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BARBADOS.

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL JURISDICTION

No. 857 of 2008

BETWEEN

ERSKINE KING

APPLICANT

AND

NATIONAL SPORTS COUNCIL

RESPONDENT

Before Dr. The Hon. Madam Justice Sonia L. Richards, Judge of the High Court

2008: November 19, 20, 24, 27

December 03, 04, 05, 08, 10, 12

2009: May 06, 08

Mr. Hal Gollop, Mr. Steve Gollop and Mr. Hilford Murrell for Applicant.

Mr. Stephen Lashley, Mr. John Forde, Mr. Larry Smith and Ms. Michelle Knight for Respondent.

DECISION

The Factual Background

[1] Mr. Erskine King (“the Applicant”) was appointed Director of Sports with the National Sports Council (“the Respondent”) with effect from 1st January, 1998. As the Director of Sports, the Applicant was the most

senior officer of the Respondent, and in effect, its Chief Executive Officer and manager.

- [2] The Respondent is a statutory corporation established in 1978 under the National Sports Council Act, Cap. 48A, as an authority to facilitate the development of sport in Barbados. Mr. Henry Inniss is currently the Chairman of the Respondent and he assumed that position in February 2008.
- [3] Soon after becoming Chairman of the Respondent, Mr. Inniss had a brief meeting with the Applicant. The purpose of this meeting was to get to know the Applicant who would be reporting directly to Mr. Inniss as the Chairman. Subsequent to this meeting, Mr. Inniss requested the Applicant's file, so as to familiarise himself with the Applicant's background. Attached to the back cover of the file was a record of the Applicant's vacation. The record indicated that the Applicant had accumulated holiday of some 215 days.
- [4] Mr. Inniss took this information to the Respondent's meeting of 23rd April, 2008. It was customary for the Applicant to attend these meetings as Director of Sports, although he was not a member of the Respondent. And the Applicant did attend the meeting of 23rd April, 2008.

- [5] After the agenda items were discussed, the Applicant, the Acting Deputy Director of Sports, and the Board Secretary were asked to leave the meeting. The Applicant did not know that the Respondent Council would be discussing his accumulated holiday.
- [6] After leaving the meeting, the Applicant was not invited back to the meeting, and he did not return. In his absence the Chairman and the members present discussed the Applicant's accumulated holiday. They decided unanimously that the Applicant should take his accumulated holiday in its entirety. In the words of the Chairman "The directive was that he was to be sent on leave, willing or unwilling."
- [7] Immediately after the meeting, Mr. Inniss went to the Applicant's office and informed him of the decision. This occurred on the night of Wednesday 23rd April, 2008. The Applicant asked that the decision be given to him in writing, and the Chairman complied.
- [8] At about 2 p.m. on Friday 25th April, 2008, the Chairman handed a letter bearing the same date to the Applicant. The letter read as follows:-

"Dear Mr. King:

At the meeting on April 23rd, 2008, the Board of the National Sports Council took the decision that you should proceed on holiday effective April 30th, 2008 for the full duration of your accumulated vacation, namely 215 days.

The Board is concerned about the accumulation of such an extended period of vacation and has agreed that this vacation entitlement should be liquidated in the shortest possible time.

I trust that you will enjoy your vacation and the Board looks forward to your resumption of work on Monday December 8th, 2008.”

The letter was signed by Mr. Inniss as Chairman of the Respondent.

- [9] On the same day that the Applicant received the correspondence requesting him to take all 215 days of his accumulated vacation, the Weekend Nation published a story under the headline “Shake-up likely at Sports Council KING TO GO ON LEAVE”. Readers were directed to page 44 of the paper for the full story. At page 44 the full story carried the headline “King’s leave. Sports Director must take 200 plus days due”.
- [10] The Applicant’s attorney-at-law wrote to the Chairman of the Respondent by letter dated 30th April, 2008. The letter stated:

“Dear Sir,

I act in association with Mr. Hilford A. Murrell as Attorney-at-Law for Mr. Erskine King, the Director of Sports of the National Sports Council, who has passed on your letter of 25 April 2008 and instructed that I reply thereto.

Your letter is a clear and unambiguous order that Mr. King *“should proceed on holiday effective April 30th, 2008 for the full duration of your accumulated vacation, namely 215 days”*.

For the avoidance of doubt, let me caution you that your order offends Section 3(7) of the Holidays with Pay Act, Chapter 348 of the Laws of Barbados – The Act clearly advises:

“The employer shall determine the date on which the annual holiday shall commence and shall give to the employee not less than fourteen days notice of such date ...”

In the premises, I have advised my client that his employer’s order offends the statutory provision and hence is ultra vires.

I should also add, that the learning in this area points to the fact that vacation leave is to be used for the benefit of the worker; not every absence from duty is leave. Indeed, absence from one’s duty, *even with pay*, can be a disciplinary sanction which can amount to a removal from office.

There is no indication from my instructions or your letter of 25 April 2008 that my client played any part in negotiating this *“holiday.”*

Indeed, recent statements attributed to you and carried in the press suggest that the Board’s action may justifiably be regarded as a disciplinary sanction being imposed upon my client.

In the circumstances therefore, I am treating your actions as a removal of my client from office without lawful authority.

I am prepared to allow for a period of seven days to elapse during which I hope you would correct the obvious error of the Board and communicate with me in an effort to resolve this administrative bungle. If I do not hear from you by then, I shall file an action in the High Court to protect my client’s interest.

In the meantime, it must be clearly understood that my client reserves all rights to his legal entitlements in this matter.”

[11] Counsel for the Respondent replied to counsel for the Applicant, by letter dated the 14th May, 2008, as follows:-

“Dear Mr. Gollop

Re. Director of the National Sports Council, Mr. Erskine King

I act on behalf of the Board of the National Sports Council and refer to your letter dated 30 April 2008 to my client which has been passed to me for response.

My instructions are that your complaint relates essentially to a decision by my client that some 215 accumulated vacation days which would have previously accrued to your client Mr. Erskine King, should be liquidated.

Mindful of the fact that Section 3(7) of the Holidays with Pay Act (“the Act”) to which you refer speaks to “annual holiday”, there is nothing in your said letter that establishes that my client has taken a decision depriving your client of a notice period for the commencement of his “annual holiday”.

Notwithstanding my view that Section 3(7) of the Act does not address the question of “accumulated vacation days”, should you be still of the view that a breach of Section 3(7) of the Act has occurred, I would ask that you indicate what remedy has been provided in the Act for such breach.

Furthermore, you should also be aware that it is trite law that the mere fact that a statute imposes an obligation, it does not necessarily follow that a concomitant right is created.

It does seem to me that Section 3(7) affords a facility to the employer and not to the employee.

So that in view of my instructions and the contents of your letter, there can be no merit in your claim that my client has offended Section 3(7) of the Act, neither can it be said that your client has been removed from office without lawful authority.

I encourage you nevertheless to forward to me the “learning” to which you have referred.”

[12] A terse reply followed from counsel for the Applicant on 14th May, 2008:

“Dear Sir,

Re: Director of the National Sports Council, Mr. Erskine King

Apropos of your response of 14 May 2008 on the captioned matter.

I will simply respond by saying to you that one does not cite ‘*trite*’ principles of law in support of one’s contention and then ask to be forwarded the “*learning*” on the same principles.

Need I say more?

You may be guided accordingly.”

Thereafter the flow of correspondence ceased.

[13] On 22nd May, 2008, the Applicant filed an Originating Notice of Motion in which he sought the following orders:

- a) A declaration that in the events which have happened a decision and/or recommendation and/or advice of the Respondent taken on 30 April 2008 to order the Applicant to proceed on holiday from 30 April 2008 “*for the full duration of your accumulated vacation, namely 215 days*” is contrary to law, an excess of jurisdiction, an abuse of power, an unreasonable or irregular or improper exercise of discretion, a failure to satisfy or observe conditions or procedures required by law and ultra vires.
- b) An order of certiorari to quash the decision and/or administrative

act and/or advice and/or recommendation of the Respondent to order the Applicant to proceed on holiday from 30 April 2008 *“for the full duration of your accumulated vacation, namely 215 days”*.

c) An order for damages including exemplary damages.”

[14] The Applicant also filed a statement pursuant to the Judicial Review (Application) Rules, 1983, in which seven grounds of relief were identified, including breach of the principles of natural justice and conflict with the policy of an Act of Parliament.

[15] During the trial, counsel for the Applicant sought and was granted leave under Order 28 Rule 8 of the Rules of the Supreme Court to amend the Notice of Motion and the Statement. Paragraph (b) of the Notice of Motion and Paragraph 3(b) of the Statement were deleted and the following inserted:

“A declaration that in the events which have happened a decision and/or recommendation and/or advice of the Respondent taken on 30 April 2008 to order the Applicant to proceed on holiday from 30 April, 2008 **“for the full duration of your accumulated vacation, namely 215 days”** constitutes a removal from office of the Applicant from his post as Director of Sports of the Respondent”.

Counsel for the Respondent did not object to the amendments.

[16] An affidavit was also filed by the Applicant in support of the Motion. The Applicant filed a supplemental affidavit on 3rd November 2008, in support of his claim for damages. Mr. Pearson Bellamy, a retired public officer, also filed an affidavit in support of the application. One affidavit was filed on behalf of the Respondent by its Chairman Mr. Inniss.

