

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

(CIVIL DIVISION)

Civil Suit No: 1745 of 2012

BETWEEN:

WILBERT LYNCH

CLAIMANT

AND

THE CHIEF PERSONNEL OFFICER

FIRST DEFENDANT

THE PUBLIC SERVICE COMMISSION

SECOND DEFENDANT

THE ATTORNEY-GENERAL OF BARBADOS

THIRD DEFENDANT

Before: The Hon. Madam Justice Shona O. Griffith, Judge of the High Court

Dates of Hearing **2020: 5th November**
 2021: 25th January
 8th March (Written Submissions)

Dates of Decision: **2021: 3rd May (Oral)**
 8th July (Written)

Appearances:

Mr. Gregory Nicholls for the Claimant.

Ms. Marsha Lougheed; Ms. Anne-Marie Coombs for the Defendants.

AND

Civil Suit No: 1347 of 2017

**IN THE MATTER OF THE
CONSTITUTION OF BARBADOS
AND IN THE MATTER OF THE
ADMINISTRATIVE JUSTICE
ACT CAP. 109B OF THE LAWS
OF BARBADOS**

BETWEEN:

KENRICK CARMICHAEL

CLAIMANT

AND

**THE ATTORNEY GENERAL
THE CHIEF PERSONNEL OFFICER**

**FIRST DEFENDANT
SECOND DEFENDANT**

Before: The Hon. Madam Justice Shona O. Griffith, Judge of the High Court

Dates of Hearing **2020: 5th November**
 2021: 8th March (Written Submissions)
 7th July (Post Judgment)

Dates of Decision: **2021: 3rd May (Oral)**
 8th July (Written)

Appearances:

Mr. Hal Gollop QC in association with Ms. Saffron Griffith for the Claimant.

Ms. Marsha Lougheed in association with Mrs. Roselyn Marshall-Mapp for the Defendants.

Judicial Review – Dismissal of Public Officer after Conviction of Criminal Offence – Process of Dismissal - Public Service Code of Conduct and Ethics – Public Service Code of Discipline – Opportunity to be Heard - Fairness of Dismissal.

DECISION

Introduction

[1] This decision encompasses two claims, which whilst neither consolidated nor factually related, were heard within a few weeks of each other and raise the same underlying legal issues. As such, the Court considers them conveniently decided together. The claims are for judicial review of the decisions by which two former public officers were in the first instance dismissed (Lynch’s case), and in the second instance (Carmichael’s case), compelled to retire, from the public service. The removal of both officers from the service, was occasioned as a result of their respective summary convictions of criminal offences. The respective cases are outlined below.

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A CV1745/2012 – Wilbert Lynch v Chief Personnel Officer et al (Lynch’s Case)

Background and Procedural History

[2] The material facts of Mr. Lynch’s claim are substantively not disputed as pertains to the events which occurred. What is in dispute however, is the legal effect of what occurred. The material facts are as follows:-

- (a) Mr. Wilbert Lynch was employed as a temporary security guard in the Ministry of Defence and Security from (as appears from an exhibit of the 1st Defendant’s evidence) the 29th August, 2007. Given the terms of the Public Service Act¹, nothing turns on the designation ‘temporary’. On April 23rd, 2010 Mr. Lynch was convicted of a criminal offence, namely theft from a supermarket in June, 2008.

The term ‘convicted’ will suffice for purposes of recitation of the facts but the question of whether Mr. Lynch was convicted or not is in issue.

¹ Section 2 of the Act defines a ‘temporary employee’ or ‘employee’ as a person holding employment in an unestablished post; section 3 of the Act renders the Act applicable to both public officers and temporary employees.

On the 25th August, 2011 the Claimant received a letter from the Personnel Administration Division notifying him that His Excellency the Governor General had accepted the advice of the Public Service Commission ('the PSC') that he be dismissed from the Public Service, in accordance with section 27(b)(1) of the Code of Conduct and Ethics, Second Schedule of the Public Service Act, 2007 ('the PSA, 2007/the Act') and section 6(1)(f) of the Third Schedule of the Public Service (Amendment) Act, 2010 ('the PSA, 2010/the amended Act');

- (b) By that letter of 25th August, 2011, Mr. Lynch was notified of his right to have his case referred to the Privy-Council in accordance with section 98 of the Constitution, and he accordingly availed himself of that right by response letter dated 7th September, 2011. The process continued, whereby Mr. Lynch was notified by letter dated the 31st October, 2011 that in accordance with section 98(2) of the Constitution and section 7(2) of the PSA 2010 (sic)², that he was suspended from duty without pay, with effect from the 2nd November, 2011 pending the outcome of his appeal to the Privy Council.

By letter dated 21st December, 2011 the Claimant was notified that the Governor-General's dismissal was upheld by the Privy Council, and

² The correct reference is paragraph 7(2) of Code III of the PSA, 2010.

accordingly, his dismissal from the Public Service took effect from the 15th December, 2011. By letter dated 15th May, 2012 the Claimant's Attorney issued a 'pre-action letter' to the Clerk, Privy Council, signaling the challenge to the lawfulness of the Claimant's dismissal and the intention to initiate legal proceedings for redress. There was no response to that letter and the proceedings herein were commenced on the 15th October, 2012.

- [3] The procedural history of the matter consists of the requisite exchanges of evidence by affidavits, leading up to aborted trials in July, 2014; January, 2016 and March, 2016. The matter finally came on before this Court in November, 2020, and was concluded by final written and oral submissions in March, 2021. The Claimant's evidence consisted of three affidavits filed by the Claimant;³ the Defendants' evidence consisted of two affidavits filed by the 1st Defendant, the Chief Personnel Officer and an affidavit filed by the Magistrate who presided over the criminal charge.⁴ Cross-examination was declined save in relation to the 1st Defendant, therefore the affidavits of the Claimant and the Magistrate stood unchallenged. The Claimant's case as understood by the Court is reduced as follows:-

³ Claimant's affidavits filed on 15th October 2012, 1st February 2016 & 9th September 2016.

⁴ Defendants' affidavits filed on 12th July, 2013 & 8th February, 2016; 2nd March, 2016.

- (i) Albeit found guilty by the Magistrate, the Claimant's conviction for theft in April, 2010 was not recorded, with the consequence that he had no conviction which could be held against him;
- (ii) *The Chief Personnel Officer ('the CPO')*
 - (a) acted unlawfully by referring the Claimant's conviction to the PSC without notice to the Claimant. Particularly, that the CPO's actions were (i) contrary to law; (ii) in breach of natural justice; (iii) an unreasonable exercise of discretion; and (iv) done in bad faith;
 - (b) failed to carry out the procedural requirements contained in the Code of Discipline of the PSA, 2010 prior to the PSC's advice to the Governor-General to dismiss the Claimant;
 - (c) acted unreasonably and in bad faith by remitting the information of the Claimant's conviction to the PSC some 16 months after his conviction.
- (iii) *The Public Service Commission ('the PSC')*
 - (a) acted unlawfully by considering the matter against the Claimant without providing notice of doing so or without providing the material which they considered. Particularly, that the PSC's actions were (i) contrary to law; (ii) in breach of natural justice;

- (iii) an unreasonable exercise of discretion; and (iv) done in bad faith;
 - (b) acted in breach of natural justice and unreasonably in failing to give the Claimant any opportunity to be heard prior to making their decision to advise the Governor-General as to his dismissal;
 - (c) acted unreasonably and in bad faith in advising the Governor-General that the Claimant should be suspended without pay pending the outcome of his appeal to the Privy-Council;
 - (d) failed to observe and apply the procedural requirements of the Code of Discipline in rendering their advice to the Governor-General of the Claimant's dismissal;
- (iv) *The Privy-Council*
- (a) acted in breach of natural justice in failing to give the Claimant an opportunity to be heard or to make representations when considering his appeal against the PSC's decision to dismiss him;
 - (b) acted in breach of natural justice considering the Claimant's appeal substantively and denying him a formal opportunity to present his case on the merits;

- (c) frustrated the Claimant's legitimate expectation of being heard in respect of his appeal against the PSC's decision that he be dismissed from the Public Service.

[4] As a consequence of these allegations, the Claimant seeks relief pursuant to section 5 of the Administration of Justice Act, Cap. 109B ('the AJA') in the following terms:-

- (i) A declaration that the PSC's advice to the Governor-General that the Claimant be dismissed from the Public Service, is unlawful and void;
- (ii) An order of Certiorari to quash the PSC's advice to the Governor-General for his dismissal;
- (iii) A declaration that the Privy-Council's decision upholding his dismissal is unlawful, void and in breach of his legitimate expectation to due process;
- (iv) Damages
- (v) Restitution of salary withheld upon his suspension without pay pending the determination of his appeal to the Privy-Council
- (vi) A mandatory injunction to be returned to his post with full emoluments and benefits.

Claimant Lynch's Submissions

- [5] Mr. Lynch's case is that whilst he was found guilty of the charge of theft, his conviction was of no effect as he was reprimanded and discharged in relation to that offence. He was informed by the Magistrate that no conviction would be recorded against him; there was a Restitution Order made in relation to the items he stole and he was ordered to pay \$350 costs of court, which he paid. The Claimant continued to work in his position for sixteen (16 months) after his criminal proceeding concluded, until he received the letter from the CPO notifying him of the PSC's decision to advise the Governor-General to dismiss him as a result of his conviction for a criminal offence; and of his right to apply to the Privy Council pursuant to section 98(1) of the Constitution for a review of that decision.
- [6] The Claimant's position is that as evidenced by the Certificate of Character submitted with his letter invoking his right to appeal to the Privy Council, the Claimant's conviction was not recorded as the said Certificate certified that he had no criminal convictions. The Claimant maintains that he was given no opportunity at any time to state his case; to retain counsel for purposes of making any oral or written representations on his behalf before the PSC or the Privy Council; nor was he ever given sight of any of the materials or information placed before the Commission or the Privy Council during their

deliberations which resulted in his dismissal from the Public Service. The Claimant says that his request to be provided with such materials as well as reasons for his dismissal went unanswered. These complaints form the basis of the Claimant's assertion that his dismissal was in breach of natural justice at the various stages over which the process was traversed.

- [7] In relation to the process traversed, it was submitted by Counsel for the Claimant that the provisions of the Code of Conduct and Ethics, and Code of Discipline (Schedules II and III of the PSA, 2010) were improperly applied or not applied at all. In particular, that in the first place, the Claimant had no conviction that could have formed the basis of his dismissal given that the Magistrate discharged him without recording a conviction, as evidenced by his clean Certificate of Character. Further in this regard, the Defendants have failed to produce the relevant piece of evidence which would establish what was recorded in relation to his conviction, namely the 'order book'. In the circumstances, the PSC ought to have followed the provisions outlined in paragraph 4 of the Code of Discipline.
- [8] Further however, even if the Claimant were to be considered convicted, the sanction of dismissal was not an automatic one that could have been imposed without following the procedure in paragraph 4 of the Code of Discipline.

In relation to the question of the sanction of dismissal in the face of a conviction for a criminal offence, Counsel for the Claimant refers to paragraph 21(1) (which was relied on by the Defendants), insofar as it provides that a person convicted of a criminal offence is *liable* to be dismissed. The provision that a person convicted is *liable* to be dismissed is not the basis for automatic dismissal. The Defendants instead were required to adhere to the steps provided in paragraph 4 of the Code of Discipline for adjudication of a charge of misconduct of a serious nature. These steps include namely, bringing a charge for misconduct of a serious nature against the Claimant to be heard before a panel appointed for that purpose; providing a statement of all the facts and materials to be relied on, as well as advising the Claimant of his entitlement to be assisted in the hearing of the charge by a trade union representative, attorney-at-law or friend.

- [9] With reference to the legal grounds applicable to the case for judicial review, Counsel for the Claimant adverted to the Defendants' failure to produce any official record which supported the Claimant having been convicted, as giving rise to an error of law.⁵

⁵ Counsel cited *Bovell v Commissioner of Police et al* BB 1995 HC 19; *Eddy Ventose – Commonwealth Caribbean Administrative Law*, pgs 127-129 in support of this contention.

Further, that the PSC and Privy Council, as adjudicating bodies, failed in their duty to make a sufficient enquiry of all relevant circumstances (one such circumstance being the fact of the Claimant's discharge by the Magistrate). In support of the Defendants' duty to make a sufficient enquiry of all relevant information, Counsel referred to **Secretary of State for Education & Science v Tameside Metropolitan Borough Council**⁶ as applied **R(DF) v Brent London Borough Council**.⁷

[10] Most importantly, Counsel for the Claimant submits that the Claimant was denied natural justice in its most basic sense – namely, that as a person to be adversely affected by a decision, the Claimant should have been afforded the opportunity to make representations on his own behalf before the decision was taken; and to be afforded the opportunity of challenging whatever adverse facts were being used against him.⁸ In the context of the Claimant's case, it was submitted that the rules of natural justice required that the Claimant ought to have been notified of intended proceedings leading to his dismissal from the Public Service. Also, that before any decision was taken, the Claimant was entitled to have (i) seen the particulars of the charges, information and documents preferred against him; (ii) to challenge the advice; (iii) to adduce

⁶ [1977] AC 1014 @ 1056B per Lord Diplock

⁷ [2011] EWHC 3251 (Admin)

⁸ Extracted by Counsel for the Claimant (submissions filed on 1st February, 2021) from **R v Secretary of State for the Home Department ex p Doody** [1994] 1 AC 531 @ 560.

evidence or make representations to the Commission before the decision was taken; and (iv) to be given an opportunity to be heard or to make representations on appeal to the Privy Council. The failure of the Claimant to have been afforded any of these safeguards was a breach of the procedural fairness of his dismissal.

