BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Civil Appeal No. 8 of 2014

BETWEEN:

JAMES IFILL **Appellant**

AND

THE ATTORNEY GENERAL **First Respondent**
THE CHIEF PERSONNEL OFFICER **Second Respondent**

Before: The Hon. Sir Marston C. D. Gibson, K.A, Chief Justice, Hon. Sandra P. Mason, The Hon. Andrew D. Burgess, Justices of Appeal

2015: April 1
June 18
2017: June 29

Mr. Bryan Weekes in association with Mr. Gregory Nicholls for the Appellant

Mr. Roger Barker in association with Mrs. Dawn Grant-Jackman for the Respondent

DECISION

BURGESS JA:

INTRODUCTION

[1] The appellant, Mr. James Ifill, appealed against the dismissal of his application in the court below, in which he sought judicial review of the

decision of the Governor General to act on the advice of the Public Service Commission (the Commission) that the appellant be required to "compulsorily resign" from the Public Service, following an investigation in which he was found guilty of seven disciplinary charges.

[2] The appellant subsequently filed an application to amend his grounds of appeal to include two additional grounds, namely, that he had been deprived of his constitutional right to a fair hearing by the Public Service Commission, and the court's failure to fully appreciate the concept of "compulsory resignation". This application was successful and leave was accordingly granted to the appellant to argue the amended ground.

FACTUAL AND PROCEDURAL BACKGROUND

[3] Mr. Ifill was an employee in the Civil Service of Barbados. He was appointed to the post of Transport Inspector in the year 1984 and was attached to the Ministry of Public Works and Transport. In November 1995, he acted in the post of Senior Transport Inspector until May 1996.

[4] In October 2002, disciplinary charges were laid against Mr. Ifill. The Commission, pursuant to **reg. 37 (2)** of the **Service Commissions (Public Service Regulations), 1978 (the Regulations)**, appointed Mr. Carlos Belgrave, the then Supervisor of Insurance, to investigate those charges. In June 2003, Mr. Ifill was found guilty in respect of seven of ten disciplinary

charges brought against him. Mr. Belgrave duly rendered a report to the Commission containing his findings and recommendations in respect of the investigation.

[5] By letter dated 4 July 2003, the Chief Personnel Officer (Ag.) wrote to the Governor General on behalf of the Commission, to inform that the form of disciplinary action which the Commission advised should be taken against Mr. Ifill, was that he should be required to "compulsorily resign" from the Public Service in accordance with **reg. 32 (1) (b)** of **the Regulations**. The letter read as follows:

> "Your Excellency
>
> Your Excellency last considered this matter at (58) and advised that Mr. James Ifill, Transport Inspector, should be interdicted from the performance of his duties on half pay pending the adjudication of ten (10) charges of misconduct which were drafted by the Solicitor General.
>
> 2. The charges against Mr. Ifill were adjudicated by Mr. Carlos Belgrave, Supervisor of Insurance, who found Mr. Ifill guilty of seven (7) of ten (10) charges which were brought against him. (Mr. Belgrave's report on the matter is at (70/1) herein).
>
> 3. Consequently, the Public Service Commission at its meeting of 2003-06-30, (submission is at 76), advised that Mr. James Ifill should be required to compulsorily resign from the Public Service in accordance with the Provision of Section 32 (1) (b) of the Service Commissions (Public Service) Regulations, 1978 which states:-

"The forms of disciplinary action which may be taken against an officer are:

(a) removal from office
(b) compulsory resignation
(c) reduction in rank
(d) suspension of increment
(e) deferment of increment
(f) withholding of increment."

4. Will your Excellency accept the advice of the Public Service Commission at (76) and approve the compulsory resignation of Mr. James Ifill, please?"

[6] By a letter dated 31 July 2003, the Chief Personnel Officer (Ag.), informed Mr. Ifill as follows:

"Sir,

I wish to refer to my letter PH 948 Vol. 2/64 dated 2002-10-28, interdicting you from the performance of your duties on half salary with effect from 2002-11-01, pending the outcome of an investigation into disciplinary charges brought against you.

2. I am directed to inform you that the Public Service Commission having considered the report of the Investigating Officer that you have been found guilty of seven of the ten disciplinary charges brought against you, advised His Excellency, the Governor General, that you should compulsorily resign from the Public Service.

3. Consequently, His Excellency, the Governor-General, acting in accordance with the advice of the Public Service Commission, accepted the Commissioner's advice that you should compulsory [sic] resign from the Public Service, in accordance with Regulations 32 (1) (b) of the Service Commissions (Public Service) Regulations, 1978.

> 4. The Commission also advised that the half salary withheld during your interdiction with effect from 2002-11-01 should not be restored.
>
> 5. In accordance with Section 98 (1) of the Constitution you may apply to have your case referred to the Privy Council. If you so desire you should apply in writing to the Governor-General-in-Privy Council, through the Clerk of the Privy Council, Government Headquarters, Bay Street, St. Michael within twenty-one (21) days of the date of this letter.
>
> 6. A copy of your letter should be delivered to the Personnel Administration Division.
>
> 7. If you do not apply within the stipulated time limit, it will be considered that you do not wish to have your case referred to the Privy Council."

[7] By letter dated 31 July 2003 addressed to the Chief Personnel Officer, Mr. Ifill requested a copy of the report prepared by Mr. Belgrave. The letter which was copied to his "legal representative", Mr. Jefferson Cumberbatch, stated as follows:

> "Dear Sir,
>
> This is to humbly request from you a copy of the report prepared by Mr. Carlos Belgrave, the Supervisor of Insurance, and presented to your office in respect of the hearing of certain allegations made against me by the Permanent Secretary, Ministry of Public Works.
>
> Access to this document is essential for my effective formulation of a response of your letter of July 21, [sic] 2003 wherein you urged a certain course of action on the basis of the Belgrave report."