The Applicant's Case

[17] The application before the Court is for judicial review pursuant to the Administrative Justice Act, Cap. 109B, and section 3(7) of the Holidays With Pay Act, Cap. 348. Section 3(7) of Cap. 348 provides that:

“The employer shall determine the date on which the annual holiday shall commence and shall give the employee not less than fourteen days’ notice of such date.”

[18] It is a fact that the Applicant was given less than fourteen days’ notice by the Respondent to proceed to take all 215 days of his accumulated holiday. And it is against this background that the Applicant claims that section 3(7) of Cap. 348 was breached by the Respondent, and that this breach amounted to an administrative act or omission which entitled him to invoke the jurisdiction of the Court under section 3(1) of the Administrative Justice Act.

[19] The argument by the Applicant is that a breach by the Respondent of section 3(7) of the Holidays With Pay Act also occurred when the

Respondent forced him to take all his accumulated vacation without discussing the matter with him. Therefore, the cumulative effect of these breaches of section 3(7) was that he was removed from his position as Director of Sports, and consequently entitled to declaratory relief and damages, including exemplary damages.

[20] The Administrative Justice Act sets out the criteria to be satisfied by an application for judicial review. Section 3(1) of that Act states that:

“An application to the Court for relief against an administrative act or omission may be made by way of an application for judicial review in accordance with this Act and with rules of court;”

The essence of the judicial review application is that an applicant is seeking relief against an administrative act or omission.

[21] An administrative act or omission is defined in section 2 as:

“... an act or omission of a Minister, public official, tribunal, board, committee or other authority of the Government of Barbados exercising, purporting to exercise or failing to exercise any power or duty conferred or imposed by the Constitution or by any enactment;”

[22] The Respondent is undoubtedly an authority of the Government of Barbados. The Applicant alleges that that Respondent was exercising powers and duties contained in an enactment. That enactment is the Holidays With Pay Act. And the powers and the duties are said to have

been exercised under section 3(7) of the enactment. It is on this basis that the Applicant's complaint appears to fall squarely within the definition of an administrative act or omission.

The Respondent's Arguments

- [23] The Respondent contends that the application is misconceived, and should not be entertained by the Court. The first reason for this submission is that on the facts of the case the Respondent exercised no power or duty under section 3(7) of Cap. 348. If the Court accepts this argument, there is no administrative act or omission that would support the application for judicial review, and the application must be dismissed.
- [24] The second reason advanced by the Respondent is that essentially the Applicant is alleging a breach of his contract of employment by the Respondent. Breach of contract is concerned with private law rights, and the jurisdiction of the Court should not be invoked under the Administrative Justice Act so as to provide public law remedies for breaches of private law rights.
- [25] The Respondent's third submission is that even if an administrative act or omission is proved, on the facts of the case the Applicant should not be granted the relief sought, and the application should be dismissed.

The Statutory Basis of the Application

- [26] The Holidays With Pay Act took effect as part of the statute law of Barbados from 11th January, 1952. The Long Title to this enactment describes it as “An Act to make provision for holidays with pay for employees.”. It is a relatively short piece of legislation with only eleven provisions, and it has been amended on six occasions since its commencement.
- [27] Some of the provisions of Cap. 348 that are worthy of note are sections 3, 4, 8 and 10. Section 3 sets out the terms and conditions of the employee’s annual holiday. Section 4 provides for payment to the employee in respect of his annual holiday. Section 8 nullifies any agreement between the employer and the employee to circumvent the provisions of the Act. And section 10 permits the summary prosecution of an employer for certain breaches of the Act, including an employer’s refusal to allow an employee to take the holiday to which he is entitled.
- [28] Before proceeding to an analysis of section 3 of Cap. 348, it should be noted that counsel for the parties agreed that statutory corporations, including the Respondent, are bound by the provisions of Cap. 348. Therefore, no issues arose as to whether this Act applied to the

relationship between the parties. If their relationship is regulated by Cap. 348, it follows that the parties cannot agree to circumvent the provisions of this legislation; and the relevant clauses of any employee handbook have to be interpreted subject to the provisions of Cap. 348

[29] Section 3(7) of Cap. 348 was quoted previously at paragraph [17] above. However, it would be convenient at this stage to quote this provision within the context of all the subsections of section 3. Section 3 in its entirety states as follows:-

“(1) Every employee, being in employment at the date 1st January, 1952 shall be treated as if his year of employment commenced on that date.

(2) Where an employee commences employment with an employer on a date later than the 1st January 1952, his year of employment commences on the date of the anniversary of the commencement date of his employment with that employer.

(3) An employee who by virtue of subsection (1) or (2) completes a year of employment with an employer is entitled to

(a) an annual holiday of not less than 3 weeks where he has been in the employment of that employer for less than 5 years; and

(b) an annual holiday of not less than 4 weeks where he has been in the service of that employer for 5 years or more.

(4) The annual holiday shall be given and taken in one period or, if the employer and employee so agree, in two separate periods and not otherwise.

(5) Where the employer and employee so agree, the annual holiday or either of such separate periods may be taken wholly or partly in advance before the employee has become entitled to such holiday.

(6) The annual holiday shall be given by the employer and shall be taken by the employee before the expiration of 6 months after the date upon which the right to such holiday, accrues: but the giving and taking of the whole or any separate period of such holiday may, with the consent in writing of the Chief Labour Officer, be further postponed for a period to be specified by him in any case where he is of opinion that circumstances render such postponement necessary or desirable.

(7) The employer shall determine the date on which the annual holiday shall commence and shall give to the employee not less than 14 days' notice of such date.

(8) Where the annual holiday or any part thereof has been taken before the right to such annual holiday has accrued, the right to a further annual holiday shall not commence to accrue until after the expiration of the period of 12 months in respect of which the annual holiday or part thereof has been so taken.

(9) Where any public holiday occurs during any period of annual holiday taken by an employee under this section, the period of the holiday shall be increased by one day in respect of that public holiday."

[30] Sections 3(1) and 3 (2) set out how the commencement of an employee's year of employment is to be determined. Section 3(3) states the amount of annual holiday to which an employee is entitled after completing a year of employment. The annual holiday ranges from not less than three weeks, to not less than four weeks, and depends on the number of years in the service of the same employer. Section 3(4) stipulates that the

annual holiday must be taken at one time; however the employer and the employee can agree to split the annual holiday into two segments. Section 3(5) allows the annual holiday or any of the two segments to be taken in advance if the employer and the employee agree.

[31] Section 3(6) ensures that the employee does not work more than six months beyond the day when he becomes entitled to his annual holiday, without taking his annual holiday. In other words, annual holiday must be taken no later than six months after it accrues to the employee. Section 3(6) also allows the deferral of the whole of the annual holiday or any of the two segments, beyond the six month deadline, but subject to certain conditions. These conditions are that the Chief Labour Officer:

- (i) finds that in the circumstances the deferral beyond the six month deadline is either necessary or desirable;
- (ii) gives written consent for the deferral; and
- (iii) specifies the period of the deferral.

[32] The employer is empowered by section 3(7) to decide the start date of the employee's vacation. This particular section also imposes on the

employer a duty to give the employee notice of the start date of his holiday, at least fourteen days before the holiday begins.

- [33] Section 3(8) addresses the taking of subsequent annual holiday where the previous annual holiday was taken before it actually accrued. Section 3(9) gives the employee an additional day where a public holiday occurs during his annual holiday. Finally, section 3(10) prohibits the employer from giving the employee notice of termination immediately before or during his annual holiday.
- [34] The foregoing is an overview of section 3(7) within the context of the other provisions of section 3. It is section 3(7) that the Applicant alleges was twice breached in relation to him. First, the notice he received was not fourteen days' notice. Second, the Respondent, acting through its Chairman and the other members of the Respondent, did not discuss the matter with him; and this he contends was a breach of natural justice.
- [35] The Respondent proffered a different construct, and submitted that section 3(7) of the Holidays With Pay Act does not apply in the circumstances of this case. The Respondent reasoned that section 3(7) deals with annual holiday and does not deal with accumulated annual holiday. Rather, it is section 3(6) of the Act that sets out the procedures

for the postponement or accumulation of annual holiday. The Respondent considered that section 3(7) does not and was never intended to deal with accumulated holiday. In fact, by sending the Applicant to liquidate his accumulated holiday, it is suggested that the Respondent was moving quickly to conform with the requirements of Cap. 348.

- [36] Having considered the relevant provisions of Cap. 348, the Court is of the view that section 3(7) of that Act applies where annual holiday accrues in relation to a current year of employment, and that annual holiday is to be taken in either one period or two periods under section 3(4), or in advance of the accrued date under section 3(5), and in any event not later than six months from the date on which the right to the annual holiday accrued as stipulated by section 3(6). Section 3(7) does not treat with a situation where annual holiday is accumulated and postponed beyond the six month limit imposed by section 3(6).
- [37] On the present facts the Applicant's holiday was accumulated and postponed for various reasons over a ten year period. And Cap. 348 envisages a different procedure for postponed annual holiday. In those circumstances, it is the Chief Labour Officer who decides, under section 3(6), how long the annual holiday can be postponed. And if the Chief

Labour Officer determines the period of postponement, it follows that it is the Chief Labour Officer and not the employer who determines the date on which postponed annual holiday is to commence.