- [11] In addition to the fundamental failure of fairness, the Claimant contends that the decision of the Privy Council was made unreasonably and in bad faith insofar as it considered his application on appeal as the substantive appeal and determined the matter without affording him an opportunity to present his case on the merits. Referring to Sir David Simmons CJ in **Leacock v Attorney-General**⁹, Counsel for the Claimant opined that there was ‘*an absence of logical connection between the evidence and the ostensible reasons for the decision*’¹⁰ in respect of the Defendants’ decision, as the procedure required to be followed was not followed and the Defendants had failed to set out the material upon which the decision had been based. On the basis of these submissions the Claimant seeks the various relief sought by way of declarations, an order of certiorari, an award of damages and restitution of his salary as a result of his suspension; and reinstatement to his post.

⁹ (2005) 68 WIR 181

¹⁰ Ibid @ paras 25-29

The case for the Defendants

[12] The Defendants firstly refute the Claimant's contention that his conviction was not recorded. They rely on the evidence of the Magistrate before whom he was convicted as confirming that the Claimant was found guilty after a summary trial for theft; an order of restitution made; the Claimant was charged \$350 costs; and in default of such payment, three (3) months in prison. The costs were paid by the Claimant. Having been convicted of a criminal offence, the Defendants' position is that the 1st Defendant was obliged by virtue of the CPO's duties pursuant to Regulation 9(a) of the PSC Regulations 1978, to refer the matter of the Claimant and his conviction to the PSC for decision. Also, that in keeping with paragraph (d) of Regulation 9, the 1st Defendant ensured that all information available to her pertaining to the Claimant's arrest, charge and conviction had been submitted to the PSC (the 2nd Defendant). According to the 1st Defendant, the process of dismissal of the Claimant was conducted in the same manner as she had always known it to be in her ten (10) years as the CPO. Specifically, that evidence of a person's conviction for a criminal offence was always evidenced by the 'order book' which was treated as an official record, submitted by the Registrar of the Supreme Court as proof of any criminal conviction.

[13] Having been statutorily required to do so, it is the Defendants' position that there was no basis for the Claimant's contention that the 1st Defendant's referral of the Claimant's conviction to the PSC, albeit 16 months after his conviction, was unreasonable or done in bad faith. The Defendants' position also is that the matter was at no time a disciplinary matter, thus it has not been established how the 1st or 2nd Defendants would have failed to comply with the Code of Discipline. Like the CPO, the 2nd Defendant's position is that it was statutorily obliged to submit the matter of the Claimant's conviction to the Governor-General. In relation to the Claimant's contention that the Defendants acted in breach of natural justice by failing to notify him of their intention of the process against him prior to the issue of the CPO's letter of 25th August, 2011 – the Defendants' position is that there was no obligation to have made any such prior notification. To the contrary, the Defendants assert that the Claimant was afforded natural justice by virtue of his opportunity to refer his matter to the Privy Council – an opportunity of which he availed himself. More particularly, the Defendants submitted that it '*was only at that juncture that it was required that the Claimant/Applicant be informed of the decision ... that he should be dismissed from the Public Service.*'¹¹

¹¹ Submissions of Defendants filed 3rd March, 2021 – para. 27

[14] Furthermore, as explained by the 1st Defendant under cross examination, it would be *‘administratively cumbersome for all information pertaining to public officers and/or temporary employees to be made available to those persons where there has been no action as yet being contemplated by the Governor-General in respect of any recommendation (s) made by the Second Defendant/Respondent.’*¹² In respect of the actual procedure employed in effecting the dismissal, the Defendants contend that the fact of the Claimant’s conviction of a criminal offence attracted the application of paragraph 21(1) of the Code of Conduct and Ethics of the amendment Act. Paragraph 21(1) of the said Code provides that a public officer who is convicted of a criminal offence whilst holding public office is liable to be dismissed. In this regard, the Claimant’s conviction was *‘...brought to the attention of the Governor-General with a recommendation in the routine business of managing persons in the employ of the Government of Barbados.’*¹³ It is the Defendants’ position that the Claimant was given *‘...every opportunity to state his objection to the recommendation of the 2nd Defendant that he be dismissed.’* With respect to such opportunity, the Defendants rely on a number of authorities including **Wiseman v Borneman**¹⁴ and **James Ifill v The Attorney-General et al**¹⁵

¹² Ibid @ para 28.

¹³ Ibid @ para 36

¹⁴ [1969] 3 All ER 257

¹⁵ [2018] CCJ 15 (AJ)

to the effect that the Claimant's opportunity to be heard need not be afforded by means only of an oral hearing.

- [15] In relation to the final issue of the infringement of the Claimant's rights under section 98(1) of the Constitution, the Defendants assert that the letter issued on the 25th August, 2011 complied with the plain requirements of section 98(1). As required, the letter notified the Claimant of the PSC's advice to the Governor-General for his dismissal and informed the Claimant of his entitlement to apply to the Privy Council for a review of the matter within 21 days. The Claimant availed himself of this right and as such no question of any breach of his right under section 98 arises on the evidence. On the whole the Defendants maintain that the Claimant's conviction for theft was a matter of record; the 1st Defendant, the CPO submitted the matter to the 2nd Defendant, the PSC in furtherance of her statutory obligations to do so; the 2nd Defendant as empowered under paragraph 21(1) of the Code of Conduct and Ethics of the PSA, 2010 and obliged under section 94(1) of the Constitution, rendered their advice to the Governor-General, that the Claimant be dismissed; the Claimant was notified of the PSC's advice for dismissal, and of his entitlement to appeal to the Privy Council under section 98(1) of the Constitution; the Claimant availed himself of that right of appeal;

the Claimant's recommended dismissal was upheld and effected by the Governor-General according to law.

The Issues in Lynch's Case

[16] Having regard to the evidence and submissions of Counsel, the issues which arise for determination in this matter are as follows:-

- (i) What is the status of the Claimant's conviction?
- (ii) Having regard to or notwithstanding the answer to (i), was the Claimant lawfully dismissed from the Public Service?
- (iii) If no to (ii), what relief is appropriately awarded to the Claimant?

The Court will return to the above issues after setting out the case of the Claimant Carmichael.

**B CV1347/2017 – Kenrick Carmichael v Attorney-General et anor
(Carmichael's Case)**

Background and Procedural History

[17] Like Lynch's case above, there is not much variance in relation to material facts, but there is dispute as to the legal effects or consequences flowing from such facts. The Claimant Mr. Kenrick Carmichael was employed in the Barbados Prison Service from June, 1995 to January, 2016 when he was suspended from work. At the time of his suspension the Claimant held the post of Prison Officer II.

On the 31st March, 2015 the Claimant was found guilty by a Magistrate for breaching a protection order issued in favour of his spouse. The Claimant was sentenced to 1 year's bond to keep the peace with 2 months imprisonment if broken, and to pay compensation in the sum of \$2000. The Claimant was also excluded from his matrimonial home and the Magistrate's order concluded by stating 'no conviction to be recorded'.

[18] On the 14th April, 2015 the Superintendent of Prisons sent a memorandum to the Permanent Secretary, Ministry of Home Affairs (PS, MHA) advising as to the Claimant's conviction and sentence, and the fact that the Claimant had failed to notify the Superintendent of his conviction. By that memorandum, the Superintendent recommended the filing of disciplinary charges against the Claimant and that he be interdicted from duty pending the determination of such charges. On 11th January, 2016 the Claimant was advised by letter on behalf of the CPO that the Governor-General, acting on the advice of the PSC proposed to dismiss him pursuant to paragraph 21(1) of the Code of Conduct and Ethics of the PSA, 2010, on the ground that he had been convicted of a criminal offence. The letter also informed the Claimant of his entitlement to apply to have his case heard by the Privy Council in accordance with section 98(1) of the Constitution and of the time limit within which to do so.

The Claimant duly applied to have his case referred to the Privy Council and was thereafter advised by letter from the CPO, that he was suspended without pay with effect from the 22nd February, 2016, pending the outcome of his appeal to the Privy Council. On the 26th May, 2016 the Claimant by his attorney-at-law received a letter from the Clerk of the Privy Council advising that he be compelled to retire from the Public Service with effect from the date of his conviction, the 31st March, 2015.

[19] On 4th August, 2016 the Claimant complained by his Attorney-at-Law to the Chief Personnel Officer that having been notified of the recommendation by the Superintendent of Prisons to the CPO that he be charged with disciplinary offences as a result of his conviction and of his failure to inform the Superintendent of his conviction, the Claimant had never appeared before any disciplinary tribunal or otherwise been called upon to answer to any disciplinary charges as specified by the Superintendent of Prisons. The Claimant by his Attorney-at-Law protested his forced retirement and asserted that he had been dismissed from his job without being afforded a fair hearing. By his Attorney, the Claimant also requested of the CPO, that he be provided with full particulars of the steps taken with respect to his termination. There were no such particulars provided, and the Claimant commenced his action for judicial review in September, 2017.

The matter came on for hearing in November, 2020. The Claimant relied on two affidavits,¹⁶ whilst the Defendants relied on the single affidavit of the Chief Personnel Officer (the 2nd Defendant).

The Case for the Claimant

[20] The Claimant's case can be summarized briefly as follows:-

- (i) In light of the fact that the Claimant's conviction was not recorded by the Magistrate, the Claimant could not have been made subject to dismissal in relation to those criminal proceedings;
- (ii) The Claimant's dismissal was procedurally improper as there was no compliance with paragraph 4 of the Code of Discipline, which sets out the steps to be taken in relation to disciplinary proceedings against a public officer;
- (iii) Despite having been notified by the Superintendent's memorandum of 14th April, 2015 of intended disciplinary charges against him, the Claimant was never called upon to appear before any disciplinary tribunal, nor called upon to answer any charges in any way. As a result, the PSC's advice to the Governor-General for his dismissal was made in breach of the Claimant's right to natural justice;

¹⁶ Filed on 8th September, 2017; 10th December, 2018

- (iv) Notwithstanding having been advised of his right to apply to have his case heard before the Privy Council and having so applied, the Claimant was never called upon to present his case to the Privy Council, or otherwise make representations to that body on his own behalf, in relation to the PSC's advice to dismiss him. As a consequence, the decision of the Privy Council was also made in breach of the Claimant's right to natural justice;
- (v) Albeit acknowledged that an oral hearing is not required in all disciplinary hearings, the circumstances of the Claimant's case warranted an opportunity being afforded to him to appear in person before the Privy Council, given that he was not afforded that opportunity before the PSC;
- (vi) The referral of the matter of the Claimant's conviction to the PSC by the Assistant Superintendent (on behalf of the Superintendent) was tainted with bias on the basis that the said Assistant Superintendent and the Claimant had an acrimonious relationship with each other based on prior incidents. It is asserted that the Assistant Superintendent could not have been objective in dealing with the Claimant due to their prior bad relations;

(vii) Having not been heard in any way, the Claimant was unable to explain his position that his failure to advise his superiors of his conviction was unintentional and based on his understanding that he had no conviction as he had been told that his conviction was not being recorded. Further, that the Claimant possessed a clean record, as evidenced by the Certificate of Character issued to him by the Police and the offence for which he was convicted was subject to extenuating circumstances regarding his mental health at the material time.

In relation to the legal grounds raised by the Claim for review, Queen's Counsel for the Claimant based the Claim principally upon the contention that having never been afforded an opportunity to be heard, the Claimant was denied his basic right to a fair hearing, as grounded in section 18 of the Constitution of Barbados.

The Defendants' Submissions

[21] The Defendants contend that that the Claimant was convicted of a criminal offence as he was found guilty after trial of the offence of breach of a protection order, and thereafter sentenced according to law. The Defendants submit firstly that the Magistrate's order that no conviction be recorded was made without jurisdiction, as there is no law which afforded any power to make such an order.

In any event, an order that the conviction not be recorded could have no effect on the fact that the Claimant had been found guilty of an offence. As a result of the Claimant's conviction, the Defendants contend that he became liable to dismissal under section 21(1) of the Code of Conduct and Ethics, Second Schedule of the Act. Further, that the Claimant's conviction set in train the process of his dismissal, as the Chief Personnel Officer was obliged pursuant to regulation 9 of the Public Service Commission Regulations 1978, to bring the conviction to the attention of the Commission.

[22] On the Claimant's assertion that he was denied natural justice, the Defendants point to the Claimant having availed himself of his statutory entitlement under section 98(1) of the Constitution, to refer the decision to dismiss him to the Privy Council, for review. The Defendants further submit that the right to be heard need not be in person as illustrated by the decision of **James Ifill v Attorney-General et al.**¹⁷ This decision will be examined in greater detail below but for now it suffices to state that the Defendants rely on it insofar as it concerned a claim for judicial review by a public officer removed from office by compulsory retirement, on the basis of a denial of natural justice. The Defendants commend this decision to the Court as the CCJ held therein that the option for the claimant to have sought a review of his case by the

¹⁷ [2018] CCJ 15 (AJ)

Privy Council afforded sufficient opportunity to be heard, and the dismissal of the claim for judicial review was upheld. The Defendants of course commend this authority as directly applicable to the respective Claimants at bar.

C Issues

[23] The issues in Carmichael's Case are identical to those identified in Lynch's Case above which are restated as follows:-

- (i) What is the legal status of the result of the Claimant's criminal proceedings in light of the Magistrate's order that 'no conviction was recorded'?
- (ii) Whether convicted or not, was the Claimant lawfully dismissed following the process complained of?
- (iii) If not lawfully convicted, what remedies are to be afforded to the Claimant?