[8] By a letter dated 29 August 2003, the Chief Personnel Officer replied to Mr. Ifill as follows:

> "Sir,
>
> I am directed to refer to your letter of July 2003-07-31 in which you requested a copy of the report submitted by Mr. Carlo [sic] Belgrave of the hearing into charges brought against you.
>
> 2. I am also directed to inform you that if it is your intention to have your case referred to the Privy Council in accordance with Section 98 (1) of the Constitution, you should apply in writing to the Governor General in Privy-Council within twenty-one (21) days of the date of this letter.
>
> 3. A copy of your letter should be delivered to the Personnel Administration Division.
>
> 4. Enclosed is a copy of the report as requested."

[9] No response from Mr. Ifill was received by the Commission, and by letter dated 20 October 2003, the Chief Personnel Officer communicated to Mr. Ifill as follows:

> "Sir,
>
> You were informed by letter PH. 948 Vol. 2/97 dated 2003-08-29 of His Excellency, the Governor-General's acceptance of the Commission's advice that you should compulsorily resign from the Public Service.
>
> 2. The said correspondence further informed you that Section 98 of the Constitution conferred on you the right to make an application for your case to be referred to the Privy Council within twenty-one (21) days of the date of that letter.

> 3. Your decision not to invoke the procedure under section 98 of the Constitution means that His Excellency, the Governor-General has acted on the Commission's advice.
>
> 4. Your compulsory resignation from the Public Service therefore takes effect from 2003-11-01."

THE HIGH COURT ACTION

Application for Judicial Review

[10] Almost five years after the Commission's communication of 20 October 2003 containing the decision of the date on which Mr. Ifill's "compulsory resignation" would take effect, Mr. Ifill filed an originating motion in the High Court on 27 June 2008 applying for judicial review under the **Administrative Justice Act, Cap 109B (Cap 109B)** against that decision. Mr. Ifill sought the following relief:

> "a) A Declaration that in the events which have happened a decision and/or administrative act and/or advice and/or recommendation of the First and Second Respondent or their duly authorized delegates to effectively dismiss the Applicant from the Public Service was unreasonable, unlawful and an abuse of discretion.
>
> b) An Order for Certiorari to quash the decision and/or administrative act and or/advice and/or recommendation of the First and Second Respondent or their duly authorized delegate to dismiss the Applicant from the Public Service.
>
> c) A Declaration that in the circumstances and events which have happened that the Applicant is entitled to be reinstated in the Public Service.

d) Damages for loss and expense by reason of an unlawful decision and/or administrative act and/or advice and/or recommendation of the First and Second Respondent or their duly authorized delegate.

e) Costs."

[11] Mr. Ifill's application for judicial review was supported by an affidavit also filed on 27 June 2008. In paragraphs 4 and 5 of his affidavit, Mr. Ifill deposed as follows:

"5. That in the month of October 2002 disciplinary charges were preferred against me and a hearing conducted.

6. That it was found as a matter of fact that I committed several breaches of discipline as alleged in the said charges."

[12] On 27 June 2008, Mr. Ifill also filed the statement pursuant to the **Judicial Review (Application) Rules, 1983** wherein he listed the following particulars of the application:

"a) The Applicant was at all material times a Transport Inspector attached to the Ministry of Public Works & Transport.

b) That in the month of October 2002 disciplinary charges were preferred against the Applicant.

c) A hearing with respect to the said charges was conducted and it was found as a fact that there were breaches of discipline committed by the Applicant.

d) That the Applicant was informed in writing by the 2nd Respondent through his delegate that he should compulsorily resign from the Public Service.

e) That such compulsory resignation would take effect from the 1st day of November 2003.

f) That the Applicant has been unable to resume his duties in the Public Service.

g) That by reason of these matters the Applicant has suffered loss and damage.

h) By acting in the manner outlined the 1st and 2nd Respondent:
   i) Acted unreasonably, irregularly, unlawfully and improperly exercised their discretion.
   ii) Abused their discretion.

i) The Applicant therefore seeks the relief contained herein…"

[13] On 5 February 2009, Ms. Gail Atkins, Chief Personnel Officer, deposed *inter alia:*

"6. That paragraphs 5 and 6 of the Applicant's Affidavit are admitted. That further to paragraph 6 that the several breaches of discipline for which the Applicant was found guilty as alleged in the said charges including absenting himself from duty without permission or reasonable excuse in contravention of paragraph 3.31 of the General Orders for the Public Service of Barbados 1970 and not reporting to the Senior Transport Inspector for duties and failing to take instructions from the Senior Transport Inspector.

…

11. That by memorandum dated 2003-08-21 the Permanent Secretary Ministry of Public Works informed the Personnel Administration Division that the Applicant had refused to accept the correspondence which was forwarded to him by registered

mail. A copy of the said memorandum is shown to me and marked "GA7".

13. That by letter dated 2003-07-31 the Applicant who was represented by Counsel throughout the Disciplinary Proceedings requested a copy of the report on the investigations prepared by Mr. Carlos Belgrave. A copy of the said letter is shown to me and marked "GA8".

14. That on the 2003-08-29 the Applicant visited the Personnel Administration Division to collect a copy of the said report and was given a copy of the said report enclosed in a letter of the said date which informed the Applicant of his right under section 98 of the Constitution of Barbados to make an application to the Privy Council.

15. That on 2003-10-03 the Secretary to the Privy Council was contacted to establish whether or not Mr. Ifill had made such an application. The Secretary confirmed that there was no receipt of an application to the Privy Council.