- [38] The unchallenged evidence is that the Applicant accumulated 215 days of holiday over a period of ten years. But there is no evidence as to how the 215 days were broken down over those years. There is no evidence of the number of days of accrued holiday that were attributable to each year. More particularly, for section 3(7) to apply to the present facts, there should at least have been evidence that some portion of the 215 days included annual holiday for the employment year during which the application was filed and for the previous employment year.
- [39] Mr. Gollop submitted that part of the 215 days included the last portion of the Applicant's holiday for 2008. But this submission is not supported either by the affidavit or oral evidence tendered in the case. These 215 days must be treated as a postponed annual holiday that required the intervention of the Chief Labour Officer under section 3 (6) of the Act.
- [40] An employer has no power to determine the commencement of postponed annual holiday. That statutory duty is solely within the province of the Chief Labour Officer, and the Court was not made aware

of any amendment to Cap. 348 that has placed the obligation to consider the postponement or accumulation of annual holiday on any authority other than the Chief Labour Officer. Additionally, neither in section 3(6) nor in any other provision of Cap. 348 is there a requirement for the Chief Labour Officer or any other person to give a stipulated period of notice to an employee when the postponement of holiday is being considered.

- [41] The Applicant has relied on a breach of section 3(7) of Cap. 348 to support his claim for judicial review under the Administrative Justice Act. The Court finds that there is no evidence that supports any breach of section 3(7) by the Respondent. The determination of the date of commencement of annual holiday by the employer, and the giving of notice to the employee can only occur logically when annual holiday is to be taken in accordance with either section 3(4) ^{or} on section 3(5) of the Act. X
- [42] Further, there is no allegation that in relation to section 3(6) of the Act either that the Respondent usurped the powers of the Chief Labour Officer, or that the Chief Labour Officer refused to exercise her statutory function under section 3(6). The Court having determined that no breach of section 3(7) has been proved, it follows that there is no statutory

foundation on which to support the application, and the application may be dismissed on this basis.

The Scope of the Administrative Justice Act

- [43] Although the Court has indicated that the application may be dismissed, the additional challenge to the application, on the basis that it should have been filed as a private law action, will also be evaluated. This evaluation will be conducted on the premise that the application is well grounded on a breach of section 3(7) of the Holidays With Pay Act.
- [44] The Respondent contends that the Applicant should not be allowed to apply for judicial review under the Administrative Justice Act because he had available to him a private law action against the Respondent for breach of contract. It was argued that the Respondent, as an employer, acted on the basis of a contract of employment with the Respondent, and that the Respondent did not act in the execution of a public purpose. Therefore, the Applicant should not be allowed to invoke the remedies under Cap. 109B. The case of **R v East Berkshire Health Authority, ex parte Walsh** [1984] 3 All E.R 425 was cited in support of this argument.
- [45] On the other hand, the Applicant is of the view that section 37 of the Interpretation Act, Cap. 1, provides that the word “shall” should be

construed as imperative. So the use of “shall” in section 3(7) of the Holidays With Pay Act, makes the giving of fourteen days’ notice to an employee a mandatory statutory requirement. The Applicant also proffered that the Administrative Justice Act has undermined any distinctions between private and public law actions.

[46] Paragraphs [44] and [45] of this judgment represent the extent of the submissions on this issue tendered on behalf of the parties. It is unfortunate that the Court received such limited assistance in unravelling the complexities of this issue. No letter of appointment was exhibited or referred to on behalf of the Applicant in either the affidavit or the oral evidence. No specific terms or conditions for the Applicant’s engagement by the Respondent were produced in any document to this Court. But the Applicant did mention in his oral evidence that he “was bound contractually by the terms of the Employee Handbook with one exception.”. By so doing he conceded the existence of a contractual relationship between himself and the Respondent, and that some of the terms of the contract are contained in the Employee Handbook issued by the Respondent. There are also other factors that indicate the existence of the relationship of employer and employee between the parties.

[47] Section 3(2) of the National Sports Council Act, Cap. 48A, establishes the Respondent as a body corporate to which section 21 of the Interpretation Act, Cap. 1 applies. Section 21 of Cap 1 provides that:

“(1) Where an Act passed after the 16th June, 1966, contains words establishing, or providing for the establishment of, a body corporate and applying this section to that body those words shall operate –

(a) to vest in that body when established –

...

(vi) the right to employ such staff as may be found necessary for the performance of its functions;”.

Not only is the Respondent empowered to employ staff, but section 15(2) of the National Sports Council Act also allows the Respondent to fill vacancies in the membership of its staff. This is indicative of the existence of a contract of employment, although all the terms of that contract are not in evidence before this Court.

[48] Section 2(1) of the Statutory Boards (Pensions) Act, Cap. 384 defines an “officer” as “a person who has been employed in the service of a Board and has been the substantive holder on a wholetime basis of any office specified in the First Schedule;”. The Applicant is the holder of the office of Director, an office mentioned in the First Schedule to Cap. 384

under the name of the Respondent. However, there is no evidence that the Applicant holds a post established by any statute, or that the Respondent has legislated any powers or duties for the Applicant under section 13 (c) of Cap. 48A. Section 13 (c) provides that:

“The [Respondent] may, with the approval of the Minister, make regulations respecting – ...

(c) the powers and duties of officers appointed by the

[Respondent] to assist in the administration of this Act and the regulations;”.

[49] It was argued forcefully on behalf of the Applicant that the Respondent is a statutory and a public body; that the Applicant is an officer of that public body, and therefore a public officer. Counsel for the Applicant referred to the definitions of “public office” and “public officer” in section 43 of the Interpretation Act. Section 43 defines terms that are used in other enactments, and the term “public officer” is used in sections 16A(1), 16A(2), and 16B of the National Sports Council Act. However, counsel for the Applicant conceded, in answer to a question posed by this Court, that there was no evidence that either sections 16A or 16B applied to the Applicant. Therefore, the definition of “public officer” in section

43 of the Interpretation Act, does not include the Applicant. The appointment or employment of the Applicant by the Respondent as an office holder does not translate him to the status of a public officer as defined by the Interpretation Act.

[50] A 2006 decision of the Caribbean Court of Justice is also relevant here. In the case of Griffith v Guyanese Revenue Authority and Attorney General, (CCJ Application No. 1 of 2006) the CCJ held that individuals employed with a public authority do not become public officers or public servants. Nelson J. delivered the judgment of the Court, and expressed the opinion that:

“... it is clear that the Revenue Authority is a public authority However, the Revenue Authority does not by virtue of that status become synonymous with the government or with a government department. Nor do the employees of the Revenue Authority become public officers, or even public servants This court is firmly of the view that the Revenue Authority is a new corporate entity distinct from the government, although it is a public corporation. The employees of the Revenue Authority are not holders of any public office nor are they employed in the service of the government of Guyana in a civil capacity.”. (paragraphs 40 and 46).

Nelson J. also cited a similar decision of the Privy Council in Perch v A.G. of Trinidad & Tobago (2003) 62 W.I.R. 461.

[51] The Court finds that the Applicant is an officer of the Respondent, and that the relationship of employer and employee also exists between the parties. Although the Applicant is described as an officer, his office is not established by statute, and his powers and duties are not delineated by statute. In reality he is an employee of the Respondent, with a contract of service. The Applicant is neither a public officer nor a public servant. Despite the fact that the Applicant is employed by a public authority, there are no statutory provisions, relating to his employment, which inject any element of public law into the employment relationship.

[52] The Respondent pressed the point that no public law remedy should be available to the Applicant because he alleges the breach of a private law right. In the Walsh case, an applicant was employed by a respondent health authority under a contract of employment which incorporated terms negotiated by a recognised negotiating body and approved by the relevant Secretary of State. He was suspended from duty, and shortly after, his employment was terminated. He sought judicial review of his dismissal on the grounds that the person dismissing him had acted ultra vires, and he claimed breaches of the rules of natural justice. The respondent raised the preliminary point that it was not appropriate for the appropriateness of judicial review proceedings was raised as a

preliminary point. It was argued that no issues of public law were involved in determining the question of dismissal.

[53] The Court of Appeal held in the Walsh case that there was no public law element that could give rise to any entitlement of administrative law remedies (page 431j). Sir John Donaldson MR, in considering the scope of judicial review under Order 53 of the United Kingdom Rules of the Supreme Court, stated as follows:-

“The ordinary employer is free to act in breach of his contracts of employment and if he does so his employee will acquire certain private law rights and remedies in damages for wrongful dismissal ... Parliament can underpin the position of public authority employees by directly restricting the freedom of the public authority to dismiss, thus giving the employee ‘public law’ rights and at least making him a potential candidate for administrative law remedies. Alternatively, it can require the authority to contract with its employees on specific terms with a view to the employee acquiring ‘private’ rights under the terms of the contract of employment. If the authority fails or refuses thus to create ‘private law’ right for the employee, the employee will have ‘public law’ rights to compel compliance ... If, however, the authority gives the employee the required contractual protection, a breach of that contract is not a matter of ‘public law’ and gives rise to no administrative law remedies.” (page 431 e-g).

[54] The Barbados Parliament authorised the Respondent to enter into a contract of employment with the Applicant. Parliament has also required the Respondent, by virtue of the Holidays With Pay Act to contract with the Applicant on specified terms. Section 3(7) of that Act is a specified

statutory term that in the view of this Court conferred private law contractual rights on the Applicant, and any breach of the statutory protection offered by section 3(7) of Cap. 348, is a breach of the Applicant's contract of employment. Such a breach of the Applicant's contract of employment usually is not a matter of public law, but is a matter of private law. Also citing the Walsh case, the CCJ opined in the Griffith case that "... an employee of a public authority under a contract of employment would not normally have a right to judicial review.". (paragraph 55)

[55] In the case of Boyce v Brewster, (1996) 52 WIR 73, the Barbados Court of Appeal, commented on section 3 of Cap. 348. Chase JA (Ag.), speaking for the Court of Appeal, held that:

"It is clear that these statutory provisions form part of every contract of employment in Barbados and the obligations imposed on the employer are mandatory." (page 73).