D Discussion and Analysis on the Issues and Law Applicable to Both Cases

Issue (i) – The status the criminal convictions

[24] The Court proceeds in respect of this issue on the basis that Magistrates are creatures of statute and can exercise no powers other than those afforded by

the relevant statutes which create and govern their jurisdiction. The relevant statutes which were cited by respective Counsel for both Claimants are the Magistrate's Courts Act, Cap. 116A and the Penal System Reform Act, Cap. 139. Neither Counsel referred the Court to any particular section in either of these Acts which empower a Magistrate either to 'caution, reprimand and discharge' a defendant, or to decline to record a conviction of a person found (or pleading) guilty to a criminal offence. Queens Counsel in *Carmichael's Case* suggested to the Court in answer to its query as to the precise power to *caution, reprimand and discharge*, that such a power was so well known that it is open to be considered as part of the Magistrate's inherent jurisdiction derived from common law. The Court considers a Magistrate's power to sentence being derived from common law to be an oxymoron, and instead expects to find the existence of any sentencing power, expressly grounded within the four corners of a statute.

- [25] In this regard, the turn of phrase '*caution, reprimand and discharge*' appears in neither Cap. 116A nor Cap. 139. The individual words 'caution' and 'reprimand' appear in neither Cap. 116A nor Cap. 139. There is also no power in either Act which empowers a Magistrate to 'not record a conviction.' There are however, as would be expected, numerous references to 'discharge.'

In relation to both Acts, the relevant provisions which arise for any consideration in relation to possible powers associated with the terminologies ‘caution; reprimand and discharge’ or a power to not record a conviction are extracted as follows:-

Cap. 116A

(i) (Part XI, Administration of Justice) **Section 230 (1)** says -

“If in the opinion of the magistrate any offence mentioned in section 229 is committed by any person, a constable may on the oral order of the magistrate if the person is present in court, or on the warrant of the magistrate if the person is not present in court, take the person into custody and thereupon the magistrate may if he thinks fit

(a) *Admonish and discharge him;* or

(b) ... (d)”

Cap. 139

(ii) (Part II, Additional Powers of Criminal Courts, Discharge and Binding Over) **Section 3 (1)** –

“Where a court by or before which a person is convicted of an offence (not being an offence the sentence for which is fixed by law) is of opinion, having regard to the circumstances,

including the nature of the offence and the character of the offender, that it is inexpedient to inflict punishment and that a probation order is not appropriate, the court may make an order discharging the offender.

(2) Such an order may *discharge the offender absolutely or, if the court thinks fit, may discharge the offender subject to the condition that the offender commits no offence during such period, not exceeding 3 years from the date of the order, as may be specified in the order*; and in this Act an order of the latter kind is referred to as an “order for conditional discharge” and the period specified in an order for conditional discharge is referred to as “the period of conditional discharge”.

(iii) Section (4) goes on to speak of the operation of the conditional discharge.

[26] There is no assistance to be had from either provision above given that section 230 of Cap. 115A applies only to offences committed under section 229, which essentially amount to contempt committed in the face of the Court. The power to ‘admonish and discharge’ at section 230(a) therefore is not applicable to any offence other than section 229 offences.

The absolute discharge under section 3 of Cap. 139 arises in the circumstance where upon **conviction** (of a qualifying offence), the court is of the view that it is inexpedient to inflict **punishment** on the offender, or it is not appropriate to make a probation order. What is clear however is that the section speaks to punishment which follows upon there being a conviction of a summary offence. There is nothing in this section which empowers a magistrate to ‘not record a conviction’. The absolute discharge under section 3 means that the offender is free to go – discharged – without any sanction. In such a person’s criminal record, the fact of a conviction will be recorded but the punishment imposed will be nil.

[27] The Court contrasts this position with the Summary Jurisdiction (Offences) Act, Cap. 98 of Belize. Section 59 of this Act provides as follows:-

*If on the hearing of any complaint it appears to the court that, although **the complaint is proved**, the offence was, in the particular circumstances of the case, of so trifling a nature that it is inexpedient to inflict any punishment, or any other than a nominal punishment-*

*(a) the court may, **without proceeding to a conviction, dismiss the complaint** and, if it thinks fit, order the defendant to pay such damages, not exceeding twenty-five dollars, and such costs of the proceedings, or either of them, as the court thinks reasonable, and the damages shall be payable to the person directed by the court; or*

*(b) the court may, upon **convicting** the defendant, discharge him conditionally on his giving security, with or without a surety or sureties to the satisfaction of the court, to appear for sentence when called upon or to be of good behaviour, and either without payment of damages and costs, or subject to the payment of damages and costs, or either of them, which the court thinks reasonable.*

[28] The above section 59 of the Belize Summary Jurisdiction (Offences) Act, expressly empowers a magistrate in circumstances where an offence has been made out – to dismiss the complaint (information in Barbados)¹⁸ without proceeding to a conviction. Alternatively, the Court may upon convicting a defendant, discharge him or her, conditionally. The difference between Belize’s section 59 and Barbados’ section 3 of Cap. 139, is that the absolute discharge termed by the former is based on an express provision which empowers the Magistrate to forego conviction; whilst absolute discharge in the latter arises upon conviction and the court is empowered to forego punishment. The clear line between conviction and punishment need not be explained. Inasmuch as there were orders made that Claimant Carmichael’s conviction *not be recorded*, and that Claimant Lynch was ‘*cautioned, reprimanded and discharged*’, it is this Court’s view that until directed to the

¹⁸ ‘complaint’ in Belize has the meaning of ‘information’ in Barbados as opposed to the restricted meaning of ‘complaint’ in Part V of Cap. 115A, which excludes offences and civil matters – section 83, Cap. 115A.

statutory source of such orders, the Claimants' respective convictions remain valid and open to all legal consequences flowing from them.

[29] Alternatively, or rather in any event, the Court considers that the orders imposed by the respective Magistrates clearly involved the exercise of powers available only on sentencing. Moreover, such sentences could only be carried out on the basis of a subsisting conviction. In *Lynch's* case, there was an order for restitution made in relation to the items stolen. An order for restitution arises only under section 70 of Cap. 115A, which itself provides for restitution 'upon summary conviction.' Mr. Lynch was also ordered to pay costs which carried a default sanction of imprisonment for non-payment. It is unclear how this sanction is to be consistent with an order that purports to deem a conviction not to exist. In *Carmichael's* case, he was ordered to pay compensation. Such an order in relation to a person charged with a criminal offence¹⁹ is made under section 72 of Cap. 115A and arises only in relation to a person convicted of a summary offence. Such an order is therefore part of the sentence upon conviction for an offence.

[30] Finally, in illustration of the Court's position on the issue of the status of the convictions, Mr. Carmichael was placed on a bond to keep the peace for 1 year, in default of so doing, 2 months' imprisonment.

¹⁹ As distinct from a defendant under Part V (complaints), or under Part IX (civil jurisdiction)

This power arises under section 139 of Part VII, (Recognizances), and is exercisable upon dismissal of an information, or conviction of a summary offence. The power exists to bind over the accused or parties with or without conditions to keep the peace, in default of so doing, maximum 12 months imprisonment. Mr. Carmichael was found guilty – his information was not dismissed – therefore he was convicted and as part of his punishment he was sentenced to a bond to keep the peace. Again, it could not be that the punishment passed by the Court could be enforced alongside an order that the conviction not be recorded. The Court's ultimate finding on this issue therefore, is that it has not been presented with any statutory power which authorized the Magistrate in either of the two cases to not record the convictions of the respective Claimants. In the event that such a power does exist, the accompanying orders of the Magistrates imposed punishments or other orders under statutory provisions which were only available consequent upon conviction of a summary offence.

[31] In light of this position, any certificates of good character presented by the respective Claimants were not accurately reflective of the Claimants' antecedents. The Defendants in both cases were therefore entitled to act on the basis that the respective Claimants had been convicted of criminal offences.

In relation to the specific contention in Lynch’s case that there was insufficient proof of the conviction by virtue of the absence of the full record of the order book – the evidence of the Magistrate including the notes of evidence and relevant record of the order book which spoke to Mr. Lynch being found guilty is accepted as sufficient evidence of his conviction. The evidence being relied upon against the fact of his conviction (or that no conviction was recorded) is rejected by the Court. The Court will now go on to consider the second issue, namely whether the Claimants were lawfully dismissed.

Issue (ii) Were the Claimants lawfully dismissed?

I Legislative Scheme

[32] The first order of business is to examine the legislative scheme which arises out of those provisions relevant to the cases at bar – namely - those provisions pertaining to discipline and removal of public officers. The applicable laws in relation to this issue are primarily extracted as follows (with the Court’s emphasis):-

The Constitution of Barbados

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

(2) Before the Public Service Commission advises the appointment to any public office of any person holding or acting in any office power to make appointments to which is vested by this Constitution in the Governor-General, acting in accordance with the advice of the Judicial and Legal Service Commission or the Police Service Commission, it shall consult the Judicial and Legal Service Commission or the Police Service Commission, as the case may be.

- (3) The provisions of this section shall not apply in relation to*
- (a) the office of any member of the Governor-General's personal staff;*
 - (b) any office to which section 93 applies;*
 - (c) any office in the Police Force;*
 - (d) any office to which section 100 applies;*
 - (e) so far as they relate to power to make appointments on transfer, any office to which section 100A applies;*
 - (f) the office of the Director of Public Prosecutions; and*
 - (g) the office of the Auditor-General."*

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

Provided that the Governor-General, acting in accordance with the advice of the Commission, may nevertheless suspend that officer from performing the functions of his office pending the determination of the reference to the Privy Council.

(2) When a reference is made to the Privy Council under the provisions of subsection (1), the Privy Council shall consider the case and shall advise the Governor-General what action should be taken in respect of the officer, and the Governor-General shall then act in accordance with such advice.”

“117.(8) References in this Constitution to the power to remove a public officer shall be construed as including references to any power conferred by any law to require or permit that officer to retire from the public service:

Provided that

(a) ...”

The Public Service Act, (2007), Public Service (Amendment) Act, 2010

Schedule II - Code of Conduct and Ethics

(a) *“21.(1) An officer who is convicted of a criminal offence or who is guilty of misconduct of a serious nature while holding public office is liable to be dismissed.*

(2)...

(b) *“27. A person who either*

(a) fails to comply with; or

(b) engages in behaviour that is proscribed by

- (i) *the provisions of paragraphs 5(c), 7(2), 8, 10, 11(2), 15, 16, 17, 18, 21, 22, 23 and 24 of the Code is guilty of misconduct that shall be regarded as a "misconduct of a serious nature" within the meaning of paragraph 2 of the Code of Discipline; and*
- (ii) *the provisions of paragraphs 14(2), 16, 18 and 19(1) is guilty of misconduct that shall be regarded as misconduct of a minor nature within the meaning of paragraph 2 of the Code of Discipline, and is subject to the penalty for the misconduct as is specified in the Code of Discipline set out in the Third Schedule.*

Schedule III - Code of Discipline

“4. (1) The Governor-General shall, on the advice of the Commission, appoint a resident panel comprising not less than 10 persons, members of which shall include attorneys-at-law, retired and serving public servants to enquire into misconduct of a serious nature; but only 3 of whom shall sit and enquire into any matter at any one time.

(2) The Permanent Secretary or Head of Department shall, within 14 days of becoming aware of misconduct of a serious nature on the part of an officer, investigate the matter and if the authorised officer is of the opinion that the public interest requires that the officer should cease forthwith to perform the functions of his office during the investigation, the Permanent Secretary or Head of Department may suspend the officer on full pay for the purpose of carrying out the investigation and immediately inform the Commission through the Chief Personnel Officer, of the suspension.

(3) Where the Permanent Secretary or Head of Department is directly involved in the misconduct referred to under sub-paragraph (2), the investigation may be carried out by such other officer of the same grade as the Permanent Secretary as the Commission determines.

(4) In any case in which an authorised officer fails to take the action referred to in sub-paragraph (2), the Commission may issue instructions setting out the manner in which any case of misconduct is to be dealt with; and the case shall be dealt with accordingly.

(5) Where an authorised officer who carries out the investigation pursuant to this paragraph is satisfied that a breach of the Code of Conduct and Ethics or the Code of Discipline has occurred, the authorised officer shall within 7 days of being so satisfied,

(a) inform the Commission of the breach; and

(b) recommend that a charge be brought against the officer.

(6) Where the Commission determines that a breach of one or both of the Codes referred to under sub-paragraph (5) may have occurred, the Commission shall within 14 days of that determination,

(a) bring a charge of misconduct against the officer;
and

(b) establish an investigatory committee of 3 persons from the resident panel of persons to conduct an enquiry into the charge; and

(i) at least one of the three shall be an attorney-at-law; and

(ii) each of the members should be selected with due regard to the standing of the officer concerned and to the nature of the charges made against the officer.

(7) Where a member of the investigatory committee is a public officer, that member shall be the holder of an office which is at a grade higher than that of the officer against whom the charge has been brought, but in any case shall not be at a grade below that of Senior Personnel Officer.

(8) An officer who is charged under sub-paragraph (6) may be interdicted from duty by the Governor-General on the recommendation of the Commission

- (a) *on such reduced pay not exceeding one half the salary to which the officer would have been entitled had the officer not been interdicted; and*
- (b) *for a period of not more than 6 months;*

and notice of the interdiction shall be in writing and shall be sent to the officer as soon as practicable.

(9) Where a period of more than 6 months has elapsed in respect of an officer who is interdicted under sub-paragraph (8) and the charge against the officer has not been determined, the Commission may extend the period of interdiction for such period as it determines; and the officer shall receive the salary to which he would have been entitled but for the interdiction.

(10) An officer who is under interdiction from duty under sub-paragraph (8) may not leave Barbados without the permission of the Governor-General granted on the recommendation of the Commission.