16. That on 2003-10-03 the Registry (Personnel Administration Division) was also instructed to make a check to determine whether correspondence in connection with an appeal to the Privy Council was received in this Division. There was no receipt of a letter of application in this Division.

17. That the Applicant was informed by letter dated 2003-10-20 that his decision not to invoke the procedure under Section 98 of the Constitution of Barbados meant that his Excellency the Governor General had acted on the Commission's advice…"

The Hearing

[14] The matter was heard by **Richards J** on 10 March 2010. Before her, it was argued by then counsel for Mr. Ifill, Mr. Hall Gollop, that the disciplinary process was not being challenged and that the sole issue rested on a determination of the meaning of the term "compulsory resignation". Mr. Gollop submitted that there is a difference between compulsory resignation and removal from office in **reg 32 (a)** and **(b)** of **the Regulations** and that therefore they cannot mean the same thing. Counsel argued that resignation has to be an act of the employee who leaves his employment of his own free will and removal from office is an act of the employer, which essentially is a dismissal. In counsel's view, Mr. Ifill had in fact been removed from office by dismissal.

[15] Then counsel for the Crown, Ms. Sharon Deane, contended that there was a difference between removal from office and compulsory resignation. She submitted that with removal from office the employee loses pension rights whereas with compulsory resignation the employee remains entitled to pension at age 60. Counsel conceded that there is nothing set out in the **Regulations** as to how a person can be compulsorily resigned, but submitted that compulsory resignation can only be at the insistence of the employer,

because if the discretion to resign is left to the employee this would be a complete absurdity.

[16] Ms. Deane also argued that there was an extensive delay between the decision to stipulate a date for Mr. Ifill's "compulsory resignation" and the filing of his application for judicial review, and that no acceptable reason was given for this delay. For these reasons, Ms. Deane argued that the court should refuse to grant Mr. Ifill relief pursuant to **section 8** of **Cap 109B**.

Richards J's Decision

[17] **Richards J** delivered her decision in the matter on 1 December 2010. In relation to the issue of undue delay, which is not before us, the judge held at para 17:

> "Despite the Court's finding of undue delay by the Applicant, the Respondents have tendered no pleadings in support of the other grounds in Section 8 of the Act. In addition to undue delay, Section 8 requires evidence of substantial hardship or substantial prejudice, or detriment to good administration."

[18] As to the remainder of the case, **Richards J** noted at **para [5]** of her judgment that the applicant, Mr. Ifill, did not challenge the findings of the disciplinary tribunal. Neither did he challenge the decision that the disciplinary action against him should take the form of compulsory resignation. Rather, the judge stressed, it was with the process by which his "compulsory resignation" was

implemented that the Applicant took umbrage. On this, the judge held as follows:

> "[21] The Applicant did not plead that the procedure followed in his case was not the usual procedure. And the affidavit of the Second Respondent did not set out the normal procedure implemented for the compulsory resignation of a public officer. Neither did it confirm that the procedure used in the Applicant's case is the usual procedure. This is an unfortunate omission, as the Applicant surely was not the first or only public officer to incur disciplinary action by way of compulsory resignation.
>
> [22] Counsel for the Applicant relied on the dictionary definition of "resign" to support his argument that resignation, even though compulsory, is the voluntary act of the public officer. He added that the Applicant should have been permitted to voluntarily submit his resignation, and that if he refused to resign, then he could have been dismissed.
>
> [23] Curiously, counsel for the Applicant made no reference to the dictionary definition of "compulsory". It is a word that is defined as meaning "obligatory", that is, having no choice. The Applicant was compelled or obliged to resign. If he had been allowed to submit his resignation, the effective date of that resignation had to be a date agreeable to his employer. Otherwise, a number of unsatisfactory situations could have arisen.
>
> [24] The Applicant might have refused to submit a letter of resignation. Or he might have submitted his resignation with a date wholly unacceptable to the employer. Either situation would have been untenable. These were not unlikely scenarios, given the allegation at paragraph 11 of the affidavit of the Second Respondent that the Applicant had refused to accept

correspondence forwarded to him by registered mail. This allegation was never refuted by the Applicant.

[25] Counsel for the Applicant further argued that had the Applicant proved unwilling to co-operate, he would be subject to dismissal. Had this scenario unfolded, the Applicant would have filed another application for judicial review, claiming that his employer had no authority to dismiss him when the penalty lawfully imposed was compulsory resignation. And if even a second disciplinary process could have been instituted, it would have taken some time to reach the ultimate discipline of dismissal. Such a convoluted and drawn out result could not have been the intention of Section 32 (1) (b) of the regulations.

[26] The Court is of the view that in all the circumstances, it was not unreasonable, within the context of compulsory resignation, for the Applicant's employer to determine the date of his resignation. The Applicant accepted the decision of the disciplinary tribunal, and he accepted the penalty of compulsory resignation. He did not ask to have his case referred to the local Privy Council. Therefore, he knew that he could not continue to work in the Public Service at the Ministry of Public Works and Transport. The Applicant would also have known that payment of his salary and emoluments would be discontinued as a direct consequence of compulsory resignation."

