicant first having the opportunity to make representations before the Respondent Board.

[114] *Issue (4)- Is the Applicant entitled to the relief claimed?* By his Fixed Date Claim Form and Statement in Support filed on the 30th day of July, 2010, the Applicant sought a veritable barrage of relief from the Court including numerous declarations, a mandatory injunction, certiorari, mandamus and orders of prohibition, damages and costs. Perusal of the orders sought reveal that a number of them are very broadly drafted.

[115] The remedies usually sought by judicial review – the declaration, injunction and the prerogative remedies - are all discretionary in nature: ***Judicial Remedies in Public Law (supra) at para 11-00.*** The Court has the discretion to refuse a remedy, even where it is satisfied that a public authority has acted unlawfully. In particular, the Court may do so where the relief sought is no

longer necessary or will have no practical significance: ***(supra) at paras 11-019-11-021***.

[116] One of the remedies sought is an injunction compelling the Respondent/Defendant to immediately formally and officially appoint the Applicant/Claimant to the post of "Consultant, Surgery (Urology)" under a formal written contract for a period of no less than three years from the date of its commencement.

[117] Sir Maurice King, Q.C. submitted on behalf of the Respondent Board that the injunction, in particular, should not be granted as injunctions should only be granted where damages will not sufficiently compensate the Claimant for any loss suffered.

[118] An injunction is a discretionary equitable remedy available on judicial review to restrain a party from taking a particular action or to compel a party to take a particular step. The remedy is usually granted by the Court in public law matters where it appears just and convenient to do so: ***Halsbury's Laws of England, Judicial Review, Volume 61 (2010) (5th Edition) at para 716***. As Counsel for the Respondent correctly pointed out, an injunction is not awarded where damages appear to be an adequate and appropriate remedy: ***Ibid at para 717***.

[119] Damages do not appear to be a suitable remedy in the instant case. It is difficult to see how damages can compensate for the failure of the Applicant to receive the formal written contract promised to him by the Respondent Board, particularly as the Applicant does not appear to have suffered any financial loss as a consequence. However even though damages do not appear to be an appropriate remedy in the instant case, this does not necessarily mean that an injunction should be awarded.

[120] The relief sought by the injunction can be obtained by an order of Mandamus and, indeed, the Applicant has simultaneously claimed an order of Mandamus requiring the Respondent to provide him with a formal written contract. It is superfluous to grant both of these remedies and an order of Mandamus is more common in public law matters.

[121] Counsel for the Respondent Board, Sir. Maurice also contended that the Applicant was not entitled to the relief sought because granting such relief, whether by way of an injunction or an order of Mandamus or a declaration was tantamount to the Court making an order for the specific performance of a contract of service. He argued that it was a cardinal principle of law that the Court would not order the specific performance of a contract of employment as an employer cannot be forced to employ a specific person. Sir Maurice also submitted that the doctrine of legitimate expectation cannot take precedence over the cardinal rule that the Court will not specifically enforce a contract of employment.

[122] For his part, Counsel for the Applicant, Mr. Thorne submitted that relief in the form of a declaration as to legitimate expectation was not, as Sir Maurice submitted, akin to specific performance. According to Mr. Thorne, there was no analogy between the two. He submitted that the Claimant was entitled to a written contract of employment.

[123] Sir Maurice relied on the following passage in ***Volume 1 of the Encyclopedia of Labour Relations*** which states:

> *"…courts have refused to grant injunctions which, in effect, would, require specific performance of a contract of employment. The reason is to be found in the clarification by the judge of the employment relationship as being between two equal contracting parties. Since, it is said, it would "turn contracts of service into*

> *contracts of slavery" if employers could compel their employees to continue in service, therefore, on the principle of reciprocity between contracting parties, and the need to maintain mutual confidence, the employee should not be able to compel the employer to keep him in service.*"

[124] Sir Maurice also relied on ***Ridge v Baldwin [1964] AC 40***, as authority for the principle that there can be no specific performance of a contract of service. He also relied on it to show that a master can terminate an employment contract at any time and for any reason or none, but that if he did so in a manner not warranted by contract, he was liable to damages.

[125] In ***Ridge v Baldwin*** Lord Reid stated at p. 66 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 case of 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. But this kind of case can resemble dismissal from an office where the body employing the man is under some statutory or other restriction as to the kind of contract which it can make with its servants, or the grounds on which it can dismiss them."*

[126] In the above extract from the speech of Lord Reid in ***Ridge v Baldwin (supra),*** it is important to point out that Lord Reid refers to a *"pure case of master and servant".*

[127] In ***Malloch v Aberdeen Corporation [1971] 1 WLR 1578 at 1596***, Lord Wilberforce interpreted the "pure master and servant cases" referred to by Lord Reid to mean *"cases in which there is no element of public employment*

or service, no support by statute, nothing in the nature of an office or state which is capable of protection".

[128] In Lord Reid's view, where those elements existed, then although the relationship may in some aspects be considered to be that of master and servant, *"there may be essential procedural requirements to be observed, and failure to observe them may result in a dismissal being declared to be void."*

[129] Lord Wilberforce expressed his agreement with the general principle stated by Lord Reid, which he indicated, existed for good reasons of public policy, but asserted on p. 1597 that:

> *"The rigour of the 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 man's 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 upon him expressly or by necessary implication, and how far these extend.*"

[130] In ***Allen et al v Commissioner of Police et al (unreported) Supreme Court of Bermuda, Suit No. 142 of 2010, Decision of June 22, 2010*** the claimants commenced judicial review proceedings against the Defendants, arguing that their decision not to renew their contract of employment was unlawful in that it constituted a breach of their legitimate expectation to a further contract. The claimants sought orders of certiorari quashing the decision not to renew their employment, as well as declarations that their employment

should continue until they become pensionable. The Defendants argued that the relief sought by the claimants should not be granted as it was unprecedented and *"akin to specific enforcement of contracts of employment".*

[131] The Court held that the claimants had a 'legitimate expectation' of having their employment continued unless they were found guilty of conduct entitling the Respondents to terminate the contract and were entitled to the relief sought. Noting that similar relief had already been granted in other public sector employment cases, specifically, ***Evans v Minister of Education [2006] Bermuda LR,*** the Supreme Court proceeded to grant the orders of certiorari and declarations requested by the claimants.

[132] Having considered the matter of the appropriate relief to be granted in this case, the Court is of the view that Dr. Emtage is not entitled to any relief over and above the Declarations as to the breaches of his 'substantive and procedural legitimate expectations' already made at paragraph [113] above.

[133] **Disposal**: In the circumstances and for the reasons given above, it is therefore ordered as follows:

1) At the date of filing of the Fixed Date Claim on 30th day of July, 2010, the Applicant had a legitimate expectation (both substantive and procedural) that:

    (a) his subsisting contract of employment would be formalized and completed by way of a written contract upon terms and conditions as practicably similar to his pre-existing contract dated the 1st day of November, 2006; and

(b) the terms and conditions under which the Applicant was employed under his subsisting contract of employment would not be varied without the Applicant first having the opportunity to make representations before the Respondent.

2) Costs of the application are awarded to the Applicant to be assessed if not agreed.

Maureen Crane-Scott
Judge of the High Court

12-01-2015