(11) A charge brought against an officer under sub-paragraph (6) shall be defined in a written statement that also sets out the nature of the case to be answered, together with

- (a) *an individual statement signed by the officer, if any;*
- (b) *signed statements from all witnesses, supervisors and any other relevant parties; and*

(c) *advice to the officer that he may be assisted, if he so wishes, throughout the enquiry by a trade union representative, an attorney-at-law or a friend.*

(12) *A copy of the statements and all documentary evidence that may be used in an enquiry relating to a charge of misconduct of a serious nature shall be given to the officer who is charged as soon as is practicable but not later than 7 days thereafter.*

(13) *The officer who is charged under sub-paragraph (6) shall be given 14 days after the receipt of the statements and documentary evidence supplied pursuant to sub-paragraph (12) to reply to the charge, and to make any observations he may wish to make in writing in respect of the charge.*

(14) *The investigatory committee referred to under sub-paragraph (6)*

(a) *is required to conclude an enquiry into the charge within 6 months of the date when the charge was brought; and*

(b) *shall submit a report of the hearing to the Commission not more than 14 days after completion of the enquiry, giving the opinion of the panel as to*

(i) *whether the charge has been proved;*

(ii) *the reasons for arriving at its opinion; and*

(iii) the penalty that may be imposed for the offence, by the Commission.

(15) The Commission shall, within 21 days of receiving a report referred to under sub-paragraph (14), make such decision on the matter as the Commission considers appropriate; and shall advise the Governor-General accordingly.

(16) Where

(a) the charge brought against an officer under sub-paragraph (6) has not been proved, and

(b) the salary of that officer was reduced,

the salary of the officer shall be reinstated to the amount that the officer received immediately before the suspension or interdiction as the case may be; but if the enquiry results in any disciplinary action other than removal from office, the officer shall be allowed such emoluments as the Governor-General approves on the recommendation of the Commission.

(17) The Commission shall, through the Chief Personnel Officer, inform the officer of the decision of the Governor-General made pursuant to subparagraph (16); and that decision shall be communicated by the Chief Personnel Officer to the officer concerned within 7 days of the receipt of the information by the Chief Personnel Officer.

(18) A member of the resident panel appointed under sub-paragraph (1) who is not a public officer, may be paid such fee for his services as the Governor-General, acting

in his discretion after consultation with the Commission and the Minister, determines.

(19) In this paragraph, “authorised officer” means the Permanent Secretary, Head of Department or an officer of the same grade as Permanent Secretary to whom subparagraph (3) refers, as the case may be.”

Service Commissions (Public Service) Regulations 1978

“30. If an officer is convicted in any court of a criminal charge, the Commission may consider the relevant proceedings of that court, and if the Commission is of the opinion that disciplinary action ought to be taken against the officer in respect of the offence of which he has been convicted, the Commission may recommend to the Governor-General what form of disciplinary action ought to be taken against the officer without an investigation being held under these regulations.”

II Dismissal/Removal from the Public Service – General Process

[33] Like the power to appoint a person to public office, the power to remove from office as well as exercise disciplinary control over a public officer rests with the Governor-General, acting in accordance with the advice of the (then)²⁰ Public Service Commission.

²⁰ It is acknowledged that by Constitutional (Amendment) Act No. 16 of 2019, the Public Service Commission is today known as the Administrative, General and Professional Service Commission but the former terminology being applicable at the material time, will be maintained in this Decision.

This power of removal is prescribed in section 94(1) of the Constitution and it is pointed out that in accordance with section 117(8) of the Constitution (interpretation section), the power to remove from office includes a power to compel retirement. As a result the respective dismissal and compulsory retirement in respect of the Claimants, are both to be regarded as removals from office. Section 98 of the Constitution complements section 94, insofar as it provides that before the Governor-General acts in accordance with any advice of the PSC under section 94(1), the Governor-General is obliged if so requested by the public officer, to refer the matter to the Privy Council and to thereafter act in accordance with the advice issued by that body.

[34] The Constitution does not make provision for, nor are there any rules made thereunder, which lay out any specific procedure to be followed by either the Governor-General or the Privy Council, in carrying out their respective powers under section 98. It is therefore necessary to examine the precise nature of the powers being exercised under these sections, in order to come to any conclusion as to whether they were lawfully exercised or not, as contended by the Claimant. The exercise of power by the Governor-General upon the advice of the Privy Council under the Constitution, has already been the subject of judicial decision in **Attorney-General v Joseph & Boyce**,²¹

²¹ [2006] CCJ 1

albeit not in relation to section 98. In *Joseph & Boyce*, the exercise of power under consideration was the prerogative of mercy, as provided under section 78 of the Constitution.

[35] Under section 78(1) the Governor-General is imbued with powers said to codify the prerogative of mercy and by virtue of section 78(2), the Governor-General is obliged to exercise those powers in accordance with the advice of the Privy Council. The precise facts of the case need not be explored and it suffices to state that a specific issue which fell to be considered was whether the Privy Council's role in advising the Governor-General under section 78(2) of the Constitution was merely advisory, thereby not rendering it subject to review. In the first instance, the joint judgment of then President De La Bastide and then Saunders JCCJ, upheld the decision of the Barbados Court of Appeal on this issue, to the effect that the Privy Council is a decision making body and that its decision (in appropriate proceedings) could be set aside or declared a nullity. Further, that there was nothing to prevent the court from examining the procedure adopted by the Privy Council and testing it (inter alia), for procedural fairness in accordance with the rules of natural justice.²²

²² Ibid @ para 41.

[36] This position was supported by the separate opinions of Nelson JCCJ²³ and Pollard JCCJ²⁴ respectively. Most particularly on this issue however, reference is made to the judgment of Bernard JCCJ in *Joseph & Boyce* which concerned only the justiciability of the Governor-General's powers under section 78 of the Constitution. Part of that consideration examined the status of the Privy Council in tendering its advice to the Governor-General in the exercise of his powers under section 78(1). The learned Justice stated as follows (emphasis mine):-

“This leads me to consider whether tribunals such as the Barbados Privy Council are merely advisory or are decision-makers. The learned trial judge at first instance came to the conclusion that it was advisory whereas the Court of Appeal held that it was a quasi-judicial body and a decision maker which tenders advice to the Governor-General who is mandated under section 78(2) of the Constitution to act in accordance with its advice”

“Much discussion has centered around what is meant by ‘quasi-judicial.’ We all know what are judicial acts; quasi-judicial acts are not always easy to define. I posit that both judicial and quasi-judicial acts involve the making of decisions. A judicial act involves making a decision based on proven facts and applying relevant legal principles;

²³ Ibid @ paras 19-24 of the Judgment of Nelson JCCJ

²⁴ Ibid @ paras 1-9 of the Judgment of Pollard JCCJ

*a quasi-judicial act also involves making a decision maybe based on proven or agreed facts, but applying and giving effect to administrative policy. One important element which is basic to all decision makers whether judicial or quasi-judicial is the requirement to act fairly. This view was expressed by Lord Loreburn as far back as 1911 in the case of **Board of Education v Rice** when he stated that the duty to act in good faith and listen to both sides is one lying upon every one who decides anything. Lord Denning, M.R. echoed similar sentiments in Breen (supra)”*
“I conclude that it matters very little whether the Barbados Privy Council is a quasi-judicial body. I agree with the finding of the Court of Appeal that it is a decision-making body and not an advisory one. Were it advisory the Governor-General could elect to ignore its advice, but as mentioned earlier Section 78(2) mandates him to act in accordance with its advice; further, he is an integral part of that decision -making process in that under sections 77(1) and (2) he has the authority to summon meetings of the Council and preside at such meetings.”

- [37] The parallel the Court wishes to draw from the dictum above of Bernard JCCJ in *Joseph & Boyce*, pertains to the exercise of the relevant functionaries, under sections 94(1) and 98(2) of the Constitution, to uphold a public officer’s dismissal. The Governor-General, as noted in *Joseph & Boyce* in relation to section 78, must act in accordance with the advice of the Privy Council.²⁵

²⁵ AG v Joseph & Boyce supra, Judgment of Bernard JCCJ @ para 17

The Court is therefore of the view that the same conclusion regarding the decision-making power of both functionaries, is applicable to section 98(2), which is that their decisions can be reviewed by a court where appropriate to do so. In relation to the Public Service Commission, the Court also attributes a decision-making function to that body as it relates to the advice issued to the Governor-General as to removal or exercise of disciplinary control over public officers under section 94(1) of the Constitution. In *Joseph & Boyce*, on the Privy Council's amenability to review point, Pollard JCCJ classified a decision-making body as one charged with making determinations affecting the rights and interests of persons.²⁶ In this regard, it is necessary to closely examine the provisions which inform the advice issued by the Commission to the Governor-General.

[38] In relation to the Commission's role in advising the Governor-General on the removal from office of and exercise of disciplinary control over public officers, the relevant provisions which operationalise this function are comprised in the Public Service Act, 2007 (as amended in 2010), particularly the Code of Conduct and Ethics (Schedule II of the Act); and the Code of Discipline (Schedule III of the Act). The Act (as amended), and the Codes must be read altogether in order to be properly understood and applied.

²⁶ AG v Joseph & Boyce supra, Judgment of Pollard JCCJ @ para 5

However for purposes of identifying the nature of the Commission's function in advising the Governor-General under section 94(1) of the Constitution, the following brief overview of certain provisions of Codes II and III will suffice:-

- (i) The Code of Conduct and Ethics sets out values and standards of behaviour which govern the public officer in the execution of his or her duties. The prescribed standards range from more minor standards pertaining to attendance and attire, to more serious standards such as use of confidential information, sexual harassment, and use of public funds;
- (ii) Code II places a duty on public officers to report breaches of the standards therein, to their superior officer (Head of Department of Permanent Secretary) and possibly the Commission itself;²⁷
- (iii) In particular, Code II classifies breaches of the standards contained therein, into two categories, namely misconduct of a serious nature,²⁸ or minor misconduct;²⁹
- (iv) Code III – the Code of Discipline, defines both minor misconduct and misconduct of a serious nature by incorporating the classifications

²⁷ Code II, paragraphs 11 & 12

²⁸ Ibid, paragraph 27(b)(i)

²⁹ Ibid, paragraph 27(b)(ii)

thereof in paragraph 27 of Code II, into the expanded definitions of both kinds of misconduct, in the interpretation definitions in Code III,³⁰

- (v) Code III, sets out the respective penalties for a public officer who commits either minor misconduct or misconduct of a serious nature.³¹

Minor misconduct attracts one of only two penalties, namely an oral warning or a written reprimand, whilst misconduct of a serious nature attracts a number of penalties ranging from dismissal to reduction in rank;

- (vi) A finding of minor misconduct is determined by a personnel officer of a higher rank than the public officer. Upon such a finding, a penalty is imposed by the relevant Permanent Secretary;³²

- (vii) The process for finding major misconduct is comprehensively governed by paragraph 4 of Code III (19 sub-paragraphs), from which is extracted the following:-

- (a) The Governor-General is obliged to appoint a panel of at least 10 persons, from amongst whom, three-member committees are convened to hear and adjudicate upon charges of serious misconduct;³³

³⁰ Code III, paragraph 2

³¹ Ibid, paragraph 6(1) & (2)

³² Ibid, paragraph 5

³³ Code III, paragraph 4(1)

- (b) Flowing from the duty of an officer to report improper conduct or breaches of Code II to a Head of Department or Permanent Secretary, (or directly to the Commission), the Commission either directly or further to an investigation by a Head of Department or Permanent Secretary, is empowered to lay a charge of serious misconduct against a public officer;³⁴
- (c) Where a charge of serious misconduct is laid, whether pursuant to an investigation conducted by a Head of Department or Permanent Secretary, (or directly as a result of action taken by the Commission), the Commission is required to convene a committee of 3 persons, from amongst the panel of persons appointed by the Governor-General under paragraph 4(1) of this Code, to enquire into the charge so laid;³⁵
- (d) The committee established by the Commission to enquire into the charge of serious misconduct has 6 months within which to complete its enquiry and thereafter, within 14 days of completion of its enquiry, the Committee must submit a report of its findings to the Commission;³⁶

³⁴ Ibid, paragraphs 4(2) – (6), conjointly

³⁵ Ibid, paragraph 4(6)

³⁶ Ibid, paragraph 4(14)(a)&(b)

(e) The findings of the investigatory committee established by the Commission to inquire into a charge of serious misconduct are delineated in the following terms:-

- i. whether the charge has been proved;
- ii. the reason for arriving at that opinion; and
- iii. the penalty that may be imposed by *the Commission*, for the offence;³⁷

(f) Upon receiving that report, the Commission is enjoined as follows:³⁸

“The Commission shall, within 21 days of receiving a report referred to under sub-paragraph (14), make such decision on the matter as the Commission considers appropriate; and shall advise the Governor-General accordingly.”

(viii) What is evident therefore, is that (assisted by the inquiry and report of the panel of 3), the Commission is statutorily mandated to come to a decision on the charge of misconduct of a serious nature. That decision, by the terms of paragraph 4(15), may depart from the recommended findings of the panel. Therefore, the panel’s role is merely advisory.

³⁷ Ibid, paragraph 4(14)(b)

³⁸ Ibid, paragraph 4(15)

(ix) The Commission makes a decision (comprised in terms reflected in paragraph (vii)(e) above, and thereafter advises the Governor-General of its decision.

[39] Returning to the question of the nature of the Commission's role vis-à-vis its advice to the Governor-General under section 94(1) of the Constitution, the Court considers it clear that the Commission comes to a substantive decision, which must then be effected by the Governor-General, save for the requirement of the latter to remit the matter to the Privy Council, if so requested by the public officer. There is not before this Court any question as to whether the Governor-General is obliged to act in accordance with the advice of the Commission in like manner that the Governor-General is obliged to act on the advice of the Privy Council in section 98(2). The language of section 94(1) does not suggest otherwise, however, by comparison, the language of section 98(2) whereby the Governor-General is expressly obliged to act in accordance with the advice of the Privy Council, is stated in stronger terms than section 94(1). The latter's weaker language in the Court's view however, is attributed to the possibility that the Commission's advice may be affected by that of the Privy Council if the matter is further referred.

However, in the event that the public officer does not invoke the right to have their matter referred to the Privy Council,³⁹ there is no power or process express or implied, for the Governor-General to do anything other than give effect to the advice of the Commission. But this question is not in issue before the Court in this matter.