THE APPEAL

The Notice of Appeal and Amended Notice of Appeal

[19] Mr. Ifill, on 17 April 2014, filed a notice of appeal entitled Civil Appeal No. 8 of 2014 appealing the decision of **Richards J**. The grounds of appeal in that notice of appeal were as follows:

"a. The Learned Trial Judge in the circumstances erred in law in failing to appreciate that the requirements of section 98 of the Constitution of Barbados required the Governor General of Barbados before taking any step with regard to the acceptance of any recommendation from the Public Service Commission regarding the compulsory resignation of the Appellant to have informed the Appellant of his right to refer the matter to the Privy Council of Barbados, in circumstances where the evidence before the Court established the Governor General was expressed to have accepted the recommendation of the Public Service Commission and had accepted that the Appellant's office had been terminated by way of compulsory resignation, prior to advising the Appellant of his right to have his mater referred to the Privy Council;

b. The Learned Trial Judge erred in failing to appreciate that the authority to order the removal from office of a civil servant is not a power which can be delegated to any other functionary by virtue of the provisions of the Constitution of Barbados and should have in the circumstances of this case held that the dismissal of the Appellant from his office in the civil service of Barbados by correspondence from the office of the Chief Personnel Officer was ineffective as a matter of law."

[20] The following orders were sought:

"(i.) Setting aside the Learned Trial Judge's decision;

(ii.) The issuance of a Writ of Certiorari quashing the Governor General's order dismissing the Appellant from the civil service of Barbados; and

(iii.) The issuance of a Writ of Mandamus mandating that the Appellant be reinstated to his office of Transport Inspector and that he be paid all outstanding emoluments which he would have

> earned from the date of his interdiction to the date of the Order of the Court."

[21] On 16 January 2015, Mr. Ifill filed an application for leave to file an amended notice of appeal. Two legal bases were advanced in support of that application. The first was that the "grounds of appeal as amended present to the Appellate Court the errors of law which led to the findings of the trial Court which are the subject matter of the Appeal". The second was that "all of the material which the Court of Appeal needs to properly adjudicate the matters in dispute are before the Court and there is no need for any further evidentiary hearing".

[22] The appellant enclosed the proposed amended notice of appeal and included, in addition to the grounds of appeal in the notice of appeal, the following two grounds:

> "c. That the Learned Trial Judge erred in failing to appreciate that in the absence of evidence that the Appellant had been given an opportunity by the Service Commission to be heard by the members of the Service Commission on the findings of the investigation carried out by Mr. Carlos Belgrave or alternatively to an opportunity to be heard at an oral hearing by a tribunal convened pursuant to regulation 40 of the Service Commissions (Public Service) Regulations, 1978 before making its decision to recommend to the Governor General that he be made to compulsorily resign from the Civil Service was unreasonable and unlawful as the decision was taken in breach of the rules of natural justice, that is to say, the decision was one to which the concept of procedural fairness attaches because it was one taken in the context of disciplinary proceedings and the ultimate

> decision impacted on the Appellant's livelihood and future pension rights.
>
> d. The Learned Trial Judge erred in law when she held that the concept of "compulsory resignation" in the context of the Service Commissions (Public Service) Regulations, 1978 was applicable to the Appellant's case, in failing to appreciate that resignation whether voluntary or constructive is an act of the public officer which cannot be imposed by the Crown arbitrarily, and she should have held that the Service Commission acted in an irrational manner when it advised the Governor General to inform the Appellant that he was required to compulsorily resign from the civil service."

Preliminary Point

[23] On 1 April 2015, this Court heard arguments from Mr. Bryan Weekes, who appeared in association with Mr. Gregory Nicholls for the appellant, and from Mr. Roger Barker representing the respondents, on the application to amend the notice of appeal to include matters which were not argued before **Richards J.**

[24] On 18 June 2015, we delivered our decision as to whether the proposed amended grounds of appeal would be allowed. We held that **section 61 (2)** of **the Supreme Court of Judicature Cap. 117A** gives us discretion to hear arguments on a ground that was either not included in the grounds of appeal or heard in the court below. The Court also stated that it looked at **Part 62** of **CPR** and **Ord 59 Rule 5** of the old **Rules of the Supreme Court 1982**, and

decision of our now defunct Divisional Court in **AG v Gill (Suit No 24 of 1972) (28 July 1972) (Unreported)** in which **Williams J** stated:

> "…on appeals from higher Courts it does not appear that there is an absolute prohibition against the raising of points of law which were not taken at the trial. The test appears to be whether or not the appellate Court can be satisfied that the facts as a whole if fully gone into would have supported the point then raised for the first time."

Williams J cited the old English House of Lords decision of **The Tasmania [1890] 15 App Cas 223** at **225** in support of that principle. Applying these authorities to the case at bar, this Court granted the appellant permission to expand his grounds of appeal as sought.

The Issues

[25] In light of the amended grounds of appeal, the written submissions of the appellant and respondent to, and their oral arguments before this Court, three main issues are raised for determination. These are:

1. Whether the Governor General acted in accordance with the advice of Public Service Commission that the penalty of compulsory resignation should be imposed, prior to affording the appellant the opportunity to have his case referred to the Privy Council in contravention of **section 98 (1)** of the *Constitution* having regard to the language used in the letter of 31 July 2003?

2. Whether the appellant's denial of an oral hearing before the Commission in the circumstances was a violation of the appellant's constitutional right to a fair hearing?

3. Whether the Commission properly advised the Governor General that the appellant be required to compulsorily resign from the public service.

COURT'S ANALYSIS AND CONCLUSIONS

[26] In our view, it is convenient to consider the issues raised in this appeal *seriatim* hereafter.

Whether the Governor General contravened section 98 (1) of the Constitution

[27] **Section 98 (1)** of the *Constitution* provides as follows:

> "Before the Governor General acts in accordance with the advice of any Commission established by this Chapter that any public officer shall be removed from office or that any penalty should be imposed on him by way of disciplinary control, he shall inform the officer of that advice, and if the officer then applies for the case to be referred to the Privy Council, the Governor General shall not act in accordance with that advice but shall refer the case to the Privy Council accordingly."