These implied statutory terms are not restricted to contracts of employment entered into with the Respondent, and the rights contained therein are not conferred by the governing statutes of the Respondent. These private law rights are conferred on the employees of other authorities of the Government of Barbados, and on the employees of private sector entities. There is nothing to suggest that at the time of the

enactment of Cap. 348, Parliament intended that these implied statutory contractual terms should confer private law rights on private sector employees, and public law rights on the employees of Government authorities.

[56] What the Applicant is alleging is a breach of his private law contractual rights as conferred by statute. And the House of Lords has decided that private law rights, whether contractual or statutory, are enforceable by an ordinary action and not by an application for judicial review (See Roy v Kensington and Chelsea Family Practitioner Committee [1992] 1AC 624.). But this Court cannot transport and import such decisions without considering whether the Administrative Justice Act debars an application for judicial review when a breach of a statutory private right is alleged.

[57] The Administrative Justice Act came into force on the 7th day of July, 1983. With the enactment of this legislation, Cap. 109B became the statutory framework in Barbados for judicial review applications arising out of the exercise of statutory duties and powers. The Long Title to the Act describes it as “An Act for the improvement of administrative justice in Barbados and for related matters.”. Nothing on the face of the Act speaks to the exclusion of an application for judicial review where a private law action is available to an applicant. Neither do any of the

sections of the Act require an application to be denied on the basis that an applicant has alternative means of redress. Another consideration is that if this Court determines that the Applicant should have utilised a private law action, section 3(2) of Cap. 109B does not permit the continuation of this action as a private law action. Section 3(2) can only operate where a court determines that a Defendant/Respondent is not an authority of the Government of Barbados. No such determination is required in this case. And the Court is of the view that Dr. Albert Fiadjoe may have overstated the scope of section 3(2) by suggesting that it is available “in the case of the wrong invocation of procedure.” (See “Commonwealth Caribbean Public Law”, 3rd ed. at pages 103 and 119).

- [58] Regrettably, counsel for the parties have not shared any research with the Court that might assist in determining whether the United Kingdom cases cited earlier can be considered as part of the law of judicial review in Barbados, either prior to or subsequent to the enactment of Cap. 109B. What is known is that before Cap. 109B commenced, the High Court, Court of Appeal and House of Lords judgments in the landmark case of O'Reilly v Mackman, [1983] 2 AC 237, had been delivered by the end of November 1982.

- [59] In O'Reilly v Mackman, the House of Lords upheld the Court of Appeal decision that a plaintiff seeking to protect his public law rights should not do so by an ordinary private law action, but on an application for judicial review. The Respondent in the present case has argued the converse to O'Reilly v Mackman, that is, that Cap. 109B does not or should not permit an application for judicial review where there is no public law right to be protected, or where the breach of a private law right is alleged.
- [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] ICR 808; R v Lord Chancellor's Department ex parte Nangle [1992] 1 All ER 897; R v Lord Chancellor ex parte Hibbit and Saunders [1993] COD 326; and R v Crown Prosecution Services ex parte Hogg (1997) 6 Admin. LR 778.
- [61] The Applicant's response is simply this, that the Respondent has breached a mandatory statutory provision, and he is entitled to judicial review against the administrative act or omission of the Respondent.

Section 2 of Cap. 109B defines an “administrative act or omission” in relation to the exercise of a power or duty conferred by an enactment. And it is the Respondent’s exercise of a power or duty conferred by Section 3(7) of the Holidays With Pay Act that the Applicant is challenging.

- [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 any 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.

The Legal Effect of Inadequate Notice

[64] Although the Court found no breach of section 3(7) of Cap. 348, it is proposed to assume a breach, so as to consider the legal effect of inadequate notice. The evidence established the fact that the Applicant received five days’ notice, or nine days less than the fourteen days’ notice required by section 3(7). Was the statutory notice period obligatory, and if so, what was the legal effect of inadequate notice on the contract of employment?

[65] It was noted at paragraph [55] of this judgment that the Court of Appeal determined in Boyce v Brewster that some of the provisions of section 3 of Cap. 348, inclusive of section 3(7), imposed mandatory obligations on the employer. Unfortunately, the Court of Appeal offered no analysis as to how it arrived at the conclusion that any of the obligations imposed by section 3 are mandatory. What was argued on behalf of the Applicant was that the use of the word “shall” in section 3(7) imposes a mandatory requirement of fourteen days’ notice. Counsel for the Applicant relied on section 37 of the Interpretation Act, Cap. 1, to draw this conclusion.

1. Is the notice period mandatory?

[66] Section 37 of the Interpretation Act provides that:

“In an enactment passed or made after the 16th June, 1966, the expression “shall” shall be construed as imperative and the expression “may” as permissive and empowering.”

In Biggs v Commissioner of Police (No. 16 of 1981; Divisional Court decision of April 23, 1981) section 37 was applied in the interpretation of the Extradition Act of 1979. Gatherer v Gomez, (1992) 41 WIR, 68, also considered section 37.

[67] However, section 37 only applies to legislation enacted after 16th June, 1966. The Holidays With Pay Act commenced on 11th January, 1952.

Therefore, section 37 of Cap. 1 cannot be used to assist in the interpretation of Cap. 348, or to draw any conclusions that any of the obligations imposed by section 3 are mandatory.

- [68] With respect to section 3(7) of Cap. 348, this provision was amended by the Holidays With Pay (Amendment) Act, No. 6 of 1961, to increase the original notice period from seven days to fourteen days. But section 37 of Cap. 1 cannot be applied to the amended provision because that amendment took effect prior to 16th June, 1966. So that the Court of Appeal could not have concluded that section 3(7) of Cap. 348 contained mandatory provisions by reference to section 37 of Cap. 1.
- [69] When the Holidays With Pay Act became law, the Interpretation Act of 1949 was in existence. The 1949 Act was repealed in 1966 by Cap. 1. A perusal of the 1949 Act reveals that it did not contain a replica of section 37 of Cap. 1. Therefore the Court of Appeal could not have relied on the 1949 Act to determine that section 3 of Cap. 348 contained mandatory obligations.
- [70] No statutory guidelines were available to the Court of Appeal in Boyce v Brewster to assist that Court in reaching the decision that section 3 of Cap. 348 contained mandatory obligations. In the absence of such

guidelines, how was the Court of Appeal able to determine Parliament's intention? Although the Court of Appeal made no reference to any statutory guidelines, the term "mandatory" was used. However, from the early 1980's there was a noticeable judicial movement away from the rigid legal classification of statutory directives as either mandatory or directory.

[71] It was in the House of Lords decision of London & Clydeside Estates Ltd v Aberdeen District Council [1980] 1 W.L.R. 182, that Lord Hailsham delivered the following lengthy statement:

"When Parliament lays down a statutory requirement for the exercise of legal authority it expects its authority to be obeyed down to the minutest detail. But what the courts have to decide in a particular case is the legal consequence of non-compliance on the rights of the subject viewed in the light of a concrete state of facts and a continuing chain of events. It may be that what the courts are faced with is not so much a stark choice of alternatives but a spectrum of possibilities in which one compartment or description fades gradually into another. At one end of this spectrum there may be cases in which a fundamental obligation may have been so outrageously and flagrantly ignored or defied that the subject may safely ignore what has been done and treat it as having no legal consequences upon himself. In such a case if the defaulting authority seeks to rely on its action it may be that the subject is entitled to use the defect in procedure simply as a shield or defence without having taken any positive action of his own. At the other end of the spectrum the defect in procedure may be so nugatory or trivial that the authority can safely proceed without remedial action, confident that, if the subject is so

misguided as to rely on the fault, the courts will decline to listen to his complaint. But in a very great number of cases, it may be in a majority of them, it may be necessary for a subject, in order to safeguard himself, to go to the court for declaration of his rights, the grant of which may well be discretionary, and by the like token it may be wise for an authority (as it certainly would have been here) to do everything in its power to remedy the fault in its procedure so as not to deprive the subject of his due or themselves of their power to act. In such cases, though language like 'mandatory,' 'directory,' 'void,' 'voidable,' 'nullity,' and so forth may be helpful in argument, it may be misleading in effect if relied on to show that the courts, in deciding the consequences of a defect in the exercise of power, are necessarily bound to fit the facts of a particular case and a developing chain of events into rigid legal categories or to stretch or cramp them on a bed of Procrustes invented by lawyers for the purposes of convenient exposition. As I have said, the case does not really arise here, since we are in the presence of total non-compliance with a requirement which I have held to be mandatory. Nevertheless I do not wish to be understood in the field of administrative law and in the domain where the courts apply a supervisory jurisdiction over the acts of subordinate authorities purporting to exercise statutory powers, to encourage the use of rigid legal classifications. The jurisdiction is inherently discretionary and the court is frequently in the presence of differences of degree which merge almost imperceptibly into differences of kind." (189E-190C)

Given the shift in emphasis, this Court has to consider the legal effect of the notice requirement of section 3(7) of Cap. 348, when measured against the yardstick of current legal principles.