[40] Thus far, the legislative process applicable to the removal of public officers from office is that the Governor-General removes in accordance either with the advice of the Privy Council after the latter's review of a case; or in accordance with the advice of the Commission, which advice is arrived at following a disciplinary process prescribed under the Public Service Act. The provisions of the Act which prescribe the process of dismissal are those contained in both the Code of Conduct and Ethics, and the Code of Discipline. The Court must also account for the Service Commissions (Public Service) Regulations, 1978, which have also been invoked by the Defendants in answer to the Claims. By section 35(4) of the Act, these Regulations are valid only to the extent that they are not inconsistent with the Act. In terms of application of the Regulations, section 35(4) additionally has the effect that where territory is occupied by the Act, whether by any of the Codes or principal provisions, the Regulations are superseded, even if not inconsistent.

³⁹ As occurred in **James Ifill v CPO et al**, *supra*

It is only where the Act is silent, and the Regulations can be applied without inconsistency, that the 1978 Regulations remain of any validity. Having addressed the general framework applicable to removal from office, the process can now specifically be examined in relation to public officers convicted of a criminal offence.

III The process of dismissal of public officers convicted of a criminal offence.

[41] Given that the Commission is the first decision maker in respect of the removal of the two Claimants from the public service, it is this body's functions and actions which must primarily be examined. It is to be borne in mind that the relevant factor common to both cases is that of the respective Claimants' convictions for criminal offences, in respect of which there are specific provisions contained in Codes II and III. Notwithstanding such specific provisions, as was observed above, and which bears repeating, the provisions of Codes II and III are to be read together in order to be properly and accurately applied. Further, subject to limits on its application in accordance with section 35(4) of the Act, Regulation 30 of the 1978 Regulations is also to be considered. The following processes or observances form the basis of consideration in relation to the dismissal process applicable to the Claimants, as persons convicted of criminal offences:-

- (i) By virtue of paragraph 27(b)(ii) of Code II as well as the definition of serious misconduct in paragraph 2(b) of Code III, the Claimants' respective criminal convictions were deemed misconduct of a serious nature;
- (ii) Given that a criminal conviction amounts to a breach of Code II, the respective Claimants' convictions were required to be brought before the Commission to be dealt with. The question was what procedure ought to have governed how the Commission dealt with the Claimants and their convictions;
- (iii) As expressly stated in paragraph 21(1) of Code II, as well as by virtue of the definition of misconduct of a serious nature in paragraph 2(b) of Code III - a person convicted of a criminal offence is liable to dismissal. Liable to dismissal however, does not mean automatic dismissal upon conviction of the criminal offence, or that dismissal is the only penalty to be imposed in relation to a criminal conviction;
- (iv) As can be seen from the definition of misconduct of a serious nature under paragraph 2(a-t) of Code III, there are twenty different actions which can amount to misconduct of a serious nature, in addition to the breaches of Code II as set out in paragraph 27(b)(i) thereof.

Any one instance of serious misconduct so defined can possibly result in dismissal, but by paragraph 6(1) of Code III, dismissal is only one of six penalties which can be imposed in respect of misconduct of a serious nature;

- (v) If it is the case that dismissal is not the only penalty to be imposed in respect of a criminal conviction, one might wonder why there is specific provision made by paragraph 21(1) of Code II, in singling out that consequence for a criminal conviction. In Code II, there are two other breaches which specify liability to dismissal as a consequence. These are - paragraph 21(2) (failure to disclose prior criminal conviction upon entering public service) and paragraph 22 (sexual harassment). When read in conjunction with paragraph 27(b)(i) (breaches of Code II which amount to misconduct of a serious nature); and the definition of misconduct of a serious nature being conduct giving rise to dismissal (paragraph 2 of Code III), it is concluded that the specific references to dismissal in paragraphs 21 and 22 of Code II do nothing more than identify the conduct therein as particularly egregious. The penalties in paragraphs 6(a-f) of Code III for misconduct of a serious nature are prescribed without qualification in relation to any specific kind of misconduct.

At all material times therefore, a public officer convicted of a criminal offence, falls as in the case of any other officer against whom misconduct of a serious nature is proved, to be subjected to any one of the six penalties provided in paragraph 6(1) of Code III.

- (vi) Further, it is noted that misconduct of a serious nature versus minor misconduct are both defined (paragraph 2 of Code III) with reference to dismissal being warranted in the former case, and not so warranted in the latter case. It is concluded that the reference to dismissal in both definitions, is merely reflective of it being the ultimate penalty to which a public officer may be sanctioned. The specific reference to dismissal in paragraph 21(1) of Code II therefore is similarly regarded and it remains the Court's view, that upon misconduct of a serious nature established by criminal conviction, dismissal is only one of the six penalties available under paragraph 6 of Code III, to be imposed against the officer.

[42] Thus far, the process identified in relation to dismissal arising from a public officer's criminal conviction is that irrespective of how it may become known, the fact of a public officer having a criminal conviction is deemed to be misconduct of a serious nature, which must be dealt with by the Commission.

It is also clear, that albeit the officer is liable to dismissal as a result of the conviction, dismissal is not the only consequence, and the additional penalties set out in paragraph 6(1) may also be imposed. However, as a result of a criminal conviction being deemed misconduct of a serious nature, a practical difficulty arises, which is illustrated by the very existence of the cases at bar. Generally speaking, when a case requiring adjudication of misconduct is reported or becomes known, the provisions of paragraph 4 of Code III quite clearly establish the following:-

- (i) The conduct reported must be investigated by the HOD or Permanent Secretary (or the Commission determines how to deal with the matter);
- (ii) Charges for the alleged misconduct are recommended by the relevant HOD or Permanent Secretary and thereafter preferred by the Commission;
- (iii) The Commission establishes the 3 person committee to inquire into the charge and report on its finding to the Commission;
- (iv) Usual provision is made for suspension pending investigation of the alleged misconduct and interdiction pending inquiry into the charges laid in relation to the alleged misconduct;
- (v) Provision is also made for due process to be followed in terms of reduction of the charge and particulars into writing; notification of the

charges to the officer; provision of written statements of witnesses and other documentation to be used in the inquiry to the officer upon or after charge; the officer is provided an opportunity to reply to the charge and to make observations in writing in relation to the charge;

- (vi) The committee established to inquire into the charge is afforded 6 months within which to conclude its inquiry and submit its report in writing to the Commission. There is no stipulation in relation to the holding of any oral proceedings, but same is not precluded. It is therefore within the purview of the Committee to hold an oral inquiry or not, however the circumstances of each case would dictate whether or not any oral inquiry is required or appropriate.

[43] This broadly outlined process above, is clearly necessary given that a decision that misconduct of any kind has been committed, can only be made following a fact-finding process which determines whether or not an officer has committed such misconduct. Given the adverse consequences to the officer upon proof of misconduct (serious or minor), safeguards for fairness and due process are built into the fact-finding process. The practical problem referred to above however, is that in relation to misconduct of a serious nature which is deemed by virtue of a conviction for a criminal offence, the process enabled by paragraph 4 of Code III is almost entirely rendered nugatory by a tribunal

superior to the Commission, namely a court of law. The Court takes this position, for as a matter of law and common sense, other than to ascertain the fact of a conviction, the investigatory process leading up to charge and thereafter the establishment of the 3 person committee to inquire into the charge, as provided in paragraphs 4(2) through 4(6) of Code III, is unnecessary. Further, when one considers the mandate of the committee established to inquire into the charge of misconduct, that committee reports to the Commission on (i) whether the misconduct alleged is proved; (ii) the reasons for such a finding; and (iii) the penalty that should be imposed.

[44] Where a criminal conviction exists, items (i) and (ii) of the inquiring committee's mandate has already been adjudicated by a superior tribunal, with the result that the Commission's decision required by paragraph 4(15) of Code III is two thirds complete. The remaining aspect of the Commission's decision would be what penalty as provided under paragraph 6 of Code III, should be imposed in relation to the misconduct of a serious nature already proved by the criminal conviction. The Code does not contemplate a separate procedure in relation to the officer convicted of a criminal offence, notwithstanding that the process of adjudication is two thirds complete by virtue of the fact of the conviction. This absence is considered a lacuna in the statutory regime and the question is begged as to how to fill that lacuna.

In any average given case, it would be difficult to envisage the Commission finding it necessary to convene a committee to inquire into the question of what penalty should be imposed as a result of an officer convicted of a criminal offence. Prior to the Codes coming into effect, the situation would have been governed by Regulation 30 of the 1978 Service Commission Regulations which is once again extracted as follows:-

“If an officer is convicted in any court of a criminal charge, the Commission may consider the relevant proceedings of that court, and if the Commission is of the opinion that disciplinary action ought to be taken against the officer in respect of the offence of which he has been convicted, the Commission may recommend to the Governor-General what form of disciplinary action ought to be taken against the officer without an investigation being held under these regulations.”

[45] This regulation was relied upon by the Defendants in both cases, however, it has for the most part been superseded by Codes II and III given that the existence of a conviction is deemed misconduct of a serious nature by both Codes.⁴⁰ Further, as a breach of Code II, the conviction must be brought to the attention of the Commission whether via a superior officer or by direct reporting to the Commission, for disciplinary process to ensue.⁴¹

⁴⁰ The conjoint effect of paragraphs 21(1) and 27(b)(i) of Code II and the definition of ‘misconduct of a serious nature’ in paragraph 2 of Code III.

⁴¹ The conjoint effect of paragraphs 11(2)(b) and 12 of Code II and paragraph 4(2) of Code III

What should be noted in relation to Regulation 30 as previously applicable, is that by virtue of a criminal conviction, the investigatory process into charges of misconduct was nullified, and the only question to be determined by the Commission, was the form of disciplinary action that ought to be taken against the officer as a result of the conviction. This prior position also serves to reinforce the Court's view that dismissal was neither an automatic, nor the only consequence available by way of disciplinary action, in relation to a public officer convicted of a criminal offence. Previous position aside, what in the Court's view remains applicable of Regulation 30 to the current regime under the Code, is the Commission's power to consider the criminal proceedings which gave rise to the officer's conviction, as the basis for their advice to the Governor-General on the disciplinary sanction to be imposed for the deemed misconduct of a serious nature.

IV Filling the lacuna

[46] The question now to be examined, is as to the process required to be undertaken by the Commission to address misconduct of a serious nature, when such misconduct is occasioned by virtue of an officer's conviction of a criminal offence. Having regard to the effect of a criminal conviction on the purpose and parameters of disciplinary proceedings under paragraph 4 of Code III, the Court must consider what aspects of the process are foregone,

the part of the process that remains, and even in the absence of express rules making provision for same, the general rules of natural justice that must be applied to that part of the disciplinary process that remains. The Court considers the process that arises in relation to disciplinary action arising from conviction for a criminal offence, in following manner, given the statutory regime of paragraph 4 of Code III:-

- (i) In light of paragraph 21(1) of Code II, the conviction is a breach of the standards prescribed in that Code and is deemed misconduct of a serious nature;⁴²
- (ii) By virtue of paragraphs 11(2) and 12 of Code II and paragraph 4(2) of Code III, the fact of an officer's conviction of a criminal offence must engage the Commission as a disciplinary matter for misconduct of a serious nature;
- (iii) Given that the conviction is deemed misconduct of a serious nature, it is not required that any charge for misconduct of a serious nature based on the underlying allegations (already proved), need be preferred against the officer;

⁴² Code II paragraph 27(b)(i); Code III definitions of misconduct of a serious nature paragraph 2.

- (iv) The Commission is not obliged to convene a panel to inquire into whether the misconduct of a serious nature has been committed, the fact of conviction (however presented), establishes misconduct of a serious nature;
- (v) It is a matter for the Commission, whether to convene a panel to determine what or whether any penalty pursuant to paragraph 6 of Code III is to be imposed against the officer;
- (vi) Given that dismissal is not the only penalty available, in determining what penalty is to be imposed, the Commission (or the panel), as had been provided under Regulation 30⁴³, would be at liberty to have regard to the proceedings of the court in which the conviction was made, which would include notes of evidence and/or reasons.

[47] The above process represents what the Commission ought to do in broad terms. The Court is of the view that the timelines throughout paragraph 4 are directory as opposed to mandatory, so that they can be departed from where applicable, but also not to the detriment of any officer subject to disciplinary process. As stated before, the matter is still a process within the context of section 94(1) of the Constitution, which results in a penalty affecting the rights and interest of the officer concerned.

⁴³ Service Commissions, Regulations, 1978; para. 43 supra

As cited from *AG v Joseph & Boyce*, any such process depriving a person of, or affecting their rights and interests, must be determined fairly.⁴⁴ The question is what is to be considered fair in these circumstances. The only question the Committee has to determine (whether by itself pursuant to paragraph 4(15) of Code III, or by a panel convened pursuant to paragraph 4(6) & (14) of Code III), is the appropriate penalty to be imposed having regard to the criminal conviction. In determining such a question, it has to be recalled that in disciplinary proceedings proper, (as borne out by the itemized mandate of a 3 person panel inquiring into a charge of misconduct⁴⁵), the question of what punishment or penalty should be imposed is a question in respect of which a person is entitled to be heard, and in respect of which there ought to be a rational connection between the result and the circumstances of the case.

[48] In answer to the question of ‘what is fair’, in the context of the circumstances of this case, the Court considers as an apt guide, the following statement extracted from **R v Secretary of State for the Home Department, ex p. Doody**⁴⁶ (this authority was briefly referred to by Counsel for Claimant Lynch in his written submissions).

⁴⁴ Per Pollard JCCJ @ paras 5-7.