[28] The Commissions referred to in this sub-section are the various Service Commissions established under *Chapter VIII* of the *Constitution*, of which the Public Service Commission is one, with the purpose of, as the Privy Council pointed out in **Endell Thomas v AG of Trinidad and Tobago [1982] AC 113** preserving the concept of a neutral non-political public service. In furtherance of this purpose, **section 94 (1)** of the *Constitution* vests the power

to appoint, discipline and remove public officers in the Governor General acting on the advice of the Commission.

[29] On its plain language, **section 98 (1)** prescribes a procedure which must be followed before the Governor General may take disciplinary action against a public officer. That procedure requires that the Governor General, before acting in accordance with the advice of the Commission that any penalty should be imposed on a public officer by way of disciplinary control, inform the officer of that advice. Mr. Weekes argues that, cases like this Court's decision in **Lloyd v AG of Barbados Civil Appeal No 23 of 2004 (Unreported)** and the English House of Lords decision in **Ridge v Baldwin [1963] 2 All ER 66**, reiterate the principle that, where such procedures are prescribed, they must be scrupulously followed, otherwise the result is that the action taken will be of no effect and the officer will be treated as still being in the employ of the State.

[30] Applying the foregoing principle to the present case, Mr. Weekes contended that the Governor General's information to the appellant did not follow strictly the procedure set out in **section 98 (1)** but "went beyond what was required by" that subsection. As evidence of that assertion, Mr. Weekes pointed to the language contained in the letter dated 31 July 2003 from the Chief Personnel Officer on behalf of the Governor General to the appellant which stated that

"…the Governor General, acting in accordance with the advice of the Public Service Commission, accepted the Commissioner's advice that you should compulsorily resign from the Public Service, in accordance with Regulations 32 (1) (b) of the Service Commissions (Public Service) Regulations, 1978". According to Mr. Weekes, this was a contravention of the requirements of **section 98 (1)** in that the statement in the letter that the Governor General "accepted the Commissioner's advice" indicated that the Governor General had "acted" on the advice received from the Commission prior to informing the appellant of his right to have the matter referred to the Privy Council. The language used in the letter, contended Mr. Weekes, would have left the appellant with the reasonable impression that his case had already been decided and that any referral to the Privy Council at this stage would have been useless.

[31] Interestingly, Mr. Weekes did not point to any principle of interpretation which would allow for the construction of the words "acts in accordance with the advice" that he offered. Mr. Barker, on the other hand, pointed us to a number of West Indian decisions in which the principles of constitutional interpretation which should guide us in approaching **section 98 (1)** were discussed. One such statement is that of Lord Wilberforce in the Jamaican

Privy Council case of **Minister of Home Affairs v Fisher [1980] AC 319** at **329** that:

> "This is in no way to say that there are no rules of law which should apply to the interpretation of a Constitution. A Constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and the traditions and usage which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation is recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the Constitution commences."

Another is that of Lord Diplock in **Hinds v The Queen [1977] AC 195** at **211** (PC) where, in considering the interpretational approach to the Jamaican Constitution, he said:

> "A written constitution, like any other written instrument affecting legal rights or obligations, falls to be construed in the light of its subject matter and of the surrounding circumstances with reference to which it was made."

And yet another is that of Lord Bingham of Cornhill in the Belizean Privy Council decision in **Reyes v The Queen (2002) 60 WIR 42** at para **26** that:

> "As in the case of any other instrument, the court must begin its task of constitutional interpretation by carefully considering the language used in the Constitution."

[32] One sure thing which these authorities, as well as West Indian Constitutional Law scholars like Dr. Francis Alexis in *Changing Caribbean Constitutions*

(2015 Barbados) pp 473-476, firmly establish, is that in interpreting a constitutional provision, a court must have respect for the language used in that provision as well as the purpose of the provision. The specific language used in **section 98 (1)** is "acts in accordance with the advice of any Commission". This can only mean things done in a manner corresponding to the advice of the Commission. So interpreted, it is particularly difficult to fathom how an indication by the Governor General of his acceptance of the advice of the Commission can amount to an act in accordance with the advice of the Commission when the advice of the Commission is that Mr. Ifill should compulsorily resign from the public service. It is plain to us that accepting the Commission's advice and doing acts in furtherance of that advice are radically disparate things.

[33] We accordingly hold that, by merely stating in the letter of 31 July 2003 that he accepted the advice of the Commission that Mr. Ifill compulsorily resign from the public service, the Governor General did not act in accordance with that advice before informing Mr. Ifill of it. The Governor General did absolutely nothing to further the compulsory resignation of Mr. Ifill advised by the Commission until after Mr. Ifill did not apply to have his matter referred to the Privy Council. The question whether the Governor General

contravened **section 98 (1)** of the *Constitution* must therefore be answered in the negative.

Whether denial of an oral hearing before the Commission violated the appellant's constitutional right to a fair hearing

[34] This Court next turns to Mr. Weekes' argument that the appellant's constitutional right to a fair hearing was denied by the Commission's failure to consider whether to recommend to the Governor General that an oral enquiry be held to afford the appellant an opportunity to challenge the findings contained in the report of Mr. Belgrave before advising the Governor General. For reasons which will emerge hereafter, in weighing this argument, it is crucially important to closely consider **sections 94 (1)** and **98 (1)** and **(2)** of the *Constitution* and *Section B* of *Part V* of the **Regulations.**

[35] Under **section 94 (1)** of the *Constitution*, the Governor General is empowered to remove and to exercise disciplinary control over public officers, acting in accordance with the advice of the Commission. This subsection provides as follows:

> "(1) Subject to the provisions of this Constitution, power to make appointments to public offices and to remove and to exercise disciplinary control over persons holding or acting in such offices is hereby vested in the Governor General, acting in accordance with the advice of the Public Service Commission."