[72] Since the London & Clydeside decision, a number of cases have suggested various guidelines for determining the legal effect of a

statutory directive, within the context of a time requirement. Following is a synthesis of these guidelines:-

- (i) The scope and purpose of Cap. 348.
- (ii) The importance of the time requirement.
- (iii) The relationship of the statutory requirement to the general object intended to be secured by Cap. 348.
- (iv) Did Parliament intend the decision maker to comply?
- (v) The effect of non-compliance.
- (vi) The consequences of non-compliance.

(i) **The scope and purpose of Cap. 348**

[73] In Secretary of State for Trade and Industry v Langridge, [1991] Ch. 402, the United Kingdom Court of Appeal addressed the scope and purpose of the Company Directors Disqualification Act 1986. The Secretary of State had not complied with a requirement in that Act to give ten clear days' notice before bringing proceedings for the disqualification of a company director. In a majority judgment, the Court of Appeal held that the requirement was directory, and that non-compliance was a procedural irregularity that did not nullify the actions

of the Secretary of State. Balcombe L.J first looked at the legislative precursor to the statutory requirement in the 1986 Act, and then considered other relevant sections of the Act. He then concluded that the scope and the purpose of the 1986 Act were clearly to protect the public by preventing unfit persons from being concerned in the management of a company. (See pages 412A – 414A).

[74] As far as this Court is aware, there is no legislative precursor to the Holidays With Pay Act that can assist in the determination of the scope and purpose of Cap. 348. This Act appears to be the first of its kind on the statute book. However, from the review of Cap. 348 at paragraphs [26] and [27] of this judgment, it is evident that the purpose of this Act is to improve the terms of employment of workers in Barbados. And to this end the Act sets out the framework for the grant of holidays to employees, and for the payment of wages to employees during a period of holiday.

(ii) **The importance of the time requirement**

[75] The Langridge case also looked at the importance of a ten day notice requirement. Balcombe L.J was of the view that the provision being considered had a very limited ability to confer advantages on the

recipient of the notice. Also, there were other situations under the legislation in which there was no requirement for notice. The notice itself did not have to state the grounds for the recipient's disqualification, and there was not much that the recipient could do in ten days. In essence the notice conferred a limited benefit on the recipient. (Page 414 B-II).

- [76] When Cap. 348 was first enacted, the notice period was a minimum of seven days. Parliament thought that notice was sufficiently important to necessitate an extension of the time requirement to a minimum of fourteen days. A seven day minimum period became inadequate after the legislation was in operation for about nine years. Parliament may have anticipated that something had to be done between the giving of the notice to the employee and the start of the employee's holiday. The employee may require time to complete a task or a project before proceeding on holiday. The fourteen day notice period may also facilitate the handover to another employee.
- [77] Section 3(7) also gives the employer the right to decide when the employee's holiday is to commence. Therefore, if the employer decides on a start date that is unsuitable for the employee, the fourteen day period

gives the employee time to reorganise his affairs in order to accommodate his holiday. In Boyce v Brewster, the employee was instructed to take two of his four weeks' holiday with immediate effect so that a matter could be resolved. The employee did so reluctantly, but indicated his unwillingness to proceed on vacation at that stage, because he usually took his vacation at a different time of the year. The employer also suggested to the employee that he should seek other employment during his holiday.

[78] Speaking for the Court of Appeal, Chase J.A. (Ag.) stated that:

“Not only did the [employer] fail to comply with the relevant mandatory provision, but he suggested to the [employee] to seek other employment during the period of his holidays.

In this court's view the conduct of the [employer] in giving the [employee] holidays at that time without the concurrence of the [employee] and suggesting that he look for other employment clearly evinced an intention on the part of the [employer] to repudiate the contract and the [employee] was entitled to accept the repudiation as constituting a constructive dismissal by the [employer].” (page 78 b – d)

[79] Chase J.A. (Ag.) found that there was no agreement between the parties for the employee to take his vacation at the time he did. It was this lack of agreement, together with the suggestion that he look for other employment that constituted constructive dismissal. The Court of Appeal

does not appear to have relied solely on the breach of the notice requirement as the basis for constructive dismissal. Also, the reference to a lack of “concurrence” implies that in the absence of the required statutory notice, the parties should reach an agreement as to the commencement date of the employee’s holiday.

- [80] An employee would be unlikely to challenge an inadequate period of notice if he has no objection to taking his holiday at the time mandated by the employer, and as long as he receives his holiday pay. It is where there is a disagreement between the parties that adequacy of notice becomes an issue. Therefore, adequate notice also protects the employer in situations where he is forced to make a unilateral decision because no agreement is forthcoming.
- [81] When adequate notice is given, the parties do not have to agree on the commencement date of the employee’s holiday. Section 3(7) authorises the employer to determine that date as long as the employee receives the appropriate notice. Adequate notice circumvents the necessity to agree on a commencement date, and gives the employer the final say. So that when an employer decides that an employee is to go on holiday “willing or unwilling”, it is incumbent upon the employer to ensure that the

minimum notice requirement is adhered to. Unlike the Langridge case where the time requirement “conferred a limited benefit”, section 3(7) confers benefits on both the employer and the employee if the proper notice period is observed.

(iii) **The relationship of the statutory requirement to the general object intended to be secured by Cap. 348**

[82] Again in Langridge, Balcombe L.J. identified the objects of both the 1987 Act and the statutory notice period. The object of the former was the protection of the public, and the object of the latter was the protection of the person against whom a disqualification application was proposed. The learned Lord Justice posited that “the relationship between these two objects clearly involves a balancing exercise.” (page 415A) He balanced the relationship first by reference to the limited benefits the time requirement conferred on the recipient of a notice. Next, he pointed out that if non-compliance rendered the notice void, the Secretary of State would have to start the process all over again. And to Balcombe L.J. it was “difficult to conceive that Parliament intended so pointless and wasteful a result.” (page 415c).

- [83] In effect, Balcombe L.J. balanced the interests of the recipient of a notice, against the interests of the Secretary of State in protecting the public. The scales were tipped in favour of the Secretary of State and the public interest. A similar exercise was undertaken in the local case of Springer v Doorly, (1948 -57) 1 Barb. L.R. 6. This was a decision of the West Indian Court of Appeal, on an appeal from the Barbados Court of Error, approximately two years prior to the enactment of the Holidays With Pay Act.
- [84] In Springer v Doorly, a statute required that regulations be made by the Director of Highways and Transport, and approved by the Governor, and that the regulations “shall as soon as possible thereafter be submitted for approval by both Houses of the Legislature.”. It was held that the statutory requirement for submission of the regulations to the Legislature for approval was directory and not mandatory. Therefore, the regulations were valid until disapproved by the Legislature. In reaching this decision, the Court of Appeal balanced the rights of the applicant against the administrative inconvenience and injustice to third parties envisaged by that Court. Both in Springer & Doorly and in Langridge, the statutory directive was held to be directory.

- [85] The object of Cap. 348 is clear from the nomenclature of the Act. It not only secures holidays for employees under defined terms and conditions, but it guarantees payment for the holiday period. And in that regard the Act sets out the benefits to be derived by employees, with the concomitant obligations of employers. However, the primary focus of the legislation is on the interests or rights of the employee.
- [86] The objects of section 3(7) are twofold. First, the employer is authorised to determine the date on which the employee's holiday begins. This is one of the few benefits bestowed on the employer by this employee - centric piece of legislation. The second object of section 3(7) is that the employer is expected to give to the employee a minimum number of days' notice of the date on which his holiday will begin. The notice requirement is a procedural obligation of the employer, that is ancillary to his right to determine the commencement date of the employee's holiday.
- [87] In Langridge, Balcombe L.J. balanced the objects of the Act against the objects of the section of that Act that required notice to be given within a stipulated time period. The balance was in favour of the public interest. In the present case the balance is between an Act that is overwhelming in its articulation of the rights of employees, and a section that confers a

limited right on employers, where the right is coupled with a duty that is in the interest of employees. Section 3(7) must be understood within this context, and undoubtedly the notice is to facilitate employees in taking their holidays with pay.

(iv) **Did Parliament intend the decision maker to comply?**

[88] Parliament must have intended employers to comply with section 3(7) of Cap 348, in light of the fact that both the employer and the employee derive benefits under this provision. In **Wang v Commissioner of Inland Revenue**, [1994] 1 W.L.R. 1286, the Privy Council held that the Hong Kong legislature intended compliance with a time provision in an Inland Revenue Ordinance.

[89] Speaking for their Lordships, Lord Slynn opined that:-

“... when a question like the present one arises – an alleged failure to comply with a time provision – it is simpler and better to avoid these two words “mandatory” and “directory” and ask two questions. The first is whether the legislature intended the person making the determination to comply with the time provision, whether a fixed time or a reasonable time. Secondly, if so, did the legislature intend that a failure to comply with such a time provision would deprive the decision maker of jurisdiction and render any decision which he purported to make null and void?” (page 1296 D-E).

[90] Lord Slynn’s dictum was followed by the Privy Council in **Charles v**

The Judicial and Legal Service Commission, [2002] UKPC 34, an appeal from Trinidad & Tobago. With respect to the first question posed by Lord Slynn, the Judicial Committee in Charles held that the framers of regulation 90 of the Public Service Commission Regulations “must have intended those involved to comply with the relevant time provisions.” (paragraph 11 of judgment).