⁴⁵ Paragraph 4(14)(b), Code III

⁴⁶ [1994] 1 AC 531 @ 560

This decision concerned an appeal from judicial review proceedings of a scheme by which the Secretary of State (SOS) for Home Affairs imposed a minimum sentence to be served by persons sentenced to a mandatory term of life imprisonment. The judgment of the House was delivered by Lord Keith of Kinkel, who said as follows, in relation to the complaint as to the failure of the SOS to have consulted with the prisoners themselves in determining the minimum sentence to be served (emphasis mine):-

“What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may

be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.”

- [49] From the above passage, several key words or phrases are important in the circumstances of this case, namely – ‘fair in all the circumstances’; ‘standards of fairness are not immutable’; ‘principles of fairness are not to be applied by rote identically in every situation; ‘what fairness demands is dependent on the context of the decision’. The Court notes that the question of what is fair therefore, must be examined beyond paying lip service to written provisions and rigid application of processes, without critical examination of what is to be applied, how it is to be applied and in the final analysis whether what was applied can be said to be fair. In this case, the Court notes that fairness can also be achieved by an opportunity afforded after a decision is taken, with a view to procuring its modification. The implication of this consideration to the case at bar need not be gainsaid and will be accounted for.

[50] The operative circumstance in the cases before the Court is that there is at once a major portion of the prescribed process in relation to disciplinary action that is rendered inapplicable to the subject matter of what is in effect a disciplinary process – namely, the imposition of a sanction for misconduct of a serious nature established by the criminal conviction. In this context, there is then a gap in the applicable statutory provisions, whereby there is no express process which applies to this particular circumstance. In a case such as this, the Court draws from the approach of now President Saunders C CJ, in his dissenting judgment in **Lucas & Carillo vs the Chief Education Officer et al.**⁴⁷ As a side note, it has to be explained that in this case, the dissent of then Saunders J CCJ was founded on a different view taken than the majority, that the underlying facts of the case gave rise to a constitutional breach of the right to protection of the law. The approach derived from this case therefore does not concern any dissent on matters of law.

[51] In this case (which concerned a constitutional claim arising from suspension of teachers during a preliminary investigation into alleged mishandling of the management of a school), the majority of the Court found that the underlying facts did not amount to a breach of protection of the law, as the process was merely an investigatory one and there were private law rights available to the

⁴⁷ [2015] C CJ 6 (AJ)

claimants to redress their complaints of the process. Saunders JCCJ however, considered that the apparent existence of private law rights was insufficient to preclude the finding of a constitutional breach of protection of the law, and preferred an approach which critically examined the specific facts of the matter, from a variety of perspectives. Included in such perspectives, were that there were adverse findings of fact concluded and publicized against the claimants without their involvement; there were unreasonable and unjustified actions taken by Government officials, outside of their statutory remit; the impact of the actions of such officials and of the adverse findings by the report resulted in the claimants being subjected to ridicule and hostile reactions from the public and parents of students at the school; there was no effective private law remedy to redress the harm suffered by the claimants as a result of a process found to be grossly unfair. That critical approach which always finds favour with this Court, was in effect to strip the process down to its true factual context and to draw the necessary conclusions as to fairness.⁴⁸

[52] In applying that approach, the question under consideration, is what is to be considered fair in relation to the disciplinary process to be applied to the Claimants, as public officers convicted of a criminal offence.

⁴⁸ A full account of the manner in which this approach is ventilated and applied can be found in *Melissa Belzair Tucker v Chief Education Officer et al*, Belize Supreme Court Claims Nos 304/2014 & 199/2015 @ paras 53-75.

The disciplinary process required, need answer only the question of what penalty should be imposed in respect of the misconduct of a serious nature occasioned by the criminal conviction. The Court considers that factors such as the following ought to be reasonably considered in such a process - (i) the nature of the offence for which convicted; (ii) the circumstances of its commission; (iii) the effect of the conviction on the repute of the Public Service or on good administration; (iv) aggravating or mitigating circumstances of the commission of the offence or the fact of the conviction, which are relevant to the officer's duties; (v) the officer's acceptance of accountability insofar as same is relevant to his or her duties or standing as a public officer; (vi) the personal circumstances of the public officer relative to the prejudice to be occasioned by the imposition of a disciplinary penalty. Some of these questions can be answered from the proceedings of the criminal conviction, however, some important questions cannot be so answered without giving the officer an opportunity to be heard. For example, Claimant Carmichael alleges that as he thought he had no conviction recorded against him, he did not see a need to advise his superiors of the conviction. Also, that at the time of the offence he was undergoing some mental health issues. In this regard, such mental health issues clearly had no bearing on his finding of guilt in a court of law, however, such issues may (or may not) have made a

difference to his employment, however there was no opportunity afforded Mr. Carmichael before the Commission, to make such representations.

[53] The Court buttresses its reasoning in relation to the need to hear an officer in this circumstance of removal from office, i.e., following conviction for a criminal offence, by reference to the position in Trinidad & Tobago, extracted from the case of **Public Service Board v Maraj**.⁴⁹ This decision concerns dismissal of a public officer subsequent to conviction for a criminal offence, but the legal issues are not on all fours with the cases at bar. By amendment to applicable provisions regarding discipline in public service, the Trinidad & Tobago Constitution prescribed a process of summary dismissal without institution of disciplinary proceedings, following a public officer's conviction of a criminal offence⁵⁰. The question before the Board in *Maraj*, was whether the process of summary dismissal which was effected outside of prescribed disciplinary proceedings, could be the subject of an appeal to the Public Service Appeal Board, whose jurisdiction was to hear appeals from decisions in disciplinary proceedings. That question was ultimately answered in the affirmative by upholding basic principles of natural justice, however, it is the actual statutory regime which provides fodder for the Court's illustration.

⁴⁹ [2010] UKPC 29

⁵⁰ Constitution of Trinidad & Tobago, section 129(5)-(7)

Section 129 of the Trinidad & Tobago Constitution precludes removal of public officers from office other than as a consequence of disciplinary proceedings. The amendment under consideration, provided for the summary dismissal after criminal conviction without the need for instituting disciplinary proceedings.

[54] The relevant portions of section 129 of the Trinidad & Tobago Constitution are extracted as follows:-

“(4) No penalty may be imposed on any public officer except as a result of disciplinary proceedings.

(5) Notwithstanding subsection (4), where an officer is convicted of a criminal charge in any court and the time allotted for an appeal has elapsed or, if the officer has appealed, the appeal process has been completed or an order has been made in the matter under section 71 of the Summary Courts Act, a Service Commission may consider the relevant proceedings on such charge and if it is of the opinion that the officer ought to be dismissed or subjected to some lesser punishment in respect of the conduct which led to his conviction on the criminal charge or to the making of the order, the Commission may thereupon dismiss or otherwise punish the officer without the institution of any disciplinary proceedings.⁵¹

(6) In furtherance of subsection (5) – (a) a certificate of conviction issued by the court shall be sufficient evidence of an

⁵¹ This provision is obviously reminiscent of Regulation 30

officer's conviction for an offence; (b) a certified copy of an order made under section 71 of the Summary Courts Act shall be sufficient evidence of the commission by the officer of the offence for which he was charged.

(7) An officer referred to in subsection (5) shall be entitled to show cause why he should not be dismissed from office.”

[55] As can be seen from the above provisions in **Maraj**, the statutory process giving rise to dismissal following conviction of a criminal offence is quite clear. The summary process of conviction enabled in the Trinidad and Tobago provisions, is that disciplinary proceedings need not be instituted and the Service Commission is to consider the relevant criminal proceedings and come to its determination as to whether dismissal – or some lesser charge ought to be imposed against the convicted public officer. Most importantly however, is the express provision that the public officer is to be given an opportunity to be heard (entitled to show cause), in relation to his or her proposed dismissal. Albeit not stated, in order to show cause, (i.e. in order to be heard) – the public officer would as a first step, have to be notified of the intended dismissal. There are no such express provisions in Barbados' Constitution, the Public Service Act or its Code of Discipline.

However, given long and established principles, even where a statute is silent on giving a party an opportunity to be heard, the courts will imply such an entitlement, once a decision involving final⁵² questions on a party's rights is being made.⁵³

[56] Further, it can be acknowledged and accepted without difficulty, that an oral hearing is not necessary in order to discharge an obligation to provide an opportunity to be heard. In fact, in light of the Commission's truncated process given that misconduct of a serious nature is already established, it is conceivable that an oral hearing for purposes of deciding sanction, would generally not be required. It would therefore suffice if representations are invited in writing, as appears to be contemplated in section 129(7) of the Trinidad and Tobago Constitution extracted above. It is the circumstances of each case which will determine whether or not an oral hearing is necessary in any given case.⁵⁴ The Court will now consider the *James Ifill* authority cited by the Defendants (primarily in the Carmichael submissions, but equally applicable to the position taken in both cases). The claimant Ifill was subject to disciplinary proceedings arising from complaints as to his job performance, effected under the procedure laid out in the then applicable 1978 Regulations.

⁵² Final as to the rights of a person as distinct from process. (See fn 64 post).

⁵³ *Wiseman v Borneman*, [1971] AC 297 @ 310 per Lord Guest.

⁵⁴ *Commissioner of Police v Mitchell*, Trinidad & Tobago Unrep. Appeal No. 1 of 1992, per de la Bastide CJ; c.f. *Callender v Commissioner of Police* (2001) 63 WIR 110

Those proceedings took the form of an investigatory report by a senior officer, which recommended charges for misconduct. The report was issued to the Commission, which recommended compulsory retirement (retirement in the public interest) to the Governor-General. The claimant was advised of the Governor-General's acceptance of the Commission's recommendation as well as his right to have his case referred to the Privy-Council within 21 days. The claimant did not so indicate and was approximately a month later again notified of his right to refer his case to the Privy Council. The claimant made no such referral and the CPO notified him by letter of his compulsory retirement from the public service.

[57] Some five (5) years later, the claimant Ifill challenged his removal from the service by way of judicial review, which application was ultimately dismissed by the CCJ. The CCJ's account of the matter reveals that the claimant's initial case before the trial judge, challenged only the manner in which the penalty was imposed against him, as opposed to any part of the disciplinary process or the actual penalty of compulsory retirement. The claimant's initial complaint of unfairness was that the Commission failed to consult with him in relation to the effective date of his retirement. At the Court of Appeal and CCJ stages however, the claimant alleged that he had been denied natural justice because (i) he'd not been permitted an opportunity to be heard before

the Commission on the findings of the report tendered against him; or (ii) he was not, but ought to have been afforded an opportunity of an oral hearing before the Commission at which he would have been entitled to cross examine persons who gave statements in the investigation carried out by the senior officer.

[58] In relation to contention (i), the CCJ found first and foremost that Mr. Ifill had not in his initial claim challenged the findings of the investigation or its process. Moreover, it was found that Mr. Ifill had been fully heard in person on the charges alleged in relation to his misconduct; he had furthermore been represented by counsel, who had put forward arguments and submissions on his behalf. As a consequence, there could have been no room for Mr. Ifill to have challenged the findings of the report in the action for judicial review. In relation to the failure of the Commission to recommend a full oral inquiry, the CCJ agreed with the Court of Appeal that given the full extent of the investigations which had been carried out, the convening of a panel to have an oral inquiry would have been superfluous. It is on the basis of these findings (i.e. that Mr. Ifill had been fully heard in the course of the investigation of misconduct against him, and that his case as originally filed did not challenge the findings of the report or the actual sanction imposed against him), that Barrow JCCJ, then made the remarks regarding the

challenge to the imposition of the sentence,⁵⁵ which Counsel for the Defendants in the cases at bar, seek to ascribe to the opportunity to be heard alleged to have been afforded the Claimants herein.

[59] In relation to Mr. Ifill's belated argument on appeal that he had been denied natural justice having not been afforded an opportunity to be heard on the sanction recommended by the Commission to the Governor-General upon the finding of his misconduct, Barrow JCCJ, said as follows⁵⁶ (set out in full, in fairness to the Defendants' argument herein):-

*“[21] The other limb of the natural justice ground was that the Commission should have heard Mr. Ifill before it decided to recommend to the Governor General that Mr. Ifill should be compelled to resign, especially because that recommendation was of a more severe sanction than the Investigator recommended. It will be recalled that the trial judge observed that Mr. Ifill did not challenge the decision to compel him to resign. The belated challenge was that the course taken by the Commission was equivalent to a court imposing a severe sentence upon a person convicted of a crime without first having given him the opportunity to plea in mitigation, citing *Gittens v The Queen*. In that case this Court decided that the failure to hear from the defendant in a criminal trial in mitigation invalidated his sentence because it was a violation of the*

⁵⁵ *James Ifill* supra, per Barrow JCCJ @ para 21-22

⁵⁶ *Ibid*

fundamental right to a fair trial, enshrined in section 18 of the Constitution.

[22] It was a factor of over-arching significance that Mr. Ifill had every opportunity, which was twice held out to him, to have the case against him referred to the local Privy Council. That was the ideal forum for him to challenge the sanction of compulsory resignation the Commission had recommended to the Governor General, as he had been informed. Aware that this opportunity was available to Mr. Ifill, it would have been superfluous (and, perhaps, embarrassing if not improper) for the Commission to have invited Mr. Ifill to a 'pre-sentencing hearing' before them, when the Privy Council was the body vested by law with the power to decide 'sentence'. The Commission could only recommend a sanction. The Governor General could only act on that recommendation if the public officer chose not to have his case, including sanction, referred to the Privy Council. The difference between Mr. Ifill's situation and that in Gittens is that before Mr. Ifill was 'sentenced' he was informed of the recommended 'sentence' and had the opportunity of deciding whether to accept that sentence or urge the imposition of a different sentence. The opportunity for mitigation was fully open to Mr. Ifill. Therefore, the argument that it was unfair and in breach of natural justice for the Commission not to have given Mr. Ifill an oral hearing to argue against the recommendation of compulsory resignation was devoid of merit."