[36] The Governor General's power under **section 94 (1)** is, however, exercised subject to **section 98 (1)**. As we have already explained, that subsection stipulates that, before the Governor General acts in accordance with the advice of the Commission, he must inform the public officer of the advice rendered by the Commission in respect of what disciplinary action should be taken against the public officer and must also afford the public officer the opportunity to apply to have his case referred to the Privy Council. It is only if the public officer does not apply to have his case referred to the Privy Council that the Governor General may act in accordance with the Commission's advice. But if, on the other hand, the public officer applies to have his case referred to the Privy Council, **section 98 (2)** is triggered and the Governor General must act in accordance with the Privy Council's advice. **Section 98 (2)** provides:

> "(2) When a reference is made to the Privy Council under the provisions of subsection (l), the Privy Council shall consider the case and shall advise the Governor-General what action should be taken in respect of the officer, and the Governor-General shall then act in accordance with such advice."

[37] These constitutional provisions are given administrative effect in *Section B* of *Part V* of the **Regulations.** A detailed code of procedure is set out in **regs. 36** through **42.** This code must be followed by the Commission where it is represented to the Commission that a public officer is guilty of misconduct. It

follows therefore that these regulations are the starting point in any examination of Mr. Weekes' argument on this issue.

[38] Given the foregoing, we set out here these regulations in so far as they are relevant to this case. They are as follows:

> "36. (1) Where it is represented to the Commission that an officer has been guilty of misconduct, the Commission shall cause an investigation to be made into the matter in such manner as it thinks proper.
>
> (2) An investigation carried out pursuant to paragraph (1) may take the form of an oral enquiry or such other form as the Commission determines, and regulation 40 shall apply where the investigation takes the form of an oral enquiry.
>
> 37. (1) Where a report of misconduct on the part of an officer is made to the Commission, the Commission may request the officer's Head of Department to investigate the matter, and the Head of Department shall investigate the matter, and…submit to the Commission a written report of his investigation containing findings and recommendations, and a copy of all the evidence and material documents relating to the matter.
>
> (2) Where the Head of Department is directly involved in any incident or matter which gave rise to the report referred to in paragraph (1), any investigation requested by the Commission pursuant to that paragraph shall be carried out by his Deputy or any other officer appointed by the Commission.
>
> 38. (1) An officer in respect of whom an investigation is being carried out under regulation 37
>
> (a) shall be informed in writing of the charges against him;
>
> (b) shall be informed in writing

(i) that he is entitled to be represented by an attorney-at-law, a friend, or a representative of an accredited Trade Union.

(ii) that a written reply to the charges, and any observations he may wish to make thereon must be received by the investigating officer within such period, being not less than 21 days, as may be permitted by the investigating officer,

(iii) that he may attach to his written reply statements from witnesses;

(c) shall, if he so requests, be supplied with copies of the statements of all witnesses and other evidence given during the course of the investigation.

39. (1) The Commission shall consider every report submitted to it pursuant to regulation 37 (1), and if it is of the opinion that

(a) the report should be amplified in any respect or that further investigation is desirable, it may refer the matter back to the investigating officer for amplification or further investigation, as the case may be;

(b) disciplinary action ought to be taken against the officer, it shall advise the Governor General what form of disciplinary action ought to be taken;

…

(e) having regard to all the circumstances of the case, an oral enquiry ought to be held into the matter, it shall recommend to the Governor General that such an enquiry be held."

[39] Plainly, those regulations, read together with **section 98 (1)** and **(2)** of the *Constitution*, envisage a three stage process prior to the Governor General exercising his decision making power. These are: stage 1, an investigation instigated by the Commission; stage 2, consideration by the

Commission of the report of the investigation and advice by the Commission to the Governor General; and, stage 3, on application by the officer, consideration of the matter by the Privy Council upon reference of it by the officer to the Privy Council.

[40] The appellant does not dispute that an investigation was held, nor that the investigating officer acted fairly in respect of that investigation. The appellant's quarrel is not with stage 1. His argument in effect is that he was denied a fair trial at stage 2 because the Commission, by not considering whether to recommend to the Governor General that an oral enquiry be held, did not at that stage seek to ensure that the maxim *audi alteram partem* was observed.

[41] In advancing that argument, Mr. Weekes conceded that there was no duty expressly imposed on the Commission by the **Regulations** to afford the appellant observance of the *audi alteram partem* maxim and so to allow the appellant an opportunity to be heard at an oral enquiry. Mr. Weekes submitted that, this notwithstanding, the discretion conferred on the Commission under **reg. 39 (1) (e)** of the **Regulations** to, in an appropriate case, advise the Governor General that an oral hearing should be conducted, implies a duty on the Commission to properly consider whether to recommend to the Governor General that an oral enquiry be held. According to Mr. Weekes,

given the severity of the penalty which it ultimately advised the Governor General to impose, such a consideration was appropriate in the appellant's case and that, in not so considering, the Commission denied the appellant fair process.

[42] We do not accept this argument of Mr. Weekes. At the heart of our disagreement with that argument is the well accepted principle captured in the statement by Lord Bridge of Harwich in the English House of Lords case of **Lloyd v McMahon [1987] 1 AC 635** at **702** that:

> "…the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory framework in which it operates."