[91] Lord Slynn’s second question will be considered later in this judgment. But in dealing with the question of compliance, there are other issues of compliance that for convenience will be considered at this stage. These issues may be itemised as follows:-

- (a) was there substantial compliance?
- (b) could non-compliance be cured under the Act?
- (c) could non-compliance be waived? and
- (d) could non-compliance be otherwise enforced?

[92] The first three issues arose in the case of R v Immigration Appeal Tribunal, ex parte Jeyanthan, [1999] 3 All ER, 231. Jeyanthan’s case did not involve a time requirement. Rather, the court had to consider a failure to comply with a procedural requirement that an

application in a particular form be used. The Court of Appeal held that there had been substantial non-compliance. However, the relevant rules allowed the appeal court “to take such steps as it thinks fit before reaching its decision to cure the irregularity.” (page 244f).

[93] In the present case there was no substantial compliance with the notice requirement in section 3(7) of Cap. 348. Five days’ written notice out of fourteen is not substantial compliance by any stretch of the imagination. And even if the Respondent was allowed to count the days from the 23rd April, 2008, when the Chairman of the Respondent spoke to the Applicant, the notice still falls short by about a week. And there is nothing in Cap. 348 that allows this breach of procedure by the Respondent to be cured.

[94] **Jeycanthan** also considered the effect of waiver of the procedural breach, and found that the breach had been waived in one instance by the tribunal, and in another instance by the complainant. (page 242 b – d). Waiver, however, is not an option in the present case. There is no provision in Cap. 348 that allows a breach of the notice requirement to be waived by the Applicant. On the contrary, neither the Applicant nor the Respondent is allowed to contract out of any of the provisions of Cap.

348. Section 8 of Cap. 348 prohibits contracting out. Therefore, waiver cannot properly arise as a consideration either under Cap. 348 or from the facts of this case.

[95] For completeness a reference will again be made to Springer v Doorly, where non-compliance with the regulations could be remedied through the legislative or the executive process. No such method of enforcement is available to the Applicant here. Additionally, Parliament did not intend criminal prosecution to be an option in this case. Not only did Parliament intend the Respondent to comply with the notice requirement of section 3(7) of Cap. 348, but Parliament did not provide for any alternative circumstances in which the time period could be reduced, or for non-compliance to be waived or cured.

(v) The effect of non-compliance

[96] A number of cases have taken into consideration the effect of non-compliance on the parties to the proceedings, and on the public interest. Springer v Doorly paid no attention to the possible conviction of the applicant in that case as a direct result of holding the time requirement to be mandatory. That appeal court was more concerned with the public mischief that would ensue if the regulations were mandatory.

[97] In R v Soneji, [2006] 1AC 340, when making confiscation orders a judge failed to observe a time requirement of a maximum six month period between the conviction and the confiscation orders. The House of Lords looked at the consequences of non-compliance, and declined to overturn the confiscation orders. Lord Steyn opined that:

“The prejudice to the two accused was not significant. It is also decisively outweighed by the countervailing public interest in not allowing a convicted offender to escape confiscation for what were no more than bona fide orders in the judicial process.” (page 354 A-B).

Again the public interest was more important than any prejudice to the accused.

[98] Another case of interest is Coney v Choyce, [1975] 1W.L.R. 422, where in considering the breach of a notice requirement Templeman J. said that:

“I accept there must be substantial compliance with the regulations, and in my judgment there has been. Asking myself whether any substantial prejudice has been suffered by those for whose benefit the requirements were introduced, I am quite satisfied the answer is no.” (page 434 C-D).

In Coney v Choyce the court considered the possible prejudice to the complainant, and concluded that no substantial prejudice was suffered by the complainant.

[99] In the Charles case the Privy Council also commented on “the lack of

significant impact of the time defaults on the appellant.” (paragraph 18). Their Lordships noted that:

“... the delays were in good faith, they were not lengthy and they were entirely understandable. The appellant suffered no material prejudice; no fair trial considerations were or could have been raised, and no fundamental human rights are in issue.” (paragraph 17)

[100] From these cases one may conclude that a court should also weigh the prejudice suffered by a compliant, against the public good or the public interest. The bonâ fides of the decision maker are also relevant. What prejudice, if any, did the Applicant in the present case suffer? He was forced to take 215 days of accumulated holiday in one tranche. However, this holiday of approximately seven months did not deprive him of his customary benefits, including salary and the use of a vehicle.

[101] The Applicant said in his evidence that **“The only thing that has changed since the 25th April, 2008, is that I don’t have access to my office.”** But, having never returned there he could not say that he had been denied access to his office. He complained that his office is occupied by the person acting as Director. The explanation given by the Chairman is that the office space at the Corporation is limited. In the Chairman’s words **“The feeling was that given the length of King’s**

leave the opportunity was taken to use space in his office temporarily. That being the largest office, we felt it would be a poor use of limited space to leave such a large office vacant for that period of time, but it is a temporary move ... upon his resumption of duty his office will be vacated and he will take up his usual place at [the Respondent].". The Court accepts this as a reasonable explanation, and finds that there is no evidence of an attempt to deny the Applicant access to his office.

[102] Counsel for the Applicant suggested that the Respondent should have considered permitting the Applicant to retain his maximum holiday allowance of 126 days under the Employee Handbook. In other words, the Applicant only should have been required to take the number of days by which he exceeded this maximum, that is, 89 days. The Court is of the view that taking all of his postponed holiday did not affect his right to annual holiday. And there is nothing unreasonable about the Respondent wishing to adhere to accepted principles of human resource management and organisational risk management.

[103] Counsel for the Applicant has also suggested that the Applicant was subjected to discriminatory and unfair treatment. Much was made of the

fact that the Respondent was not the only person with a sizeable amount of postponed holiday. The evidence of the Applicant is that there were other employees of the Respondent who also had large portions of postponed holiday. In one case the number of days of postponed holiday was alleged to be a total of 388 days.

[104] This evidence was not contradicted by the Respondent. But, at the time the Applicant was directed to take all of his postponed holiday, he was the manager of these other persons. And there is no evidence that he sought to bring this information to the attention of the Chairman or the Respondent prior to proceeding to take his 215 days of postponed holiday. The difference between the Applicant and those other persons is that the Applicant is the only individual managed by the Chairman and/or the Respondent. The Chairman had the information about the Applicant available to him, but the Applicant was the one in a position to make the Chairman aware that these other persons were in a similar position. While it may have been short sighted of the Chairman not to seek from the Applicant any relevant information about persons in a similar position, this did not absolve the Applicant, as the CEO, from making the information available to the Chairman.

[105] Therefore, the Court cannot conclude that the Chairman had the information available about all individuals employed by the Respondent, who had accumulated or postponed holiday, and that armed with this knowledge a decision was taken to deal solely with the Applicant. And it is unlikely that the Respondent will proceed to take similar action in relation to these other persons until a final decision is pronounced with respect to the application before the Court.

[106] The Applicant also complained about the circumstances existing at the time he was instructed to take all of his postponed holiday. According to his evidence, the CEO's of two other statutory boards were sent on leave shortly before he received the Respondent's directive. These occurrences fuelled a fear in the Respondent "that he would suffer the same fate.". There is no evidence before this Court to suggest that the situation with the CEO's at the Rural Development Commission and the Urban Development Commission was the same as that of the Applicant. The Applicant admitted this in his oral evidence.

[107] The Applicant's counsel suggested that the Respondent had "an agenda to remove Mr. King.". Again, there is no evidence that the Respondent had any such agenda. Indeed, there is no evidence of any previous

negative interaction between the Applicant and any member or employee of the Respondent, or between the Applicant and any other person, that indicates any hostility or unfairness, or any discriminatory or prejudicial conduct towards the Applicant as the Director of Sport. The Applicant has not demonstrated that as a result of the Respondent's failure to give him adequate notice, he has sustained material prejudice or any prejudice.

(vi) **The consequences of non-compliance**

[108] The second question posed by the Privy Council in the **Wang** case, was whether Parliament intended non-compliance to render the decision void. The first question, whether Parliament intended the decision maker to comply with the time requirement, was considered at paragraphs [88] to [95] of this judgment. On the present facts before the Court, the answer to the first question was found to be in the affirmative.

[109] With respect to the second question, the Judicial Committee held in **Wang** that a failure by the inland revenue authorities to make an assessment within a reasonable time, did not make the assessment void or deprive the authority of jurisdiction. Lord Slynn reasoned that:

“It does not follow that his jurisdiction to make a determination disappears the moment a reasonable time has elapsed. If the court establishes the time by which a reasonable

time is to be taken as having expired, which will depend on all the circumstances, including factors affecting not only the taxpayer but also the Inland Revenue, it would be surprising if the result was that the commissioner had jurisdiction to make the determination just before but not just after that time. Their Lordships do not consider that that is the effect of a failure to comply with the obligation to act within a reasonable time in the present legislation. Such a result would not only deprive the government of revenue, it would also be unfair to other taxpayers who need to shoulder the burden of government expenditure; the alternative result (that the commissioner continues to have jurisdiction) does not necessarily involve any real prejudice for the taxpayer in question by reason of the delay.

Their Lordships accordingly consider that in the context of this legislation a failure to act within a reasonable time (had it occurred) would not have deprived the commissioner of jurisdiction or made any determination by him null and void.”. (pages 1296F - 1297A).