[60] The emphases underlined and in bold are both of the Court's doing. At first blush, the words underlined appear to fully support the Defendants' position in both cases before the Court. That is, that both Claimants Lynch and Carmichael, were afforded the opportunity to be heard, and availed themselves of that opportunity, having elected to have their cases referred to the Privy Council. The words in bold however, bring to bear that there are significantly distinguishing features between the respective positions of Mr. Ifill on the one hand, and the Claimants at bar. Aside from the above dictum, the Court can allude to several other distinguishing factors. First – *Ifill's* case was based on the 1978 Regulations and involved a full disciplinary process of a fact finding investigation pertaining to charges of misconduct in relation to officer's discharge of his duties. Second, there was a finding of misconduct following the investigation during which the CCJ determined that Mr. Ifill had been fully heard in person as well as represented by counsel. Third, the facts giving rise to the finding of misconduct bore direct relation to the performance of Mr. Ifill's duties, and correspondingly, direct relation to the sanction recommended by the Commission. Further, the 1978 Regulations empowered the Commission only to 'recommend' a sanction to the Governor-General.

- [61] As stated before, the two Codes (Code of Conduct & Ethics and Code of Discipline) in most respects, supersede the 1978 Regulations in relation to disciplinary procedure. Whilst the substance of the underlying procedure remains the same, there are significant reformulations or additions, which elucidate and strengthen the Commission's powers and structure as a decision-making tribunal. In particular paragraph 4 of Code III clearly encapsulates the procedure required for disciplinary action, and paragraphs 4(14) and 4(15) render pellucid, both the fact, and parameters, of the Commission's decision-making mandate in relation to misconduct of a serious nature. Unlike the 1978 Regulations, the Commission, by paragraph 4(15) of the Code of Discipline is mandated to make a decision in relation to the finding of misconduct of a serious nature, reasons for such a finding and most pertinent to the case at bar, the sanction to be imposed for such misconduct.
- [62] Also by paragraph 4(15), the Commission advises the Governor-General of this decision; and by section 94(1) of the Constitution, the Governor-General acts in accordance with that advice. The Commission is therefore the first tier of the entire decision-making process for removal of a public officer. In *Ifill*, as stated by the CCJ, there had been a full opportunity to be heard afforded the claimant during the investigatory process into the charges of misconduct against him.

The finding of misconduct concerned allegations which touched and concerned the conduct by Mr. Ifill of his duties. As a result, those facts were within the contemplation of the Commission, and the process included oral engagement with the public officer, both of which would have informed the Commission's recommendation of a sanction. In the instant case, the misconduct is deemed as such by the existence of a conviction of a criminal offence punishable by a period of imprisonment. As already stated above, inasmuch as the conduct which formed the basis of the conviction is already proved (in a court of law), there has to be a logical connection between those underlying facts and/or process of the criminal conviction, and the sanction imposed against the officer, especially if it is removal from office.

[63] That logical connection was already there in *Ifill*, as the misconduct arose from conduct associated with the discharge of his duties, and he was found to have been fully heard in relation to the finding of misconduct. When therefore the matter was available for review by the Privy Council, that body would have been able to have before them the relevant information, namely the report into Mr. Ifill's conduct, the submissions of his Counsel as well as the responses and submissions that he was found to have made during the process. The Privy Council therefore would have had available to them the information necessary to make a full assessment of the sanction imposed against Mr. Ifill,

had he availed himself of the opportunity (twice given and twice refused), to refer his case for review. This is not the situation in either of the cases at bar. The underlying facts of the criminal conviction need to have the relevant connection to the Claimants' respective duties (as per the relevant factors alluded to by the Court in paragraph 52 supra). In order to carry out an assessment of those relevant factors, the Commission needed to have considered the proceedings in the relevant court of conviction, as well as taken into account any representations from the convicted officers regarding why they ought not to be removed from office.

[64] With reference to the Court's position regarding the decision of the Commission being subject to the requirement for fairness, even if the point were to be taken as held by Barrow JCCJ in *James Ifill*⁵⁷ (albeit with reference to the 1978 Regulations), that the Commission did not have the final word on the Mr. Ifill's sentence, the fact that a decision making body is not the final arbiter of a claimant's rights does not preclude a review impugning that decision. Support for this position is to be found in *Wiseman v Borneman* which affirmed a right to a fair hearing even where no decision adverse to the claimant is being finally made.⁵⁸

⁵⁷ James Ifill supra, per Barrow JCCJ @ paras 21-22

⁵⁸ Supra per Lord Morris of Borth-y-Gest @ 311

In the instant case, the Privy Council could only have considered what was provided to them by the Commission, as there is no evidence of any substantive hearing. Given the failure or refusal of the Defendants to have placed before the Court evidence of their alleged consideration of the matter, the Privy Council's consideration of the matter could have afforded the Claimants no greater opportunity than that provided by the Commission. Such opportunity according to the evidence before the Court, was nil.

[65] It is now possible to conclude the question of what process ought to have been applied by the Commission in the cases at bar, before effecting a dismissal of the Claimants. In addition to the broad steps in the removal process outlined at paragraph 46 above, the Court will add the following which are intended to ensure that an officer convicted of a criminal offence, who is facing disciplinary penalty, is afforded due process:-

- (i) the officer convicted and facing dismissal or other disciplinary penalty ought to be notified of the intention of the Commission to impose a disciplinary sanction pursuant to paragraph 6(1) of Code III;
- (ii) Where removal from office is contemplated, the officer should be specifically advised of that intended penalty;
- (iii) The officer should be given the opportunity to make representations or show cause why the action, should not be taken.

In light of the fact that the factual circumstances giving rise to the conviction cannot be disputed (having been proved in a court of law), an oral hearing ought not to be necessary, unless the circumstances of the matter so dictate.

The Court must now consider the above legal principles and process which ought to have been followed, against the evidence of what actually transpired in respect of the Claimants, in order to determine whether the Claimants were unlawfully removed from office as asserted.

V The Lawfulness of the Removal of the Claimants

Lynch's Case

[66] With reference to the process of dismissal of the Claimant Lynch, the evidence on behalf of the Defendants was provided by the 1st Defendant. The Court extracts the following paragraphs from the first affidavit of the 1st Defendant⁵⁹:-

“7. That in respect to paragraph 6, the law does not require that I or the Public Service Commission notify the Claimant that action is being taken against him until it is actually done. By way of letter dated 25th August, 2011, ... the Claimant was advised of the relevant sections of the Public Service Act, 2007.

⁵⁹ Affidavit of 1st Defendant, filed on 12th July, 2013, paragraphs 7, 10 & 11.

10. That paragraph 9 is inaccurate as once a public officer has been found guilty in any court of a criminal charge, the Public Service Commission may consider the relevant proceedings of the court and if the Commission is of the opinion that disciplinary action ought to be taken against that public officer it can so recommend to the Governor-General.

11. The Claimant having been found guilty of an offence as set out in paragraph 21(1) of the Second Schedule of the Public Service Act, Cap. 29 was guilty of misconduct of a serious nature and subject to the penalties for the said misconduct, as in accordance with paragraph 27 of the said Schedule. The Public Service Commission considered the matter and advised the Governor-General that the Claimant should be dismissed, which is one of the penalties applicable to misconduct of a serious nature.”

[67] The Court extracts the above paragraphs to illustrate deficiencies in the evidence submitted in support of the Defendants’ case. Paragraphs 7 and 10 of the 1st Defendant’s affidavit speak of matters of law, which should not be contained in affidavits drawn for purposes of evidence. The Court understands however, that lawyers take instructions; lawyers draft affidavits (or witness statements), for the most part in lawyers’ language; and too often, statements and conclusions of law find their way in affidavits, attributed to affiants in whose purview such legal matters do not lie.

In the case of paragraph 7 of the 1st Defendant's affidavit, this statement (that the law did not require the Commission to notify the Claimant of the action being taken against him until it was actually done), is to speak mildly, quite wrong. As demonstrated in the Court's preceding discussion of the relevant law⁶⁰, the statutory provisions identified in the said letter⁶¹ might have said nothing about notifying the Claimant of the action being taken against him. However, the legal principles which import fairness to the application of such provisions required such notice to be given. The Commission's function under the Constitution's section 94(1), (as effected by paragraphs 4(14)&(15) of Code III of the PSA), is at worst quasi-judicial. It is in any event a decision affecting the rights and interest of the Claimants. As such, the Commission's decision on removal of a public officer, thereafter rendered as advice to the Governor-General, is subject to the requirement of fairness⁶² at the point in time the decision is made.

[68] As stated in paragraph 52 above, part of that requirement of fairness, would have been to notify the Claimant of the Commission's intended action. Part of that requirement of fairness, would have been to have afforded the Claimant

⁶⁰ Particularly, in this regard see supra, paragraphs 35-37; 47-49; 52-55

⁶¹ Letter from Chief Personnel Officer to Claimant dd 25/8/2011; section (sic) 27(b)(1) 2nd Schedule, PSA 2007, section (sic) 6(1)(f) 3rd Schedule PSA (Amendment) 2010.

⁶² Fn 42 supra, referencing Pollard JCCJ in *AG v Joseph & Boyce*; fn 44 supra, referencing *R v Secretary of State for Home Department, ex p. Doody* per Lord Keith of Kinkel

at that stage, an opportunity to be heard, (most conceivably by written representations) on why he should not have been dismissed or subjected to a lesser form of punishment. In relation to paragraph 10 of the 1st Defendant's affidavit, this statement that the Commission may consider the relevant proceedings of the Court and recommend the action thought fit, is taken from Regulation 30 of the 1978 Service Commissions (Public Service) Regulations. The apparent application of that regulation is incomplete in addition to incorrectly cited in isolation, for as discussed, these Regulations are valid only to the extent that they are not inconsistent with the PSA.⁶³ In relation to Regulation 30, this Regulation remains valid only insofar as the Codes do not specify a process for dismissal of the public officer convicted of a criminal offence. Further, this Regulation still has to be read in conjunction with paragraph 4 of Code III of the Act, and is also subject to the general principles regarding fairness. In actual fact, had the Commission actively applied Regulation 30 as alluded to in paragraph 10, they ought to have afforded the Claimant an opportunity to be heard, as Regulation 30 required that the Commission call upon the officer to show cause against dismissal.

[69] Lastly, with respect to paragraph 11 of the first affidavit of the 1st Defendant, the conclusion stated that having been found guilty of an offence, the Claimant

⁶³ Section 35(4) of the Public Service Act, Cap. 29; see supra, paragraph 40

was guilty of misconduct of a serious nature having regard to paragraphs 21(1) and 27 of Code II, is correct. Thereafter, it is stated that the Commission *‘considered the matter and advised the Governor-General that the Claimant should be dismissed, as one of the penalties applicable to misconduct of a serious nature.’* There was, however, no evidence submitted by the Defendants in support of their assertion that the Commission considered the matter – for example, not even the date on which the (Commission’s) decision was made, has been provided to the Court. Counsel for the Claimant continuously decried this lack of evidence and submitted that the Defendants were in further breach of their obligations as a public authority, having failed to disclose to the Court, all information relevant to the proceedings. The Court’s position regarding this lack of evidence is somewhat less indignant. It is assumed that a decision such as removing a public officer from the service must have been made at a meeting of the Commission; it is assumed that such a meeting must have taken place on a specific day (even if effected by round robin); it is assumed that such a meeting would have had minutes.⁶⁴ It is also assumed that the Commission must have had before them some aspect of the proceedings of the court of conviction, namely the evidence of the conviction;

⁶⁴ Regulations 5&6 of the 1978 Regulations (which remain valid as there are no applicable provisions on the Commission’s regulation of their procedure in the Act or Codes) require meetings to produce minutes.

the particulars of the charge; the Magistrate's notes of evidence; and any statement in mitigation made by the Claimant upon his sentencing.

[70] In the absence of such evidence of the Commission's proceedings, the Court could not be asked or expected to come to any conclusion regarding the fairness of the process undertaken which would have been favourable to the Defendants. The Court need not speculate on whether the matter was even properly considered to begin with. The Court can only accept the Claimant's evidence that he was never notified of the Commission's intention to dismiss him, and that he was never given the opportunity to make any representations to the Commission, regarding his dismissal from the service. This evidence, coupled with there being no evidence of how the Commission actually carried out their deliberation and came to their decision, results in a finding that the Commission's advice to the Governor-General regarding the Claimant's dismissal was in breach of natural justice.

[71] This finding concerns the Commission's advice rendered to the Governor-General. The Claimant also seeks to impugn the Privy Council's decision upholding the decision to dismiss him. The Defendants' answer to this claim is that at the point in time the Claimant was informed of his right to refer his case to the Privy Council he was afforded due process. Further, that having availed himself of that right, the Claimant was afforded an opportunity to be

heard. However, reverting to the Court's consideration of the *James Ifill* case,⁶⁵ one has to critically consider the circumstances in order to determine whether the process was fair, or whether there was in fact an opportunity given to the Claimant to be heard. The Commission's decision was referred to the Privy Council for review. It has not been suggested that the Privy Council's review of the matter was dealt with by way of rehearing or consideration afresh. To the contrary, the Claimant contends that he was also not given any opportunity to be heard by the Privy Council, nor was he ever provided with any reasons or material arising from their consideration of the matter. In the first instance, the Court agrees with the Defendants' position that the Privy Council's decision need not have been in person⁶⁶ In fact, given the absence of any provisions regarding the conduct of any review process under section 98 of the Constitution,⁶⁷ it is expected that the Privy Council would not be engaging in any 'in person' hearing. Rather, it is expected that the Privy Council would consider what is provided to it by the Commission in addition to whatever submission might be made by the public officer.

⁶⁵ Supra, paragraphs 56-64

⁶⁶ Supra, paragraph 56,

⁶⁷ To be contrasted with the Privy Council's functions under section 78 of the Constitution.