[43] It is our judgment that what the requirements of fairness demanded in this case, depended on the operative framework created by the **Regulations** and **section 98 (1)** of the *Constitution*. In approaching that framework, we have in mind the dictum of Lord Reid in **Wiseman v. Borneman [1971] AC 297 at 308 (Wiseman v Borneman)** that:

> "Natural justice requires that the procedure before any tribunal which is acting judicially shall be fair in all the circumstances, and I would be sorry to see this fundamental general principle degenerate into a series of hard-and-fast rules. For a long time the courts have, without objection from Parliament,

> supplemented procedure laid down in legislation where they have found that to be necessary for this purpose. But before this unusual kind of power is exercised it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation."

So that, the question whether we should imply a duty on the Commission at stage 2 to consider whether an oral enquiry should be recommended to the Governor General must depend on whether the framework set up by the **Regulations** and **section 98 (1)** of the *Constitution* is insufficient to achieve fairness and that to require additional steps would not frustrate the apparent purpose of the legislation.

[44] In this Court's judgment, the framework is decidedly not insufficient. Before explaining why this is so, however, we think it important to point out that **reg. 39 (1) (e)** does not admit of the interpretation placed on it by Mr. Weekes. To begin with, **reg. 39 (1) (e)** is to be understood in the context of **reg. 36**. **Reg. 36** itself empowers the Commission, where it is represented to it that an officer is guilty of misconduct, to cause an investigation into the matter "in such manner as it thinks fit". In any event, such an investigation "may take the form of an oral enquiry or such other form as the Commission determines".

[45] Taken in the context of the power of the Commission to order initially, either an oral enquiry or some other form of enquiry, it becomes obvious that the

oral enquiry provision in **reg. 39 (1) (e)** allows for the Commission, after considering a report of an investigation conducted in a form other than an oral enquiry, to recommend to the Governor General that an oral enquiry be held. **Reg. 39 (1) (e)** expressly allows the Commission to recommend to the Governor General "an oral enquiry", not "another oral enquiry". On its plain words, then, the Commission cannot recommend to the Governor General that an oral enquiry be held pursuant to **reg. 39 (1) (e)** where the initial enquiry was, as in this case, an oral enquiry. It is only where the initial investigation proceeded in a form other than an oral enquiry that the Commission can invoke **reg. 39 (1) (e).**

[46] But even if **reg. 39 (1) (e)** were capable of being applicable where the initial investigation took the form of an oral enquiry, this Court does not see any need to supplement the statutory procedure at stage 2 with an oral enquiry in this case because, according to the appellant, the nature of the matter is one of discipline and the penalty is likely to be severe. This Court is satisfied that the three stages of the framework set up by the **Regulations** and **section 98 (1)** of the *Constitution* are sufficient to ensure fairness to a public officer, like the appellant, in disciplinary matters. The **Regulations** and **section 98 (1)** of the *Constitution* did not leave the appellant without occasion to confront the allegations made against him and to provide a response thereto.

[47] In the first place, there is no question that at stage 1 of the disciplinary process, the principles of natural justice were observed. There was compliance with **reg. 38 (1)** which expressly secures due process for public officers in the position of the appellant. Pursuant to that sub-regulation, the appellant was informed in writing of the charges against him, given an opportunity to provide a written reply to the charges and attach statements of witnesses, and also given the opportunity to request statements of all witnesses and other evidence given during the course of the investigation. These processes comport with the standard of fairness adumbrated by the Privy Council in the Trinidad and Tobago case of **Walter Annamunthodo v Oilfields Workers' Trade Union [1961] AC 945**. There, the Privy Council stated that:

> "It is a principle of natural justice that a man must be given notice of the charge and an opportunity to meet it, and provided that he is, it is his fault if he chooses not to take advantage of it, but the notice must be such as to convey to his mind what is in danger."

On this authority, then, it is clear that fairness was observed during the investigation stage, stage 1, of the appellant's case.

[48] The procedural requirements of stage 1 of the disciplinary process observed in this case may be contrasted with that in the Trinidad and Tobago Privy Council case of **Evan Rees and Others v Richard Alfred Crane (Rees v Crane) [1994] 2 AC 173** at 182. In that case the Privy Council held that:

> "… the respondent was not treated fairly. He ought to have been told of the allegations made to the commission and given a chance to deal with them—not necessarily by oral hearing, but in whatever way was necessary for him reasonably to make his reply."

[49] What is more is that, not only was the appellant assured fair treatment by **reg. 38 (1)** at stage 1, but he also enjoyed a constitutional safeguard of procedural fairness entrenched in his **section 98 (1)** constitutional right to appeal to the Privy Council against the advice rendered by the Commission at stage 3. So that, assuming there was a defect in the investigative stage of the disciplinary process or during the stage of the consideration of the report by the Commission and its subsequent advice of the disciplinary penalty to be imposed, there remained a right in the appellant to have that defect raised and heard at an independent hearing of the Privy Council.

[50] Needless to say, this Court is ever aware that the mere existence of a subsequent right of appeal, like the appellant's reference to the Privy Council in this case, is not determinative of whether there is need for fairness to be accorded to a person affected by a decision at an earlier stage of the proceedings. This was made clear in the Privy Council case of **Calvin v Carr and others [1979] 2 All ER 440** at 447 where that Court stated that:

> "…their Lordships recognise and indeed assert that no clear and absolute rule can be laid down on the question whether defects in natural justice appearing at an original hearing, whether administrative or quasi-judicial, can be "cured" through appeal

> proceedings. The situations in which this issue arises are too diverse, and the rules by which they are governed so various, that this must be so."