[110] The above dicta in Wang was cited with approval by another Judicial Committee in the Charles case. After concluding, in answer to the first question, that the drafters of the relevant regulation intended compliance with a time requirement, the Law Lords considered that three factors should be examined in the formulation of the answer to the second question as to whether non-compliance rendered the process void. The factors to be examined are:-

“ (i) the role of the regulation, and its individual parts, in the overall regulatory scheme, (ii) the purpose and policy of the time provisions, and (iii) in the end a judgment as to whether

those who promulgated the regulations intended that breach of a time limit should deprive the Commission of jurisdiction, thus rendering any later purported decision or determination null and void.”. (paragraph 11).

[111] The court in Charles conducted this examination and opined that it was “highly unlikely” that the Commission intended breaches of time limits at the investigation stage to prevent the Commission from discharging its public function and duty. In the words of Justice Tipping:

“A self imposed fetter of such a kind on the discharge of an important public function would seem inimical to the whole purpose of the investigation and disciplinary regime ... Although the time limits ... are incidentally of benefit to [the complainant] their Lordships view them as designed primarily to expedite the investigation process for the benefit of the public interest in having matters of indiscipline or misconduct effectively investigated and dealt with. This makes it unlikely that breach of a time limit was intended to lead to the frustration of that ultimate purpose.”. (Paragraphs 12 and 13.)

[112] The Wang and Charles cases involved the discharge of public functions by statutory authorities under their governing legislation. These cases differ from the circumstances of the present case, in that the Respondent was not discharging any public functions under its governing statutes. Additionally, the time requirement of fourteen days’ notice is within the context of an implied term in a contract of employment; and it is also a

letter on the right of the Respondent employer to dictate the start date of the holiday of the Applicant employee.

[113] Having considered the guidelines enumerated at paragraph [72] of this judgment, the Court is of the view that it was the intention of Parliament to make it obligatory and mandatory for an employer to give the full fourteen days' notice requirement to an employee. The notice period is for the benefit of both the employer and the employee. And Parliament considered compliance to be so important a condition attached to the grant of holiday, that it enlarged the notice period from seven days to fourteen days.

[114] There was no substantial compliance by the Respondent, and there is nothing in Cap. 348 that is capable of curing partial or total non-compliance. Waiver is not possible under Cap 348, and there is no evidence that the Applicant did anything that might be considered as a waiver of the notice requirement. Another consideration is that Cap. 348 does not provide for criminal prosecution as an alternative to the breach of the notice requirement. The effect of non-compliance by the Respondent is that the Respondent had no legal authority to send the

Applicant on vacation with effect from April 30, 2008. Inadequate notice was tantamount to no notice at all.

2. **The contract of employment**

[115] Quite apart from the question of whether the breach of the notice requirement invalidated the decision of the Respondent to send the Applicant on vacation, there is another issue to be resolved arising out of the invalid notice. That issue is whether by forcing the Applicant to take his accumulated holiday, without proper notice, the Respondent removed him from his office. Stated differently, one may ask whether Parliament intended that an invalid notice would result automatically in a repudiation of the contract of employment by the Respondent.

[116] Counsel for the Applicant emphasised that the Applicant was not claiming wrongful dismissal, but removal from office. This Court is of the view that the question to be determined is whether, in the circumstances of this case, the Respondent dismissed the Applicant or removed him from the office of Director of Sport. In this case, removal from office does not mean removal from a public office, because the Applicant is not a public officer.

[117] The case of Boyce v Brewster is relevant to the determination of this issue. It was a private law action claiming damages for constructive dismissal. The application before this Court is essentially a private law claim that the Administrative Justice Act has clothed with the mantle of a judicial review application. The Court of Appeal held in Boyce v Brewster that a breach of section 3(7) of the Holidays With Pay Act resulted in the repudiation of the contract of employment, and the constructive dismissal of a private sector employee. There is one similarity between Boyce v. Brewster and the present facts. In both cases there was no notice to satisfy the statutory requirements. Thereafter follows a divergence of the factual matrices of the two cases.

[118] In Boyce v Brewster the employee did not agree to take his holiday at the time determined by the employer, because he was accustomed to taking his holiday at a different time of the year. There is no evidence in the present case that the Applicant objected to taking his holiday at the time selected by the Respondent. During his meeting with Mr. Inniss, his only request was for the decision of the Respondent to be reduced to writing. And the letter from his attorney-at-law dated 30 April, 2008, confined itself to the breach of the statutory notice requirement. At no time during his meeting with Mr. Inniss did the Applicant suggest that

taking his accumulate holiday, at the time mandated by the Respondent, would have been inconvenient for whatever reason.

[119] Counsel for the Applicant insisted that the Applicant did not offer any reasons of inconvenience during this meeting because there was no discussion between the parties. Neither party revealed much about this meeting in their evidence. The limited evidence is that Mr. Inniss informed the Applicant about the Board's decision; and that the Applicant asked to be informed in writing, and subsequently received correspondence to that effect. There is no evidence that the Applicant was asked for his opinion, or dissuaded from giving his opinion, and his sole request was granted with due dispatch. But assuming the inability of the Applicant to state his concerns at the meeting, no reasons were forthcoming in the correspondence from his counsel. The affidavit and oral evidence of the Applicant are likewise devoid of any reason why taking his accumulated holiday at the relevant time would have been either inconvenient for, or prejudicial to, the Applicant.

[120] Another defining factor in Boyce v Brewster that is absent from the present case is that the employer in Boyce v Brewster suggested to the employee that he should look for other employment during his holiday.

In this case the Respondent in its letter of 25 April, 2008, indicated to the Applicant that he was expected to return to work. That letter stated "I trust that you will enjoy your vacation and the Board looks forward to your resumption of work on Monday December 8th, 2008.". There is nothing in the evidence before this Court that indicates that the intention of the Respondent was contrary to what was expressed in this letter.

[121] In the circumstance of Boyce v Brewster, the Court of Appeal was in no doubt that the conduct of the employer "clearly evinced an intention on the part of the [employer] to repudiate the contract". However, the failure of the Respondent here to give the Applicant the correct statutory notice does not demonstrate an intention to repudiate the contract of employment. There was no credible reason advanced as to why the Applicant could not take his accumulated holiday at the time mandated by the Respondent. And the express intention of the Respondent was that the Applicant should return to work at the end of the period of accumulated holiday.

[122] The facts of Attorney-General of Antigua & Barbuda v Lake, (1998) 4 LRC 348, are also distinguishable from the present case. Dr. Lake was a public officer who was removed by the Prime Minister from his

position as Medical Superintendent “in a way which was intentional, direct and effective.” (page 361f). Dr. Lake was also told by the Minister of Health not to return to the hospital because the hospital was closed to him. In these circumstances the Judicial Committee found that Dr. Lake

“was removed from his position in fact, and not merely in some artificial or theoretical way ... [and he] was fully entitled to act on the basis that he had been removed from his office as Medical Superintendent ...”. (page 362 c-e).

[123] On the present facts there is no evidence of any political interference, and no evidence of any intention to remove the Applicant from his office or to dismiss him. Although another individual is acting in the Applicant’s post, this is on a temporary basis until his return to office. And the Applicant has not been barred from returning to or entering the premises of the National Sports Council.

[124] Byron, C.J. (Ag.) of the Grenada Court of Appeal opined that “A permanent exclusion [from the performance of one’s employment] would, in effect, be a removal from office, by whatever euphemism it is described.”. (See Duncan v Attorney-General, Civ. App. No. 13 of 1997). There was no permanent exclusion of the Applicant from his workplace in the present case.

[125] Byron, C.J. (Ag.) stated further in Duncan that:

“The payment of salary would be only one factor to be considered in deciding whether the officer in receipt has been removed from office. It is not conclusive. An officer, who is prevented from discharging the duties of his office, or is excluded from his workplace, against his will and without lawful authority has been removed from office even if he is in receipt of salary.”.

Mr. Duncan was a public officer who was sent on leave, with immediate effect, ostensibly for the purpose of facilitating a reorganisation of the Ministry of Finance. He had accumulated 43 days out of a possible maximum accumulation of 126 days. When the accumulated 43 days had expired, Mr. Duncan was asked to remain on leave until further notice. He was never asked to resume his duties, but his salary continued to be paid until the payments stopped.

[126] It was against this factual background in Duncan that Byron, C.J. (Ag.) made his findings. The circumstances of the present case are different, in that the Applicant was not expected to remain on leave beyond the expiration of his 215 accumulated days. The Applicant here was not excluded from his workplace but encouraged to enjoy his vacation and resume work on a specified date. The Applicant filed his action before that specified date, and his evidence did not demonstrate any intention on the part of the Respondent to prolong his leave beyond that date, or to

terminate his employment. The authorities in the Duncan case clearly did not want Mr. Duncan to resume his duties.

[127] The facts of this case do not establish a repudiation of the contract of employment by the Respondent. If there was no repudiation of the contract of employment, there could be no dismissal or removal from office of the Applicant by the Respondent. What is interesting is the Applicant's claim for pension rights consequent upon a removal from office. Had the Applicant established his dismissal or removal by the Respondent, he would have faced the additional challenge of section 9(b) of the Statutory Boards (Pensions) Act, Cap. 384. This section provides as follows:

“9. Subject to sections 10 to 13, a pension gratuity or other allowance shall not be granted under this Act to any officer ...

(b) who has been dismissed from the service of a Board; ...”.