[72] The Court considers the position of Barrow JCCJ in *James Ifill*, that given the fullness of the investigatory process therein which resulted in the finding of the claimant's misconduct, any oral hearing thereafter would have been superfluous. This position can be similarly applied in general, in relation to proceedings ventilated before the Commission, so that there is thereafter no requirement for any further oral hearing. However, in relation to the Commission's decision to advise the Governor-General to dismiss the Claimant Lynch, it has already been found that the process of dismissal was not fair, in that the Claimant was never notified of the intention to dismiss him; neither was he given an opportunity to be heard on why he should not be dismissed. In the circumstances, the Court cannot be asked to affirm the Privy Council's decision, which in the absence of any evidence as to its proceedings, can be taken no further than the Commission's decision and subsequent advice to the Governor-General. It is therefore found that the decision of the Privy-Council upholding the Claimant Lynch's dismissal is subject to the same flaw as that of the Commission, namely, a lack of fairness in not hearing the Claimant relative to his dismissal.

Carmichael's Case

[73] In relation to the Claimant Carmichael's case, the position is not much different.

According to the evidence, Mr. Carmichael was notified of his impending dismissal only at the stage of the Commission already having made its decision, then submitting its advice in this regard to the Governor-General. Also, likewise as in Lynch's case, whilst it was asserted that the Commission considered the matter, there was no evidence put before the Court which supported that process. This is particularly stark after there was a submission of the matter for disciplinary action by the Claimant's superior along with a recommendation for charges to be laid on the basis that the Claimant failed to reveal the fact of his conviction. There was no indication from the evidence of what became of that recommendation for disciplinary charges. However, it is acknowledged that there was no requirement for a disciplinary process, to establish misconduct of a serious nature, as the same is deemed by a criminal conviction. The Court once again holds however, that the Claimant ought to have been notified by the Commission of the intention to dismiss him, as well as to be heard as to why he should not be dismissed. In this regard, insofar as the Privy Council imposed a sanction of compulsory retirement in lieu of dismissal, as already noted, by virtue of section 117(8) of the Constitution, a power to remove a public officer from office includes the power to compel to retire.⁶⁸

⁶⁸ "...(8) References in this Constitution to the power to remove a public officer shall be construed as including references to any power

[74] The Claimant Carmichael was therefore also removed from office by a process that is regarded as unfair. With respect to the Privy Council's decision the Defendants once more, did not put before the Court evidence of that body's consideration of the dismissal of Mr. Carmichael. On the same basis therefore, the Court is unable to take into account what if anything, the Commission actually considered in making their decision as to dismissal. Further, given that there is no evidence that the Privy Council engaged in any substantive consideration of the matter, the same deficiencies applicable to the Commission's consideration (or lack thereof) would similarly apply to the Privy Council's process. In the circumstances, notwithstanding that the Claimant's case was referred to the Privy Council, the opportunity afforded him was based upon a process at the first level which was not fair. The dismissal in relation to Claimant Carmichael must also be adjudged unfair, for want of an opportunity afforded to him to be heard in relation to why he should not be dismissed. Having found the dismissal (and removal from office by compulsory retirement) of both Claimants to have been effected in the absence of natural justice, the Court now considers the effect of this finding and the remedy to which the Claimants are entitled.

conferred by any law to require or permit that officer to retire from the public service:..”

Issue (iii) The remedies to be afforded the Claimants

[75] In relation to the remedies to be afforded the Claimants, the Court commences its consideration of this issue with reference to an overarching principle of judicial review as stated in **Ridge v Baldwin** that '*... it is not the decision as such which is liable to review; it is only the circumstances in which the decision was reached ...*'⁶⁹ As a consequence, it has to be understood that this Court is not concerned with whether the dismissal of both Claimants was justified, relative to the offences for which they were convicted and the circumstances of their employment. Additionally, the effect of a finding of unlawfulness is illustrated by **Ridge v Baldwin** per Lord Reid⁷⁰:-

“...Then there was considerable argument whether in the result the watch committee's decision is void or merely voidable. Time and again in the cases I have cited it has been stated that a decision given without regard to the principles of natural justice is void, and that was expressly decided in Wood v. Woad.[62] I see no reason to doubt these authorities. The body with the power to decide cannot lawfully proceed to make a decision until it has afforded to the person affected a proper opportunity to state his case.”

⁶⁹ [1963] 2 All ER 63 @ 91

⁷⁰ [1964] AC 40 @ 80-81

This position in relation to a decision effected in breach of natural justice being rendered void as opposed to merely unlawful (but still effective), was affirmed by the Privy Council in **McLaughlin v Government of Cayman Islands**,⁷¹ as it was by the CCJ in **Edwards v Attorney-General of Guyana and the Public Service Commission**.⁷² Despite the clarity of the authorities that the effect of a decision carried out in breach of natural justice is void, there is less clarity in relation to the effect on a claimant's employment status.

[76] In relation to the Claimant Lynch, the position is regrettably rendered moot in light of the unfortunate circumstance that Mr. Lynch has since the hearing of evidence in the matter in November, 2020, passed away. The matter was not concluded with the closing submissions of Counsel, until March, 2021, mostly on account of COVID-19 disruptions. That unfortunate position has rendered the path in relation to Mr. Lynch's remedy, one which involves an award of damages only, as opposed to any consideration of reinstatement which generally brings with it practical difficulties occasioned by a breakdown in a work relationship, a breach of trust, the passage of time and implications for innocent third parties. With respect to Mr. Lynch's case, the remedies to be granted would be an appropriate declaration followed by a quashing order in

⁷¹ [2007] UKPC 50

⁷² [2008] CCJ 10 @ paras 14-15.

respect of the decision to dismiss him - at both levels (namely the Commission's advice to the Governor-General; and the Governor-General's acceptance of the Privy-Council's upholding his dismissal). Consequent upon the quashing of Mr. Lynch's dismissal, he (his Estate) is entitled to an order for restitution of salary payable to him from the effective date of his suspension without pay, from the 2nd November, 2011 to the date of his demise, less all lawful deductions applicable within that period. Legal costs are awarded to the Claimant, to be assessed if not agreed. The monies owed to the Claimant by virtue of this order shall be payable to his Estate, upon substitution of an appropriate representative thereof.

[77] In relation to Claimant Mr. Carmichael, the Governor-General's decision to remove him from office based upon the advice of the Commission (for dismissal), as varied by the Privy-Council's advice for compulsory retirement, is void, having been found, at both levels, to have been in breach of natural justice. As a consequence, that decision is also declared void and an order quashing same is made (similarly, at both levels). In this instance however, Mr. Carmichael seeks reinstatement to his post as a prison officer. The Defendants are not so inclined and this situation brings to bear the practical difficulties attendant upon a decision being adjudged in breach of natural justice.

As a result of the quashing order, Mr. Carmichael is entitled to be restored his salary lost (less all lawful deductions), from the date of his suspension without pay, pending the review of his matter by the Privy Council, namely the 22nd February, 2016, to the date of pronouncement of judgment in this Court, namely the 17th May, 2021. On the issue of reinstatement however, the Court recognizes that along with the quashing order, it would also be appropriate to remit the matter to the Commission for a lawful process to be followed, which would entail giving the Claimant the right to be heard as to why he should not be dismissed. It ought to be recognized by the Claimant, that his reinstatement may very well be short-lived and whereas his removal from the service by way of compulsory retirement safeguards certain benefits, a short-lived reinstatement may not be a better outcome for his interests. In the circumstances, the Court will hear Queen's Counsel for Mr. Carmichael, on any further instructions he may receive in relation to his options as pertains to the Claimant's insistence or not, on reinstatement to his post as prison officer. Legal costs are granted to the Claimant, to be assessed if not agreed. The Court will hear Queen's Counsel for the Claimant in relation to whether there will be requested, any amendment to the remedy sought of reinstatement.

E Conclusion and Disposal

Miscellaneous

[78] The Court has principally addressed the issue of natural justice, as this issue was that most pertinent to the Claimants' complaints regarding their removal from office. There were other grounds invoked and alleged, which the Court considers effectively addressed without extensive consideration, as follows:-

- (i) Bias – In both cases, there was an allegation of bias or bad faith alleged in relation to the Claimant Carmichael's supervisor, and in Lynch's case, the CPO, in respect of those officers bringing the respective Claimants' convictions to the attention of the Commission. Code II, paragraphs 11&12, and Code III, paragraph 2, impose a duty on superior officers, as well as any officer having notice of suspected misconduct, to report such conduct accordingly. In the matters before the Court, no evidence other than a presumptive compliance with such duty is supported by the evidence and as such, there is no discussion to be had in relation to any issue of bias or bad faith;
- (ii) Additional grounds of unreasonableness, excess of jurisdiction, and procedural impropriety were pleaded in respect of both cases, arising from the Commission's failure to afford the Claimant a hearing prior to arriving at a conclusion to dismiss.

The circumstances raise the substantive issue of natural justice, and whilst it is accepted that depending on the perspective with which viewed, the same circumstances can give rise to findings in relation to the other grounds of review asserted. The Court does not consider it necessary or appropriate to discuss overlapping grounds, where the main substantive ground of review is apposite;

- (iv) In relation to Lynch's case, the ground of legitimate expectation in relation to an expectation of a substantive hearing before the Privy Council was pleaded. To the contrary, the evidence suggests that based on the practice of the Defendants, there could not have been any such expectation reasonably held, based on past conduct of the Defendants.

Conclusion of Lynch's Case

[79] The case for Mr. Wilbert Lynch, deceased, is concluded with the following declarations and orders:-

It is hereby declared that:-

1. The Public Service Commission's advice to His Excellency, the Governor-General of Barbados to dismiss the Claimant from his employment as a temporary Security Guard at the Ministry of Defence and Security, notice of which advice was given to the

Claimant by letter dated 25th August, 2011, was issued in breach of the Claimant's right to natural justice and is accordingly unlawful and void;

2. The advice of the Privy Council to His Excellency, the Governor-General of Barbados, for the dismissal of the Claimant to be upheld and the decision of His Excellency, the Governor-General that the Claimant be dismissed from his employment with effect from the 15th December, 2011, were made in breach of the Claimant's right to natural justice and are accordingly unlawful and void.

It is therefore ordered as follows:-

3. An Order of Certiorari is granted quashing (i) the Public Service Commission's advice to His Excellency, the Governor-General of Barbados, that the Claimant be dismissed from the Public Service; and (ii) the Claimant's dismissal from the Public Service by His Excellency, the Governor-General as upheld upon the advice of the Privy Counsel.
4. Upon the quashing of his dismissal, the Claimant is awarded restitution of the salary withheld from him from 2nd November, 2011, being the date of his suspension from office without pay in accordance with section 98(1) of the Constitution, to the date of pronouncement

of judgment of this Court, the 3rd May, 2021 ('the Restitution Award').

5. The Claimant is awarded legal costs to be assessed by the Registrar, Supreme Court, if not agreed.

AND THE COURT issues the following directions for purposes of determining the Restitution Award at paragraph 4 of this Order; and in order to enable the proceedings to be properly concluded having regard to the death of the Claimant, which occurred since the last hearing of the Claim.

6. Pursuant to the Court's power to issue directions under CPR Rule 21.8(1) & (2), it is directed that:-
 - (i) An order for substitution of the Claimant is to be made pursuant to Rule 19.5(2)(a);
 - (ii) For the purposes of making such order of substitution, the Court dispenses with the need for an application to be filed under Rule 19.3(3), however evidence on affidavit is to be filed attesting to the fact of and particulars of the Claimant's death, as well as the name and particulars of the intended Personal Representative of the Claimant's estate;

- (iii) Such affidavit evidence is to be filed on behalf of the Claimant on or before the 12th August, 2021.
7. (i) For purposes of determining the Restitution Award, the Defendants are to file and serve an affidavit detailing and exhibiting the calculation of the salary and benefits to which the Claimant would have been entitled from the date of his suspension on the 2nd November, 2011 to the 3rd May, 2021. Such calculations are to reflect the gross and net amounts owed after all deductions are made according to law, or other terms of his employment;
- (ii) Such affidavit is to be filed on behalf of the Defendants on or before the 22nd July, 2021.
8. The parties are to return to Court on a date to be fixed in September, 2021 for disposal of any matters remaining subsequent to the Court's decision of 3rd May, 2021.

Conclusion of Carmichael's Case

[80] The case for Mr. Kenrick Carmichael, is concluded with the following declarations and orders:-

It is hereby declared that:-

1. The Public Service Commission's advice to His Excellency, the Governor-General of Barbados to dismiss the Claimant from his employment as a Prison Officer II in the Barbados Prison Service, notice of which advice was given to the Claimant by letter dated 11th January, 2016, was issued in breach of the Claimant's right to natural justice and is accordingly unlawful and void;
2. The advice of the Privy Council to His Excellency, the Governor-General of Barbados, that in lieu of dismissal, the Claimant be compelled to retire from the Prison Service with effect from the 31st March, 2015, was made in breach of the Claimant's right to natural justice and is accordingly unlawful and void;
3. The Claimant remains employed by the Government of Barbados in the post of Prison Officer II at such remuneration to which he is entitled by virtue of that post.

It is therefore ordered that:-

4. An Order of Certiorari is granted quashing (i) the Public Service Commission's advice to His Excellency, the Governor-General of Barbados, that the Claimant be dismissed from the Public Service; and (ii) the Claimant's compulsory retirement from the Public Service by

His Excellency, the Governor-General as effected upon the advice of the Privy Counsel.

5. Upon the quashing of his compulsory retirement, the Claimant is awarded restitution of the salary withheld from him from 31st March, 2015, being the date of his suspension from office without pay in accordance with section 98(1) of the Constitution, to the date of pronouncement of judgment of this Court, the 3rd May, 2021 ('the Restitution Award').
6. The Claimant is awarded legal costs for Queen's Counsel and one junior attorney, to be assessed by the Registrar, Supreme Court, if not agreed.

SHONA O. GRIFFITH
Judge of the High Court