[51] In that case also, the Privy Council opined further that:

> "…it is for the court…to decide whether…there has been a fair result, reached by fair methods…Naturally there may be instances when the defect is so flagrant, the consequences so severe, that the most perfect of appeals or rehearings will not be sufficient to produce a just result…There may also be cases when the appeal process is itself less than perfect; it may be vitiated by the same defect as the original proceedings, or short of that there may be doubts whether the appeal body embarked on its task without predisposition or whether it had the means to make a fair and full inquiry, for example where it has no material but a transcript of what was before the original body. In such cases it would no doubt be right to quash the original decision."

[52] Against that jurisprudential backdrop and based on **Attorney-General and Others v Joseph (Jeffrey) and Boyce (Lennox) (2006) 69 WIR 104**, counsel for the appellant argued that it is not certain whether an applicant has a right to make oral representations to the Privy Council. If the Privy Council simply reviews the materials supplied by the Commission, counsel hypothesized, the initial process would remain defective and the appellant would have never been afforded an oral hearing.

[53] Regardless of the nature of the hearing before the Privy Council, this Court is satisfied that any possible defect at stage 1 or stage 2 would be cured by the hearing by the Privy Council, even if that hearing was by way of documentary

evidence. As was explicated in **Rees v Crane**, fair treatment does not necessarily involve an oral hearing, all that is necessary is that there is a reasonable opportunity to make a reply. Thus any defect in the Commission's failure to consider whether to recommend that there be an oral hearing could be cured before the Privy Council, since the Privy Council could conduct an independent inquiry and could substitute its own recommendation of a disciplinary penalty for that of the Commission.

[54] In fine, we reject the appellant's contention that the failure of the Commission to consider whether to recommend to the Governor General that an oral inquiry be held deprived him of his natural justice right. Accordingly, we find that there was no breach of procedural fairness in the appellant's case. We are of the view that the cumulative effect of the framework set up by the **Regulations** and **section 98 (1)** of the *Constitution* ensured that procedural fairness was afforded to the appellant, and that fairness was observed at each stage of the disciplinary process.

[55] If, however, supplementary reasons for rejecting the appellant's claim were needed, this Court would point to the flood of Commonwealth case authority that the rules of natural justice do not apply and that a person may not invoke the *audi alteram partem* maxim where the impugned conduct does not lead to a final determination of the rights in issue but is merely of an advisory

nature. As was stated by Lord Slyn of Hadley in **Rees v Crane** this principle is fully captured by Lord Reid in the English House of Lords case of **Wiseman v Borneman** where he said at **p. 308**:

> "It is, I think, not entirely irrelevant to have in mind that it is very unusual for there to be judicial determination of the question whether there is a prima facie case. Every public officer who has to decide whether to prosecute or raise proceedings ought first to decide whether there is a prima facie case, but no one supposes that he should first seek the comments of the accused or the defendant on the material before him."

[56] As it relates to this case, the role of the Commission in the disciplinary process is unequivocally stated in **reg. 39 (1) (b)** of the **Regulations**. It is to consider the report of the investigation and, if it is of the opinion that disciplinary action ought to be taken against the officer, to advise the Governor General what form of disciplinary action ought to be taken. **Reg. 39 (1) (b)**, then, makes it clear that the conduct of the Commission does not lead to a final determination of the appellant's rights. Such a final determination is with the Governor General. For this reason also, the appellant's claim of breach of procedural fairness at stage 2 must fail.

Whether the Commission properly advised the Governor General that the Appellant be required to "Compulsorily Resign"

[57] Finally, this Court turns to the appellant's third and final ground of appeal. It is that, in the circumstances of the appellant's case, the Commission acted

improperly in advising the Governor General that the appellant be required to "compulsorily resign" pursuant to **reg. 32 (1) (b)**.

[58] Here, Mr. Weekes premised that, according to the general principles of statutory interpretation, the expression "compulsory resignation" must be given its usual and natural meaning. He continued that the dictionary meaning of the word "compulsory" is "required by a law or rule" and that of the word "resignation" is "the act of giving up a job or position in a formal or official way". Therefore, counsel concluded, the term "compulsory resignation" means "the act of giving up a position formally as required by a law or rule".

[59] Based on that conclusion, counsel argued that in order for a resignation to be compulsory, an act must have occurred that is inconsistent with the employment relationship, having the effect of terminating or potentially terminating that relationship. Counsel submitted that a breach of paragraph **3.31** of the **General Orders for the Public Service of Barbados 1970** relating to public officers absenting themselves from work and not reporting for work, under which the appellant was found guilty, does not render a public officer's status effectively terminated, but rather, it exposes the public officer to disciplinary action.

[60] Mr. Weekes further contended that resignation must be the voluntary act of a public officer and that the Commission cannot force a public officer to resign.

Consequently, the State by requiring the appellant to compulsorily resign was requiring him to do something which he was not prepared to do. The penalty of "compulsory resignation" was therefore irrational, *ultra vires* and of no legal effect.

[61] Mr. Weekes' arguments on the issue of compulsory resignation is basically the same as were advanced before **Richards J** in the High Court. We have set out her reasons for rejecting that argument at para [18] of this judgment. We find her reasons entirely persuasive and we accept them as our reasons for rejecting the third ground of the appellant's appeal. We would only add that we view Mr. Weekes' interpretation of "compulsorily resign" as overly stylized. It appears obvious to us that, as Mr. Barker argued, the drafters of the **Regulations** were merely creating a disciplinary measure which would ensure a method of terminating the employment of a public officer while preserving his/her pension rights. This appears to us to be a disciplinary measure which can produce a salutary result in cases like the present case.

CONCLUSION

[62] For all of the foregoing reasons, we hold that the appeal must fail on all three grounds raised by the appellant.

DISPOSAL

[63] The appeal is dismissed. There will be no order as to costs.

Chief Justice

Justice of Appeal **Justice of Appeal**