Cap. 384 clearly envisages situations where officers of statutory boards may be dismissed, and the Act restricts the payment of pension or other benefits in such situations.

3. The grounds for relief

[128] The application before the Court details seven grounds of relief that fall under section 4 of Cap. 109B. The grounds are that the Respondent's decision to direct the Applicant to take all of his accumulated holiday was:

- (i) contrary to law;
- (ii) an excess of jurisdiction;
- (iii) an abuse of power;
- (iv) an unreasonable or irregular or improper exercise of discretion;
- (v) a failure to satisfy or observe conditions or procedures required by law;
- (vi) a breach of the principles of natural justice; and
- (vii) in conflict with the policy of an Act of Parliament.

These seven grounds respectively refer to sections 4(a), (b), (f), (e), (c), (d) and (i) of Cap. 109B.

[129] If the Respondent acted in breach of section 3(7) of the Holidays With Pay Act, then its actions would have been contrary to law, an excess of jurisdiction or ultra vires, a failure to satisfy or observe conditions or procedures required by law, and in conflict with legislative policy. In this regard, grounds (a), (b) and (c) and (i) of section 4 of Cap. 109B would have been satisfied.

[130] The Applicant has challenged the actions of the Respondent that he alleges were taken in breach of the Holidays With Pay Act. His claim is that the Respondent could not direct him to take his holiday without the mandatory statutory notice. Both the determination of the start date of an employee's holiday, and the giving of the statutory notice are duties to be performed under section 3(7) of the legislation. Therefore, there are no discretions contained in section 3(7) that would attract ground 4(e) of Cap 109B, and no question of an unreasonable or irregular or improper exercise of a discretion by the Respondent arises.

[131] With respect to ground 4(f), there is no evidence of a deliberate or malicious intent on the part of the Respondent or any other person to injure, humiliate or embarrass the Applicant. At paragraph 15 of his affidavit filed on May 22, 2008, the Applicant stated:

"I am however aware that the manner in which the Respondent has dealt publicly with the situation may tend to convey the impression that there was something sinister in my actions. I am of the view that this was a calculated effort by the Respondent to humiliate me in the eyes of the public."

Again, the evidence tendered in this case does not support these claims.

[132] Also in paragraph 21 of the same affidavit, the Applicant alleged that the Respondent's decision that he should take all of his accumulated holiday was "being used as a form of punishment". Rand J. found an "element of intentional punishment" in the Canadian case of Roncarelli v Duplessis, (1950) 16 DLR (2d) 689, at page 706. In that case it was determined that a restaurant proprietor's liquor licence was cancelled as a punishment for standing bail for Jehovah's Witnesses. The Supreme Court of Canada awarded damages against the Prime Minister of Quebec, having found that he instigated the cancellation of the licence by the Liquor Commission. This Court has found no evidence of a malicious intention on the part of either the Respondent, or its employees, or any public official, to punish the Respondent. Unlike Roncarelli v Duplessis no reason has been suggested or articulated on behalf of the Applicant as to why he was being punished.

[133] In the Lake case it was argued that the termination of Mr. Lake's employment was wrongful and embarrassing ([1998] 4 LRC 348, 357d).

The Duncan case also recognised that:

“... a professional person or senior public servant will suffer other substantial losses, such as loss of reputation, or loss of the satisfaction of discharging duties, loss of the opportunity for promotion and so on.”.

Paragraph 21 of the Applicant's first affidavit alleges that the action of the Respondent caused him to suffer “a loss of reputation and untold embarrassment”. However, neither in the affidavit or oral evidence are there any specifics beyond these allegations. Once again the Court finds that the Applicant's allegations were not proved, and they cannot be inferred from the surrounding facts of this case. For example, there is no evidence that the Respondent or any of its members orchestrated the newspaper articles referred to in the evidence. Without any evidence of an abuse of power, ground 4(f) of Cap. 109B remains unsubstantiated.

[134] The final ground for relief to be considered is section 4(d) of Cap. 109B, that is, a breach of the principles of natural justice. The Originating Notice of Motion makes no direct reference to a breach of natural justice in the application for relief. In addition, the declaratory relief sought in

the Statement filed pursuant to the Judicial Review (Application) Rules, 1983, does not mention a breach of natural justice in the declaratory relief sought. It is in paragraph 4(f) of the Statement that a breach of the principles of natural justice is mentioned as part of the grounds for relief. Therefore, the Applicant may be taken to have abandoned this ground as a basis for the declaratory relief sought. But in so far as the Applicant's first affidavit and the submissions on behalf of the parties included references to this ground for relief, the Court will consider those submissions.

[135] The Applicant contends that he was never consulted about the decision requiring him to ^{take} ~~take~~ all of his accumulated holiday. The complaint was ~~that~~ [✗] that he had no opportunity to speak to the matter, and that there was no agreement with the Respondent relative to the accumulated holiday. In essence, the allegation is that the Respondent did not observe the audi alteram partem rule.

[136] The Holidays With Pay Act mandates a specific notice period before an employer may request that an employee proceeds on holiday. Where the notice requirement is not observed, Boyce v Brewster has suggested that "the concurrence" of the employee is necessary. (1996) 52 WIR at page

78c). All that the Court of Appeal was recommending was that, in the absence of the correct statutory notice, the employee should agree or concur with the request of the employer. This is not the same as a right to be heard. Even if the employee is consulted or heard there is no guarantee that the employee will accede to the employer's proposal. The Holidays With Pay Act does not permit the parties to circumvent its provisions, therefore notice allows the employer to forego either consultation or concurrence. Consultation and concurrence are strategic devices for ensuring that the employee does not seek legal redress.

[137] The Applicant alleged "loss of reputation and untold embarrassment" that resulted from the lack of consultation coupled with the press reports. It has been held that decisions which reflect adversely on a person's reputation, or cast aspersions on his character, attract the rules of natural justice. (See "Natural Justice: Principles and Practical Application" G.A. Flick, 2nd ed. At pages 30-31). As noted at paragraph [133] of this judgment, there is no evidence to support these allegations. It cannot be said that the Respondent was responsible for doing anything "to blast [the Applicant's] reputation forever – perhaps to ruin his prospects for life, without giving him an opportunity of either defending or palliating his

conduct". (See Jessell MR in Fisher v Keane (1878) 11 Ch.D. 353, 362-363).

[138] The Applicant has not shown the existence of any statutory or contractual requirement for him to be consulted by the Respondent prior to the decision concerning his accumulated leave. There are no proven issues of reputation, status, penalty or punishment. Therefore, the Court is unable to find that a breach of the principles of natural justice has occurred in this case.

4. Entitlement to relief

[139] Section 6 of the Administrative Justice Act provides that"

"The Court may on an application for judicial review grant relief in accordance with this Act

(a) to a person whose interests are adversely affected by an administrative act or omission;".

In order to obtain relief, the Applicant must first demonstrate that his interests were adversely affected by an administrative act or omission. If he does this, then it is for the Court to decide whether to exercise the judicial discretion to grant him relief.

[140] Of the seven grounds for relief presented on behalf of the Applicant, four grounds were substantiated, namely grounds 4(a), (b), (c) and (i) of the Administrative Justice Act. However, his entitlement to relief is not based on substantiating any ground for relief, but by demonstrating that his interests were adversely affected as a result of the administrative act or omission of the Respondent. Although clear grounds for relief have been identified, there must also be a corresponding adverse effect on the interests of the Applicant.

[141] After a careful examination of all the evidence and legal submissions in this matter, the Court has determined that despite the breach of a mandatory notice provision by the Respondent, there was no repudiation of the contract of employment. All the rights and privileges of the Applicant's employment remain intact. Additionally, no evidence was found to support the allegations of unfair, discriminatory or prejudicial conduct orchestrated by the Respondent against the Applicant. Likewise, proof of loss of reputation, embarrassment, humiliation and punishment were lacking. Without this evidential basis, the Court is unable to make a finding that the Applicant's interests were adversely affected.

[142] The remedies under Cap. 109B are discretionary, and the Court also declines to exercise the judicial discretion in favour of the Applicant. There was no disadvantage or prejudice to the Applicant as a result of the defect in procedure that occurred. (See for example D.P.P of the Virgin Islands v Penn, (2008) UK. P.C); Peach v A.G. T& T, (2003) WIR 461 at 469h; Coney v Choyce, [1975] 1 W.L.R. 422 at 434 C-D and 435H).

[143] Had the Respondent given the Applicant proper notice, its decision to direct him to take all of his accumulated holiday would have been the same. Mr. Inniss said in his evidence that the decision was that the Applicant should take all of his accumulated holiday whether “willing or unwilling.” The reality is the loss of nine more days of notice, juxtaposed against 215 days of accumulated holiday. Therefore, relief would have been of no practical use to the Applicant.

Disposition

[144] The application for judicial review is dismissed. In the view of the Court, there was no breach of section 3(7) of the Holidays With Pay Act by the Respondent. Section 3(7) is concerned with annual holiday, and there is no evidence that any part of the 215 days accumulated by the Respondent represented annual holiday for the year 2008. The 215 days

are postponed holiday, and postponed holiday is addressed by section 3(6) of Cap. 348. Had the Applicant established a breach of section 3(7), the application would fall within the scope of the Administrative Justice Act. However, his interests were not adversely affected, and the Court would not have exercised its discretion to grant him the relief sought.

Sonia L. Richards

SONIA RICHARDS

High Court Judge